EQUALITY AND GAY RIGHTS
IN THE UNITED STATES AND IN CANADA

by

Ralf Erich Jürgens, Dr.iur.

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Institute of Comparative Law
McGill University
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Abstract

Both in Canada and in the United States the law disadvantages gay men and lesbians.

This master's thesis considers whether the guarantee of equality in the U.S. Constitution and in the Canadian Charter of Rights and Freedoms can change this situation.

The first part argues that in theory the Fourteenth Amendment's equal protection clause provides a promising basis for challenges to policies and statutes that discriminate against gays. Nevertheless, these challenges are unlikely to be successful because most U.S. courts fail to see beyond the stereotypes that prevent homosexuals from gaining access to their civil rights.

The second part contends that the approach to constitutional equality taken by the Supreme Court of Canada might be more helpful in eradicating discrimination against gays. Challenges of, e.g., policies excluding homosexuals from the Canadian Forces or the exclusion of same-sex couples from the benefits that heterosexual couples enjoy should be successful.

Résumé

Au Canada et aux Etats-Unis, la loi désavantage les gai(e)s.

Cette thèse de maîtrise porte sur le droit à l'égalité et sur l'interprétation qui en a été donné par les cours des deux pays.

La première partie démontre que, en théorie, le quatorzième amendement à la Constitution americaine fourni une base prometteuse pour contester les politiques et les lois discriminatoires contre les gai(e)s. Néanmoins, ces contestations risquent de n'avoir aucun succès puisque la plupart des cours américaines sont incapable de voir au-delà des stéréotypes qui empêchent les homosexuels d'avoir accès à leurs droits.

La seconde partie soutient que, au Canada, le concept d'égalité constitutionnelle peut promouvoir l'égalité des gai(e)s. La Cour suprême a reconnu que l'application de l'art. 15(1) de la Charte doit servir à corriger les désavantages et les préjugés présents et passés. La contestation de la politique qui exclue les gai(e)s des Forces Armées Canadiennes, ou des lois qui empêchent les couples homosexuels d'avoir accès aux mêmes bénéfices que les couples hetérosexuels, devrait avoir du succès.

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As required by the Faculty of Graduate Studies and Research, it is declared hereby that the preparation of this thesis is entirely the work of the author and that it was done without any assistance beyond the normal direction provided by the thesis supervisor.

Ralf Erich Jürgens Montréal, December 1990

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General Introduction

Both in Canada and in the United States there is a whole fabric of official policies and laws that treat homosexuals[1] differently than heterosexuals. These differences are manifest in many spheres the right to serve in the armed forces, the right to marry; the right to financial benefits that accrue to recognized family units, and the right to custody and adoption of children.[2] Partly because of a supposition that they do not know any gay people and partly through their willful ignorance of society's workings, many people are largely unaware of these and the many other ways in which gays are subject to discrimination resulting from widespread fear and hatred. As Mohr has pointed out,[3] contributing to the social ignorance of discrimination is the difficulty for gay people, as an invisible minority, to even complain of discrimination:

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[1] Although "lesbian women and gay men" is the better expression, it is often too cumbersome. Except where otherwise noted, the term "homosexuals" therefore refers to both lesbian women and gay men.

[2] Examples taken from A. Bruner, "Sexual Orientation and Equality Rights" (1985) in A F. Bayefsky & M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 457 at 459. For a detailed summary of Canadian laws that institutionalize heterosexuality and discriminate against gays and lesbians, see B Ryder, "Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege" forthcoming (1990) Can. J. Fam. Law. See also The Coalition for Gay Rights in Ontario, *Discrimination against Lesbians and Gay Men: The Ontario Human Rights Omission: A Brief to the Members of the Ontario Legislature* (1986); A. Arnup, "Mothers Just Like Others: Lesbians, Divorce, and Child Custody in Canada" (1989) 3 CJWL 18; E Deleury, "L'union homosexuelle et le droit de la famille" (1984) 25 C. de D. 75. For a good overview of the vast array of official and unofficial forms of discrimination that affect every aspect of a homosexual's life in the United States, see J.C. Hayes, "The Tradition of Prejudice versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny after *Bowers* v. *Hardwick*" (1990) 31 Boston College L.R. 375 at 377-405; D.A. Ben-Asher, "Legal Discrimination Against Homosexuals in America, and a Comparison with More Tolerant Societies" (1990) 7 N.Y.L.Sch. J.Hum.Rts 157; R.R. Rivera, "Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States" (1979) 30 Hastings L.J. 799.

[3] R.D. Mohr, *Gays/Justice: A Study of Ethics, Society, and Law* (New York: Columbia University Press, 1988) at 27.

> For if one is gay, to register a complaint would suddenly target one as a stigmatized person, and so, in the absence of any protections against discrimination, would in turn invite additional discrimination [4]

Mohr cites a study by the National Gay and Lesbian Task Force that found that over ninety percent of gays and lesbians in the United States had been victimized in some form on the basis of their sexual orientation [5] Some might suggest that discrimination against gays is justified because gays are "immoral" or "unnatural" However,

> [o]ne of our principles itself is that simply a lot of people saying something is good . does not make it so Our rejection of the long history of socially approved and state-enforced slavery is a good example [C]onsistency and fairness requires that the culture abandon the belief that gays are immoral simply because most people dislike or disapprove of gays and gay acts [6]

And the charge of unnaturalness has no content other than its expression of moral aversion.

The issue of whether to make sexual orientation an expressly forbidden ground of discrimination has been debated in the legislatures in Canada and the United States with growing frequency. The issue has also been tested in the courts of these countries

In the Canadian human rights codes the lists of expressly prohibited grounds of discrimination have grown, but the legislators of many of the ten provinces and the federal parliament have chosen to leave out sexual orientation [7] Exceptions are Quebec,[8]

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[4] *Ibid.*

[5] *Ibid.*

[6] *Ibid.* at 32.

[7] EGALE (Equality for Gays and Lesbians Everywhere) has recently produced an action kit to assist people in lobbying the federal government to ensure that amendments to the *Canadian Human Rights Act* are introduced in the House of Commons in the fall of 1990 and that they include a prohibition on discrimination based on "sexual orientation" The draft package of amendments to the *Canadian Human Rights Act* which was being reviewed in the spring contained sexual orientation as a prohibited ground of discrimination The challenge is to make sure that the amendments are introduced in the fall and that sexual

Ontario,[9] as well as Manitoba[10] and the Yukon[11] which have also amended their human rights legislation during the past three years to include sexual orientation.[12] The traditional

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orientation is still part of any bill that is introduced. The federal government promised action on this issue as early as March 1986. See the responses to recommendations 10 and 11 from "Towards Equality. The Response to the Report of the Parliamentary Committee on Equality Rights", tabled in the House of Commons in March 1986 by the then Minister of Justice, the Hon John Crosbie: "The Government will take whatever measures are necessary to ensure that sexual orientation is a prohibited ground of discrimination in relation to all areas of federal jurisdiction."

[8] R S Q 1977, c C-12, s. 10, amended Bill 86 (C-61), assented to December 1982 Section 10 states: "Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap".
As the Quebec *Charter* is a constitutional document that prevails over inconsistent provincial laws enacted before or after the *Charter* itself, it provides protection against discrimination in the private sector as well as in the public sector, unlike other human rights codes in Canada. The Quebec Commission des droits de la personne has characterized the motivation of this legislative provision as follows: "Réticence à accepter le phénomène de l'homosexualité, d'une part, disposition à accepter de traiter la personne homosexuelle en toute égalité d'autre part, telles nous semblent les valeurs sous-jacentes aux dispositions législatives qui concernent les homosexuels au Québec" [cited from P. Girard, "Sexual Orientation as a Human Rights Issue in Canada 1969-1985" (1986) 10 Dalhousie L.J. 267 at 269 For a detailed discussion of complaints based on allegations of discrimination on the basis of sexual orientation under the Quebec *Charter*, see *ibid.* at 268-73. See also N. Duplé, "Homosexualité et droits à l'égalité dans les Chartes canadienne et québécoise" (1984) 25 C. de D 801 at 826-41

[9] *Human Rights Code, 1981*, S O. 1981, c. 53, as am. by S.O. 1984, c 58, s. 39 and S.O. 1986, c. 64, s. 18.

[10] *Human Rights Code*, S.M. 1987-88, c. 45, s. 9(2)(h).

[11] *Human Rights Act*, S.Y. 1987, c. 3, s. 6(g).

[12] In contrast, Newfoundland's Justice Minister has recently said that the province is not ready to protect gays and lesbians from discrimination. Paul Dicks told a St. John's newspaper in June 1990 that there is no consensus in the Liberal government for adding sexual orientation to the province's human rights legislation. Dicks argued that there is no demand for the change and said that some types of discrimination "may be okay". "Every time you bring a new basis of discrimination, you have to be sure of two things," Dicks explained. "One is that the government is satisfied that form of discrimination is invalid, and secondly that you are not covering off legitimate areas of discrimination." Cited from Gaezette, September 1990, at 16.

failure to include sexual orientation as a prohibited ground of discrimination has been maintained in the *Canadian Charter of Rights and Freedoms*.[13] Subsection 15 (1) refers expressly to "discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability"[14]

In the United States very little legislation protects gay men and lesbians from discrimination by private citizens or organizations on the basis of sexual orientation. Congress did not expressly include sexual orientation as a protected characteristic in the *Civil Rights Act of 1964*,[15] and courts have refused to interpret the *Act* to proscribe discrimination against gays as discrimination on the basis of sex.[16] Nor do the states provide such protection: only Wisconsin has a comprehensive statute barring such discrimination in employment,[17] and

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

[14] Section 15 provides:
15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
Under the provisions of s. 32(2), s. 15 did not come into force until April 17, 1985.

[15] Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.). Mohr, *supra*, note 3 at 162-211 advances three related arguments for the inclusion of sexual orientation in the 1964 *Civil Rights Act* as a characteristic on the basis of which a person may not be discriminated against in employment, housing, and public services. He believes that (1) gay rights are necessary if gays are to have reasonably guaranteed access to judicial or civic rights; (2) that gay rights are necessary if gays are to have reasonably guaranteed access to the political rights of the sort found in the First Amendment of the *Constitution*; and (3) that gay rights are necessary if democracy is consistently and coherently to be given a preference-utilitarian rationale - that is, if democracy is at least in part justified as the form of government that tends to maximize goods and services in society by registering people's overall preferences.

[16] See, e.g., *DeSantis* v. *Pacific Tel. & Tel. Co.*, 608 F. 2d 327 (9th Cir. 1979), *Smith* v. *Liberty Mut. Ins. Co.*, 395 F. Supp. 1098 (N.D. Ga. 1975).

[17] See Wis. Stat. Ann. §§ 111.31-.395 (West 1988). Other states regulate certain forms of discrimination based on sexual orientation. See, e.g., *Cal. Civil Code* § 51.7 (West 1984)

recently a gay-rights law was voted in Massachusetts prohibiting discrimination against homosexuals in employment, housing, credit and public accomodations.[18] Moreover, few state courts have interpreted state civil-rights statutes to bar discrimination on the basis of sexual orientation.[19] Some localities have also adopted measures to prohibit discrimination on the basis of sexual orientation by private citizens and organizations. Indeed, the vast majority of the regulations aimed at eradicating discrimination based on sexual orientation are local ordinances and municipal executive orders, which tend to prohibit discrimination in employment, housing or public accomodations. Local attempts to address these forms of discrimination are nonetheless limited in several respects.[20] Discrimination against gays remains pervasive.

This thesis will focus on the implications of "equality rights" under s. 15 of the *Canadian Charter of Rights and Freedoms* and under the equal protection principles contained in the

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(barring violence based on sexual orientation against persons or property); Mich. Comp. Laws Ann. § 333.20201 (2)(a) (West 1984) (barring the denial of care in health facilities on the basis of sexual orientation).

[18] See the report in The New York Times, November 1, 1989 at A27. On July 5, the state's highest court decided that a referendum question on the new gay and lesbian civil-rights bill would not be allowed on the ballot. In addition, eight states have executive orders forbidding discrimination by state agencies. See A.S. Leonard, *Gay & Lesbian Rights Protections in the U.S.* (1989) (pamphlet published by the National Gay & Lesbian Task Force).

[19] In California, for example, the state courts have found that although gay people are not listed explicitly as a protected group in the *Unruh Civil Rights Act*, gay men and lesbians are protected under the *Act*. See Note, "Developments in the Law - Sexual Orientation and the Law" (1989) 102 Harv. L.R. 1508 at 1668 [hereinafter: "Sexual Orientation and the Law"] with reference to *Rolon* v. *Kulwitzky*, 153 Cal. App. 3d 289, 200 Cal. Rptr. 217 (Ct. App. 1984); *Hubert* v. *Williams*, 133 Cal. App. 3d Supp. 1, 184 Cal. Rptr. 161 (App. Dep't Super. Ct. 1982).

[20] See *ibid.* See also B. Case, "Repealable Rights: Municipal Civil Rights Protection for Lesbians and Gays" (1989) 7 Law and Inequality 441. She points out that municipal ordinances are too limited to effectively address the problems faced by gays and lesbians. The ordinances cover only a small geographic area and have no application in some major areas of concern such as federal and state government employment, child custody, marriage, military service, and some private employment discrimination. The small numbers of grievances processed in major metropolitan areas such as New York, Minneapolis, and Seattle indicate the limited impact of these ordinances.

Fifth and Fourteenth Amendments to the *Constitution of the United States*[21] for federal and provincial or state laws and public policy that affect sexual orientation.

Part I discusses the constitutional status of sexual orientation in the United States. Chapter I argues that the right to privacy analysis, which implies that homosexuality primarily raises problems of sexual conduct, is insufficient to support a favourable resolution of all the legal problems a gay person may encounter. It then examines *Bowers* v. *Hardwick*[22], a Supreme Court case that construed the right to privacy as it pertains to homosexual activity, and demonstrates that the logic of the majority opinion is flawed for at least two reasons. First, the Court selectively relied on the language of two of its privacy cases to define the scope of the right to privacy. The second flaw is its reliance on historical discrimination as proof that private homosexual intimacy is not an essential liberty. The chapter concludes that as a result of the apparent exclusion of homosexuals from substantive due process protections, it might be more promising to challenge government-sponsored discrimination through the equal protection principles contained in the Fifth and Fourteenth Amendments of the *United States Constitution*. Chapter II discusses the U.S. approach to equality, pointing out some of the many problems with it. While in theory the Fourteenth Amendment's equal

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[21] The Fourteenth Amendment to the *Constitution of the United States* reads as follows:

> 1. All presons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifth Amendment provides that:

> No person shall be held to answer for a capital crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

According to the United States Supreme Court, the Fifth Amendment contains an equal protection component. *Bolling* v. *Sharpe*, 347 U.S. 497 at 499 (1954).

[22] 478 US 186 (1986) [hereinafter *Hardwick*].

protection clause provides a more promising basis for challenges to policies and statutes that discriminate against gays, the equal protection clause will be of little help unless the courts apply heightened equal protection scrutiny. Chapter III argues that homosexuals fulfill the criteria for status as a protected class under equal protection precedent. Chapter IV discusses the effects of *Hardwick* on recent federal court decisions. It argues that *Hardwick* does not preclude a finding that sexual orientation classifications should be accorded heightened equal protection scrutiny and that those courts that have relied on *Hardwick* to hold that the courts should not protect them have used reasoning that is superfluous and even antithetical to equal protection jurisprudence.[23] Nevertheless, the chapter concludes that recent holdings under the equal protection clause indicate that future challenges to anti-gay policies are unlikely to be successful. Courts fail to see beyond the stereotypes that prevent homosexuals from gaining access to their civil rights.

Part II examines the constitutional status of sexual orientation in Canada and points out the many differences between the approaches to constitutional equality taken by the supreme courts of the two countries. It contends that *Andrews* v. *Law Society of British Columbia*,[24] which constitutes the first major decision on the interpretation of the s. 15 equality provisions by the Supreme Court of Canada, signals the possibility that the legal concept of equality as it is developing in Canada might help to change the pervasive inequalities facing gay men and lesbians in Canadian society. Chapter I argues that sexual orientation, although not expressly included among the prohibited grounds of discrimination, should be accepted by the courts as an analogous ground of discrimination under s. 15(1) of the *Charter*. Sexual orientation shares many if not all of the characteristics of the grounds enumerated under s. 15, and homosexuals constitute a disadvantaged group in society. The next two chapters argue that the general principles and themes articulated in *Andrews* and two subsequent Supreme Court decisions,[25] although they do not involve discrimination on the basis of

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[23] This has been pointed out by Hayes, *supra*, note 2 at 377.

[24] [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1, 10 C.H.R.R. D/5719 [hereinafter *Andrews* cited to D.L.R.].

[25] *R.* v. *Turpin*, [1989] 1 S.C.R. 1296, 96 N.R. 115 [hereinafter *Turpin* cited to S.C.R.] and *Reference re Sections 32 and 34 of the Workers' Compensation Act (1983) (Nfld.)* [1989] 56

sexual orientation, are promising for gays.[26] In McIntyre J.'s discussion of equality and discrimination, adopted by the Court, important themes emerge,[27] each of which has important implications for the protection of equality for gay men and lesbians under the Constitution. The themes include the following:

(1) acceptance of a purposive approach to the interpretation of s. 15;

(2) rejection of the equation of equality with sameness of treatment and acceptance of an effects-based approach;

(3) rejection of the "similarly situated" test.

Chapter II discusses the meaning that the Supreme Court of Canada has attributed to the notion of equality. It argues that the concept of formal equality is inadequate to the task of erasing the effects of discrimination against disadvantaged groups in society and that the Supreme Court was therefore right in adopting a purposive and effects-based approach to s. 15. Chapter III discusses the "similarly situated" test as it has been used until very recently by Canadian courts. It points out the many deficiencies of the test and concludes that the Supreme Court was right in rejecting the test. Chapter IV is dedicated to a discussion of the test articulated for interpreting s. 1 of the *Charter*[28] in *R.* v. *Oakes*[29] and in subsequent Supreme Court decisions. It argues that the test should not be abandoned in equality cases and that some of the concerns regarding its application expressed by part of the Court in *Andrews* are unfounded In particular, a coherent approach to equality rights must ensure

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D.L.R. (4th) 766 (S.C.C.) [hereinafter *Workers' Compensation Act Reference*].

[26] Ryder, *supra*, note 2 at n.157, agrees, saying that the general approach to the interpretation of equality rights set out by the Supreme Court of Canada in *Andrews* and *Turpin* indicates that s. 15 has the potential to pose a significant challenge to what he calls the legal construction of heterosexual privilege.

[27] See N.C. Sheppard, "Recognition of the Disadvantaging of Women: The Premise of *Andrews* v. *Law Society of British Columbia* (1989) McGill L.J. 207 at 210.

[28] Section 1 provides:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by laws as can be demonstrably justified in a free and democratic society.

[29] [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [hereinafter *Oakes* cited to D.L.R.].

that notions similar to *Canadian Bill of Rights* jurisprudence are not reintroduced into s. 1. The chapter concludes that the standard used should be even more rigorous in cases involving issues closer to the core of human rights. Chapter V analyses possible implications of the Court's decisions in equality rights cases on future cases involving homosexuals. It argues that the Canadian approach to equality might be more helpful in eradicating discrimination against gays than the U.S. approach. While the judicial approach to the interpretation of the Fourteenth Amendment is inherently conservative, *Andrews* signals the possibility that courts will listen to the voices of homosexuals. The Court has not adopted an approach to equality that confines homosexuals' future arguments to a "fixed doctrinal box".[30] Thanks to the Court's departure from the "similarly situated" test, homosexuals will not have to argue that they are similarly situated to heterosexuals in order to gain equal rights. Court challenges of, e.g., policies excluding gay men and lesbians from the Canadian Forces or the exclusion of same-sex couples from some of the benefits that heterosexual couples enjoy should be successful. However, because the battle will most likely be fought under s. 1, the refusal by part of the Court in *Andrews* to apply the full rigours of *Oakes* to s. 1 analysis in equality cases causes some concern.

[30] See Sheppard, *supra*, note 27 at 228.

Part I. **The Constitutional Status of Sexual Orientation in the United States**

Chapter 1. **The Privacy Argument**

a. Introduction

Until very recently, few courts in the United States had invoked the equal protection clause in cases involving homosexuals. Advocates of legal reform in favour of gays and lesbians have long relied most heavily on a constitutional right of privacy as a basis for protecting the decision to engage in gay sexual activity.[31] This chapter argues that an analysis based on the right to privacy, which implies that homosexuality primarily raises problems only of sexual conduct, is insufficient to support a favourable resolution of all the legal problems a gay person may encounter.[32] It then analyses the Supreme Court's decision in *Hardwick*, finding that the Court erred in its treatment of the privacy problem and that the decision was probably not decided on principled grounds. It concludes that *Hardwick* may therefore pose less of a threat to other privacy precedents than would otherwise be the case. However, gay rights activists will encounter greater obstacles when challenging sodomy statutes or statutes denying gays the right to marry on right to privacy grounds. They are therefore increasingly relying on the equal protection clauses.

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[31] Unlike the *United States Constitution*, the guarantees in the *Canadian Charter* have not yet been interpreted as including a right to privacy.

[32] See E.R. Arriola, "Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority" (1988) 10 Women's Rts L.R. 143 at 144. See also Note, "The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification" (1985) 98 Harv. L.R. 1285 at 1287.

b. The Privacy Argument

The privacy argument emphasizes the fundamental importance of sexuality to the individual and the relative unimportance of the state's interest in regulating private, self-regarding conduct. It is based on the classical liberal conception that individuals should enjoy autonomy within certain spheres that lie beyond the permissible reach of government. As has been pointed out, privacy analysis assumes a dual structure - a division between the home and the outside world - that does not reflect the complexity of social life.[33] This dualism is especially ill-suited to the affirmation of gay rights because it assumes that homosexuality is merely a form of conduct that can take place in the privacy of the bedroom at a specified time, rather than a continuous aspect of personhood or personality that requires expression across the public/private spectrum. Privacy analysis assumes that

> the problem to be solved is unwarranted intrusion into a protected sphere and that the right to be vindicated is, in Judge Cooley's famous words, "the right to be left alone." Yet if the real problem is one of pervasive discrimination against gays, the withdrawal of the state from the bedroom will not greatly alleviate it and indeed may exacerbate it by subtly sanctioning the continued stigmatization of the private activity.[34]

The amorphous character of the right to privacy has allowed the Supreme Court to confine its application to rights particularly connected with the family, such as child bearing, child rearing and marital decisions.

From its origin, the Due Process Clause has often been interpreted as protecting traditionally recognized rights from state and federal power.[35] Nothing in the text of the

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[33] *Ibid.* at 1290.

[34] *Ibid.* at 1291.

[35] See C.R. Sunstein, "Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection" (1988) 55 U. Chicago L.R. 1161 at 1170

clause compels such a reading, and on this point as on others its history is ambiguous.[36] In its judicial interpretation, however, the clause has frequently been understood as an effort to restrict short-term or shortsighted deviations from widely held social norms, it has an important backward-looking dimension:[37]

> For purposes of due process, the baseline for inquiry has tended to be the common law, Anglo-American practice, or the status quo. The Due Process Clause is thus closely associated with the view that the role of the Supreme Court is to limit dramatic and insufficiently reasoned change, to protect tradition against passionate majorities, and to bring a more balanced and disinterested perspective to bear on legislation.[38]

Though the point should not be overstated, since tradition has not been and should not be the exclusive focus of the Court's due process jurisprudence, this basic understanding has nevertheless played a large role in the Court's decisions on substantive due process

Accordingly, although some commentators had interpreted earlier cases to mean that the right of privacy comprehends a general right to sexual autonomy and therefore protects homosexuality,[39] the Supreme Court in *Hardwick*[40] upheld, against a constitutional

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[36] See F.H. Easterbrook, "Substance and Due Process" [1982] S.Ct R. 85 at 95 (arguing that the Fifth Amendment and the *Bill of Rights* generally were understood as a "nondegradation principle" designed to ensure that things would not "get worse").

[37] See Sunstein, *supra*, note 35 at 1171.

[38] *Ibid.*

[39] See *supra*, note 32 at 1288, n. 21, referring to J. Baer, *Equality under the Constitution* (1983) at 231 ("The Courts have refused, on non existent grounds, to extend this right [of privacy] to homosexuals."); Richards, "Homosexuality and the Constitutional Right to Privacy" (1979) 8 N.Y.U. Rev. Law & Soc. Change 311 at 314 ("There is no principled way to defend the earlier right to privacy cases and not extend the right to homosexuality . .").

[40] *Supra*, note 22. Michael Hardwick was arrested in 1982 for engaging in oral sex in the bedroom of his home in violation of Georgia's anti-sodomy statute. After a preliminary hearing, the district attorney decided not to continue the prosecution. Hardwick then brought suit in a federal district court, seeking a declaratory judgment that the statute was unconstitutional. The district court granted a motion to dismiss for failure to state a claim. The Eleventh Circuit reversed that judgment, holding that the Georgia sodomy statute

challenge, the application of Georgia's sodomy statute to consensual same-sex sodomy.[41]

c. The Court's Treatment of the Privacy Problem in *Hardwick*

In *Hardwick*, the Court relied on the language of two of its privacy cases to define the reach of the right to privacy. It declared the reach of the right to privacy to be confined to those "liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty or justice would exist if [they] were sacrificed,'"[42] and to those liberties that are "'deeply rooted in this Nation's history and tradition.'"[43]

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involves a fundamental right of privacy and could be enforced only if the state proved that it has a compelling interest in regulating Hardwick's behaviour and that this statute is the most narrowly drawn means of safeguarding that interest.

[41] In Canada the question raised in *Bowers* has been settled by legislative reform; sodomy between consenting persons twenty-one years of age or older was decriminalized in Canada in 1969 (see *Criminal Code*, R.S.C. 1970, c. C-34, s. 158). Although anyone can engage in anal intercourse, the practical effect of the amendment was to partially decriminalize gay sexuality. On January 1st 1988 new sexual offences sections were brought into force. "Buggery" was eliminated as an offence; "anal intercourse" became legal between consenting persons aged 18 or over. A new system based on age and power between the partners was adopted in the defining of sexual offences (see *Criminal Code*, R.S.C. 1985, c. C-46, s. 159(2)). However, the criminal stigma attached to gay sexuality remains, as the age of consent for other sexual acts is fourteen. The federal government did not follow the recommendation of the Parliamentary Committee on Equality Rights that the age of consent to private sexual activity be made uniform without distinction based on sexual orientation. Arguments that s. 159 in its current form violates *Charter* equality rights have led to inconsistent results (see Ryder, *supra*, note 2 at n.109). In the United States, sodomy remains a crime in twenty-four states and the District of Columbia. In the states of New York, Pennsylvania and Massachussetts, laws criminalizing sexual acts between consenting adults have been found by the highest courts of those states to violate individual rights protected by the Due Process Clause of the Fourteenth Amendment to the federal constitution. For further information, see "Sexual Orientation and the Law", *supra*, note 19 at 1519-21.

[42] *Supra*, note 22 at 191-92 (quoting *Palko* v. *Connecticut*, 302 U.S. 319 at 325, 326 (1937)).

[43] *Ibid.* at 192 (quoting *Moore* v. *East Cleveland*, 431 U.S. 494, 503 (1977). In *Moore* v. *Cleveland* Powell J. had written that "appropriate limits on substantive due process come ... from careful respect for the teachings of history [and] solid recognition of the basic values

The Court found that these formulas confer no right of privacy to the private sexual conduct of homosexuals, since "[p]roscriptions against that conduct have ancient roots."[44]

Language in other Court opinions, however, indicates that the proper reach of the right of privacy is grounded in other concerns: the value of individual autonomy, the freedom to define one's own identity, individual happiness, personal control of intimate associations, and the right secured by the Fourth Amendment - to be secure in one's home from unwarranted government intrusion.[45] In its effort

> to halt the flow of illegitimate privacy rights, the Court awkwardly attempted to confine the rights conferred by this line of cases to the narrow fact patterns of the cases themselves. '[N]one of the rights announced in these cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case' .. Surely, however, the right of sexual intimacy is as necessary for individual liberty as the right to use contraceptives, to possess obscenity in one's home, or to choose an abortion.[46]

As Sunstein has pointed out,[47] the Court's privacy jurisprudence cannot be understood

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that underlie our society.... Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."

[44] *Ibid.* However, as has been pointed out by N. Vieira, "Hardwick and the Right of Privacy" (1988) 55 U. Chicago L.R. 1181 at 1184, the common law controls on homosexual conduct encompass considerably less than the *Hardwick* opinion implies. In *Rex* v. *Samuel Jacobs* (168 Eng. Rep. 830 (1817)), one of the earliest reported cases on sodomy, the Court specifically held that the criminal prohibition against sodomy did not apply to oral sex The holding of the *Jacobs* case was widely accepted, and as a result there was "almost complete accord" among commentators that "at common law commission of the crime [against nature] required penetration *per anum*, and that penetration *per os* did not constitute the offense." (*State* v. *Morrison*, 25 NJ Super 534, 96 A2d 723 at 725 (1953)).

[45] See R.W. Lewis, "*Watkins* v. *U.S. Army* and *Bowers* v. *Hardwick*: Are Homosexuals a Suspect Class or Second Class Citizens?" (1989) 68 Nebraska L.R. 851 at 858, referring to *Hardwick*, supra note 22 at 2850-53, Blackmun J., dissenting.

[46] *Ibid.* at 859, citing *Hardwick*, *supra* note 22 at 190-91.

[47] *Supra*, note 35 at 1173.

exclusively in terms of being confined to the liberties rooted in the Nation's history and tradition. The use of tradition has produced considerable awkwardness in privacy cases. The principal difficulty lies in determining the contours and reach of the relevant tradition:

> Traditions can be described at varying levels of generality. There may well be, for example, a tradition of respect for intimate association. The application of that tradition has hardly been consistent, however, and the hard cases arise when the general tradition of respect meets a particular context in which the general tradition has been repudiated and, to that extent, does not exist at all. There is no established tradition of protection of abortion, marital privacy, or use of contraception. In the hard cases, part of the question is whether the tradition should be read at a level of generality that draws the particular practice into question.[48]

Many of the important privacy cases read the role of tradition in precisely this way. In short,

> ıe tradition cannot by itself be controlling in close cases, and the ‹onstitutional question must be answered instead by an inescapably normative inquiry into how the relevant tradition is best characterized. As a result, the tradition is sometimes treated as aspirational. The Court has referred in some key cases to "evolving standards of decency," as to which tradition is relevant but not dispositive.[49]

It is for this reason, among others, that the Court's decision in *Hardwick* is troublesome. The Court in this case erred in its treatment of the privacy problem:

> At the level of generality that best explains such decisions as *Roe* and *Griswold*, the governing tradition would require far stronger justification than did the *Hardwick* Court for criminal bans on sexual activity between consenting adults.[50]

In *Hardwick*, the Court used the wrong level of generality to conceptualize the plaintiff's claim of liberty:

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[48] *Ibid.*

[49] *Ibid.*

[50] *Ibid.* at 1171-72.

> [I]n asking whether an alleged right forms part of a traditional liberty, it is crucial to define the liberty at a high enough level of generality to permit unconventional variants to claim protection along with mainstream versions of protected conduct. The proper question as the dissent in *Hardwick* recognized, is not whether oral sex as such has long enjoyed a special place in the pantheon of constitutional rights, but whether private, consensual, adult sexual acts partake of traditionally revered liberties of intimate association and individual autonomy [51]

Once the inquiry is shifted from the particular proscribed acts and the group of people who engage in them to the claim of liberty that must be balanced against the state's assertion of power, it becomes clear that a proscription on private acts of sodomy should not survive Protection of the public realm is a legitimate state interest. But the Court in *Hardwick* "fail[ed] to see the difference between laws that protect public sensibilities and those that enforce private morality "[52]

The law at issue bans all sexual contacts of a specified kind, even if conducted out of public view, even if engaged in by married couples or other consenting adults It thus intrudes the grasp of the criminal law deep into an area that involves no state interest in protecting public decency. Government must offer greater justification for policing the bedroom than for policing the streets. Accordingly, "the relevant question is not what Michael Hardwick was doing in the privacy of his own bedroom, but what the State of Georgia was doing there."[53]

The only justification considered by the *Hardwick* majority was that a majority of the Georgia legislature had decreed that private acts of oral and anal sex offend public morality The Court deemed this sufficient, since "[p]roscriptions against that conduct have ancient

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[51] See L. Tribe, *American Constitutional Law* (Mineola, N.Y.. Foundation Press, 1988) at 1428.

[52] *Hardwick*, *supra*, note 22 at 212 (Blackmun J., dissenting). As has been pointed out by R. Demers, "De la lex scantinia aux récents amendements du Code Criminel: homosexualité et droit dans une perspective historique" (1984) 25 C. de D. 777 at 777, throughout history laws became more and more preoccupied with private morality and control of individual behaviour.

[53] Tribe, *supra*, note 51 at 1428.

roots."[54]

The lengthy recitation of instances where homosexuality has been disapproved in Western society is beside the point. As the Court acknowledged before, even the "pure[st]" of "common law pedigree[s]" cannot ensure the continuing constitutional validity of long-practiced invasions of body or home.[55] In Justice Blackmun's words, neither "the length of time a majority has held its convictions [n]or the passions with which it defends them can withdraw legislation from th[e] Court's scrutiny."[56]

The dissenters found it "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds on which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[57]

In past privacy cases, the Court has felt at liberty to depart from history when the interest at stake seemed sufficiently important. In *Loving* v. *Virginia*, for example, it invalidated a statute forbidding miscegenation despite the fact, noted by the Court, that marriage between partners of different races traditionally had been prohibited by most states in the country. The mere longevity of a statute, even when the law fits into a legal pattern or tradition, has never before been deemed a bar to judicial intervention.[58] What is it about the claim in *Hardwick* that sets it apart from other privacy claims? The lack of reasoning in the

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[54] *Hardwick*, *supra*, note 22 at 192.

[55] *Tennessee* v. *Garner*, 471 U.S 1, 14 (1985) (holding unconstitutional the time-honoured rule that police may use deadly force to stop any fleeing felon).

[56] *Hardwick*, *supra*, note 22 at 210 (dissenting opinion).

[57] Holmes, "The Path of the Law" (1897) 10 Harv. L.R. 457 at 469, quoted in *Hardwick*, *supra*, note 22 at 199, Blackmun J., dissenting.

[58] As J.A. Gordon, "Process, Privacy, and the Supreme Court" (1987) 28 Boston College L.R. 691 at 718 puts it, the law must be dynamic for a number of reasons: technological advances create unthought-of intrusions from which individuals need protection. Similarly, the perceived need for a law can evaporate as social evolution exposes the impropriety of an outmoded piece of legislation.

majority's opinion suggests that the explanation lies in the emotional response of five justices to the subject of homosexuality.[59] The decision was probably not decided on principled grounds. Indications that prejudice rather than legal principle was responsible for the outcome can be found in what the four dissenting justices called "the majority's almost obsessive focus on homosexual activity"[60] The Court repeatedly characterized the issue presented as involving an alleged "fundamental right to engage in homosexual sodomy,"[61] even though the Georgia statute covers oral or anal intercourse committed by any two people - homosexual or heterosexual, married or unmarried. The two lower courts had dealt with the statute in its entirety; they made no distinctions among categories of individuals subject to the prohibition on sodomy. The Supreme Court, however, reframed *Hardwick*, converting it from a "sexual privacy" case to a "gay rights" case. "The majority's reformulation of *Hardwick* reinforces the impression that the justices had made up their minds on the proper result beforehand, and then tailored the case to suit their particular prejudices."[62] As one commentator put it, it seems as if the Court took advantage of a rare opportunity to base a decision on personal preferences without the risk of a widespread public reaction, since the decision was unlikely to have any real impact, due to the virtual non-enforcement of the Georgia sodomy statute and similar non-enforcement in other states.[63]

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[59] See T.B. Stoddard, "*Bowers* v. *Hardwick*: Precedent by Personal Predilection" (1987) 56 U. Chicago L.R. 648 at 655. As the Note "Substantive Due Process Comes Home to Roost: Fundamental Rights, *Griswold* to *Bowers*" (1988) 10 Women's Rights L R. 177 at 208 puts it, *Bowers* suggests that the fears that greeted *Roe* - that the vaguely wrought due process clause would take the shape that the justices' personal or political value judgements gave to it - have at least been fulfilled. See also J. Williamson, "The Constitutional Privacy Doctrine After *Bowers* v. *Hardwick*: Rethinking the Second Death of Substantive Due Process" (1989) 62 S. Calif. L.R. 1263 at 1298. Williamson argues that the decision is based on prejudicial grounds that have no place in constitutional interpretation.

[60] Tribe, *supra*, note 51 at 1430-31, quoting *Hardwick* at 200, Blackmun J., joined by Brennan, Marshall, and Stevens JJ., dissenting.

[61] *Hardwick*, *supra*, note 22 at 191, opinion of the Court.

[62] Stoddard, *supra*, note 59 at 652.

[63] See Williamson, *supra*, note 59 at 1328.

d. Conclusion

The case may therefore pose less of a threat to other privacy precedents than would otherwise be the case. *Hardwick* does not necessarily doom any and all sexual privacy claims relating to unorthodox or nonmarital sex between consenting adults.[64]

In some circles, however, *Hardwick* is thought to spell the end to efforts to use constitutional litigation to prevent government from imposing sanctions on the basis of sexual orientation. But while it can be taken for granted that after *Hardwick* gay rights advocates will encounter increased obstacles when challenging sodomy statutes or statutes denying gays the right to marry in state courts on right to privacy grounds,[65] *Hardwick* left open other constitutional

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[64] See Tribe, *supra*, note 51 at 1431-35. Also Williamson, *supra*, note 59 at 1297 argues that the constitutional protection of privacy rights has not been irreversibly damaged. However, see Vieira, *supra*, note 44, who (at 1181) maintains that the right of privacy is itself an unreliable safeguard for nontextual rights: "One should ask, however, whether the problem lies with the *Hardwick* decision or with the doctrine that the Court was asked to apply.... Because I conclude that the problem of unprincipled decision making in this area is rooted in underlying doctrinal deficiencies, and not merely in the shortcomings of the *Hardwick* opinion, I suggest a need to explore an alternative to the new substantive due process."

[65] After the *Hardwick* decision was announced, a lawsuit challenging a similar law in Louisiana was withdrawn, and the highest court of Missouri issued an opinion upholding a similar law in that state. The Supreme Court subsequently refused to consider a challenge to a Texas law penalizing sexual activity between persons of the same gender or to review a decision by the highest criminal court of Oklahoma, which had declared invalid a law prohibiting anal and oral sex between heterosexuals. Consequently, it seems that the Supreme Court may recognize anal or oral sex between heterosexuals as not being subject to state prosecution. See A.S. Leonard, "The Legal Position of Lesbians and Gay Men in the United States", in *The Second ILGA Pink Book* (Utrecht: Series on gay and lesbian studies nr. 12, 1988) 99 at 101. As recently as Feb. 2, 1990 the Georgia House of Representatives rejected a move to repeal the state's "ancient statute" that outlaws sodomy (see the report in 35 Outweek (1990) at 28). However, on June 8, 1990 a circuit court judge in Fayette County (Kentucky) affirmed a district court judge's ruling that the sodomy law violates the commonwealth's constitution. Attorneys for the state have since asked the Kentucky Court of Appeals to review the Circuit Court's decision. If the higher court upholds the lower court's decision, the case may go before the Kentucky Supreme Court. A ruling against the anti-gay Kentucky sodomy law, which penalizes sexual conduct between people of the same sex without equally penalizing conduct between people of opposite sexes, would change the law for the whole commonwealth. In Michigan, a trial court has struck down a state sodomy law, ruling that a prohibition on some forms of consensual sexual

challenges to state sodomy statutes.[66] As a result of the apparent exclusion of homosexuals from substantive due process protections, homosexuals are increasingly challenging government-sponsored discrimination through the equal protection principles of the U.S Constitution.

Chapter 2. **The U.S. Approach to Equality**

a. Introduction

In the United States, the Supreme Court has evolved criteria and tests - generally, three levels of scrutiny - by which to measure the effect of legislation on the constitutional rights of any group or classification of persons created or singled out in legislation or government action.[67] This chapter first describes the fundamental features of the U.S. approach and then points out the many problems with it. It argues that the concept of equality in the U.S. legal system does not support differences and that it is discriminatory to force homosexuals,

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activity violates the state's constitutionally guaranteed right to privacy. While the decision affects only those courts and law enforcement agencies within Wayne County, it paves the way for a case that could land in the state's Supreme Court. As Sue Hyde, director of the Privacy Project, a program of the National Gay and Lesbian Task Force that focuses on efforts to repeal existing sodomy laws, has pointed out, the recent Kentucky and Michigan cases, as well as the political organizing going on in several other states, prove that sodomy laws can be attacked on a state-by-state basis. Since *Hardwick*, activists have targeted various states for repeal both legislatively and through the judicial system. The Michigan decision, although it was issued by a trial court, represents the first victory the lesbian and gay community has had in the fight to legalize sodomy through the state-by-state strategy. For further details, see N. Reyes and A.S. Leonard, "Two State's Sodomy Laws under Fire in Courts" (1990) 35 Outweek 18.

[66] See *Hardwick*, *supra*, note 22 at 196 n.8.

[67] On the interpretation of the Fourteenth Amendment, see Duplé, *supra*, note 8 at 812-14. For a good discussion of the enforcement of the principle of equal protection, see Hayes, *supra*, note 2 at 405-24.

as a precondition to their access to fundamental rights, to declare the irrelevance of their sexual orientation.

b. The Three-Tiered Approach

In the United States, strict scrutiny is applied when a group is "inherently suspect" or in a "suspect class" as race or religion or when classifications deny fundamental constitutional rights such as the right to vote,[68] the right to marry, and the right of access to court to obtain a divorce.[69] The defender of a suspect classification must prove that the enactment was required for an "overriding state interest" that could not be accomplished in a less prejudicial manner.

Under the "minimal scrutiny" test a court will uphold legislation found to be "rationally related" to the furtherance of a legitimate state interest. Under minimal scrutiny, the onus is on the challenger to show that the state did not have a legitimate purpose in enacting the legislation and that the classification does not have a rational relationship to the object of the legislation. If the minimal scrutiny standard is selected, the given classification is virtually certain to be consistent with the Equal Protection Clause.[70] Or as has been said, there is "minimal scrutiny in theory and virtually none in fact".[71]

This test for the constitutionality of legislative classifications has been severely criticized. In particular, it has been pointed out that

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[68] See *Kramer* v. *Union Free School Dist.*, 395 U.S. 621 (1969).

[69] See *Boddie* v. *Connecticut*, 401 U.S. 371 (1971).

[70] E.L. Barrett, "The Rational Basis Standard for Equal Protection Review of Ordinary Legislative Classifications" (1979-80) 58 Kentucky L.J. 845 at 860, reports that in only 8 cases out of the 90 before the U.S.S.C. in which a written opinion was released between 1955 and 1980 involving the rational basis standard, was the legislation invalidated. See A.F. Bayefsky, "Defining Equality Rights" in A.F. Bayefsky & M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 1 at 54.

[71] G. Gunther, "Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection" (1972) 86 Harvard L.R. 1 at 8.

> [i]t is always possible to define the legislative purpose of a statute in such a way that the statutory classification is rationally related to it. The nature of the burdens or benefits created by a statute and the nature of the chosen class's commonality will always suggest a statutory purpose - to so burden or benefit the common trait shared by members of the identified class.[72]

If a burden or a benefit is placed on a group that shares a trait that can be named, at least one purpose for doing so can always be "to burden or benefit those that share the trait."[73] The requirement that legislative classifications be "rationally related" to legislative ends therefore amounts to no requirement at all; it can always be satisfied.

The two standards described above, into which all potential grounds of classification are to be organized, proved to be too rigid. The U.S. Supreme Court has therefore sporadically and unevenly suggested varieties of levels of scrutiny falling somewhere between minimal and strict scrutiny. Quasi-suspect classifications include gender and illegitimacy,[74] and trigger intermediate scrutiny, which requires a substantial relationship between the classification and an important government interest.

Some of the many problems with the U.S. approach to equality have already been pointed out. Others become apparent when we apply a feminist analysis. A number of points may be made:

(1) The concept of equality in the U.S. legal system does not support differences, it only supports sameness. The very standard for equal protection is that people who are similarly situated must be treated equally.[75] The proclamation of difference, therefore, legitimizes

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[72] See for example: *Powell* v. *Pennsylvania*, 127 U.S. 678 at 687, (1888); *U.S. Railroad Retirement Bd.* v. *Fritz*, 449 U.S. 166 at 187, (1980), Brennan J., dissenting.

[73] Note, "Legislative Purpose, Rationality, and Equal Protection" (1972) 82 Yale L.J. 123 at 128, 131. For examples of further criticism, see Rayefsky, *supra*, note 70 at 54.

[74] See *Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 at 441 (1985) [hereinafter *Cleburne*].

[75] See e.g., *F.S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920) ("all persons similarly circumstanced shall be treated alike").

existing inequity. The problem with this concept of equality is that it makes the recognition of differences a threat to the premise behind equality. If to be equal you must be the same, then to be different is to be unequal.[76] As Lorraine Code points out, the value of equality is in itself questionable if it is so construed that neither its rhetoric nor its practice can accomodate relevant differences. As long as putative labour market equality can require women to conceal evidence of pregnancy or to refrain from having children, then women's relevant differences are not being taken into account.[77] As a matter of fact, U.S. liberal feminists and U.S. feminist lawyers have denied or minimized the importance of the pregnancy difference, thus making men and women more "alike" so as to force the legal system to treat men and women similarly.[78]

In the same way it seems likely that homosexuals, to make an argument for equal protection, will be required to claim that gay and lesbian relationships are the same as heterosexual relationships. To gain the right, they must compare themselves to married couples. The law looks to the insiders as the norm, and requires that those seeking the law's equal protection situate themselves in a posture similar to those who are already protected. In arguing for the right to legal marriage, lesbians and gay men would be forced to claim that they are just like heterosexual couples, have the same goals and purposes, and vow to structure their lives similarly. The law apparently provides no room for arguing that they are different but nonetheless entitled to equal protection.

Equality has long been a central feminist issue. Early liberal theorists' preoccupation with issues of equality was one of the principal inspirations of contemporary feminist thought.[79] Yet, as one commentator pointed out,

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[76] See M. Minow, "Learning to Live with the Dilemma of Difference: Bilingual and Special Education" (1985) Law and Contem. Problems at n.191.

[77] See L. Code, "Feminist Theory" in S. Burt, L. Code, L. Dorney, eds., *Changing Patterns - Women in Canada* (Toronto: McClelland and Stewart, 1988) 18 at 46.

[78] See R. West, "Jurisprudence and Gender" (1988) 55 U. Chicago L.R. 1 at 22.

[79] Compare A. Jaggar, *Feminist Politics and Human Nature* (Totowa: Rowman & Allenheld, 1983) 173 at 173-97.

> formulations of the project phrased to accord priority to the achievement of equality between the sexes are problematic. They are often interpreted .. to mean that women really want to be just like men.... The liberal vision of equality is not much better from a feminist point of view. It provides ready support for the claim that the sexes are equal, but different, and hence should occupy different but complementary places in society.[80]

As Carol Gilligan notes, feminist theorists in non-legal disciplines rediscovered women's differences from men during the same decade that liberal feminist political activists and lawyers pressed for equal (meaning same) treatment by the law.[81] What unifies radical and cultural feminist theory, and what distinguishes both from liberal feminism, is the discovery, or rediscovery, of the importance of women's fundamental material difference from men.[82] The differences have been reidentified as women's strengths rather than weaknesses.

Therefore, from the feminist perspective it is discriminatory to force homosexuals, as a precondition to their access to fundamental rights, to declare the irrelevance of their sexual orientation.

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[80] See Code, *supra*, note 77 at 45.

[81] See C. Gilligan, *In a Different Voice* (Cambridge, Massachusetts, and London, England: Harvard University Press, 1982) at 6-8. As has been pointed out by M. Eberts, "Risks of Equality Litigation" in K.E. Mahoney & S.L. Martin, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 89 at 91, however, the feminist community itself does not speak with one voice on the question of "sameness" of treatment. Some feminist theorists argue that the law should treat men and women identically, in spite of women's disadvantaged past and current special responsibilities (like childbirth and child care). The feminists will argue that the same treatment is the best course because they take the view that only by claiming no "special" treatment can women claim the rights of full citizenship. Many see advocating special treatment for women as providing to legislators a convenient pretext for various kinds of paternalistic and restrictive legislation. See also W.W. Williams, "American Equality Jurisprudence" in K.E. Mahoney & S.L. Martin, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 115 at 120: "[T]he division, as old as feminism itself, pits those who focus on the similarities between men and women and hold up an ideal of common humanity against those who focus on what is unique, special, different and worthy in women's culture and experience as contrasted to men's culture and experience and hold up an ideal in which women are empowered to speak in their own voice and project their values into the public realm."

[82] See West, *supra*, note 78 at 14.

Feminists have pointed out that the "similarly situated" ideal that equates equality with sameness and difference with inferiority devalues human individuality. This concept of equality is also unsatisfactory because it obscures the possibility that equality can apply to people who are different - with their differences acknowledged. At the same time, the connection between inequality and difference treats the particular categories of difference used to assign positions of equality and inequality as permanent, and, indeed, treats people as subject to categorization rather than as manifesting multitudes of characteristics.[83] We thus realize that a prejudice against difference is already built into equality jurisprudence. Furthermore, it offers no guidelines for determining when two persons are alike or not for the purposes of the Fourteenth Amendment.[84]

(2) The conventional approach also fails to offer a solution to the question of how differences should be taken into account. As Lorraine Code points out, there is a fundamental moral problem about treating individuals differently.[85] In democratic societies it has long been taken for granted that all should be treated alike and equally. Traditional moral theories emphasize the importance of impartiality and equality in moral decisions. And moral decisions, it is believed, should be made on the basis of reason alone, with no appeal to emotions. So if women's - and homosexuals' - differences from men - or heterosexuals - are in fact to be taken into account, a way of thinking differently about difference has to be developed.

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[83] See Minow, *supra*, note 76 at n.193.

[84] C. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven: Yale University Press, 1979) at 117 has presented an alternative standard to that used by the courts or advocated by the common-humanity feminists that would at least partly respond to the cultural feminist's concerns. That test of the constitutionality of sex-based legislation would focus on whether "the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status". As has been pointed out by Williams, *supra*, note 81 at 121-22, the courts' three-tiered equal protection standard does not speak directly to this idea of equal protection. For the courts, the history of subordination justifies closer scrutiny of sex cases, but that scrutiny itself focuses on matters unrelated to subordination, namely the degree of fit between classification and purpose and the importance of the government's purpose.

[85] See Code, *supra*, note 77 at 46-47.

Feminism has drawn our attention to the fact that difference itself is intellegible only as a statement of relationship; rather than being intrinsic, difference is a social construct designed to confirm superiority. Judges therefore both create and defeat equality from a relationship of power with respect to the differences they construct. In other words, deviancy is always constructed from the vantage point of some claimed normality; for there to be a position of inequality, there must be a contrasting position, not of equality, but of superiority. In short, the idea of difference depends on the establishment of a relationship between the one assigned the label of "different" and the one used as counterexample.[86] In our society humanness has been defined by what heterosexual men do. When women - or homosexuals - act differently, their behaviour is judged deviant because it differs from that male heterosexual norm. Yet it is worth noting that difference is a symmetrical relation There is no "normal" person or position that is in itself free from being different. If women - and homosexuals - are different from men, then men, by the same token, are different from women - and homosexuals.[87] As has been pointed out,

> [t]he disjunction between self and "other" contains the seeds of domination. In the terms of feminist theory, male reality manifests itself by negating that which is non-male.[88]

This is equally true for what concerns homosexuality: heterosexual reality manifests itself by negating that which is not heterosexual. The male model defines self, and other important concepts, by opposing the concept to a negativized "other". Male rationality "divides the world between all that is good and all that is bad - between objective and subjective, light and shadow, man and woman."[89] And between heterosexual and homosexual. The

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[86] See Minow, *supra*, note 76 at n.197.

[87] See Code, *supra*, note 77 at 48.

[88] A. Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1986) 5 Yale L.J. 1373 at 1382.

[89] *Ibid.* at 1382-83. R. Colker, "Anti-Subordination Above All: Sex, Race, and Equal Protection" (1986) 61 N.Y.U. L.R. 1003 at 1007 argues that courts should analyse equal protection cases from an anti-subordination perspective. Under the anti-subordination perspective, it is inappropriate for certain groups in society to have subordinated status

disjunction between self and "other", therefore, contains the seeds of domination not only of male over female, but also of straight over gay.

When those possessing the power to set the norm are heterosexual, they easily classify homosexuals as the deviant "other" to justify the unequal burdens homosexuals bear. And because most judges embed their unstated white, heterosexual male point of comparison in categories and labels, differences appear neutral, inevitable and true. The multiplicity of "other" perspectives is ignored.

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because of their lack of power in society as a whole. The approach seeks to eliminate the power disparities between men and women, and between whites and non-whites [and between heterosexuals and homosexuals], through the development of laws and policies that directly redress those disparities.

Chapter 3. **Homosexuality as a Suspect Classification**

a. Introduction

As has been pointed out, the difficulty with the U.S. equal protection analysis is that the only real issue before the courts in any particular case concerns which of the levels of scrutiny to adopt. Once a court finds the right pigeonhole, the constitutional result follows almost automatically.[90]

The flexibility of the rationality standard gives courts enormous discretion regardless of the soundness of the governmental action in question. Without a clear statement by the Supreme Court that sexual orientation classifications should be given heightened scrutiny, even in cases in which there is absolutely no relationship between sexual orientation and governmental interest, because of incorrect understanding of the nature of homosexuality, gays and lesbians will still not be guaranteed protection against discrimination. This chapter outlines the criteria on which the Supreme Court has focused in determining whether a classification is suspect. It then analyses two cases where courts have employed heightened equal protection scrutiny to strike down classifications based on sexual orientation and argues that the findings in the two cases that gay men and lesbians satisfy the criteria for suspect class status are supported by a wide range of evidence.

b. Do Homosexuals Constitute a Suspect Class?

The Supreme Court has focused on several factors in determining whether a classification

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[90] N. Finkelstein, "Sections 1 and 15 of the *Canadian Charter of Rights and Freedoms* and the Relevance of the U.S. Experience" (1985) 6 Advocate 188 at 195.

is suspect. Five criteria are enumerated:[91]

(1) long history of discrimination;[92]

(2) characteristics that bear no relation to ability to "perform or contribute to society";[93]

(3) marked by a "badge" of distinction;

(4) relegated to a position of political powerlessness;[94]

(5) possess an immutable characteristic that is either inherent or uncontrollable.[95]

These criteria, however, are not a mechanical check-list each item of which must be met.[96] Rather, they constitute a series of questions that assist the courts in their initial analysis as to whether special societal conditions exist that should cause courts to forego their usual presumption that a classification is rational, and that instead should cause them to presume that a classification arises from invidious and non-legitimate government motives.

Courts have usually declined to find that classifications based on sexual orientation deserve any form of heightened scrutiny.[97] In reaching this conclusion, some courts have simply

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[91] See, e.g., Note, "Homosexuals' Right to Marry: A Constitutional Test and a Legislative Solution" (1979) U. Pennsylvania L.R. 193 at 202-203; Duplé, *supra*, note 8 at 814-18; Hayes, *supra*, note 2 at 413-24.

[92] See *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 313 (1976) (declining to hold that classifications based on age are suspect).

[93] See *Frontiero* v. *Richardson*, 411 U.S. 677, 685 (1973), Brennan J.

[94] See *Plyler* v. *Doe*, 457 U.S. 202 (1982) at 217 n.14.

[95] See *Frontiero*, *supra*, note 93 at 686.

[96] See Hayes, *supra*, note 2 at 456, referring to *Cleburne*, *supra*, note 74 at 472 n.24, Marshall J., dissenting in part.

[97] See, e.g., *Woodward* v. *United States*, 871 F.2d 1068 at 1074 (Fed. Cir. 1989); *Padula* v. *Webster*, 822 F. 2d 97 at 103 (D.C. Cir. 1987); *Baker* v. *Wade*, 769 F. 2d 289 at 292 (5th Cir. 1985), cert. denied, 478 U.S. 1022 (1986); *Dronenberg* v. *Zech*, 741 F. 2d 1388 at 1391 (D.C. Cir. 1984); *Childers* v. *Dallas Police Dept.*, 513 F. Supp. 134, 147 n.22 (N.D. Tex. 1981); *Rich* v. *Secretary of the Army*, 735 F.2d 1220 at 1229 (10th Cir. 1984); *Todd* v. *Navarro*, 698 F. Supp. 871 at 874 (S.D. Fla. 1988); *Gay and Lesbian Students Ass'n* v. *Gohn*, 656 F. Supp. 1045 at 1056-57 (W.D. Ark. 1987); *benShalom* v. *Marsh*, 881 F.2d 454 (7th Cir. 1989) [hereinafter *benShalom III*]; see also *benShalom* v. *Marsh*, 703 F. Supp. 1372 (E.D. Wis.

relied on the absence of Supreme Court precedent holding that homosexuality is a suspect classification.[98] Other courts, erroneously equating homosexual orientation with participation in acts outlawed by state sodomy statutes, have held that if states may constitutionally criminalize sodomy, classifications based on whether or not a person engages in sodomy cannot be invalid.[99]

Recently, some courts have begun to look more closely at the relationship between sexual orientation and the values of equal protection. In two cases, courts have employed heightened equal protection scrutiny to strike down classifications based on sexual orientation.

In *Watkins* v. *United States Army*,[100] the United States Court of Appeals for the Ninth Circuit concluded that *Hardwick* did not resolve the equal protection issue. It held that homosexuals constitute a suspect class and that Army regulations that discriminate on the basis of homosexual orientation are unconstitutional.

This decision was, however, subsequently withdrawn by an eleven-judge en banc panel of the

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1989) [hereinafter *benShalom II*]; *benShalom* v. *Secretary of the Army*, 489 F. Supp. 964 (E.D. Wis. 1980) [hereinafter *benShalom I*] (ordering the Army to reinstate benShalom for the remaining eleven months of her enlistment).

[98] See, e,g., *Childers*, *ibid.* at 147 n.22. As has been pointed out, the Supreme Court has never held, however, that classifications based on sexual orientation are not suspect, it has simply never addressed the issue of suspectness in the context of sexual orientation; see "Sexual Orientation and the Law", *supra*, note 19 at 1565.

[99] See, e.g., *Woodward*, *supra*, note 97.

[100] 847 F.2d 1329 (9th Cir. 1988)[hereinafter *Watkins II*] The case involved an openly gay serviceman administratively discharged, pursuant to Army regulations, after fourteen years solely because of his homosexual orientation. For detailed discussions of the facts of the case, see *Watkins II* at 1330-34. For a detailed discussion of the Army's regulations and their application, see *Falk* v. *Secretary of the Army*, 870 F.2d 941 (2d Cir. 1989). See also *Lesbians and Gays in the Military* (1988), report by the Defense Personnel Security Research and Education Center, prepared by T.R. Sarbin and K.E. Karols and released by C.K. Eoyang. This study of the suitability of homosexuals for military service was prepared in the context of the DPSREC's search for connections between personal history items and the potential for security violations.

Ninth Circuit Court of Appeals in a decision in which the majority of the panel did not address the equal protection issue raised in the previous decision.[101] For a six-judge majority, Pregerson J. wrote that, because the Army, "with full knowledge of [Watkins'] homosexuality, had repeatedly permitted him to reenlist,"[102] the Army was equitably estopped from barring his reenlistment on the basis of his sexual orientation. Thus, the Court found it unnecessary to reach the equal protection issues raised in *Watkins II*. This refusal to consider the panel's broad equal protection arguments represents a setback for gay and lesbian rights because in withdrawing the panel's decision the Court removed the only circuit court decision to hold that sexual orientation is a suspect classification.[103] Nonetheless, the decision greatly expands the rights of gay and lesbian servicepersons. The Court's finding that Watkins' sexual orientation had no adverse impact on his military performance belies the Army's contention that "[h]omosexuality is incompatible with military service,"[104] and may therefore provide the basis for other successful fact-specific challenges to the military's policy of discrimination. If the judges who voted to reinstate Watkins believed that his reinstatement would adversely affect the national interest, they would clearly have refrained from invoking equity to order reinstatement. Instead, Pregerson J. concluded:

> This is a case where equity cries out and demands that the Army be estopped from refusing to reenlist Watkins on the basis of his homosexuality.[105]

In *High Tech Gays* v. *Defense Industrial Security Clearance Office*,[106] the District Court found that gay men and lesbians constitute a quasi-suspect class, and on that basis

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[101] *Watkins* v. *United States Army*, 875 F.2d 699 (9th Cir. 1989) [hereinafter *Watkins III*].

[102] *Ibid.* at 701.

[103] See The Editors of the Harvard Law Review, *Sexual Orientation and the Law* (Cambridge, Massachusetts: Harvard University Press, 1990) at 165.

[104] 32 C.F.R. pt. 41, app. A, pt. 1.H.1.a (1988).

[105] *Watkins III*, *supra*, note 101 at 704-05.

[106] 668 F. Supp. 1361 (N.D. Cal. 1987) [hereinafter *High Tech Gays I*].

invalidated the government's policy of subjecting gay and lesbian security-clearance applicants to extended investigations and mandatory adjudications.

The plaintiffs had claimed that DISCO's policy and practice of refusing to grant industrial security clearances to gays because of their sexual orientation, private practice thereof with consenting adults, and related social and political activities, including membership in gay organizations, and of subjecting them to unjustifiable and time-consuming investigations because of their sexual orientation and related matters violates their Constitutional rights to freedom of speech and association and to equal protection and the due process of law

The District Court held that the Department of Defense's (DoD) security clearance regulations "must withstand strict scrutiny because they impinge upon the right of lesbians and gay men to engage in any sexual activity, not merely sodomy, and thus impinge upon their exercise of a fundamental right."[107]

It rejected the reasons proffered by the DoD to justify its policies and found the absence of even a "rational basis for defendants' subjecting all gay applicants to expanded investigations and mandatory adjudications while not doing the same for all straight applicants."[108]

The District Court therefore concluded that the DoD policy violates the Constitution and granted summary judgment to the plaintiffs.

However, recently a three-judge panel of the Ninth Circuit reversed the district judge's decision.[109] The opinion by Brunetti J. disagrees with the ruling that homosexuality was at least a quasi-suspect classification requiring heightened scrutiny under Fifth Amendment equal protection doctrines. Citing *Hardwick* as well as *Padula* v. *Webster* and *benShalom II*,

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[107] *Ibid.* at 1370.

[108] *Ibid.* at 1373.

[109] *High Tech Gays* v. *DISCO*, No. 87-2987 [hereinafter *High Tech Gays II*). See A.S. Leonard, "Ninth Circuit Rejects Challenge on Security Clearances" [1990] Lesbian / Gay Law Notes 13.

Brunetti J. asserted:

> If for federal analysis we must reach equal protection of the Fourteenth Amendment by the Due Process Clause of the Fifth Amendment ... and if there is no fundamental right to engage in homosexual sodomy under the Due Process Clause of the Fifth Amendment ... it would be incongruous to expand the reach of equal protection to find a fundamental right of homosexual conduct under the equal protection component of the Due Process Clause of the Fifth Amendment.[110]

Brunetti used a three-part test for identifying suspect classifications. To be a "suspect" or "quasi-suspect" class, homosexuals must (1) have suffered a history of discrimination; (2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and (3) show that they are a minority or politically powerless, or alternatively show that the statutory classification at issue burdens a fundamental right.[111] Brunetti asserted that gays qualify only on the first part:

> Homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes.... The behavior or conduct of such already recognized classes is irrelevant to their identification.... Moreover, legislatures have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orientation through the passage of anti-discrimination legislation. Thus, homosexuals are not without political power; they have the ability to and do "attract the attention of the lawmakers," as evidenced by such legislation. See Cleburne, 473 U.S. at 445.... Lastly, as previously noted, homosexual conduct is not a fundamental right.[112]

Because the Court held that the District Court had erred in granting the plaintiffs' motion for summary judgment by applying heightened scrutiny in its equal protection analysis, it then reviewed the plaintiffs' and defendants' cross-motions for summary judgment applying rational basis scrutiny. The Court accepted the argument that DISCO's policies were not

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[110] *Ibid.*

[111] *Ibid.*, citing *Bowen* v. *Gilliard*, 483 U.S. 587, 602-603 (1986).

[112] *Ibid.*

status-oriented, but focused rather on conduct, in contrast to the asserted absolute exclusion of homosexuals by the CIA challenged in *Dubbs* v. *Central Intelligence Agency*, 866 F.2d 1114 (Ninth Cir. 1989), in which the Circuit denied summary judgment to the Agency.

Since the Court would only apply rational basis scrutiny, DISCO's argument that the KGB seeks out gays for exploitation convinced the Court that expanded investigations of gay applicants have a rational basis. The Court rejected the contention that DISCO violated the First Amendment by using membership in a gay organization as a reason for undertaking such an investigation. The Court asserted that this was one of many factors and claimed that nobody had been denied a clearance solely on the basis of organizational membership.

The attorney for High Tech Gays later filed a petition for rehearing en banc and for certiorari. He asserted that not only was the Court wrong on the merits, but that it improperly dismissed the case, since even a rational basis evaluation would have required a further hearing to compile a factual record. The attorney criticized the Court for improperly drawing inferences favourable to DISCO in determining whether to grant its motion to dismiss, despite sharp factual controversy over whether gays are specially targeted by foreign agents and the lack of a factual record on other controverted points. The record consisted entirely of affidavits and unilateral submissions accompanying motion papers.[113] But the 27-member Ninth Circuit Court of Appeals recently refused to reconsider the decision of the three-member appeals panel. Two judges who dissented from the full panel's majority opinion not to hear the case said the decision was "a grave error" and that it "will have tragic results." The dissenting judges also pointed out that the Navy not only discredited the KGB theory 38 years ago in its Crittendon Study, but also declared that homosexuals are no more of a security risk than heterosexuals. In a written dissent, the two judges concluded:

> To leave on the books the rule that the government can discriminate against homosexuals whenever it has a rational basis to do so is an invitation to tragedy. Homosexuals are hated, quite irrationally, for what they are, what they did not choose to be and what they cannot easily change. Mainstream

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[113] *Ibid.*

> society has mistreated them for centuries. If the equal protection clause means anything, it should mean the government cannot, on the slightest of justifications, join in the discrimination.[114]

Both the *Watkins II* and *High Tech Gays I* courts found that gay men and lesbians have suffered a history of purposive discrimination, that sexual orientation bears no relationship to the ability to perform or contribute to society, that prejudices and inaccurate stereotypes have led to discrimination against gay men and lesbians, that sexual orientation is sufficiently immutable, and finally that gay men and lesbians lack the political power necessary to obtain redress from the executive and legislative branches of government.[115]

The findings in *Watkins II* and *High Tech Gays I* that gay men and lesbians satisfy the criteria for suspect class status are supported by a wide range of evidence.[116]

(1) Gay men and lesbians have suffered a history of discrimination both public and private. Discrimination against homosexuals is a cultural fact in Western society that dates back to Biblical days.[117] They face dismissal from their jobs if their sexual orientation is discovered,[118] they are prohibited from serving in the military, and in many cases they are prevented from raising children. Such discrimination arguably is at least as burdensome as that which has afflicted several minorities (including aliens and the poor) that have been

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[114] Citation taken from A.S. Leonard, "High Tech Gays Loose Court Case" (1990) 63 Outweek 22.

[115] See *Watkins II*, *supra*, note 100 at 1345-49; *High Tech Gays I*, *supra*, note 106 at 1369-70.

[116] See "Sexual Orientation and the Law", *supra*, note 19 at 1567 with reference to Note, "An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality" (1984) 57 S.Cal. L.R. 797 at 816-27 [hereinafter: "Application of Heightened Scrutiny"].

[117] See Note, "The Legality of Homosexual Marriage" (1973) 82 Yale L.J. 573 at 577.

[118] One of the most serious areas of discrimination has been in the area of federal employment. See *ibid.*

shielded on occasion by the stricter judicial standard of review. However, it might reasonably be found that discrimination against homosexuals has not been as burdensome as that affecting other minority groups, particularly blacks.[119]

(2) Classifications that discriminate against homosexuals are based on inaccurate stereotypes that frequently bear no relation to the ability to perform or contribute to society. Certainly, disparaging misconceptions about homosexuals are endemic in Western society. Stereotypes about homosexuality assume, for example, that gay men and lesbians are likely to molest children, that they cannot be trusted to keep secrets, and that homosexuality is "contagious". These assumptions have repeatedly been proven false.[120]

(3) Homosexuals cannot rely on the political process to make themselves heard. Because people who openly declare their homosexuality face harassment, loss of employment, and social ostracism, most gay men and lesbians are not likely to risk publicly calling for changes in policies. But even if homosexuals opened up about their sexuality, because of both moral disapproval of homosexuality and the fact that gay men and lesbians constitute a minority of the population, discriminatory practices would probably continue.

Therefore, the courts in *benShalom III* and in *High Tech Gays II* were wrong to hold that homosexuals are not without political power. In *High Tech Gays II* the Court found that homosexuals are not without political power, as they have the ability to and do "attract the attention of the lawmakers."[121] Legislatures have addressed and continue to address the

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[119] The *Watkins II* Court held that the group defined by homosexual orientation had suffered a history of purposeful discrimination as "pernicious and intense" as that suffered by any other group established as suspect (at 1345).

[120] See, e.g., Canada, Parliament. House of Commons. Sub-Committee on Equality Rights, *Equality for All: Report* (Ottawa, 1985) at 31.

[121] Citing *Cleburne*, *supra*, note 74 at 445. In *Cleburne* the Court held that the mentally retarded do not constitute a class requiring increased judicial protection, noting in part that government actions protecting the mentally retarded indicate that they are not politically powerless. The Court reasoned that these government actions could only have occurred with public support, and that the mentally retarded are not politically powerless because they could attract the attention of the government.

discrimination suffered by homosexuals because of their sexual orientation through the passage of anti-discrimination legislation.

In *benShalom III* the Court came to the same conclusion, stating that "[i]n these times homosexuals are proving that they are not without growing political power," and that "[a] political approach is open to them to seek a congressional determination about the rejection of homosexuals by the Army."[122] As support for this assertion, the court noted gays in high political office[123] and the participation of Mayor Richard Daley in the 1989 gay rights parade in Chicago.

While it is certainly true that homosexuals are proving that they are not without growing political power, political considerations, prejudice, and ignorance at both the state and federal levels ensure that gays will not receive legislative or executive aid sufficient to overcome the discrimination to which they are subject. In reality, only very few legislatures have addressed the discrimination suffered by homosexuals because of their sexual orientation.[124] The vast majority of states do not provide protection from discrimination and are very unlikely to do so. And only a few localities have adopted measures to prohibit discrimination on the basis of sexual orientation.[125]

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[122] *Supra*, note 97 at 466.

[123] Citing a report from Time magazine that one congressman is an avowed homosexual, and that there is a charge that five other top officials are known to be homosexual. Carlson, "How to Spread a Sexual Smear", Time, June 19, 1989, at 33.

[124] After a legislative battle of almost two decades, Massachusetts became the second state to pass a law prohibiting discrimination against homosexuals in employment, housing, credit and public accommodations in 1989. The Massachusetts bill was passed only after its backers agreed to amendments that some homosexuals found offensive. Among them are provisions stating that the state does not endorse homosexuality or recognize homosexual partnerships and exempting religious institutions. Opponents, like State Senator Edward P. Kirby, have vowed to fight for repeal through a referendum. "This is bad for society," he said. See the report in the New York Times, Nov.1, 1989 at A27. See also *supra*, note 18.

[125] It is important to note that the Court has at least in one case also reasoned that legislative efforts to protect a class from invidious discrimination provides a basis for the Court to grant that class heightened judicial protection as well. See *Frontiero* v. *Richardson*, *supra*, note 93 at 687-88. In that case, one of the factors the Court considered in holding

The precise criteria the Supreme Court has used to determine political powerlessness are unclear, but gays are certainly vastly underrepresented in the political bodies that enact and enforce laws.[126] In *San Antonio Indep. School Dist.* v. *Rodriquez*[127] the Court looked to whether the group had been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Only those groups who are excluded from the majoritarian political process receive special judicial protection; special judicial solicitude is appropriate because the class cannot realistically expect to receive help from the other branches of government.[128] The Court relied on this factor in extending protection to aliens[129] and the minor children of illegal aliens,[130] and in denying heightened scrutiny to classifications based on age[131] or wealth.[132]

Heightened scrutiny has been adopted in cases involving race or gender. While both women and blacks are certainly underrepresented in political bodies, they are not without growing political power. The fact that gays are starting to attract the attention of a few lawmakers

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women to be a class needing increased judicial protection was that Congress had prohibited various forms of public and private discrimination based on gender. The Court reasoned that Congress, by manifesting an increased sensitivity to gender classifications, had concluded that those classifications are inherently invidious. This conclusion, according to the Court, provides some guidance in the Court's own inquiry into whether gender classifications are inherently invidious and therefore subject to heightened judicial scrutiny. Consistent with the reasoning in *Frontiero*, the few laws protecting homosexuals from discrimination indicate not simply the growing political power of homosexuals, but also the recognition by some democratic bodies that discrimination against homosexuals is pervasive and inherently invidious. This recognition further supports the courts' subjecting classifications that disadvantage homosexuals to heightened scrutiny. See Hayes, *supra*, note 2 at 462-63.

[126] Only one congressman is an avowed homosexual. See *supra*, note 123.

[127] 411 U.S. 1, 28 (1973).

[128] See "Application of Heightened Scrutiny", *supra*, note 116 at 815.

[129] *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971).

[130] *Plyler*, *supra*, note 94 at 217 n.14.

[131] *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 313 (1976).

[132] *San Antonio Indep. School Dist.* v. *Rodriquez*, *supra*, note 108.

can therefore not suffice to deny heightened scrutiny to classifications based on sexual orientation. Homophobia and stereotypes that have been the major cause of gays' political powerlessness still persist. Most elected officials fear taking any action that would even appear to endorse homosexuality.[133] Gay or lesbian support of or interest in a politician can ruin a career. Parties can lose significant numbers of voters if they are seen as being "soft on gay rights." Political opponents can turn a campaign around by planting the suggestion that a candidate is either gay or sympathetic to the gay cause. Finally, state legislatures and Congress have enacted the most blatant examples of discrimination against gays.[134] As has been stated,

> [t]he continued existence of laws that discriminate against gays and the unwillingness of legislatures to change those laws are evidence of gays' political powerlessness.[135]

(4) Whatever the causes of homosexuality, the orientation itself does not appear to be one that is freely chosen, nor in most instances can it be changed.[136]

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[133] See "Application of Heightened Scrutiny", *supra*, note 116 at 826, with many examples.

[134] Sodomy statutes are only one example. Police, governmental employers, the Immigration and Naturalization Service and others also defend policies that discriminate against gays. See *ibid.* at 802-803.

[135] *Ibid.* at 827.

[136] See Coleman, "Changing Approaches to the Treatment of Homosexuality" in W. Paul, J. Weinrich, J. Gonsiorek & M. Hotvedt, eds., *Homosexuality - Social, Psychological, and Biological Issues* (Beverly Hills: Sage,1982) at 81-88. The requirement of immutability, however, is a very problematic one. Rather than focusing on whether it is possible for an individual to alter a particular characteristic, courts should ask whether it would be offensive to make legal protection conditional on the requirement that one change a highly personal, often self-defining, trait. See *Watkins II*, *supra*, note 100 at 1347-48. It has also been argued that, rather than basing the application of heightened scrutiny on the immutability of a characteristic, courts should ask whether a characteristic is an aspect of personality fundamental to the individual; see *supra*, note 32 at 1304. But even this reformulation of the immutability requirement does not escape the objection that the meaning and import of sexual identity to an individual cannot be detached from the social construction of heterosexual privilege. On this point, see Ryder, *supra*, note 2 and D. Herman, "Are We Family?: Lesbian Rights and Women's Liberation" (1990) 28 Osgoode Hall L.J. (forthcoming). Herman points out that in a feminist analytical framework, not only is

Researchers have extensively studied the origins of sexual orientation, but still have no generally accepted explanation of its development.[137] Although no consensus exists as to how or why a person turns out to be gay or straight, agreement exists on some basic facts:

(a) The acquisition of homosexuality is not subject to control.[138] Individuals do not choose their sexual orientation.[139] Either a biological predisposition or a prenatal hormonal influence may be responsible for homosexuality.[140] The latest study from the Kinsey Institute indicates that theories grounding the development of sexual orientation on a social or psychological basis alone have no support.[141]

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heterosexuality enforced, but lesbianism is a possibility that must be actively struggled for. According to Herman, lesbianism can be expressed politically as well as personally. It may not be necessary to have intimate sexual relations with women in order to be a lesbian. I agree with the argument made by Ryder that the requirement of immutability should be abandoned. However, in what follows I will argue from a more "traditional" point of view, as it seems entirely unlikely that the U.S. Supreme Court will abandon the requirement.

[137] See "Application of Heightened Scrutiny", *supra*, note 116 at 817, with many references.

[138] *Ibid.* at 818-19. In *Plyler*, *supra*, note 94, the Court struck down a denial of public education to the minor children of illegal aliens, because the discrimination was imposed "on the basis of a legal characteristic over which children can have little control" (at 220). In contrast, the Court would not grant suspect status to adult illegal aliens bacause entry into that class was "the product of voluntary action" (at 219 n.19).
"[L]egal burdens should bear some relationship to individual responsability or wrongdoing" (at 219).
Homosexuality, like race, gender, and the illegal alien status of the children in *Plyler*, is a characteristic that is outside the individual's control. Therefore, it is generally unfair to inflict burdens on a person merely because of her sexual orientation.

[139] *Ibid.* at 818. Even the U.S. Roman Catholic bishops have recently acknowledged that "[h]omosexual orientation, because it is not freely chosen, is not sinful." See the report in The Gazette (Montréal), November 15, 1990 at B8.

[140] *Ibid.* at 819.

[141] See A. Bell, M. Weinberg & S. Hammersmith, *Sexual Preference, Its Development in Men and Women* (Bloomington: Indiana University Press, 1981) at 191-92.

(b) Sexual orientation is immutable.[142] Homosexuality is just as deeply ingrained in a person as is heterosexuality.[143] Nothing indicates that homosexuality is susceptible to change. Researchers who have claimed successful conversions have yielded no more than limited and problematic behavioural changes that other researchers and commentators have severely criticized[144].

Therefore, the Court in *High Tech Gays II* was wrong to hold that homosexuality is not an immutable characteristic.[145] The court argued that homosexuality is behavioural and hence fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes:

> The behavior or conduct of such already recognized classes is irrelevant to their discrimination.[146]

In reality, sexual orientation extends beyond the acts a person has or has not engaged in. A person who is gay has that sexual orientation whether or not that person has ever engaged in a homosexual act, and is thus conceptually distinct from a person who has homosexual experiences, despite his or her sexual orientation.[147] Therefore, the behaviour or conduct of the class of homosexuals is irrelevant to its identification as a class.

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[142] See "Application of Heightened Scrutiny", *supra*, note 116 at 819-21.

[143] *Supra*, note 141 at 211, 222.

[144] See "Application of Heightened Scrutiny", *supra*, note 116 at 820, with many references.

[145] *Supra*, note 109.

[146] *Ibid.*

[147] See "Application of Heightened Scrutiny", *supra*, note 116 at 817, with many references.

Chapter 4. **The Effect of *Hardwick***

a. Introduction

Judicial designation of homosexuality as a suspect classification, even though it could not automatically eradicate all forms of discrimination against gays, could provide a comprehensive doctrinal framework within which to address the problem of gay inequality. Even without the passage of anti-discrimination legislation to remedy private acts of discrimination, heightened scrutiny could lead courts to strike down a broad array of discriminatory practices against gays - including criminal statutes, exclusion of gays from teaching positions and the military, and denial to gays of access to public accomodations.

It has, however, been debated whether *Hardwick* precludes a finding that sexual orientation classifications should be accorded heightened equal protection scrutiny. This chapter first discusses the cases that have held that *Hardwick* is binding precedent in the equal protection context. It argues that, strictly as a matter of doctrine, *Hardwick* was misread in these cases: first, these cases vastly oversimplify the structure of the Fourteenth Amendment and, second, sexual orientation classifications and sodomy are entirely separate phenomena. But even in cases where regulations all relate to conduct, the fact that someone engages in criminalized acts does not in itself explain anything other than the criminal sanctions.

b. Is *Hardwick* Binding Precedent in the Equal Protection Context?

Because *Hardwick* dealt only with the constitutional status of laws that criminalize sodomy, and only considered the validity of those laws in the context of a substantive due process challenge, it has been held that *Hardwick* does not in fact preclude such a finding:[148]

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[148] See "Sexual Orientation and the Law", *supra*, note 19 at 1568.

> Sexual orientation classifications and sodomy, however, are two entirely separate phenomena: sexual orientation classifications are based on the direction of an individual's sexual and affectional attractions, while sodomy statutes proscribe particular sexual acts in which persons of any sexual orientation may participate.... Discrimination against gay men and lesbians, moreover, often has little to do with a disapproval of homosexual sodomy.... Because discrimination against gay men and lesbians is based on more than just a desire to regulate conduct governed by sodomy statutes, *Bowers* v. *Hardwick* is simply irrelevant to the constitutional status of classifications that discriminate against gay men and lesbians as a group.[149]

Moreover, even in cases in which discrimination against gay men and lesbians is limited to those who do engage in homosexual sodomy, *Hardwick* does not preclude the application of heightened equal protection scrutiny. *Hardwick* dealt only with due process and never considered the question of equal protection.[150] As Sunstein contends, equal protection claims would not be foreclosed even if some or all of the class engaged in conduct that could be constitutionally proscribed, because equal protection looks to prevent unjustified government hostility to a class from causing that class to be injured.[151]

Nevertheless, most recent cases have held that *Hardwick* is binding precedent in the equal protection context.[152]

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[149] *Ibid.* at 1568-69.

[150] *Ibid.* at 1569.

[151] Sunstein, *supra*, note 35 at 1162 n.9.

[152] The argument from *Hardwick* is specifically advanced in *Padula* v. *Webster*, *supra*, note 97; *Gay Inmates of Shelby County Jail* v. *Barksdale* No. 84-5666 (6th Cir. June 1, 1987) (Westlaw, Allfeds database); *Dronenburg* v. *Zech*, *supra*, note 97 at 1391; *State* v. *Walsh*, 713 S.W. 2d 508, 511 (Mo. 1986). Other courts conclude that *Hardwick* lends support to the foreclosure of meaningful equal protection. See *Gay and Lesbian Students Ass'n* v. *Gohn*, *supra*, note 97 at 1057 (W.D. Ark. 1987). But see *Hardwick*, *supra*, note 22 at 202 (Blackmun J., dissenting); *Doe* v. *Casey*, 796 F.2d 1508, 1522 (D.C. Cir. 1986), aff'd in part and rev'd in part on other grounds, sub nom. *Webster* v. *Doe*, 108 S.Ct. 2047 (1988); *benShalom* v. *Marsh*, *supra*, note 97; *High Tech Gays I*, *supra*, note 106 at 1369; *Swift* v. *United States*, 649 F.Supp. 596, 601 (D.D.C. 1986).

In *Padula* v. *Webster*[153] the United States Court of Appeals for the District of Columbia Circuit upheld the FBI's policy of considering homosexual conduct a significant and often dispositive factor in employment decisions.[154] Although the Court acknowledged the plaintiff's claim that homosexuals meet the Supreme Court's criteria for suspect or quasi-suspect status, it did not consider those criteria and held that the issue was controlled by *Hardwick*:

> It would be quite anomolous [sic], on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause.... If the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious.[155]

The Court therefore ruled that the class of persons who engage in homosexual conduct do not constitute a suspect or quasi-suspect class.[156]

In a unanimous decision in *Woodward*,[157] the U.S. Court of Appeals for the Federal Circuit, falling in line with the D.C. Circuit precedent, rejected a constitutional challenge of a decision to release from active duty a gay U.S. Naval Reserve officer. The Court held that *Hardwick* precluded a decision for Woodward on either privacy or equal protection

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[153] *Supra*, note 97 at 99.

[154] Noting that the FBI claimed to discriminate only against persons who engaged in actual homosexual conduct, and observing that the plaintiff had engaged in homosexual conduct, the court defined the class disadvantaged by the FBI's policy to be persons who engaged in homosexual conduct, not merely those with homosexual status. See Hayes, *supra*, note 2 at 433, referring to *Padula* at 102.

[155] *Ibid.* at 103.

[156] *Ibid.*

[157] *Supra*, note 97. Petition for cert. filed, 58 U.S.L.W. 3155 (U.S. Aug. 30, 1989) (No. 89-344). On Febr. 26, 1990, the U.S. Supreme Court declined to hear the case.

grounds.[158] It agreed with the decision in *Padula* v. *Webster* and refused to recognize a constitutionally significant distinction between status and conduct, defining homosexuals as persons who engage in homosexual conduct; since such conduct, under *Hardwick*, may be made criminal, persons whose status is so defined may be the target of governmental discrimination. The Circuit Court also relied on *Dronenburg* v. *Zech*[159] for the proposition that the usual military rationalizations for excluding gays meet the minimal requirements for sustaining the exclusion consistent with due process of law.

The Seventh Circuit, in *benShalom III*,[160] removed a district court injunction[161] that barred the Army from considering Sgt. Miriam benShalom's sexual orientation as an adverse factor in her application for reenlistment in the service.[162] The Appeals Court disputed the

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[158] *Ibid.* at 1076 ("After *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm.").

[159] *Supra*, note 97.

[160] *Supra*, note 97. Petition for cert. filed, 58 U.S.L.W. 3397 (U.S. Dec. 4, 1989) (No. 89-876). On Febr. 26, 1990, the U.S. Supreme Court has declined to hear the case. The case concerned the Army's refusal to reenlist Miriam benShalom in the Army Reserves because she had professed to be a lesbian, although the Army did not allege that she had engaged or attempted to engage in any type of homosexual conduct. The Army acted pursuant to its regulation barring the reenlistment of homosexuals in the Army Reserves that were essentially the same as the regulation considered in *Watkins*. Homosexuals, according to the regulation, included not only those who had engaged in homosexual acts, but also those who desired homosexual contact. On lesbians in the military, see M.M. Benecke & K.S. Dodge, "Military Women in Nontraditional Job Fields: Casualties of the Armed Forces' War on Homosexuals" (1990) 13 Harvard Women's L.J. 215.

[161] See *benShalom II*, *supra*, note 97.

[162] The District Court reasoned that the regulations defined homosexuals, not by the commission of, or intent to commit, a homosexual act, but rather by the nature of their sexual desires (at 1374). The Court noted that the Army could prevent the reenlistment of a homosexual who simply professed a homosexual identity without ever intending to participate in a homosexual act, while the Army could reenlist a person with a heterosexual orientation who nonetheless participated in a homosexual act (at 1374-75). The Court therefore found that the regulation classified on the basis of homosexual status, not conduct (at 1375). It further held that *Hardwick* did not foreclose a finding that the class defined by homosexual conduct needed heightened judicial solicitude (at 1378-79) and that homosexuals

District Court's definition of the class in question, saying that one could reasonably view a person's admission of homosexuality as reliable and compelling evidence that the person likely would engage in homosexual conduct.[163] It then specifically found that *Hardwick* compels the conclusion that sexual orientation is not a suspect classification:

> If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes.[164]

These recent holdings under the equal protection clause demonstrate that judges equate homosexuality with sodomy, and on that basis find that *Hardwick* precludes the application of heightened scrutiny to sexual orientation classifications.[165] These developments indicate that future equal protection challenges to anti-gay policies are unlikely to be successful. In particular, the courts' interpretation of *Hardwick* as precluding suspect class status even for classifications based explicitly on sexual orientation[166] raises serious doubts that courts will uphold the application of heightened scrutiny in equal protection challenges to sodomy statutes, which classify solely according to conduct.[167]

Strictly as a matter of doctrine, however, *Hardwick* was interpreted correctly in the majority opinion in *Watkins*, and misread in *Padula*, *Woodward*, *benShalom III* and *High Tech Gays II*.

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are a suspect class. It concluded by ruling that the Army's regulation barring reenlistment of homosexuals violated homosexuals' equal protection rights (at 1380).

[163] *BenShalom III* at 464.

[164] *Ibid.*

[165] See *Sexual Orientation and the Law*, *supra*, note 103 at 168.

[166] See *benShalom III* and *Woodward* v. *United States*.

[167] See *Sexual Orientation and the Law*, *supra*, note 103 at 169.

Properly understood, the *Hardwick* decision does not resolve the issue in these later cases. For many reasons, *Hardwick*'s holding that due process privacy rights do not extend to homosexual sodomy has no bearing on whether government discrimination against homosexuals violates equal protection principles.[168]

As observed in *Watkins II*, these cases vastly oversimplify the structure of the Fourteenth Amendment, which not only provides a guarantee of due process but also poses an independent obligation on government not to draw invidious distinctions among its citizens.[169]

Equal protection is intended to provide judicial protection to disadvantaged groups, regardless of whether traditional attitudes condone or condemn the particular conduct in which members of such groups engage.[170] In contrast, the *Hardwick* Court's due process analysis is designed to protect only rights "deeply rooted in this Nation's history and tradition."[171] That the *Hardwick* Court found no barrier in substantive due process to laws that criminalize acts in which gay men and lesbians engage, therefore,

> says more about the tradition-based nature of due process than about the merits of an equal protection challenge to sexual orientation classifications. Because sexual orientation classifications meet the traditional criteria for heightened equal protection scrutiny, and because discrimination based on sexual orientation implicates precisely the kinds of concerns that the equal protection clause addresses, courts should apply heightened scrutiny to such classifications.[172]

Because due process and equal protection call for distinct types of analysis, the conclusion in *Hardwick* does not dispose of the issue in the other cases. As has been pointed out,

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[168] Sunstein, *supra*, note 35 at 1163.

[169] *Supra*, note 100 at 1339-45.

[170] See Sunstein, *supra*, note 35 at 1167.

[171] *Moore* v. *City of E. Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Powell, J.).

[172] See "Sexual Orientation and the Law", *supra*, note 19 at 1370.

> [s]ubstantive due process protects those activities traditionally recognized as liberties, and traditional animosity toward an activity engaged in by a class, according to *Hardwick*'s reasoning, mitigates against recognition as a traditional liberty. But this same traditional animosity toward a class, which would preclude substantial due process protection of conduct by that class, justifies heightened judicial protection of that class under equal protection principles. The prejudice and animosity toward homosexuals on which *Hardwick* relies therefore does not preclude, and in fact supports, a judicial finding that homosexuals are vulnerable to invidious and irrational government discrimination in violation of the principle of equal protection of the laws.[173]

Sunstein has therefore suggested that the Equal Protection Clause is a natural route for constitutional protection against discrimination on the basis of sexual orientation; and that, more generally, statutes that are unaffected by the Due Process Clause may be drawn into severe doubt by principles of equal protection.[174] The Supreme Court based its decision in *Hardwick* on the view that the scope of substantive due process should be defined largely by reference to tradition. Thus, the Court looked to whether homosexual sodomy was "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition."[175] But as Sunstein has pointed out,[176] a holding that the Due Process Clause extends thus far and no farther does not affect the equal protection claim, which is founded on a different set of values:

> [T]he Equal Protection Clause is a self-conscious repudiation of history and tradition as defining constitutional principles. Analysis of an equal protection claim therefore proceeds along an entirely distinct track.[177]

Since its inception, the Equal Protection Clause has served an entirely different set of purposes from the Due Process Clause. The Equal Protection Clause is

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[173] Hayes, *supra*, note 2 at 468.

[174] Sunstein, *supra*, note 35 at 1163.

[175] *Hardwick*, *supra*, note 22 at 191-92.

[176] Sunstein, *supra*, note 35 at 1168.

[177] *Ibid.*

> emphatically not an effort to protect traditionally held values against novel or short-term deviations. The Clause could not be characterized as a 'nondegradation principle' designed to ensure that things will not 'get worse.' It is implausible to describe the role of the Supreme Court, under the Equal Protection Clause, as the provision of a sober second thought to legislation or the defense of tradition against pent-up majorities. The clause is not backward-looking at all; it was self-consciously designed to eliminate practices that existed at the time of ratification and that were expected to endure.[178]

On any view, the Equal Protection Clause is not rooted in common law or status quo baselines or in Anglo-American conventions. The clause does not safeguard traditions; it protects against traditions, however longstanding and deeply rooted. Its function is to protect disadvantaged groups against the effects of past and present discrimination by political majorities.

As a result, it may therefore be plausible to interpret the Due Process Clause to permit the regulation of homosexual sodomy but to proscribe the regulation of heterosexual sodomy. Such an interpretation would not, however, immunize from attack on equal protection grounds a law that drew a line between heterosexuals on the one hand and gays and lesbians on the other. Generally speaking, it would not be anomalous for the Equal Protection Clause to prohibit the state from drawing lines that the tradition-based Due Process Clause itself incorporates.[179]

It has been argued, however, that even if due process and equal protection are accorded the distinct analysis that clearly established precedent demands, one can interpret *Hardwick* as prescribing the denial of heightened scrutiny under the Equal Protection Clause by defining the class of homosexuals in a certain way.[180] The argument turns on the relationship

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[178] *Ibid.* at 1174 with reference to Easterbrook, *supra*, note 36 at 95.

[179] *Ibid.* at 1170.

[180] See J.E. Halley, "The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity" (1989) 36 UCLA L.R. 915 at 919.

between homosexual identity and homosexual acts. If criminal or criminalizable sodomy is the inevitable consequence[181] or the essential characteristic of homosexual identity, then the class of homosexuals is coterminous with a class of criminals or at least of persons whose shared behaviour is criminalizable. In *Padula* v. *Webster*, for example, the holding that *Hardwick* requires a rejection of any heightened scrutiny for homosexuals under the Equal Protection Clause turns on a finding that sodomy is "the behaviour that defines the class."[182] In the same vein, Reinhardt J. in his dissenting opinion in *Watkins II* argued that "when conduct that plays a central role in defining a group may be prohibited by the state, it cannot be asserted with any legitimacy that the group is specially protected by the Constitution."[183]

At first glance there is a powerful logic to this view. After *Hardwick*, the Constitution does not protect homosexual sodomy from criminalization. But the question after *Hardwick* is not

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[181] In *benShalom III* the Court rejected the district judge's distinction between homosexual conduct and status; relying on benShalom's assertion that she had not engaged in any homosexual activity, the district judge held that exclusion premised solely on status was unconstitutional. The Circuit held that gay status implies a desire to engage in gay conduct, and that the Army was not required to turn a blind eye to the likelihood that the conduct will follow:

> Plaintiff's lesbian acknowledgement, if not an admission of its practice, at least can ... reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct. Such an assumption cannot be said to be without individual exceptions, but it is compelling evidence that plaintiff has in the past and is likely to again engage in such conduct. To this extent, therefore, the regulation does not classify plaintiff based merely upon her status as a lesbian, but upon reasonable inferences about her . conduct in the past and in the future.

Because the Army does not classify people on the basis of "mere status," the Court reasoned, the District Court was wrong to accord heightened scrutiny to the classification.

[182] *Supra*, note 97 at 103. Halley has pointed out that it is a short step from this definition to the reasoning advanced in *Plyler* v. *Doe*, *supra*, note 94 at 219 n.19, where the Supreme Court rejected out of hand any argument that "illegal aliens" constitute a suspect class because "entry into the class is in itself a crime." See Halley, *supra*, note 2 at 920.

[183] *Supra*, note 100 at 1357.

whether it is illogical to hold that those who engage in acts that can be criminalized might by virtue of that fact qualify as a suspect class. The question is, rather, whether it is anomalous to conclude that a class that includes people who engage in acts substantively unprotected by the Due Process Clause can be entitled to judicial protection against official discrimination.[184] As has been pointed out,[185] the question in *Padula* and *Watkins* was whether discrimination against a subgroup of people, some or many of whom engage in conduct that can constitutionally be criminalized, is a violation of the Equal Protection Clause. Nothing in *Hardwick* purports to answer that question:

> The fact that the underlying conduct can be criminalized is irrelevant to the problem; it is always immaterial to an equal protection challenge that members of the victimized group are engaging in conduct that could be prohibited on a general basis.[186]

However, courts have refused to recognize a constitutionally significant distinction between status and conduct, defining homosexuals as persons who engage in homosexual conduct; since such conduct, under *Hardwick*, may be made criminal, persons whose status is so defined may be the target of governmental discrimination.

As Sunstein has pointed out,[187] there are many difficulties with using *Hardwick* to dispose of claims of unconstitutional discrimination on the basis of sexual orientation.

(i) Sometimes a civil disability might be imposed on gays and lesbians in jurisdictions in which there is no criminal prohibition on homosexual acts. In such jurisdictions, *Hardwick* is of uncertain relevance. It is by no means clear that the fact that the state could criminalize the relevant acts is sufficient to support discrimination in circumstances in which the state has chosen to impose no such criminal disability.

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[184] See Sunstein, *supra*, note 35 at 1168.

[185] *Ibid.* at 1166.

[186] *Ibid.* at 1167.

[187] *Ibid.* at 1178 n. 85.

(ii) It is unclear that the state's power to criminalize homosexual acts includes the authority to impose unique or distinctive civil disabilities on a class of people that includes many who engage in such acts. Imagine, for example, a law prohobiting gay men and lesbians from teaching in the public schools. Even if homosexual acts may be criminalized, it remains necessary to explain why a class including many who engage in such acts, and not other criminal acts, are being forced to suffer civil sanctions. The problem becomes more severe in light of the fact that the civil sanctions appear weakly related to legitimate state purposes.

It is apparent that those courts that, subsequent to *Hardwick*, have denied protected status to homosexuals further reasoned that *Hardwick* constitutionally allows the government to disadvantage homosexuals, because those classifications are legitimate attempts to prevent certain kinds of conduct or to implement a particular view of morality.[188] As one author has noted,[189] implicit in this reasoning is that *Hardwick* established that the government has a legitimate interest in regulating or criminalizing homosexual conduct, and that the government may therefore discriminate, not only against those who engage, but also those with a propensity to engage, in that conduct.[190] However,

> [t]his reasoning is inconsistent with the criteria the Court has established for determining if a class should be protected, is irrelevant to equal protection jurisprudence, and is itself conceptually misapplied.... The reasoning used by those courts denying equal protection claims by homosexuals first requires that *Hardwick* mean that the government has a legitimate interest in criminalizing homosexual conduct. *Hardwick* reasoned that majority beliefs about the immorality of homosexual conduct provide a rational basis for laws criminalizing that conduct.[191]

However, *Hardwick*'s holding only involved consideration of whether homosexual sodomy is a traditional liberty, and not whether societal attitude justifies criminalizing homosexual

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[188] See Hayes, *supra*, note 2 at 468.

[189] *Ibid.* at 469.

[190] See, e.g., *Woodward*, *supra*, note 97 at 1076.

[191] Hayes, *supra*, note 2 at 469.

conduct under equal protection principles.

(iii) Discrimination against people of homosexual orientation is also different from discrimination against people who engage in acts that are criminalized. The difference is important in at least two ways. First, members of the relevant class may not have engaged in the prohibited acts at all. Second, discrimination on the basis of sexual orientation has some of the characteristics of a status offense as prohibited in *Robinson* v. *California*.[192]

Hardwick should therefore not be used by courts to dispose of claims of unconstitutional discrimination on the basis of sexual orientation. Sexual orientation classifications and sodomy are two entirely separate phenomena:

> [S]exual orientation classifications are based on the direction of an individual's sexual and affectional attractions, while sodomy statutes proscribe particular sexual acts in which persons of any sexual orientation may participate. Many people who consider themselves gay or lesbian rarely or never engage in such acts, others remain entirely celibate, and some, in an attempt to conform to socially accepted behavior, may actually enter heterosexual relationships while still identifying themselves as gay.[193]

Sodomy is simply not the defining characteristic of a homosexual sexual orientation. Also, whether homosexual orientation is tantamount to a propensity to engage in sodomy or other homosexual conduct is irrelevant to whether homosexuals are a protected class. Homosexuality is not so uniquely related to a propensity to commit sodomy that it should foreclose an equal protection analysis of government classifications that disadvantage only homosexuals. Heterosexuals also commit sodomy, and not all homosexuals, especially lesbians, have such a propensity.[194] It can therefore be concluded that, whatever tenuous relation might exist between homosexuals and an increased likelihood to commit sodomy

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[192] 370 US 660 (1962).

[193] See *Sexual Orientation and the Law*, *supra*, note 103 at 58-59.

[194] But see Lewis, *supra*, note 45 at 860, who, without further explanation, states that homosexuals are necessarily defined by their sexual conduct.

is not sufficient to foreclose an equal protection analysis of whether the government instead based discrimination against homosexuals on invidious or irrational motives [195]

Discrimination against gay men and lesbians, moreover, often has little to do with a disapproval of homosexual sodomy. As has been pointed out,[196] the DoD regulations concerning homosexuality provide that if a member of the service has engaged in a homosexual act, but it is determined that the act was atypical and that the person is primarily heterosexual in orientation, the person will be retained.[197] If, however, a serviceperson indicates that her sexual orientation is homosexual, she will be dismissed regardless of whether she has engaged in any sexual act at all.[198] Because discrimination against gay men and lesbians is based on more than just a desire to regulate conduct governed by sodomy statutes, *Hardwick* is simply irrelevant to the constitutional status of classifications that discriminate against gay men and lesbians as a group.[199]

Even in cases where regulations all relate to conduct,[200] the fact that someone engages in criminalized acts does not in itself suffice to explain other than the criminal sanctions for such acts. Heterosexuals who engage in sodomy are not being discriminated against; homosexuals are. It is really not so much the fact that the conduct can be criminalized that matters. It is the fact that a homosexual engages in it that obviously matters.[201]

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[195] Hayes, *supra*, note 2 at 470.

[196] See *Sexual Orientation and the Law*, *supra*, note 103 at 59.

[197] See 32 C.F.R. pt.41, app.A, pt.1.H.1.c(1) (1987).

[198] See *ibid.* pt.1.H.1.c(2).

[199] See *Sexual Orientation and the Law*, *supra*, note 103 at 59.

[200] The *High Tech Gays II* court argued that a differentiation between a "conduct" and an "orientation" case was not relevant to the case at issue, "as the DoD regulations challenged by the plaintiffs all relate to conduct." See *supra*, note 109.

[201] Hayes, *supra*, note 2 at 471 makes a good point when he says that although the courts should not equate homosexual orientation with homosexual conduct, neither should they reason that government classifications that disadvantage on the basis of homosexual conduct are less likely to be individiously based than those that disadvantage on the basis of

Therefore the argument that, because homosexual conduct can be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational basis review for equal protection purposes,[202] is not convincing. Instead, the fact that homosexuals who engage in criminalized conduct, but not heterosexuals who engage in the same kind of conduct, are being discriminated against, further proves that homosexuals constitute a suspect or quasi-suspect class, because it is clear evidence of present discrimination.

c. Conclusion

Recent holdings under the equal protection clause indicate that future challenges to anti-gay policies are unlikely to be successful, although there are powerful arguments to the contrary.

Courts fail to see beyond the stereotypes that prevent homosexuals from gaining access to their civil rights. After *Hardwick*, wherein the Supreme Court ridiculed homosexuals' claim to privacy for their intimate sexual relations as "at best, facetious,"[203] "homosexuals' claim [to marry] may readily be dismissed by the Court as at best, absurd."[204]

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orientation. Sodomy laws and other government actions that explicitly target homosexuals must be scrutinized under the same standard used for classifications based on homosexual orientation.

[202] See, e.g., *High Tech Gays II*.

[203] *Hardwick*, *supra*, note 22 at 194.

[204] See C.A. Lewis, "From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage" (1988) 97 Yale L.J. 1783 at 1783. After reviewing a number of cases involving homosexuals and the CIA, one commentator concludes that the courts based these rulings on stereotypes of homosexuals as unstable, society's prejudice towards homosexuals, and the logically flawed argument that homosexuals might reveal sensitive information through blackmail. Therefore, he argued, a homosexual plaintiff has no chance of successfully challenging his dismissal from the agency, unless the courts change their attitudes about homosexuals. See Note, "Fire at Will: The CIA Director's Ability to Dismiss Homosexual Employees as National Security Risks" (1990) 31 Boston College L.R. 699 at 748.

In *Hardwick* a majority of the Court probably viewed sodomy between same-gender couples with such distaste, if not revulsion, that they failed to see that from the viewpoint of homosexual couples these sexual acts may be the most "natural" expressive acts of love and care. "Only in the eyes of the heterosexual beholder, who possesses the power to attribute difference, is sodomy performed by members of the same sex unnatural."[205]

This distorted vision of *Hardwick* is, in part, endemic to jurisprudence. Because courts need only think in terms of the anonymous individual in a rule-bound game, they may avoid emotional reciprocity and "the moral crux of the matter in real human situations."[206]

Besides, recent Supreme Court equal protection cases evidence a trend away from creating new suspect classes. This trend can be seen in *Cleburne*.[207] In *Cleburne*, none of the justices believed that the best doctrinal resolution of the matter was to find that the mentally retarded constituted a suspect class. All, however, examined the city's interest in denying a special use permit for a group home for the mentally retarded with less deference than could be justified under the traditional, highly deferential rational basis test.[208] The availability of this "second order" rational basis scrutiny, combined with the Court's refusal to find that the mentally retarded constituted a suspect class, signals that the Court is unlikely to determine that any new class is suspect. As has been pointed out,[209] it is particularly unlikely that the Court, should it be faced with an equal protection challenge to a state law that requires marriage partners to be of different sexes, will find that

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[205] *Ibid.* at 1791.

[206] See Scales, *supra*, note 88 at 1387.

[207] *Supra*, note 74.

[208] *Ibid.* at 458-59.

[209] See A. Friedman, "The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family" (1987/88) 3 Berkeley Women's L.J. 134 at 149.

homosexuals constitute a suspect class.[210]

In short, the right to privacy analysis is insufficient to support a favourable resolution of the legal problems a homosexual may encounter. In theory, the Fourteenth Amendment's equal protection clause provides a more promising basis for a challenge of policies and statutes that discriminate against gays. Courts should apply heightened scrutiny to anti-gay discrimination. However, given the general "conservatism" of the Supreme Court, apparent in many of its recent decisions and, in particular, its negative ideas about homosexuals,[211] the Court is unlikely to determine that homosexuals constitute a suspect class.

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[210] It is equally unlikely that the Court would strike down the marriage laws' opposite-sex requirement under a rational basis test or even a "second order" rational basis test. See *ibid.* at 149. On the issue of whether gay men and lesbians should be suing for gay marriages, see A.S. Leonard, "Should We Be Suing for Gay Marriages" (1990) 67 Outweek 30; T.B. Stoddard, "Why Gay People Should Seek the Right to Marry" (1989) 6 Outlook 9; P.L. Ettelbrick, "Since When Was Marriage the Path to Liberation?" (1989) *ibid.* In Washington, D.C., Craig Dean and Patrick Gill have recently sought court-ordered issuance of a marriage license. On this first attempt to seek the right to marry since *Singer* v. *Hara* (11 Wash. App. 247, 522 P.2d 1187 (1974)), see the report in La Presse, Montréal, Mardi 27 Novembre 1990. On the gay marriages issue, see, e.g., K.L. Karst, "The Freedom of Intimate Association" (1980) 89 Yale L.J 624; Note, "Marriage: Homosexual Couples Need Not Apply" (1988) 23 New England L.R. 515; Ingram, "A Constitutional Critique of Restrictions on the Right to Marry - Why Can't Fred Marry George - Or Marry and Alice at the Same Time?" (1984) 10 J.Contemp.L. 33; R. Rivera, "Queer Law: Sexual Orientation Law in the Mid-Eighties: Part II" (1986) 11 U.Dayton L.R. 275; C.L. Lewis, *supra*, note 204; A. Friedman, *supra*, note 209.

[211] See *Hardwick*, *supra*, note 22, especially at 197. Generally, the U.S. Supreme Court is poised for a swing to the right. On October 1, 1990, it opened a new term with a solid conservative majority on the horizon; the only uncertainty is whether its move to the right will proceed in modest steps or "dramatic leaps". The determining vote in how far and how fast change will come may well belong to David Souter, President George Bush's first nominee to the Court. Souter replaced William Brennan, the liberal force on the Court for more than three decades.

Part II. The *Canadian Charter of Rights and Freedoms* and Equality Rights for Gays

Chapter 1. Sexual Orientation as an Analogous Ground under Section 15

a. Introduction

Chapter 1 argues that sexual orientation, though not expressly included in the list of prohibited grounds of discrimination under s. 15(1), should nevertheless be accepted by the courts as an analogous ground of discrimination. There are at least two reasons for this. lesbians and gay men are a disadvantaged group in Canadian society and suffer from historic and current discrimination. Further, they share many if not all of the characteristics that identify the grounds enumerated under s. 15(1).

In arriving at this conclusion, this chapter first points out that the equal protection section of the *Charter of Rights and Freedoms*, s. 15, specifies "sex" among the prohibited grounds of discrimination while omitting "sexual orientation". It explains why sex discrimination in s. 15 has not been held to cover sexual orientation. It then points out that there nevertheless exists clear consensus that the list of grounds of discrimination in s. 15(1) is not exhaustive Opinion was divided only as to whether the grounds of distinction covered are completely open-ended. In *Andrews* and two subsequent Supreme Court decisions,[212] the Court has applied an "enumerated and analogous grounds" approach, setting down some suggested limits for nonenumerated grounds. This chapter argues that this approach accords with what should be the main purpose of s. 15 - the elimination of disadvantage - and is promising for lesbians and gay men. In fact, subsequent to *Andrews*, two courts have already held s 15 to include a prohibition against discrimination upon the ground of sexual orientation.[213]

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[212] *Workers' Compensation Act Reference, supra*, note 25 *Turpin, ibid.*

[213] *Veysey* v. *Canada (Commissioner of Correctional Services)*, (1990) 29 F.T.R. 74, aff'd on other grounds by the Federal Court of Appeal, unreported decision dated May 31, 1990

b. **Discrimination on the Basis of "Sex"**

In the absence of specific legislative protection, Canadians who have complained formally of discrimination on the ground of "sexual orientation" have attempted to gain standing under the heading of "sex".[214] But earlier cases had made it clear that complainants would not be allowed to read in "sexual orientation" where it was not written.

In *Damien* v. *Ontario Racing Commission*,[215] Damien complained to the Ontario Human Rights Commission that he had been refused employment on the basis of sexual orientation. The Commission told Damien that it could not accept his complaint because the *Ontario Human Rights Code* did not prohibit discrimination on that ground, and therefore it lacked jurisdiction. Damien was obliged to seek his remedies in the courts in a civil action based on wrongful dismissal.

In another case, the Saskatchewan Human Rights Commission took up the case of Douglas Wilson, a graduate student and sessional lecturer at the University of Saskatchewan. The University had told Wilson that he would no longer be allowed to enter public schools to supervise practice teaching. Wilson charged that the action was taken "because of his sex and in particular because he is homosexual." The University applied to the Court of Queen's

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(Court File A-557-89); *Brown* v. *British Columbia Minister of Health*, (1990) 42 B.C.L.R. (2d) 294 at 309-10 (B.C.S.C.).

[214] See Bruner, *supra*, note 2 at 460-62; P. Hughes, "Feminist Equality and the Charter: Conflict With Reality? (1985) 5 Windsor Y.B. Access Just. 39 at 81-82. In *Bliss* v. *Attorney General of Canada*, [1979] 1. S.C.R. 183, 23 N.R. 527, 92 D.L.R. (3d) 417, [1978] 6 W.W.R. 711, 78 C.L.L.C. 14, 175 [hereinafter *Bliss*], the Supreme Court of Canada held that differential treatment of pregnant women is not discrimination on the basis of sex. In deciding *Brooks, Allen & Dixon et al.* v. *Canada Safeway Ltd*, [1989] 94 N.R. 373, the Supreme Court overruled its holding in *Bliss*, stating that "[d]iscrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant." For a detailed discussion see L. A. Turnbull, "*Brooks, Allen & Dixon* v. *Canada Safeway Ltd* - A Comment (*Bliss* Revisited)" (1989) 34 McGill L.J 172.

[215] (1979), 11 O.R. (2d) 489 (H.C.).

Bench for an order prohibiting the Commission from proceeding with a formal inquiry.[216] The Court granted the order on the ground that sex as used in the *Fair Employment Practices Act* meant gender and not sexual orientation In the words of the Court,

> [i]t should be noted that the section in question prohibits discrimination on the basis of his race, his religion, his sex, etc. and not on the basis of his sexual activities, his sexual propensity or his sexual orientation.[217]

In yet another case,[218] the Supreme Court of Canada overturned a decision of a Board of Inquiry appointed pursuant to the *Human Rights Code* of British Columbia.[219] The Board had upheld a complaint by a member of a gay organization that a Vancouver newspaper had breached s. 3 of the *Code* by refusing to publish an advertisement placed by the organization Under the section, a person's sex was deemed not to be reasonable cause for denying any accomodation, service, or facility customarily available to the public unless it relates to the maintenance of public decency.[220] The newspaper argued that it was upholding public decency, but a majority of the Board found the basis of the decision to be

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[216] *Bd. of Govs. of the Univ. of Sask.* v. *Sask. Human Rights Comm.*, [1976] 3 W.W.R. 385, (sub nom. *Re Rd. of Govs. of the Univ. of Sask. and Sask. Human Rights Commission*) 66 D.L.R. (3d) 561 (Sask. Q.B.).

[217] *Ibid.* at 389, 66 D.L.R. (3d) at 564.

[218] *Gay Alliance Toward Equality* v. *The Vancouver Sun*, [1979] 2 S.C.R. 435, 97 D.L.R. (3d), 577, 10 B.C.L.R. 257, 27 N.R. 117 [hereinafter *GATE*].

[219] S.B.C. 1973 c. 119 (as am.); now R.S.B.C. 1979, c. 186.

[220] Section 3 reads as follows:
3.(1) No person shall
(a) deny to any person or class of persons any accomodation, service, or facility customarily available to the public; or
(b) discriminate against any person or class of persons with respect to any accomodation service, or facility customarily available to the public, unless reasonable cause exists for such denial or discrimination.
(2) For the purposes of subsection (1),
(a) the race, religion, colour, ancestry, or place of origin of any person or class of persons shall not constitute reasonable cause; and
(b) the sex of any person shall not constitute reasonable cause unless it relates to the maintenance of public decency.

a personal bias against homosexuals.[221] The majority of the Supreme Court disagreed, finding that the section did not apply. It held that the newspaper's choice not to accept advertising for a publication that would propagate homosexual views "was not based upon any personal characteristic ... but upon the content of the advertising itself."[222]

It is evident, therefore, that "sex" in anti-discrimination legislation does not mean sexual orientation.[223] As has been pointed out,[224] we may conclude from this that the prohibition against sex discrimination in s. 15 of the *Charter* does not cover sexual orientation.[225]

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[221] The principal finding of the Board reads as follows:
"Assessing all the evidence offered on the question of the cause or motivation behind the Appellant's refusal to publish the Respondent's advertisement, the majority of the Board of Inquiry found the inevitable conclusion to be that the real reason behind the policy was not a concern for any standard of public decency, but was, in fact, a personal bias against homosexuals and homosexuality on the part of various individuals within the management of the Appellant newspaper. Board member Dr. Dorothy Smith dissented on this point and held that there was no evidence whatsoever on which the Board could make such a finding; and that, in particular there was no evidence to rebut the Appellant's repeated statements that its policy was predicated on a desire to protect a reasonable standard of decency and good taste." See Joint Record (GATE) at 11.

[222] *Gate* at 456, 97 D.L.R. (3d) at 591, Martland J. For an analysis of the decision, see J. Richstone and J. Stuart Russell, "Shutting the Gate: Gay Civil Rights in the Supreme Court of Canada" (1981) 27 McGill L.J. 92; Girard, *supra*, note 8 at 274-75.

[223] The situation in the U.S. is similar, see Rivera, *supra*, note 2 at 809. But see the recent announcement by the Human Rights Commission of Nova Scotia, which says that in all places where the *Nova Scotia Human Rights Act* refers to sex as a prohibited ground of discrimination, it shall be interpreted also to mean sexual orientation. In 1988, a task force on AIDS recommended the *Nova Scotia Human Rights Act* be amended. Attorney General Tom McInnis has pushed for changes for two years, but the provincial cabinet has twice refused to accept the recommendations. Earlier this year, Environment Minister John Leefe caused a storm when he tied acceptance of gay rights to events at the Mount Cashel orphanage in Newfoundland. MacKay dismissed Leefe's linking of pedophilia and homosexuality, and said the commission will continue to push the government for statutory protection. See J. Harrington and B. Beattie, "Nova Scotia Decides Gays Have Rights Too", The Link, September 18, 1990 at 7.

[224] See Bruner, *supra*, note 2 at 463.

[225] This is confirmed by a statement in the federal discussion paper on equality rights. See, Department of Justice, *Equality Issues in Federal Law: A Discussion Paper* (1985) at 63, where it is said that sexual orientation is not covered by prohibitions of sex discrimination.

As a result, if s. 15 is to act as a protection against discrimination on that ground it will have to be demonstrated that the section is broad enough to include sexual orientation despite the fact that it does not expressly enumerate the ground.

c. Unenumerated Grounds as Prohibited Grounds of Discrimination

Section 15 applies "without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" It is perhaps this very wording of the section that provides the strongest evidence that unenumerated grounds should be accepted as possible prohibited grounds of discrimination Section 15(1) is clearly an open-ended provision, given that the words "in particular" appear prior to the list of enumerated grounds of discrimination.

The simplest and likeliest interpretation of the term "in particular" is that the enumerated classifications that follow are to be read as inclusive rather than exhaustive. Peter Hogg says that the wording of s. 15 "makes it clear that these grounds are not exhaustive, so that laws discriminating on other inadmissible grounds (for example, height, sexual preference) would also be in violation of s. 15."[226]

The cases[227] and commentaries[228] reflect a clear consensus that the list of grounds is not

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[226] P. Hogg, *Canada Act 1982 Annotated* (1982) 51; Hughes, *supra*, note 214 at 80. See also Duplé, *supra*, note 8 at 803: "Cependant, les termes utilisés permettent de conclure que la liste des fondements de discrimination interdite n'est pas exhaustive."

[227] E.g., *Smith, Kline & French Laboratories Ltd* v. *A.G. Canada* (1985), [1986] 1 F.C 274, 24 D.L.R. (4th) 321, 7 C.P.R. (3d) 145 (T.D.); *Re Andrews and Law Society of British Columbia* (1985), 22 D.L.R. (4th) 9, 66 B.C.L.R. 363 [1986] 1 W.W.R. 252 (B.C.S.C).

[228] A.A. McLellan, "Marital Status and Equality Rights" in A. Bayefsky & M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto. Carswell, 1985) 411 at 431-37; A. Bruner, *supra*, note 2 at 459-467; P. Hughes, *supra*, note 214 at 80-81; Girard, *supra*, note 8 at 267; J.E. Jefferson, "Gay Rights and the Charter" (1985) 43 U.T. Fac. L.Rev. 70 at 72-73; C.F. Beckton, "Section 15 and Section 1 of the Charter - The Courts Struggle" in G.-A. Beaudoin, ed., *Your Clients and the Charter - Liberty and Equality* (Cowansville, Qué.: Yvon Blais, 1988) 273 at 279. Even the federal and Ontario government

exhaustive, and both named ("enumerated") and unnamed ("unenumerated") grounds may give rise to equality claims. That conclusion is supported by the legislative history of the section.[229]

Opinion was divided, however, as to whether the grounds of distinction covered are completely open-ended.[230] While some cases have held that the list of proscribed grounds is not unlimited and that some distinctions fall outside s. 15,[231] the Saskatchewan Court of Appeal held that a distinction may be covered though it does not form a part of any genus common to the enumerated grounds.[232] There has also been some discussion of the matter by commentators.[233] Robin Elliot has argued that the list should be open-ended, citing the difficulty of drawing lines between what would be covered and what would not, the fact that s. 15 would otherwise be narrower than the *Canadian Bill of Rights* and the

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discussion papers on equality rights acknowledged that the list of protected categories is open-ended. In the federal discussion paper, the Department of Justice took the position that "the wording of section 15 suggests that while certain grounds are enumerated for emphasis, there could be successful complaints of a denial of equality based on other grounds." *Supra*, note 225 at 63. The Ontario Background Paper stated that "the list of grounds is apparently not meant to exhaust the groups which may be protected from discrimination under section 15. Rather, it would seem that the list of classes in section 15 was intended to be open-ended." See Ministry of the Attorney General, *Sources for the Interpretation of Equality Rights Under the Charter: A Background Paper* (1985) at 300.

[229] See K.H. Fogarty, *Equality Rights and Their Limitations in the Charter* (Toronto: Carswell, 1987) at 110-11.

[230] As the Ontario paper stated (*supra*, note 228 at 301), "the real issue seems to be not whether non-enumerated grounds should be given protection, but rather which additional grounds will be judicially recognized."

[231] *Koch* v. *Koch* (1985), 23 D.L.R. (4th) 609 (Sask. Q.B.) (residency requirements); *Scott* v. *A.G. British Columbia* (1986), 3 B.C.L.R. (2d) 376 (S.C.) (registered and unregistered voters); *McDonnell* v. *Fédération des Franco-Colombiens* (1987), 31 D.L.R. (4th) 296 (B.C.C.A.) (excluding official language as a ground because covered by other *Charter* sections)

[232] *Reference re French Language Rights of Accused in Sask. Criminal Proceedings*, [1987] 5 W.W.R. 577 (Sask. C.A.).

[233] See W.W. Black & L. Smith, "The Equality Rights" in G.-A. Beaudoin & E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1989) 557 at 583.

view that s. 15 requires that every individual be treated with equal concern and respect.[234] On the other hand, Marc Gold argues that s 15 is limited to grounds sharing at least some of the characteristics of the enumerated grounds.[235] William Black and Lynn Smith agree and argue that an extended but limited list of grounds is the best of problematic alternatives for taking account of the institutional constraints on the courts.[236] According to them, this interpretation is the option most consistent with what should be a primary purpose of s 15 - the alleviation of inequality for persistently disadvantaged groups An unlimited list of grounds tends to weaken the arguments in favour of judicial review, and weakened justification is likely to be transformed into weakened protection in the long run.[237] Another relevant consideration is the burden on the courts that an unrestricted list would impose The burden could quickly become unmanageable if courts had to consider unintended effects on any individual or collection of individuals.[238] The wording of s 15 provides support for placing limits on the reviewable distinctions. The inclusion of an enumerated but not exhaustive list of grounds suggests that s. 15 does not purport to guarantee overall fairness in the world.[239] William Black and Lynn Smith conclude by saying that it is not easy to

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[234] See Elliot, *Judicial Review of Social and Economic Legislation under Section 15 of the Charter*, paper delivered at the Stanford Lectures, August, 1986.

[235] M. Gold, "Equality: What does it Mean?" in Canadian Institute for Professional Development, *Equality Rights and Employment: Preparing for Fundamental Change - East* (1986) A-1 at A-23-27.

[236] See Black & Smith, *supra*, note 233 at 583-88. In previous articles, the authors had suggested the contrary: see W. Black, "A Walk Through the Charter" in L. Smith et al., eds., *Righting the Balance: Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986) at 57, Smith, "A New Paradigm for Equality Rights", *ibid.* at 255

[237] *Ibid.* at 584.

[238] *Ibid.*

[239] *Ibid.* at 585. See also H. Wade MacLauchlan, "Of Fundamental Justice and Society's Outcasts: A Comment on R. v. Tremeyne and R. v. McLean" (1986) 32 McGill L J. 213 at 227-28: "It would be preferable as an approach to section 15 and to litigation of equality rights to build into the elaboration of relevant classes and the definition of discrimination a purposive touchstone. This accords with the general principles of interpretation enunciated by the Supreme Court in dealing with the *Charter*. The equality rights guarantee of the *Charter* was not enacted in a vacuum, nor was it enacted for the purpose of eliminating all distinctions created by the state. Even after the recognition of equality rights in the *Charter*,

predict exactly how the courts would narrow s. 15 if forced to consider any distinction:

> One possibility is that they would adopt for all grounds a very limited definition of what constitutes equality, perhaps by imposing a requirement of intent or refusing to require reasonable accomodation. A second possibility is that the standards used in applying section 15 would become incoherent, in part because different claims would have so little similarity with one another, and the result would be ad hoc assessment providing only sporadic protection to anyone. A third possibility is that courts would adopt different levels of scrutiny for different grounds of distinction.[240]

d. **The Supreme Court of Canada's Position**

In three judgments concerning s. 15 the Supreme Court of Canada has since addressed the issue and placed limits on the reviewable distinctions.

(i) *Andrews* v. *Law Society of British Columbia*

Andrews was the first decision of the Supreme Court to interpret the equality rights provisions of the *Charter*. The majority of the Court in *Andrews* concluded that there must be discrimination on an enumerated or analogous ground to obtain protection under s. 15.

The issue in *Andrews* was relatively limited and specific - is it permissible under s. 15 of the *Charter* to require citizenship of persons wishing to be called to the bar and admitted to the practice of law.[241] The petitioner, Mark Andrews, was a British subject residing permanently in Canada. He had law degrees from Oxford University and, after arriving in

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only certain people will continue to be eligible for student loans and we will still have urban zoning. Again, we must be careful not to trivialize the whole concept of equality by litigating every conceivable instance in which the government makes distinctions. That, after all, is the essence of government, particularly in the contemporary administrative state."

[240] *Ibid.*

[241] The challenge was to s. 42 of the *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26.

Canada, had met all of the requirements for admission to the practice of law in British Columbia except the citizenship requirement. His petition sought a declaration that the statutory requirement of citizenship violated s. 15 of the *Charter*.

(1) History of the Case

At trial Taylor J. rejected this claim, saying that citizenship is a ground that comes within the ambit of s. 15 protection but that the requirement was not discriminatory [242]

The judgment of the Court of Appeal attempts to steer a middle course between what are seen as two unacceptable options. McLachlin J.A. was concerned on the one hand that a "pure rationality test" would be "unduly lenient" in that such a test would take no account of the degree of prejudice as long as the distinction was relevant at all, and might uphold legislation if rationally related even to a purpose that was itself objectionable. McLachlin J.A. was also concerned, however, about the consequences of an unduly broad definition of s. 15.[243] She noted that the labelling of every legislative distinction as an infringement of s. 15(1) trivializes the fundamental rights guaranteed by the *Charter* and, secondly, that to interpret "without discrimination" as "without distinction" deprives the notion of discrimination of content. She said that only denials of equality that discriminate are violations of s. 15. Therefore, she said, it is necessary to consider what the phrase "without discrimination" means in s. 15.[244] She defined "discrimination" in terms of reasonableness

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[242] Taylor J.'s definition of discrimination was quite narrow. See 22 D L.R. (4th) 9, at 16: "I would say that the essence of discrimination for the present purpose is the drawing of an irrational distinction between people based on some irrelevant personal characteristic for the purpose, or having the effect, of imposing on certain of them a penalty, disadvantage or indignity, or denying them an advantage.... Thus, in order to amount to discrimination under s. 15(1), the personal characteristic on which a distinction is based must either be one which is entirely irrelevant in the context in which the distinction is made or one which is given a significance clearly beyond that which could reasonably be justified in such a context - the distinction must in this sense be irrational."

[243] See W.W. Black & L. Smith, "Constitutional Law - Charter of Rights and Freedoms, Sections 15 and 1 - Canadian Citizenship and the Right to Practice Law: *Andrews* v. *Law Society of British Columbia*" (1989) 68 Canadian Bar Review 591 at 593.

[244] *Supra*, note 227 at 606-607 (D.L.R.), 312-13 (B.C.L.R.).

and fairness, the former referring to the rationality of the distinction and the latter to the fact that the treatment should not be unduly prejudicial to those adversely affected. She placed the onus on the challenger, on a balance of probabilities, and said:

> The ultimate question is whether a fair-minded person, weighing the purposes of legislation against the effects on the individuals adversely affected, and giving due weight to the right of the Legislature to pass laws for the good of all, would conclude that the legislative means adopted are unreasonable or unfair.[245]

Under the "reasonable and fair" test the issue is not only whether similarly situated persons are treated similarly in light of the purposes of the legislation, but also whether the treatment is "reasonable" and "fair" having regard to the purposes and aims of the legislation and its effects. This left little room for the application of s. 1. In McLachlin J.'s view,

> [i]t follows that s. 1 will function so as to permit legislation which is discriminatory to be upheld, provided the necessary conditions are met. It may well be that generally discrimination cannot be justified in a free and democratic society. But it is not true that it can never be justified. Circumstances may arise where discriminatory measures can be justified. For example, in times of war, the internment of enemy aliens might be argued to be justifiable under s. 1, notwithstanding the fact that this is discriminatory and would not be tolerated in peace time. Viewed thus, s. 1 plays a vital role in the determination of the validity of legislation impugned on the basis of s. 15. The role, while essential, is limited; most cases may not disclose circumstances which can be argued to justify discriminatory legislation.[246]

McLachlin J.A. finally held that the petitioner had shown that the citizenship requirement was unreasonable or unfair.

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[245] *Ibid.* at 610 (D.L.R.), 315 (B.C.L.R.), 253 (W.W.R.).

[246] *Ibid.*

(2) The Supreme Court of Canada's Approach

The Supreme Court took quite a different approach to the case, although a majority of the Court expressed substantial agreement with the outcome, holding that non-citizenship constitutes an analogous ground. As William Black and Lynn Smith have pointed out,[247] the Court shared most of the concerns of the British Columbia courts about interpreting the section in a way that gave it substance while at the same time containing it within workable bounds. However, the Court's solution differed markedly from both of the earlier judgments. Instead of relying on tests based upon rationality, reasonableness and the severity of the burden created by the law, the Supreme Court concluded that the central limitation on s. 15 derives from the grounds of distinction that come within its protection.

The majority's reasoning concerning the meaning and application of s. 15 appears in the judgment of McIntyre J., Lamer J. concurring. The Court confirmed that the protection offered by s. 15 is open-ended and that grounds other than those named, such as citizenship, can be covered. McIntyre J. said that "[t]he enumerated grounds in s. 15(1) are not exclusive and the limits, if any, on grounds for discrimination which may be established in future cases await definition."[248]

However, it is virtually impossible to read his reasons as not setting down some suggested limits for nonenumerated grounds.[249]
First, he found the "neutral" approach, which would treat every distinction drawn by law as discrimination under s. 15(1), to be unsatisfactory, accepting the criticisms of this approach made by McLachlin J.A. in the Court of Appeal.[250] Second, he also found the

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[247] *Supra*, note 243 at 596.

[248] *Supra*, note 24 at 18.

[249] See D.W. Elliott, "*Andrews* v. *Law Society of British Columbia* and Section 15(1) of the *Charter*: the Emperor's New Clothes? (1989) 35 McGill L.J. 235 at 242.

[250] The "neutral" approach was advanced by P. Hogg in *Constitutional Law of Canada* (Toronto: Carswell, 1985). He said, at 800-1: "I conclude that s. 15 should be interpreted as providing for the universal application of every law. When a law draws a distinction between

"unreasonable or unfair distinctions" approach of the Court of Appeal unsatisfactory:

> I would reject, as well, the approach adopted by McLachlin J.A. She seeks to define discrimination under s. 15(1) as an unjustifiable or unreasonable distinction. In so doing she avoids the mere distinction test but also makes a radical departure from the analytical approach to the Charter which has been approved by this Court. In the result, the determination would be made under s. 15(1) and virtually no role would be left for s. 1.[251]

Third, he concluded by saying that the "enumerated and analogous grounds" approach most closely accords with the purpose of s. 15. This approach adopts the concept that discrimination is generally expressed by the enumerated grounds. These provide guidance as to which additional grounds of discrimination should be accorded protection under s. 15: section 15(1) is designed to prevent discrimination based on the enumerated and analogous grounds. The approach is similar to that found in human rights and civil rights statutes. To illustrate this approach, McIntyre J. cites an excerpt from the judgment of Hugessen J. in *Smith, Kline & French Laboratories Ltd.* v. *A.-G. Can.*:

> The rights which it [s. 15] guarantees are not based on any concept of strict, numerical equality amongst all human beings. If they were, virtually all legislation, whose function it is, after all, to define, distinguish and make categories, would be in prima facie breach of s. 15 and would require justification under s. 1. This would turn the exception into the rule. Since courts would be obliged to look for and find justification for most legislation, the alternative being anarchy, there is a real risk of paradox: the broader the reach given to s. 15 the more likely it is that it will be deprived of any real content.
> The answer, in my view, is that the text of the section itself contains its own

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individuals, on any ground, that distinction is sufficient to constitute a breach of s. 15, and to move the constitutional issue to s. 1. The test of validity is that stipulated by s. 1, namely, whether the law comes within the phrase "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"."
He argued that the word "discrimination" in s. 15(1) could be read as introducing a qualification in the section itself, but he preferred to read the word in a neutral sense because this reading would immediately send the matter to s. 1, which was included in the *Charter* for this purpose.

[251] *Supra*, note 24 at 23. For a critique of the "reasonable and fair" test, see already Eberts, *supra*, note 81 at 103-104.

> limitations. It only proscribes discrimination amongst the members of categories which are themselves similar. Thus the issue, for each case, will be to know which categories are permissible in determining similarity of situation and which are not. It is only in those cases where the categories themselves are not permissible, where equals are not treated equally, that there will be a breach of equality rights.
> As far as the text of s. 15 itself is concerned, one may look to whether or not there is "discrimination", in the pejorative sense of that word, and as to whether the categories are based upon the grounds enumerated or grounds analogous to them. The inquiry, in effect, concentrates upon the personal characteristics of those who claim to have been unequally treated. Questions of stereotyping, of historical disadvantagement, in a word, of prejudice, are the focus and there may even be a recognition that for some people equality has a different meaning than for others.[252]

The words "without discrimination" require more than a mere finding of distinction between the treatment of groups or individuals. A complainant under s. 15(1) must show not only that he or she is not receiving equal treatment but, in addition, must show that the legislative impact of the law is discriminatory.

Thus, at the s. 15(1) stage there is to be an assessment whether the alleged ground of discrimination is enumerated or analogous, whether the person complaining is not receiving equal treatment before and under the law or the law has a differential impact on that person in the protection or benefit it affords, and whether the legislative impact of the law is discriminatory. At the s. 1 stage, there is to be a review of possible justifications for the law based on reasonableness.

Regarding the criteria according to which analogous grounds are to be identified, McIntyre J. supplied no precise test. However, he stressed the importance of the nature of the discriminatory action. He said that discrimination involves the type of personal characteristics that are often arbitrarily attributed to individuals, without any necessary relevance

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[252] *Supra*, note 24 at 22, citing *Smith, Kline & French Laboratories Ltd.* v. *A.-G. Canada*, *supra*, note 227 at 591-92 (D.L.R.).

to the individuals' merit.[253] A number of his other comments seemed to relate more to the nature of the claimant's group.[254] He said that discrimination sometimes involves stereotyping and historical disadvantage,[255] and noted that permanent resident non-citizens constitute a "discrete and insular minority".[256] Generally, though, in describing analogous grounds, McIntyre J. seemed to emphasize relative disadvantage resulting from irrelevant personal characteristics.

It is less than clear that McIntyre J.'s colleagues wholly shared his views on what to emphasize when looking for analogous criteria.

La Forest J. left open a larger role for s. 15, beyond protection against discrimination on enumerated or analogous grounds, although he expressed "substantial agreement"[257] with McIntyre J.'s views on s. 15(1). He envisaged a possible residual role for judicial intervention

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[253] *Supra*, note 24 at 18: "I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."
See also Wade MacLauchlan, *supra*, note 239 at 228: "Surely, if the grounds are to be extended, it ought to be done in cases which are analogous to the stipulated grounds and in which there is some legitimate concern that there will be discrimination based upon a personal characteristic of individuals as members of a class."

[254] See Elliott, *supra*, note 249 at 243.

[255] McIntyre J. at 18 said that "[t]he enumerated grounds ... reflect the most common and probably the most socially destructive and historically practised bases of discrimination and must ... receive particular attention". As has been pointed out by Elliott, *supra*, note 243 at 243 n.43, these features, which distinguish the enumerated grounds, presumably can be used also to identify analogous grounds.

[256] McIntyre J. at 24, using the words of the U.S. Supreme Court in *U.S.* v. *Carolene Products Co.*, 304 U.S. 144 at 152-53, note 4, 82 L.Ed. 1234 (1938), subsequently affirmed in *Graham* v. *Richardson*, 403 U.S. 365 at 372, 29 L.Ed. 2d 534, 91 S.Ct. 1848 (1971).

[257] *Ibid.* at 37.

under s. 15(1) in cases of "legislative or governmental differentiation between individuals or groups that is so grossly unfair to an individual or group as to merit intervention pursuant to s. 15."[258]

For Wilson J., the important question was whether or not non-citizens were a "discrete and insular minority",[259] disadvantaged in the sense that they lacked political power.[260] She further elaborated the significance of this description by explaining that non-citizens, because of their lack of political power, are "vulnerable to having their interests overlooked and their rights to equal concern and respect violated."[261] Of particular significance is Wilson J.'s comment that a determination as to whether a group falls into an analogous category "is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society."[262]

For Wilson J., disadvantage because of lack of political power, or for other reasons, may be sufficient to constitute an analogous category for the purposes of s. 15(1).[263]

Political powerlessness was also a criterion for La Forest J., but he added to it the immutable or arbitrary nature of the distinction and its relative irrelevance.[264] He pointed out that citizenship is an immutable characteristic in the sense that it is "one typically not within the control of the individual" and that "[c]itizenship is, at least temporarily, a charac-

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[258] *Ibid.* at 38. See also C. Sheppard, *supra*, note 27 at 223 n.59, 226 n.71, where she suggests that one could envision non-enumerated or non-analogous classifications that create inequalities in the effective enjoyment of fundamental rights and freedoms.

[259] See *supra*, note 256.

[260] *Andrews*, *supra*, note 24 at 32, Wilson J.

[261] *Ibid.*

[262] *Ibid.*

[263] *Ibid.*

[264] *Ibid.* at 39, La Forest J.

teristic of personhood not alterable except on the basis of unacceptable costs."[265]

As has been pointed out,[266] Wilson J.'s emphasis in ascertaining analogous categories is thus quite different from that of McIntyre J. Instead of stressing the nature of the distinction drawn by the government, Wilson J. focused on the condition of those subject to it.

A further question that arises concerning both enumerated and non-enumerated grounds is whether s. 15(1) is limited to the protection of disadvantaged groups. The Women's Legal Education and Action Fund (LEAF) had argued in its intervenor factum:

> Some of the terms in section 15 indicate clearly the type of disadvantage which is meant to be addressed by the equality guarantees: e.g., mental and physical disability. Others are all encompassing on their face: e.g., race, sex. These latter grounds appear to place on the same footing the equality claims of those who have been historically disadvantaged (like women and people of colour) and those who, traditionally, have been members of the dominant group (men, whites). In assessing claims to substantive equality brought under section 15, it is submitted that a Court should bear in mind that the purpose of the section is to promote the equality of those who have been disadvantaged. While not categorically ruling out the equality claims of members of a dominant group, a purposive approach would lead a Court to interpret section 15 in such a way that these claims would be viewed with caution.[267]

In his comment on *Andrews*, Marc Gold argues that the Court did not settle the question of whether s. 15 is limited to the protection of socially disadvantaged groups.[268] That s. 15(1) is limited to the protection of disadvantaged groups was, however, underlined by

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[265] *Ibid.*

[266] See Elliott, *supra*, note 249 at 244.

[267] *Factum of the Women's Legal Education and Action Fund (LEAF)*, submitted to the Supreme Court of Canada in *Law Society of British Columbia* v. *Andrews*, September 22, 1987 at 14, para.33.

[268] See M. Gold, "Comment: *Andrews* v. *Law Society of British Columbia* (1989) 34 McGill L.J. 1063 at 1067.

Wilson J.:

> Given that s. 15 is designed to protect these groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one.[269]

In sum, *Andrews* addressed many of the questions concerning the scope of s. 15. However, one of the questions left open was whether the enumerated and analogous grounds represent not only the central feature of s. 15, but also constitute the only grounds upon which s. 15 can be invoked. A second issue left open was the application of s. 15 to the advantaged subset of enumerated and analogous groups: "what about claims by members of the racial majority, or men or persons in their thirties, that a law or practice does not treat them equally in comparison with a racial minority, or women, or the elderly?"[270]

Since the *Andrews* case, the Supreme Court has delivered other judgments concerning s. 15, which help to illuminate, if not entirely to resolve, these issues.

(ii) *Workers' Compensation Act Reference*

In *Workers' Compensation Act Reference* the Supreme Court unanimously held that sections 32 and 34 of the *Newfoundland Workers'Compensation Act*,[271] which preclude a court action for damages by someone who is subject to the compensation scheme of the *Act*, does not

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[269] *Supra*, note 24 at 34, Wilson J.

[270] See W. Black & L. Smith, *supra*, note 243 at 605 n.66 for statements indicating that the first of these two questions may be left open. See also Gold, *supra*, note 268 at 1076. "The Court explicitly leaves open the possibility that section 15 applies to legislation that classifies on any ground whatsoever, not only legislation that classifies on the basis of enumerated or analogous grounds. This forms a significant proportion of the cases decided to date under section 15, and it is reasonable to expect that litigation of this kind will continue to be brought unless and until the Supreme Court clearly holds that these cases are not justiciable under section 15."

[271] S.N. 1983, c. 48, ss. 32-34.

violate s. 15. The Court was of the view that the *Workers'Compensation Act*

> does not, in these circumstances, constitute discrimination within the meaning of s. 15(1) of the *Canadian Charter of Rights and Freedoms* as elaborated by this Court in *Andrews v. Law Society of British Columbia* ... The situation of the workers and dependents here is in no way analogous to those listed in s. 15(1), as a majority in Andrews stated was required to permit recourse to s. 15(1).[272]

This suggests that if grounds other than the enumerated and analogous ones are covered at all, it will only be in unusual or extreme circumstances. As has been pointed out,[273] it is significant that the judgment was delivered by La Forest J., who had had doubts about the limitation in *Andrews*, and that two new appointees to the Court, Gonthier and Cory JJ., joined in the opinion.

In a later case, *R.* v. *Turpin*,[274] the Supreme Court treats the requirement of either enumerated or analogous grounds as essential.

(iii) *Turpin*

Turpin was a challenge by three accused who were charged with murder in Ontario. At the time of the trial, s. 429 of the *Criminal Code*[275] provided a mandatory trial by jury in the case of indictable offences, but accused persons under s. 430 of the *Code*, tried in Alberta, were allowed to elect trial by judge alone. The Court held that a classification between individuals accused of criminal offences in one province versus another was not analogous to the enumerated grounds in s. 15.

Concerning the second issue left open in *Andrews*, there are statements in *Turpin* suggesting

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[272] *Supra*, note 25 at 766.

[273] See W. Black & L. Smith, *supra*, note 243 at 606.

[274] *Supra*, note 25.

[275] R.S.C. 1970, c. C-34. Section 430 was repealed by S.C. 1985, c. 19, s. 64.

that claims by members of the racial majority, or men, that a law or practice does not treat them equally in comparison with a racial minority, or women, will be upheld only in exceptional circumstances, if at all. Speaking for the Court, Wilson J held that a finding of discrimination will in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged. According to her, a determination as to whether or not discrimination is taking place, if based exclusively on an analysis of the law under challenge is likely to result in the same kind of circularity which characterized the "similarly situated" test clearly rejected by the Court in Andrews. She continued by saying that it would be stretching the imagination to characterize persons accused of one of the crimes listed in s. 427 of the *Criminal Code* in all the provinces except Alberta as members of a discrete and insular minority. She added that this categorization is not an end in itself but merely one of the analytical tools that are of assistance in determining whether the interest advanced by a particular claimant is the kind of interest s. 15 is designed to protect:

> It is a means of ensuring that equality rights are given the same kind of broad, purposive interpretation accorded to other *Charter* rights: see *Hunter* v. *Southam*, [1984] 2 S.C.R. 145; *R.* v. *Big M Drug Mart*, ... Differentiating for mode of trial purposes between those accused of s 427 offences in Alberta and those accused of the same offences elsewhere in Canada would not, in my view, advance the purposes of s. 15 in remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society.[276]

She concluded by saying that to recognize the claims of the appellants under s 15 of the *Charter* would "overshoot the actual purpose of the right or freedom in question."[277]

That s. 15(1) is limited to the protection of disadvantaged groups was thus central to the

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[276] *Turpin, supra*, note 25 at 1333.

[277] *Ibid.*, citing *R.* v. *Big M Drug Mart Ltd.* (1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 [hereinafter *Big M Drug Mart* cited to S.C.R.] at 344.

Court's holding in *Turpin*.[278] At least the decision indicates that members of an advantaged subset of an enumerated or analogous ground would have a more onerous burden in proving a violation.[279]

(iv) Conclusion

It can be stated that the Court has restricted s. 15(1) analysis to enumerated or analogous categories of discrimination. Further, non-enumerated grounds of discrimination must be analogous to the enumerated grounds in the sense that they must be a source of disadvantage and prejudice. This approach appears to constitute a further significant limitation on the number of potential claimants under s 15, protecting the courts from claims by privileged groups who are the target of legislative classification.[280] This limitation makes sense in terms of the social history that led to the adoption of s. 15. Still, it might be asked why the section should not apply when a law causes unjustifiable detriment to a group that is relatively advantaged compared to its counterparts, rare though such an event may be. William Black and Lynn Smith have two answers to this question:[281] first, such application would tend to weaken the protection afforded by s. 15 to disadvantaged groups in much the same way that the section would be weakened by recognition of an unlimited

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[278] Based on this reasoning, the Court has more recently rejected also a s. 15 claim brought by individuals claiming relief against the federal crown. See *Rudolph Wolff and Co.* v. *Canada*, unreported, March 29, 1990.

[279] W. Black & L. Smith, *supra*, note 243 at 608.

[280] In the United States, the Supreme Court has evolved criteria and tests - generally, three levels of scrutiny - by which to measure the effect of legislation on the constitutional rights of any group or classification of persons created or singled out in legislation or government action. Before *Andrews*, it had been suggested that these tests may be used in judging whether the application of laws violates the "general prohibition" of s. 15(1) of the *Charter*. Canadian courts have, however, acknowledged that it would be inappropriate for them to simply adopt the three-tier system by stating, without further justification, that because Parliament has chosen not to enumerate certain classes, those classes are less worthy of protection and the courts are relieved from applying their most stringent scrutiny to complaints by members of those classes.

[281] W. Black & L. Smith, *supra*, note 243 at 608.

list of distinctions. Second, the courts are only one vehicle for promoting equality, and the use of this vehicle has costs in terms of intrusion on the democratic process. When the detriment is to a group that has economic and political power, there is less reason to assume that the political process will be incapable of correcting the problem, and the costs of judicial activity become less justifiable. Also, the U.S. experience suggests that the test applicable to grounds unlike those enumerated might become so lax as to provide almost no protection and thus not be worth the resulting complications [282]

Regarding the criteria by means of which analogous grounds are to be identified, a number of features of the enumerated grounds have been identified by the Supreme Court which suggest that the Court is adopting the approach that a number of courts and commentators have advanced:[283]

> The core idea is to generate a set of criteria to assess whether a non-enumerated ground shares a sufficient number of features so as to be deemed analogous. These features include the presumptive irrelevance of the ground to many legitimate legislative purposes, whether the group defined by the classification has suffered a history of discrimination, the extent to which they are relatively politically powerless, and whether the basis of classification concerns those aspects of one's person that are either beyond one's control or within that sphere independently protected by the Constitution.[284]

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[282] W. Black & L. Smith, *supra*, note 233 at 585.

[283] See Gold, *supra*, note 268 at 1069 n.28, citing *Smith, Kline & French Laboratories Ltd.* v. *Canada (A.G.)*, *supra*, note 227. See also Gold, "Equality Past and Future: The Relationship Between Section 15 of the *Charter* and the Equality Provisions in the *Canadian Bill of Rights*" in Law Society of Upper Canada. Department of Education, ed., *Equality: Section 15 and Charter Procedures* (Toronto, 1985) Chapter A-1, at 4-7, for similar lists of criteria, see Jefferson, *supra*, note 228 at 80-84; W. Black & L. Smith, "Section 15 Equality Rights Under the Charter. Meaning, Institutional Constraints and a Possible Test" in G.-A. Beaudoin, ed., *Your Clients and the Charter - Liberty and Equality* (Cowansville, Qué: Yvon Blais, 1988) 225 at 248.

[284] Gold, *supra*, note 268 at 1069.

e. **Discrimination on the Basis of Sexual Orientation**

As we have seen, s. 15 appears, on its face, to continue the legal pattern of ignoring the concerns of lesbians and gay men. Sexual orientation is not included in the list of prohibited grounds of discrimination in s. 15(1) of the *Charter*.

Homosexual groups, faced with the reluctance of politicians to include sexual orientation in federal human rights legislation and in the human rights laws of many of the provinces, have been uneasy about its explicit omission from s. 15 of the *Charter*. They were afraid that deliberate exclusion of "sexual orientation" from the enumerated classifications could be taken as a signal that this classification ought not to trigger the protection of s. 15.[285] The issue has also perturbed human rights advocates. On January 5, 1983, amendment of s. 15 of the *Charter* was urged to include marital status, political affiliation and sexual orientation as enumerated prohibited grounds of discrimination.[286] The government took the position that s. 15 was open-ended and therefore was capable of prohibiting other than the enumerated grounds. In his reply the then Minister of Justice and Attorney General of Canada gave a strong indication that while the drafters of the Constitution did not want to say so expressly, it could be taken as understood that equal protection covers sexual orientation. The Minister stated:

> The list of grounds of discrimination contained in section 15 is not exhaustive. Thus, while it is true that certain grounds of discrimination are expressly prohibited, this enumeration does not detract from the general prohibition found in the section. Therefore, express prohibition of the specific forms of discrimination on the basis of marital status, political affiliation and sexual orientation is not necessary.[287]

Today there is little doubt that sexual orientation should be accepted by the courts as an

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[285] On the issue, see Jefferson, *supra*, note 228 at 73-74.

[286] See Bruner, *supra*, note 2 at 464.

[287] Private correspondence, Hon. Mark MacGuigan, 11 Feb. 1983; see Bruner, *supra*, note 2 at 464.

analogous ground of discrimination.

There has been some discussion of the matter by commentators.[288] Colleen Sheppard has pointed out that discrimination against homosexuals has been just as pervasive and damaging as some of the enumerated grounds.[289] Peter Hogg also seems to suggest that sexual preference is covered by s. 15.[290] Gwen Brodsky and Shelagh Day believe that it is likely that grounds such as marital status and sexual orientation will be found to be covered by s. 15 because in *Andrews* the Court has accepted noncitizenship as a personal characteristic.[291] The Parliamentary Committee on Equality Rights concluded that sexual orientation should be read into the general open-ended language of s. 15 of the *Charter* as a constitutionally prohibited ground of discrimination, because homosexuals in Canada

> do not enjoy the same basic freedoms as others. Their sexual orientation is often a basis for unjustifiably different treatment under laws and policies, including those at the federal level, and in their dealings with private persons.[292]

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[288] As a matter of fact, the two most frequent suggestions for extended grounds are marital status and sexual orientation (see MacLauchlan, *supra*, note 239 at 228) Other grounds presently covered in human rights legislation in Canada but which do not fall within the explicit or implicit terms of s. 15 are "social condition" (*Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, s. 10; the Newfoundland *Human Rights Code*, R.S N. 1970, c. 262, ss 7(1) and 9(1), refers to "social origin"), "record of criminal conviction" (*Canadian Human Rights Act*, S C. 1976-77, c. 33, s. 3(1)) and "source of income" (Manitoba *Human Rights Act*, S.M. 1974, c. 65, s. 2(1). According to Hughes, *supra*, note 214 at 80, feminist analysis requires that four grounds which must be added are political belief, sexual orientation, marital status and perhaps pregnancy.

[289] Sheppard, *supra*, note 27 at 226, n.72. She continues saying that, while sexual orientation may well be recognized as analogous in future cases, one wonders whether its exclusion reflects the extent to which it was perceived to pose threats to a central societal institution - the heterosexual family.

[290] *Supra*, note 226 at 799.

[291] S. Day & G. Brodsky, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989) at 206.

[292] *Ibid.* at 29.

In its brief to the all-party Parliamentary Subcommittee on Equality Rights, the Canadian Bar Association expressed the view that sexual orientation is one of the more obvious unenumerated grounds of discrimination prohibited by s. 15.[293] Peter Maloney supported this view when he told the Subcommittee:

> I think, quite frankly, it is there already. It is not there in the sense that the words "sexual orientation" are there ... [but] the legislative history is such that sexual orientation is already included in section 15.[294]

The Federal Court of Canada[295] and the Supreme Court of British Columbia[296] have found sexual orientation to be protected under the *Charter*'s equality section. In the first ruling, of November 3rd, 1989, a federal inmate won the right to a private "family" visit, inside prison, with his homosexual lover. Dubé J. ruled that Timothy Veysey, an inmate of Warkworth Institution, a federal medium-security penitentiary, had been discriminated against because of his sexual orientation. Dubé J. said that Veysey was denied a benefit available to heterosexual inmates and that the basis of this denial was his sexual orientation. This, he maintained, was a violation of s. 15 of the *Charter*.

By ruling that Veysey's exclusion from the visiting program constituted discrimination, Dubé J. implied that Veysey and Beau are family for the purposes of the Correctional Service's program. Dubé J. wrote:[297]

> Bearing in mind that the goal of the program is the preparation of inmates for their return to life in the community through the preservation of their most supportive relationships, this desirable goal is not furthered by denying the applicant's access to his most supportive relationship.

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[293] *Supra*, note 120 at 29.

[294] *Ibid.*

[295] *Supra*, note 213.

[296] *Ibid.*

[297] The following citations are taken from the report on *Veysey* by P. Zanette in 123 GO Info (Ottawa, 1989/90) 1.

The program is normally open to inmates and wives, husbands, common-law partners, children, parents, brothers, sisters and grandparents. Dubé J. rejected arguments by prison officials that allowing Veysey to participate would subject him to considerable personal danger and would threaten the peace and good order of the prison. He further suggested that in order to reduce the "risk", the institution could easily make sure the names of the inmates participating in the program remain confidential.

In his judgment, Dubé J. discussed how sexual orientation can be seen as analogous to the other prohibited grounds of discrimination in the *Charter*. He stated that "[o]ne's religion may be changed but with some difficulty; sex and mental or physical disability, with even greater difficulty." He continued by saying that, "[p]resumably, sexual orientation would fit within one of these levels of immutability (changeability)." He also noted that

> the individual or groups involved have been victimized and stigmatized throughout history because of prejudice, mostly based on fear or ignorance, as most prejudices are. This characteristic would also clearly apply to sexual orientation, or more precisely to those who have deviated from accepted norms, at least in the eyes of the majority.

The Crown appealed, but lost again in a May 31, 1990 ruling by the Federal Court of Appeal.[298] The Court of Appeal decided that the term "common law partner" in CSC directives is broad enough to include same-sex partners:

> [T]he wording ... goes beyond the traditional meaning of common-law relationships .... These ambiguous and novel expressions [in the CSC directives], combined with the fact that one of the goals of the program is to prepare inmates for their return to life in the community outside the penitentiary, lead us to the conclusion that the Program does not exclude common-law partners of the same sex.[299]

Therefore, the corrections commissioner erred in denying Veysey the special visiting rights. Rather than calling the action a violation of rights, the Court termed it an error in

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[298] *Supra*, note 213.

[299] *Ibid.* at 4.

judgment. The Court did not rule on whether or not common-law partners of the same sex are common-law spouses and refrained from expressing any view on that issue.[300] Further, the Court of Appeal judges did not endorse the view that the *Charter* protects gay rights. Although this caused some disappointment among gay rights activists, it is important to point out that during the appeal the Crown itself conceded that s. 15 does protect gay rights.[301]

On January 25th, 1990, the Supreme Court of British Columbia also found sexual orientation to be protected under s. 15.[302] The plaintiffs had submitted that discrimination on the basis of sexual orientation, while not one of the enumerated grounds in s. 15, is prohibited under it. Counsel for the defendants conceded that sexual orientation is akin to the grounds enumerated in the section. After pointing out that in *Andrews* the Supreme Court had decided that while citizenship is not an enumerated ground under s. 15 of the *Charter*, the citizenship requirement nevertheless infringed the equality provision of s. 15(1), Coultas J. simply stated: "I find that discrimination based on sexual orientation contravenes

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[300] According to Elisabeth Thomas, Veysey's lawyer, the liberal interpretation of common-law partner nevertheless gives ammunition for future same-sex spousal cases. See Gabriell Goliger, "Veysey Wins Appeal" (1990) 10 XS (Supplement to XTRA! Magazine, Toronto) 3.

[301] Therefore, the judges did not have to address the issues on the basis of any infringement of rights accorded by the *Charter*. It is significant that the A.G. of Canada conceded that sexual orientation is covered by s. 15 of the *Charter*. As Elisabeth Thomas pointed out, at least the federal government is not going to be able to come back to court (in a new case) and say that sexual orientation is not a prohibited ground of discrimination. That was a big move in the federal government's position.

[302] *Brown*, *supra*, note 213. The case was about a group of AIDS patients who brought an action claiming that the decision by the provincial ministry of health to place AZT under the Pharmacare Plan, with the result that all AIDS patients except those on social assistance or in long-term care facilities were required to pay part of the cost of the drug, discriminated against them and violated ss. 7 and 15 of the *Charter* in that it affected an identifiable group, 90 percent of whom were homosexual or bisexual males. They contended that despite being catastrophically ill, that group was denied the benefit of direct funding accorded to others who were catastrophically ill, specifically cancer and transplant patients. The action was dismissed. The Court held that the evidence did not establish direct discrimination.

the equality provisions of the *Charter*."[303]

Although there can be little doubt that "a search for indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice" will yield the conclusion that gays and lesbians are deserving of the protection of s. 15,[304] in what follows I want to provide further arguments why this protection should be accorded Dubé J. noted that sexual orientation can be seen as analogous to the other prohibited grounds of discrimination in the *Charter* because it is an immutable characteristic and because homosexuals have suffered a history of discrimination There are many other reasons why sexual orientation should be accepted as an analogous ground of discrimination While it has been suggested that attempts to describe a set of features that are common to all enumerated and analogous grounds are misguided,[305] it might nevertheless be helpful to examine whether sexual orientation meets the criteria that are being put forward In the Ontario government discussion paper on equality rights, the Attorney General of Ontario, Ian Scott, set out five criteria that unenumerated classes under s. 15 of the *Charter* should meet to be consistent with enumerated classes. He suggests that "the kinds of classes which have the greatest chances of obtaining inclusion in the *Charter* are those which in some measure conform to the characteristics of the enumerated classes."[306] Sexual orientation

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[303] *Ibid.* at 310.

[304] See Ryder, *supra*, note 2 at n.179.

[305] *Ibid.* at n.187. Ryder argues that a more desirable approach to s. 15 would be to recognize that discrimination on the basis of the enumerated and analogous grounds operates in diverse ways. According to him, the enumerated grounds in reality share only one feature in common: they describe personal characteristics that have been used historically to identify and disadvantage groups perceived to share the stigmatized characteristics. He continues by saying that, apart from this common feature, the disadvantaged groups identified by the enumerated characteristics have experienced discrimination in different ways. I agree. Because it seems likely, however, that courts will be looking for characteristics that sexual identity and the enumerated grounds have in common, I will nevertheless examine these characteristics more closely. In *Andrews* the Court has not required non-citizenship to fulfill all of the following criteria. Thus it has shown that the Supreme Court of Canada is taking a more flexible approach than the courts in the United States.

[306] *Supra*, note 228 at 302.

meets all five criteria:[307]

> In fact, sexual orientation fits more squarely within the guidelines that were suggested elsewhere in the paper than any of those it names with potential for inclusion.[308]

1.The group has received statutory protection.[309]

Québec was the first province to include sexual orientation as a prohibited ground of discrimination in its *Charter of Human Rights and Freedoms*. Since then Ontario, Manitoba and the Yukon have also amended their human-rights legislation to include sexual orientation, thus implicitly recognizing that gays and lesbians need statutory protection.

2.The group is subject to a pattern of discrimination.[310]

Homosexuals, as a class, are singled out for unequal treatment as a principle of official policy. Members of the Parliamentary Subcommittee on Equality Rights were

> shocked by a number of the experiences of unfair treatment related to us by homosexuals in different parts of the country. We heard about harassment of and violence committed against homosexuals. We were told in graphic detail about physical abuse and psychological oppression suffered by

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[307] Nevertheless, there is no mention of sexual orientation in the Ontario paper at all. Sexual orientation is not discussed even once in over 400 pages of analysis, except for references to the Quebec *Charter of Human Rights and Freedoms* and to the *GATE* case. Thirty pages specifically devoted to non-enumerated grounds yield discussion of political belief, marital status, social condition, and family status as "the major non-enumerated grounds with potential for inclusion." *Ibid.* at 316.

[308] M. Leopold & W. King, "Compulsory Heterosexuality, Lesbians, and the Law: The Case for Constitutional Protection" (1985) 1 CJWL/Rifd 1632 at 181. Despite its obvious attempt to prevent an airing of the issue of lesbian and gay rights, the Background Paper itself does provide the basis for a strong argument that sexual orientation not only could, but should be given s. 15 protection.

[309] See *supra*, notes 6-11.

[310] There should be no dispute that homosexuals have historically been discriminated against; as has been pointed out by Jefferson, *supra*, note 228 at 82-83, it is entirely possible that courts - as in the *Veysey* case - will be willing to take judicial notice of that history, but it may be necessary to present evidence.

> homosexuals.... Hate propaganda directed at homosexuals has been found in some parts of Canada. We were told of the severe employment and housing problems suffered by homosexuals.[311]

They continued by saying that during their travels across the country they met homosexuals of all ages, many professions, different religions and various socio-economic backgrounds. They found them to express a common concern about the lack of access to facilities, services and economic opportunities. These same concerns were frequently expressed as well by non-homosexuals on behalf of homosexuals. They concluded by saying that

> sexual orientation is no more relevant to a person's fitness to compete for a given job or reside in particular accommodations than sex, race or religion. Because sexual orientation is a personal matter, it should not be a criterion in determining the availability of services, facilities, accomodations or employment to Canadians.[312]

Further, Canadian family law, custody cases, provincial human rights rulings, and the disposition of the *GATE* case[313] indicate not only that homosexuals experience serious discrimination in Canada, but that it is legal discrimination.[314]

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[311] *Supra*, note 120 at 26.

[312] *Ibid.* at 29.

[313] For a detailed discussion of discrimination against gays and lesbians in these areas, see Leopold & King, *supra*, note 308 at 166-78.

[314] But see the federal discussion paper on equality rights, *supra*, note 228 at 63, where it is stated: "Distinctions on the basis of sexual orientation are not made on the face of any federal legislation. However, there are policies excluding homosexuals and lesbians from such bodies as the Canadian Armed Forces." As has been pointed out by Leopold & King, *supra*, note 308 at 180, this makes it appear as if the policies of the Armed Forces are the only problem faced by lesbians or gay men that lie within the jurisdiction of the federal government: "By denying the existence of facial discrimination and then admitting to discriminatory policies only in the Armed Forces, the paper ignored all of the other policies, practices, and legislative provisions that, while not perhaps referring explicitly to homosexuals, certainly have an adverse impact on them."

3.The major characteristic defining the group cannot be easily changed by the individual.[315] As has been pointed out by Leopold and King,[316] some of the grounds presently protected under s. 15 are not, strictly speaking, unchangeable. For example, one can change one's religion. And one's age definitely changes. There is a recognition, though, in the protection granted these categories,

> that they are a part of a person in a way that makes her vulnerable to any prejudice that may exist on the basis of them. One cannot change one's age at will, and one's religious beliefs are "an integral part of one's identity and cannot be easily changed" or renounced.[317]

Sexual orientation is also an integral part of one's personality, and it is difficult if not impossible to change it at will. Leopold and King conclude by saying that if "being poor is often outside an individual's control,"[318] if social condition "would be very difficult to change,"[319] if political belief "is often an integral aspect of an individual's self-definition,"[320] and if marital status is considered to have major potential for inclusion despite its easily changeable nature, then sexual orientation should certainly pass the "immutability" test.[321]

4. The group is a discrete and cohesive class.

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[315] For a detailed discussion of the debate whether or not sexual orientation is immutable, and of the reasons why this requirement is particularly problematic, see *supra*, notes 136-147. In what follows, I will concentrate on a comparison of sexual orientation and the enumerated grounds in s. 15 as far as their immutability is concerned.

[316] *Supra*, note 308 at 182-83.

[317] *Ibid.*, citing from the Ontario Background Paper, *supra*, note 228 at 305.

[318] Ontario Background Paper, *supra*, note 228 at 325.

[319] *Ibid.* at 327.

[320] *Ibid.* at 319.

[321] See also Jefferson, *supra*, note 228 at 83: "Whether or not homosexuality is accepted as a characteristic over which the individual has no control, it can also be argued that the right to a homosexual existence is protected under the freedom of thought, belief, opinion and expression, and freedom of association."; Duplé, *supra*, note 8 at 825.

The Ontario Background Paper states that one factor that should be considered in determining whether a group should be entitled to constitutional protection is the "extent to which the group characteristic represents a major source of identity or serves as a discrete way of identifying people."[322]

Though lesbians and gay men are not necessarily a visible minority,[323] the gay community has a well-established group identity defined by its political, service, community, and commercial organizations, its alternative social-service support system, its newspapers and magazines, and its network of friends.[324] However, in a letter explaining why Alberta would not include sexual orientation in its *Human Rights Protection Act*, it was stated that

> [w]e strongly believe that sexual orientation and sexual practice, since they are not visible characteristics, are private matters and need not be communicated to anyone, subject to the wish of the person. In this respect, it is felt that an amendment ... should not be needed to achieve your objective of allowing people to live without fear of discovery of their personal lives.... Since sexual orientation is not appropriately publically practiced ... it does not compare to something like religion that is publicly practiced.[325]

There are several reasons why this distinction is wrong. First, the Alberta *Human Rights Act* does not protect only those who practice their religion publicly. People who shun public ritual for private devotion are still covered by anti-discrimination law. Moreover, it is not easy to hide one's sexual orientation: on the contrary, it puts a lot of strain on the individual. Heterosexuals don't have to hide their sexual orientation. Why then should homosexuals have to hide what is an integral and important part of their lives, including

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[322] *Supra*, note 228 at 305.

[323] Still, many gay men and lesbians are easily identifiable as such. While others may not be identifiable, this will often be the result of their "hiding".

[324] As Leopold & King, *supra*, note 308 at 183 put it, "[i]f a lesbian's or gay man's identity is not readily apparent to those around her or him, it is only because she or he is being very guarded and careful."

[325] J. Koper, chair, Health and Social Service Caucus, letter dated March 21, 1985, quoted in Rites 2 (1985) 2:4. Cited from Leopold & King, *supra*, note 308 at 184.

their same-sex partners, their friends and their activities and likings? Third, it is fallacious to identify sexual orientation with sexual activity.[326] The same mistake is made here as in many of the recent decisions on gay rights in the United States.[327]

5. The group is not economically defined or based.

First, it is important to point out that the finding that s. 15(1) is limited to the protection of disadvantaged groups[328] does not mean that any given group has to be economically disadvantaged. This already follows from the fact that not all of the groups that are presently enumerated in the *Charter* are economically disadvantaged.[329] What is more, the non-economic basis of the classifications enumerated in s. 15(1) is considered as one of their common characteristics.[330] Sexual orientation, as well as sex or race or any other of the protected grounds, not only cuts across economic classes but includes members of every racial, religious, cultural, ethnic, and political group.[331]

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[326] See L. Massiah, Gay and Lesbian Awareness Civil Rights Committee, letter in response to Janet Koper, quoted in Rites 2 (1985) 2:4: "The inability ... to differentiate between sexual orientation and sexual behavior is amazing. Behavior is private, your orientation as a heterosexual is common knowledge." Cited from Leopold & King, *supra*, note 308 at 184.

[327] *Supra*, notes 180-202.

[328] *Supra*, note 278.

[329] E.g., while women and blacks are often poorer than men or whites, Chinese or Japanese in Canada are not. The protection against discrimination upon the ground of race, of course, applies equally to them. The reason is obvious: all of the groups enumerated in the *Charter* have been disadvantaged by virtue of the very characteristic that identifies them as a class, that is sex or race and not economic status.

[330] Two other categories that have nevertheless been suggested for inclusion - economic status and social condition - are more or less economic classifications.

[331] It should, however, be noted that lesbians and gay men incur heavy economic penalties for their identity. While gay men are generally considered as relatively well off, due to AIDS and AIDS-related conditions there is an increasing number of gay men living in miserable economic conditions. Lesbians as a group are relatively poor. In their case, comparable to that of single heterosexual women, marriage does not hide the fact that women are generally economically disadvantaged in our society. Their poverty is therefore even more visible than that of women in general.

While political powerlessness is not one of the five criteria contained in the Ontario Background Paper, it has been a criterion both for Wilson and La Forest JJ. in *Andrews*.[332] It would be a mistake to view amendments to provincial Human Rights Acts to include sexual orientation as a prohibited ground of discrimination as signs of the po itical power of homosexuals. What counts is that, relative to heterosexuals, homosexuals are still as a group lacking political power and are therefore vulnerable to having their interests overlooked and their rights to equal concern and respect violated. While it is certainly true that during the last twenty years gay and lesbian groups have "come out of the shadows and entered the political arena in a determined way", spending a considerable amount of effort educating the public and governments about the discrimination and oppression they "face in all walks of life",[333] homosexuals are still among "those groups in society to whose needs and wishes elected officials have no apparent interest in attending".[334] As has been pointed out,[335] while none of the groups in s. 15 are noted for their political power, few are as politically unpopular as lesbians and gays:

> Other disadvantaged groups may have difficulty getting the attention of politicians or having their concerns taken seriously. But gay or lesbian support of or interest in a politician can ruin a career.[336]

The features of the debates that have taken place in the legislatures of Manitoba and Ontario regarding the addition of sexual orientation as a prohibited ground of orientation to those provinces' human rights legislation are in themselves an indication of the lack of political power of gays and lesbians. They revealed that even heterosexually identified politicians rarely risk affirming the value of gay and lesbian lives.[337] And self-identification

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[332] *Supra*, note 24 at 32, Wilson J., and 39, La Forest J.

[333] See Girard, *supra*, note 8 at 268.

[334] *Andrews*, *supra*, note 24 at 32, Wilson J., citing J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) at 151.

[335] Leopold & King, *supra*, note 308 at 184.

[336] *Ibid.*

[337] On the debates, see Ryder, *supra* note 2 at n.125-51.

as a gay or lesbian carries enormous social, economic and political risks. In Canada there is only one Member of Parliament, New Democrat Svend Robinson of Burnaby, B.C., who has undertaken those risks.

It can be concluded that it will obviously be up to the courts to decide whether protection under the *Charter* will be extended to lesbians and gay men.[338]

f. Conclusion

While the equal protection section of the *Charter of Rights and Freedoms*, s. 15, does not specify "sexual orientation" among the prohibited grounds of discrimination, sexual orientation should be accepted by the courts as an analogous ground of discrimination. Gays and lesbians fulfil all of the criteria by which analogous grounds are to be identified.

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[338] Even if the *Canadian Human Rights Act* should finally be amended to include sexual orientation as a prohibited ground of discrimination, this should not be interpreted as a sign of the political power of homosexuals. One should not forget how long homosexuals have been fighting for the inclusion and how unwilling the Government has always been to act. Besides, it is important to note that homosexuals will not - by the mere fact of legislated equality guarantees - be suddenly and factually equal. As has been pointed out by K.A. Lahey, "Feminist Theories of (In)Equality" (1987) in K.E. Mahoney & S.L. Martin, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 71 at 81, people who have been systematically, consistently, and relentlessly relegated to a subordinated status are, as a result of the construction of that status, not in fact equal to the people who have constructed that subordinated status.

Chapter 2. **The Meaning of Equality**

a. **Introduction**

Once it is recognized that s. 15(1) protects against discrimination on the basis of sexual orientation, the question must be whether the legal concept of equality can help to change the pervasive inequalities facing homosexuals in Canadian society.[339]

This chapter argues that, though they do not address the issue of discrimination on the basis of sexual orientation, the general principles and themes articulated in *Andrews*, *Workers' Compensation Act Reference* and *Turpin* are promising for homosexuals.

As Colleen Sheppard has pointed out,[340] the most important and promising aspect of the *Andrews* decision is the Supreme Court's embrace of a purposive approach to s. 15:

> McIntyre J. rejects formulaic approaches to the equality guarantees in which constitutional violations are determined with reference to abstract or formal rules. Instead, he insists that the interpretation of s. 15 must be informed by an appreciation and understanding of its social and historical purpose.

The Court has rejected the *Canadian Bill of Rights* jurisprudence concerning equality and made the protection of groups that are disadvantaged in our social, political and legal systems the central function of s. 15.[341] In describing the conception of equality that, in his

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[339] According to A. Petter & A.C. Hutchinson, "Rights in Conflict: The Dilemma of *Charter* Legitimacy" (1989) 23 U.B.C. L.R. 531 at 537, the popular principle of equality is the best example of rights indeterminacy. Although this principle receives almost universal approval, there is very little agreement on its scope and meaning.

[340] *Supra*, note 27 at 211.

[341] According to T. Berger, "The *Charter*: A Historical Perspective" (1989) 23 U.B.C. L.R. 603 at 605, the most distinctly Canadian aspect about the *Charter* and the related enactments is that they are not just for individuals. The *Charter* is designed to guarantee the rights of groups, collectivities and communities of people.

view, underlies s. 15, McIntyre J. states that "the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another."[342] He emphasizes that this goal might be thwarted by making an inappropriate distinction, but that identical treatment may also frequently produce inequality. Therefore he rejects the notion that equality means "sameness of treatment":

> It must be recognized at once ... that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality.[343]

The rejection of the equation of equality with sameness of treatment and inequality with differential treatment is important because it marks a major departure from traditional notions of equality.

This chapter first discusses the notion of formal equality and its application in early s. 15 cases. It identifies the fundamental problems with the traditional equation of equality with sameness of treatment and argues that its rejection as well as the acceptance of an effects-based approach are in accordance with the general approach taken by the Supreme Court concerning the definition of the rights and freedoms guaranteed by the *Charter* and with the intention behind s. 15, which was to go beyond the guarantee of equality "before the law" provided by s. 1(b) of the *Canadian Bill of Rights* and to promote the substantive equality of disadvantaged groups. The chapter concludes that the Supreme Court's approach should help homosexuals to gain equal rights. First, according to this approach their differences must be accomodated to secure equality of outcome. Second, policies and legislative provisions that, while not perhaps referring explicitly to homosexuals, still have an adverse impact on them, should under this approach be held unconstitutional.

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[342] *Supra*, note 24 at 11, McIntyre J.

[343] *Ibid.* at 10, McIntyre J. Chief Justice Dickson had previously made the same point in *Big M Drug Mart* (*supra*, note 277 at 347), stating: "In fact, the interest of true equality may well require differentiation in treatment."

b. **The Notion of Formal Equality**

The idea of equality underlying *Canadian Bill of Rights* jurisprudence is that of formal equality. Formal equality means equality in the form of the law, and it requires that laws treat similarly persons who are similarly situated. Formal equality was first defined by Aristotle, who said in his Ethics that "things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness."[344]

The principle does not require every person to be treated identically. Aristotle calls it "equality proportionate to desert" in contrast to what he terms "numerical equality [which] means being treated ... identically."[345] It rejects, as a requirement of justice, "numerical equality", or what has been referred to as "absolute equality", namely, to "treat all persons in the same way in all respects". The principle is, however, quite clearly formal. It immediately raises the question, as Aristotle put it: "Equals and unequals in what?" The principle in itself is empty because it does not provide any criteria of relevance:[346]

> Application of the principle therefore requires the specification of numerous questions: what attributes or differentiating features are relevant and why? What is to be allowed as a relevant difference such as would justify differential treatment? What reasons will count for treating persons

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[344] Aristotle, *Ethica Nichomacea* (1925), trans. W. Ross, Book V3, at 1131a-6.

[345] A.F. Bayefsky, "Defining Equality Rights Under the *Charter*" in K.E. Mahoney & S.L. Martin, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 106 at 106, citing from E. Barker (trans.), *The Politics of Aristotle* (1946), Book V, i, 1301a.

[346] See also P. Westen, "The Empty Idea of Equality" (1982) 95 Harv. L.R. 537 at 543. He argues that equality ought to be "banished from moral and legal discourse" on grounds that it is an empty and confusing idea. For an analysis of Westen's argument see Gold, "Moral and Political Theories in Equality Rights Adjudication" in J.M. Weiler & R.M. Elliot, eds., *Litigating the Values of a Nation: the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986) 85 at 90; D. Harris, "Equality, Equality Rights and Discrimination under the *Charter of Rights and Freedoms*" (1987) 21 U.B.C. L.R. 389 at 393.

differently?[347]

The formal norm of equality is associated with classical liberalism. It tends to regard biological or other real differences as barriers to equality, emphasizing "fair play" without examining whose interests the rules of the game serve. Similarly, it overlooks the social histories of groups that document the entrenchment of the interests of some at the expense of others. As has been pointed out,[348] inferior education forecloses opportunities for advancement. Similarly, the construction of inaccessible buildings or transportation systems can, in the case of the physically disabled, turn what would otherwise be an irrelevant biological difference into a relevant one. Finally, the formal norm presumes individuals are "solitary actors", and that everyone's goals are defined by a utilitarian, market-based society.[349]

From the time of its first expression until the present day, belief in the idea of formal equality has co-existed with the exclusion and oppression of disadvantaged groups:

> Aristotle's Greece was a slave-holding society in which women were not citizens; in Canada, it was not until well into this century that women and members of racial minorities were enfranchised.[350]

The idea of formal equality has taken women and other disadvantaged groups into its embrace only very recently. Now, having been accepted as "likes" for purposes of some basic

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[347] Bayefsky, *supra*, note 345 at 107.

[348] See D. Baker, "The Changing Norms of Equality in the Supreme Court of Canada" (1987) 9 Supreme Court L.R. 497 at 500.

[349] *Ibid.* Baker contrasts this with pluralistic selection of goals such as native Canadian claims to "self-government" and the feminist demand that equality take sex into account. In such situations it is not biological differences but rather the collective aspirations of the minority group that create a problem for the formal norm of equality. See also J. McCalla Vickers, "Majority Equality Issues of the Eighties" (1983) Can. Hum. Rts Y.B. 47; Gold, "Equality Before the Law in the Supreme Court of Canada: A Case Study" (1980) 18 Osgoode Hall L.J. 336 at 370.

[350] Brodsky & Day, *supra*, note 291 at 148.

rights, women and other disadvantaged groups find that the concept of formal equality is inadequate to the task of erasing the effects of centuries of discrimination:[351]

> In circumstances where women and men are identically situated with respect to the opportunity or right sought, the model of formal equality works. However, when women and men are not identically situated, which is most of the time, the formal equality model breaks down; in fact, it is inherently discriminatory.[352]

c. A Purposive Approach to Equality

Generally, the Supreme Court has expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* is a purposive and generous one, not a narrow or legalistic one.[353] In *Hunter v. Southam*, Dickson J. identified the

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[351] *Ibid.* at 148. See also Vickers, *supra*, note 349 at 50, where she points out that goals and aspirations of some groups currently seeking more equality in Canada are based on an understanding of equality that severely challenges the traditional or customary notions held by Canadians and represented in law and policy by the Canadian state until very recently. As an example she points out that many advocates of greater equality for Canadian women presume that a "just society" has an obligation to achieve in significant measure equality of rights and of condition between the sexes in a way that redresses an inequality widely considered to have a natural basis.

[352] *Ibid.*

[353] On the purposive approach, see W. Pentney, "Interpreting the Charter: General Principles" in G.-A. Beaudoin & E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1989) 21. The *Charter* is different from other laws. This affects virtually all aspects of *Charter* analysis, including the definition of the scope and content of substantive rights. Perhaps the clearest expression of this doctrine in any Canadian constitutional case is the following statement of Dickson J. in *Hunter* v. *Southam Inc.* (14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, [1984] 2 S.C.R. 145 at 155): "The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and

elements of a "purposive" approach and he applied this to the *Charter* as a whole, as well as to the specific right relied on in the case. The meaning of a right or freedom guaranteed by the *Charter* is to be ascertained by an analysis of the purpose of such a guarantee, it is to be understood, in other words, in the light of the interests it was meant to protect.[354] The actual technique involved in applying the purposive approach has been elaborated upon by Dickson J. in *Big M Drug Mart*.

> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*.[355]

A purposive and generous approach to *Charter* equality rights has significant implications for the interpretation of s. 15.

In *Andrews*, the Court found that the language of s. 15 was deliberately chosen in order to remedy some of the perceived defects of the *Canadian Bill of Rights*:

> [U]nlike the *Canadian Bill of Rights*, which spoke only of equality before the law, s. 15(1) of the *Charter* provides a much broader protection. Section 15

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liberties. Once enacted, its provisions cannot easily be repealed or amended It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind." The *Charter* is part of the Constitution, so it can be repealed or amended only through the process of constitutional amendment This is made explicit in s. 52(3) of the *Constitution Act, 1982*, which provides that: "Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada" The Constitution of Canada is defined in section 52(2) as including "this Act" and Part I of "this Act" is the *Charter*. By contrast, the *Canadian Bill of Rights* never became part of entrenched constitutional provisions. It was enacted by the federal Parliament in 1960, and can be repealed or amended in the same way as it was enacted.

[354] *Supra*, note 353 at 157.

[355] *Supra*, note 277 at 344.

> spells out four basic rights. (1)the right to equality before the law; (2)the right to equality under the law; (3)the right to equal protection of the law; and (4)the right to equal benefit of the law The inclusion of these last three additional rights in s. 15 of the *Charter* was an attempt to remedy some of the shortcomings of the right to equality in the *Canadian Bill of Rights*.[356]

The shortcomings of the *Canadian Bill of Rights* as far as the right to equality is concerned are well known.[357] In *A.-G. Can.* v. *Lavell*; *Isaac* v. *Bedard*[358] the Supreme Court upheld s. 12(1)(b) of the *Indian Act*, which deprived women but not men of their membership in Indian bands if they married non-Indians. The provision was held not to violate equality before the law although it might, the Court said, violate equality under the law if such equality were protected.[359] In *Bliss* v. *A.-G. Canada*[360] a pregnant woman was denied unemployment benefits to which she would have been entitled had she not been pregnant.

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[356] *Supra*, note 24 at 14, McIntyre, J

[357] Generally, the Supreme Court of Canada was much criticized for its timid approach to the *Canadian Bill of Rights*. See P.W. Hogg, "A Comparison of the Canadian Charter of Rights and Freedoms with the Bill of Rights" in G.-A. Beaudoin & E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1989) 1 at 17. Hogg points out that in the 22 years that elapsed between the *Bill*'s enactment in 1960 and the *Charter*'s adoption in 1982, the *Drybones* case was the only one in which the Supreme Court of Canada held a statute to be inoperative for breach of the Bill. In contrast, the Supreme Court of Canada's attitude to the *Charter* has been entirely different.

[358] (1973), 38 D.L.R. (3d) 481, [1974] S.C.R. 1349, 11 R.F.L. 333.

[359] In an unpublished paper prepared for the Canadian Human Rights Foundation, Professor Claire Beckton of the Faculty of Law of Dalhousie University, cites the *Lavell* case as illustrative of the Dicean principle in action and concludes: "[T]his approach [the principle of "equality of treatment in the enforcement and application of the laws of Canada before the law enforcement authorities and the ordinary courts of the land"] was considered unacceptable and groups and individuals who appeared before the Special Joint Parliamentary Committee on the Constitution argued for wording in section 15 that would ensure a requirement not only of procedural equality but also of substantive equality." See G.L. Gall, "Some Miscellaneous Aspects of Section 15 of the Canadian Charter of Rights and Freedoms" (1986) 24 Alta L.R. 462 at 463.

[360] *Supra*, note 214. For a detailed discussion of *Bliss* and, generally, of the basic problems that plagued the Supreme Court in its treatment of the *Bill of Rights*, see M. Gold, *supra*, note 349. For a discussion of a series of cases in the latter half of the nineteenth century and the first half of the twentieth on the subject of equality for women, see M. Eberts, *supra*, note 81 a. 92-93.

She claimed that the *Unemployment Insurance Act* violated the equality guarantees of the *Canadian Bill of Rights* because it discriminated against her on the basis of her sex. Her claim was dismissed by the Supreme Court on the grounds that there was no discrimination on the basis of sex, since the class into which she fell under the *Act* was that of pregnant persons, and within that class, all persons were treated equally. According to the Court, any inequality in the protection and benefit of the law was "not created by legislation but by nature."[361]

These decisions certainly led Canadian women to the view that the judicial system offered little prospect for equality-seekers to achieve even minimal protection from discriminatory laws.

It is readily apparent that s. 15 of the *Charter* is not a mere restatement of s. 1(b) of the *Canadian Bill of Rights*. Early drafts of s. 15, which were similar in wording to the equality guarantee of the *Bill*, were rejected specifically to overcome the inadequacies of interpretations that had been rendered under the *Bill*.[362] In particular, the language of s. 15 was chosen to increase equality protections for women and other disadvantaged groups. Section 28 was added to reinforce the guarantee of equality for women.[363] In summary,

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[361] *Ibid.* at 422 (D.L.R.), 190 (S.C.R.).

[362] The *Charter* went through seven different drafts before it finally became part of the Constitution. Section 15(1) went through four versions. On the drafting history, see R. Elliott, "Interpreting the Charter - Use of the Earlier Versions as an Aid" (1982) U.B.C. L.R. 11, who indicates that examination of earlier drafts can assist in interpreting the final version of the *Charter*, since the alterations may reveal both the nature of the political decisions taken during the drafting process and the intentions the drafters wished to avoid or to ensure. See also Jefferson, *supra*, note 228 at 74-76; Bayefsky, *supra*, note 345 at 106, where she says that the legislative history of s.15 reveals little positive conception as to the meaning of equality: "What emerges is a picture of dissatisfaction with the past, a desire for change and a few ideas on the part of the drafters as to what the future should hold." In summary, the legislative history is enlightening. However, it cannot be determinative if the *Charter* is to be capable of growth over time; see *Hunter* v *Southam*, *supra*, note 353 at 641 (D.L.R.).

[363] About the achievements of the women's movement during the constitutional negotiation process, see Eberts, "A Strategy for Equality Litigation Under the Canadian Charter of Rights and Freedoms" in J.M. Weiler & R.M. Elliot, eds., *Litigating the Values*

the equality rights guarantee in s. 15 was clearly intended to go beyond the guarantee of equality "before the law" provided by s. 1(b) of the *Canadian Bill of Rights* and was clearly intended to promote the substantive equality of disadvantaged groups.[364] Also, decisions about the meaning of rights under the *Bill* cannot be determinative of their meaning under the *Charter*, the *Charter*, as a constitutional rather than statutory instrument, must be construed afresh. In *Big M Drug Mart* Dickson J. pointed out, on behalf of the Supreme Court of Canada, that rights under the *Bill* are merely "recognized and declared" as existing, and that "whatever the situation under that document, it is certain that the *Canadian Charter of Rights and Freedoms* does not simply recognize and declare existing rights."[365]

In spite of this, many equality rights decisions reflect the view that the only purpose of s. 15 is to restate the "equality before the law" element of the rule of law. It has been pointed out that,

> [i]n the main, Canadians are being treated to nothing more than the *Canadian Bill of Rights* in new clothes. No court has undertaken a comprehensive analysis of the difference between men's sex equality claims and women's sex equality claims, that is, the difference between claims involving entrenched disadvantage and claims involving disadvantageous distinctions in isolated circumstances.[366]

In early s. 15 cases courts have embraced a formal rather than a substantive vision of equality.[367] As a consequence, men have been able to rely upon s. 15 to challenge

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of a Nation: the Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1986) 411 at 411-13.

[364] *Supra*, note 291 at 188.

[365] See D. Gibson, "Canadian Equality Jurisprudence: Year One" in K. E. Mahoney & S.L. Martin, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 128 at 129, citing *Big M Drug Mart*, *supra*, note 277 at 343.

[366] *Ibid.*

[367] On early section 15 cases, see *ibid.*

programs providing special benefits for women.[368] Of the first thirty-five sex-discrimination claims brought under the *Charter*, twenty-five have been raised by male litigants Of the eleven cases in which sexual equality claims have succeeded, seven have involved male claimants.[369] Generally, s. 15 litigation has been dominated by established groups and interests to the exclusion of the socially disadvantaged Moreover, formal equality rights have served to benefit extraordinary or elite women at the expense of ordinary women.[370] Those representing women in equality litigation have felt compelled to advance arguments that accept and reinforce liberal assumptions.[371] The arguments that have succeeded are

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[368] E g., in *Phillips* v. *Social Assistance Appeal Board (N.S.)*, a single father challenged a provision in welfare legislation that provided special benefits to single mothers. Counsel argued that such legislation violated the *Charter* guarantee of sexual equality. The Nova Scotia Supreme Court, (1986), 73 N.S.R. (2d) 415, 27 D.L R. (4th) 156, 26 C R R. 109 (S C), and the Court of Appeal, (1986), 76 N S.R. (2d) 240 (C A.), agreed Rather than extending the benefits to men, they struck the provision down. As A. Petter, "Legitimizing Sexual Inequality: Three Early Charter Cases" (1989) 34 McGill L.J 358 at 362 puts it, "[f]ormal equality was achieved: equality of nothing".

[369] *Ibid.* at 360-61 Similarly, in the United States the legal guarantees that were initially intended to eliminate racial oppression were used to reproduce and reinforce the racial privilege enjoyed by non-blacks. See Lahay, *supra*, note 338 at 74-75.

[370] See C. Sheppard, "Equality, Ideology and Oppression: Women and the Canadian Charter of Rights and Freedoms" (1986) 10 Dalhousie L J. 195 at 212-14. She points out that the doctrine of equal treatment in the "public sphere" only helps those women who can emulate men and meet the standards of a male-dominated world. It fails to pose the question of why many women cannot meet these standards in the first place. The demand for equal treatment also contributes to the continued subordination of women by implicitly devaluing "female-associated" skills, activities and values. Male-defined standards are left unchallenged; women simply claim an equal ability to conform to them.
In *Re Blainey and Ontario Hockey Association* (1986), 26 D L R (4th) 728, 54 O R (2d) 513, 14 O.A.C. 194 (C.A.), a twelve-year-old girl wished to play hockey in a league that was restricted to boys. While evidence suggested that most girls twelve years and older would have difficulty competing successfully in a boys' hockey league, Blainey was an exceptional athlete. Her *Charter* claim, based largely upon the principle of formal equality, succeeded While it may have benefited a few female athletes, this ruling did nothing to address the underlying, substantive inequalities experienced by a majority of female athletes For further discussion of the case, see Petter, *supra*, note 368 at 363-65.

[371] An example is *Re Shewchuk and Ricard*, 28 D L.R. (4th) 429, [1986] 4 W.W R 289, 2 B.C.L.R. (2d) 324, 1 R.F.L. (3d) 337, a case in which a man challenged legislation permitting affiliation and child-support orders against fathers, but not mothers, of illegitimate children. Ricard's lawyer argued that the statute violated s. 15 and sought to

arguments that have endorsed a formal vision of equality or have embraced an orthodox liberal dichotomy between public and private realms. It soon became clear that, unless Canadian judges moved decisively to reject this so-called neutral and principled approach to equality, it would soon become virtually impossible to argue that the *Charter* is designed to eliminate the social, economic, or legal causes of actual inequality. As one commentator pointed out,

> [t]his 'neutral' approach can easily be used to strike down the few benefits women have managed to receive from the modern welfare state. It could also be used to promote the one-way model of integration, which gives men all of the benefits of being men and all of the benefits of being women at the same time that it continues to deprive women of any of the benefits that men enjoy and, in addition, eliminates those few legal protections that women do receive qua women. In practice and impact, such a one-way model of equality is scarcely neutral, but we should not be surprised when judicial concepts of neutrality reflect the same bias in favour of men that permeates Canadian culture as a whole.[372]

Clearly, the early cases seemed to foreshadow the posing of a very harsh set of alternatives for women: either retain a few existing "benefits" at the expense of a paternalistic approach, or accept the same treatment as men, despite differing social and economic realities.[373]

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have it struck down. The Women's Legal Education and Action Fund (LEAF) intervened before the British Columbia Court of Appeal, but instead of attacking the assumption of formal equality on which the lawyer's argument was based, it voiced unqualified support for the view that all sexual distinctions in legislation should be treated alike. Paragraph 19 of the factum reads as follows: "Reference to the legislative history of ss. 15(1) and 28 confirms that their purpose is to put into effect strong and positive equality rights between the sexes rendering prima facie unconstitutional all distinctions based on sex. Thus all such distinctions should be unconstitutional unless justified according to the rigorous standards whether under s. 1 or otherwise." According to Petter, *supra*, note 368 at 362-63, LEAF embraced this formal vision of equality because it felt that it would weaken its credibility to argue that sexual equality rights should not be available to males.

[372] Lahey, *supra* note 338 at 82-83.

[373] As a result it was widely expected that the *Charter*, rather than promoting social equality, would legitimize the prevailing inequality of women and other disadvantaged groups. See, e.g., Petter, *supra*, note 368 at 367: "In the world of *Charter* litigation, such [disadvantaged] groups are permitted to succeed only if they play the game according to liberal rules - rules that are calculated to create divisions between elite and ordinary women

Andrews sets a new and very different direction for the interpretation of equality rights from that set by the lower courts in the first three years of equality rights legislation by moving towards a substantive view of equality. McIntyre J. rejected formulaic approaches to the equality guarantees in which constitutional violations are determined with reference to abstract or formal rules. Instead, he insisted that the interpretation of s. 15 must be informed by an appreciation and understanding of its social and historical purpose.[374]

The notion that equality means sameness of treatment was rejected:

> It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality.[375]

Colleen Sheppard has identified two fundamental problems with the traditional equation of equality with sameness of treatment and inequality with differential treatment. According to her, the traditional notion of equality is premised on a false and unfair assumption about social reality:

> To maintain that equality will be secured by treating all individuals the same requires that everyone be the same. Underlying this conception is an assumption that society is a conglomeration of undifferentiated, autonomous individuals. But no such illusory world exists. Moreover, the undifferentiated, autonomous individuals contemplated by the theory, upon closer scrutiny, have the characteristics of individuals in the dominant groups in society. Thus, the sameness ot treatment accorded women [homosexuals] is informed by the standards set by [heterosexual] men in response to male [heterosexual] interests and needs. To be equal, therefore, women [homosexuals] must adopt the ways of being and acting of the [heterosexual] men who dominate.... In short, in a diverse society, a sameness of treatment approach demands and rewards conformity to a norm defined in accordance

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and to translate short-term gains into long-term losses.... [E]ven when women's groups win under section 15, they lose."

[374] Sheppard, *supra*, note 27 at 211.

[375] *Andrews*, *supra*, note 22 at 10, McIntyre J.

with the characteristics of the members of dominant groups in society.[376]

A second fundamental problem with a definition of equality that is limited to sameness of treatment is that, in a diverse society and in a world of pervasive and severe inequalities, sameness of treatment, by not acknowledging disparate disadvantaging effects, can accentuate inequality.[377] In *Big M Drug Market* the question had arisen as to whether the *Charter* was a purpose-oriented instrument or an effects-oriented instrument.[378] Dickson C.J., writing for the majority of the Court, stated that in his view
"both purpose and effect are relevant in determining constitutionality." Either an "unconstitutional purpose or effect can invalidate legislation."[379] In her separate judgment Wilson J. took the approach that

> [the *Charter*] asks not whether the legislature has acted for a purpose that is within the scope of the authority of that tier of government but rather whether in so acting it has had the effect of violating an entrenched individual right. It is, in other words, first and foremost an effects-oriented

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[376] Sheppard, *supra*, note 27 at 212 with reference to C. Dalton, "Remarks on Personhood", American Association of Law Schools Panel, January 5, 1985. See also McCalla Vickers, *supra*, note 349 at 58: "Yet if we interpret equal treatment as identical treatment regardless of the different needs of individuals, few equality goals will be realized and most equality rights will exist simply on paper." Lahey, *supra*, note 338 at 83 suggests that Canadian judges move to adopt a theory of inequality, which is feminist in its methodology but which need not be applied only to cases involving sexual subordination. A theory of inequality would discard the norm of the white, middle-class, able-bodied (and heterosexual) male and would affirm the importance of all human beings, including women (and homosexuals).

[377] Hughes, *supra*, note 214 at 83-84 agrees with Sheppard and argues that a feminist approach to equality under the *Charter* requires that sections 15 and 28 be interpreted in accordance with the following postulates: (1) that equality in s. 15 be defined to include recognition of differences and not be defined solely to mean "same treatment"; (2) that "discrimination" in s. 15 be interpreted to refer to unintentional discrimination (discriminatory effect), as well as to intentional discrimination.

[378] See W.F. Pentney, "Interpreting the Charter: General Principles" in G.-A. Beaudoin & E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1989) at 32-34.

[379] *Supra*, note 277 at 331-32.

document.[380]

Thus, the decision accepted the principle that under the *Charter* effects may invalidate legislation. In *Andrews* this principle is applied to the equality provision. The Court recognized that a law or policy that is neutral on its face and treats everyone in the same way can still be discriminatory and violate the equality guarantees if it has a disparate disadvantaging impact on certain individuals or groups.[381] Contrary to the U.S. Supreme Court, which has limited violations of the equal protection clause to intentional or purposive discrimination,[382] it adopts an effects-based approach and thus gives s. 15 a broader scope

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[380] *Ibid.* at 360-62. On Wilson J.'s approach, see Hughes, *supra*, note 214 at 91.

[381] *Supra*, note 24 at 17: "It was held in that case, as well, that no intent was required as an element of discrimination, for it is in essence the impact of the discriminatory act or provision upon the person affected which is decisive in considering any complaint." (McIntyre J., referring to *Ontario Human Rights Commission and O'Malley* v. *Simpson's Sears Ltd* [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321 in which the Court held that a facially neutral policy requiring store employees to work on Saturdays had a discriminatory impact on the complainant, who was a Seventh Day Adventist). For a detailed discussion of the question of whether s. 15 should be activated by a showing of nothing more than disparate impact on a group sharing a particular characteristic, see W. Black, "Intent or Effects: Section 15 of the Charter of Rights and Freedoms" in J.M. Weiler & R.M. Elliot, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986) 120. Black reviews the arguments that have been advanced in favour of imposing a requirement of intention in s. 15 cases, as well as the responses and counterarguments thereto. In his view, the major argument in favour of imposing such a requirement is that, unless we do, s. 15 will "reflect a theory of equality that, as a society, we have not accepted" (at 131).

[382] The origin of the doctrine of systemic discrimination can be found in *Griggs* v. *Duke Power Co.* (401 U.S. 424, 28 2Ed. 125 (1970)), a case concerning employment discrimination and a civil rights statute. Burger C.J. stated at 432 that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as built-in head-winds for minority groups". Lower courts began applying this doctrine to the equal protection clause of the Fourteenth Amendment, but the life span of a constitutional systemic discrimination doctrine in the United States was short. The death blow came with *Washington* v. *Davis*, 426 U.S. 229 (1976), where the U.S. Supreme Court stated (at 242): "A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and the average black than to the affluent white." For more details, see D. Mossop, "A Discussion of Systemic Discrimination in a Constitutional

than the U.S. courts have given to the equal protection clause of the Fourteenth Amendment:[383]

> To approach the ideal of full equality before and under the law ... the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another.[384]

The rejection of "equality as sameness of treatment" and the acceptance of an effects-based approach strongly orient s. 15 in the direction of ensuring that the legal and governmental system does not exacerbate societal disadvantaging of persistently disadvantaged groups, rather than in the direction of protecting against isolated incidents of arbitrary treatment of individuals who generally receive their fare share from the system.[385]

Forum" (1986) 44 Advocate 369. At 370 he says: "The Supreme Court fell for the floodgate argument. If we let all the water out, we will drown. However, if we keep the gates closed, we will all keep ourselves dry. The reality is that minorities also do not want to drown.... The High Court of the Americas failed to see the possibility - no, the need - for a middle ground."

[383] American commentators have suggested that the goal of equal results for groups is simply not one that their country wishes to achieve, except in a narrow range of circumstances. See Black, *supra*, note 381 at 132, referring to Bennett, "Mere Rationality in Constitutional Law: Judicial Review and Democratic Theory" (1979) 67 Calif. L.R. 1049 at 1076-77. In contrast, a test of equality that ignored unequal impact could not be justified in terms of prevailing Canadian conceptions of equality. See Black, *ibid.*

[384] *Andrews*, *supra*, note 24 at 11, McIntyre J.

[385] Black & Smith, *supra*, note 243 at 614. See also Black & Smith, "Section 15 Equality Rights Under the Charter. Meaning, Institutional Constraints and a Possible Test" in G.-A. Beaudoin, ed., *Your Clients and the Charter - Liberty and Equality* (Cowansville, Qué.: Yvon Blais, 1988) 225 at 240. The authors point out that an underlying purpose is to take account of the interests of groups as well as individuals: "In this respect, the Canadian and American paradigms may depart significantly. There is no doubt that persistent disadvantage is associated with certain groups. Section 15 specifically incorporates a comparison in terms of group characteristics, for it includes an enumeration of grounds of discrimination. In our opinion, it also incorporates a group perspective in a broader sense that reflects concern for the welfare of the group as a whole." As R. Elliot, "The Supreme Court of Canada and

According to the Court, the purpose of s. 15 is

> to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component.... It must be recognized, however, as well that the promotion of equality under section 15 has a much more specific goal than the mere elimination of distinctions. If the Charter was intended to eliminate all distinctions, then there would be no place for sections such as s. 27 (multicultural heritage); s. 2(a) (freedom of conscience and religion); s. 25 (aboriginal rights and freedoms); and other such provisions designed to safeguard certain distinctions. Moreover, the fact that identical treatment may frequently produce serious inequality is recognized in s. 15(2), which states that the equality rights in s. 15(1) do "not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups.[386]

Wilson J. expressly stated that s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society.[387]

Thus, it was acknowledged that disadvantage is a concept relevant to s. 15. Section 15 is not simply about dissimilarity in treatment between individuals or groups.[388]

Section 1 - the Erosion of the Common Front" (1987) 12 Queen's L.J. 277, has pointed out (at 281), the U.S. tradition is imbued with the profound concern of classic liberalism for protecting the individual against the state. The individual and the state are seen as protagonists. Rights inhere in the individual and are enforced against the state. Canada also has a strong tradition of liberalism. But it has other traditions too, traditions which distinguish its society markedly from that of the United States. Elliot has referred to Canada's strong collectivist tradition, in which the individual is seen as a member of the community and the state is viewed as an agency which mediates between the interests of various groups within society, and by which the goals of the collectivity are advanced. See also B. McLachlin, "The Charter of Rights and Freedoms: A Judicial Perspective" (1989) 23 U.B.C. L.R. 579 at 581-82.

[386] *Supra*, note 24 at 15-16, McIntyre J.

[387] *Ibid.* at 34, Wilson J.

[388] That a primary purpose of the equality rights provisions is to eliminate or reduce conditions of disadvantage had been pointed out by Black & Smith, *supra*, note 385 at 239.

d. **Conclusion**

As pointed out above, the Court has found that sameness and difference are not the compelling determinants of equality. Several important implications flow from the rejection of a sameness standard.[389] Most important for homosexuals is that, to make an argument for equal protection, they will not be required to claim that they are the same as heterosexuals, that homosexuals have the same goals and purposes, and vow to structure their lives similarly. The Canadian approach means that homosexuals' differences from heterosexuals must be accomodated to secure equality of outcome.

In the United States the situation is different. There equality remains quite strictly understood in a fair play / equality of opportunity mode that emphasizes sameness of treatment regardless of the different needs or severity of disadvantage of equality-seekers. The judiciary is deeply invested in viewing itself as neutral and non-interventionist. Homosexuals in the United States have often pointed out that "[t]he very standard for equal protection is that people who are similarly situated must be treated equally."[390] To gain, e.g., the right to marry, they must compare themselves to married couples.[391] It is also

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[389] See Sheppard, *supra*, note 27 at 214-18: First, once it is acknowledged that an apparently neutral law or policy can have a disparate impact on certain groups, it becomes clear that affermative or positive action is needed to redress systemic and institutionalized discriminatory policies and practices. Second, recognition of effects-based discrimination may lead towards a more "positive" rights approach to s. 15, for central to the acknowledgement of effects-based discrimination is the requirement of positive remedial action.

[390] See P.L. Ettelbrick, *supra*, note 210 at 15.

[391] Many homosexuals in the United States are terrified by the thought of emphasizing their sameness to married heterosexuals in order to obtain the right to marry. They believe that until the Constitution is interpreted to respect and encourage differences, pursuing the legalization of same-sex marriage would be leading the gay and lesbian movement into a trap; it would be demanding access to the very institution which, in its current form, would undermine the movement to recognize many different kinds of relationships. See Ettelbrick, *supra*, note 210 at 15-16: "The thought of emphasizing our sameness to married heterosexuals in order to obtain this right terrifies me. It rips away the very heart and soul of what I believe it is to be a lesbian in this world. It robs me of the opportunity to make a difference. We end up mimicking all that is bad about the institution of marriage in our effort to appear to be the same as straight couples. By looking to our sameness and

unlikely that the judiciary, understanding its role to be a limited one, will depart from the notion that the equal protection promised by the Fourteenth Amendment means ensuring that the similarly situated are treated alike by government.

Equally important for homosexuals in Canada is the adoption of an effects-based approach. In the federal government's discussion paper on equality rights, the government had stated that "[d]istinctions on the basis of sexual orientation are not made on the face of any federal legislation,"[392] thus denying the existence of facial discrimination and ignoring all the policies, practices, and legislative provisions that, while not perhaps referring explicitly to homosexuals, certainly have an adverse impact on them. The recognition that facially neutral laws or policies can still be discriminatory is, therefore, a big step forward in homosexuals' fight for equal rights. For example, immigration policies that frequently prevent lesbians or gay men from being able to bring their partners into the country, although they do not intentionally discriminate against homosexuals, could still be held unconstitutional for having an adverse impact on them.[393] Again, the situation in the United States is different in this respect.

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deemphasizing our differences, we don't even place ourselves in a position of power that would allow us to transform marriage from an institution that emphasizes property and state regulation of relationships to an institution which recognizes one of many types of valid and respected relationships."

[392] *Supra*, note 228 at 63.

[393] On immigration policy, see, e.g., S.E. Lundy, "I Do But I Can't: Immigration Policy and Gay Domestic Relationships" (1986) 5 Yale Law & Policy Review 185; P. Girard, "From Subversion to Liberation: Homosexuals and the Immigration Act 1952-1977" (1987) 2 CJLS/RCDS 1.

Chapter 3. **Rejection of the "Similarly Situated" Test**

a. **Introduction**

A further, general implication of the rejection of the equality as sameness approach is the necessary abandonment of a straightforward rule-based approach to constitutional equality. As has been pointed out,[394] one cannot simply conclude

> that inequality exists where individuals from disadvantaged groups are being treated differently. It depends on the circumstances.... Differential treatment does not necessarily produce inequality. Sameness of treatment does not necessarily generate equality. When, then, is it permissible to treat people differently and when is it not?

To resolve this question, McIntyre J. rejected the "similarly situated" test, which is a restatement of the Aristotelian principle of formal equality, and stated that instead

> [c]onsideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application. The issues which will arise from case to case are such that it would be wrong to attempt to confine these considerations within such a fixed and limited formula.[395]

This chapter first outlines the "similarly situated" test. The second part is dedicated to a critique of the test. It argues that even the "improved similarly situated" test as applied by a number of Canadian courts is seriously deficient. An analysis of *Andrews* v. *Ontario Ministry of Health*,[396] where the Ontario High Court of Justice held that homosexual

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[394] Sheppard, *supra*, note 27 at 217.

[395] *Andrews*, *supra*, note 24 at 13, McIntyre J.

[396] 49 D.L.R. (4th) 584 [hereinafter *Karen Andrews*].

couples were not similarly situated to heterosexual couples, serves to demonstrate this. The chapter concludes that the abandonment of the test is promising for gay men and lesbians, as it means that their arguments will no longer be confined to establishing that they are similarly situated to heterosexuals.

b. **The "Similarly Situated" Test**

Canadian courts have long incorporated a question about whether "similarly situated" people are being treated similarly into their analysis of equality claims. The statement of this old test for equality rights most often referred to is in an early Ontario case, *Re McDonald and R.*, in which Morden J. of the Ontario Court of Appeal said:

> It can reasonably be said, in broad terms that the purpose of s. 15 is to require that those who are similarly situated be treated similarly.[397]

This thesis was restated by him in a later decision in the case of *R.* v. *R.L.*:

> The basic nature of the right or rights conferred by s. 15 requires some examination. The essentially relational nature of equality has been described as follows. The concept of equality is, by definition, relational or comparative. A person can only be found to be equal in relation to or in comparison with some other person who serves as a standard or

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[397] (1985), 51 O.R. (2d) 745 at 765, Morden J. quoting Tussman and tenBroek, "The Equal Protection of the Laws" (1948) 37 Cal. L.R. 341 at 344. In the *McDonald* case, a young man wished to be tried in youth court rather than in an ordinary court of criminal jurisdiction. He would have been entitled to be tried in youth court if the allegation had been either that he committed an offence after April 1985 or that the offence had been committed and the trial held in any of four provinces other than Ontario. Applying its test to the case, the Court decided that the accused was not similarly situated to others who had been charged with committing offences at an earlier time, but did seem to conclude that he was similarly situated to others who had allegedly committed offences at the same time as him but in other provinces. No explanation was given why young offenders are similarly situated despite geographical location, but not despite the date of the alleged offence.

criterion.[398]

The "similarly situated" test has been applied in many subsequent decisions of the Ontario Court of Appeal.[399] As summarized in *R.* v. *Ertel*, the test for determining whether there has been a contravention of s. 15 is a three-step one:[400]

(1) Step One

In view of what Morden J.A. described as the "essentially relational nature of equality" in *R.* v. *R.L.*, it is necessary, as a first step in the analysis of a s. 15 challenge, to make comparisons and to identify the class or classes of persons who are said to be treated differently.

(2) Step Two

The next step in a s. 15 analysis is to determine whether these classes are "similarly

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[398] (1986), 14 O.A.C. 318 at 324, 28 C.C.C. (3d) 417 at 424-25, quoting M.H. Freedman, "Equality in the Administration of Criminal Justice" (1967) 9 Nomos 250 at 253-54.

[399] *Reference re Act to Amend Education Act* (1986), 25 D.L.R. (4th) 1, 53 O.R. (2d) 513, 23 C.R.R. 193 (Ont. C.A.), Howland C.J.O. and Robins J.A. (dissenting), aff'd on other grounds (1987), 77 N.R. 241 (S.C.C.); *Bregman* v. *Attorney General for Canada* (1986), 33 D.L.R. (4th) 477, 57 O.R. (2d) 409 (Ont. C.A.); *R.* v. *Century 21 Ramos Realty Inc. and Ramos* (1987), 58 O.R. (2d) 737, 19 O.A.C. 25, 32 C.C.C. (3d) 353 (Ont. C.A.); *R.* v. *Ertel* (1987), 20 O.A.C. 257 (Ont. C.A.). For a discussion of many of these cases see C.F. Beckton, *supra*, note 228 at 282-85. For an early critique of the test see, however, the Alberta Court of Appeal in *Mahe et al.* v. *The Queen* (1988) 80 A.R. 161. After pointing out that the test was not very helpful, the Court outlined its approach to s. 15 as follows (at 185): "I say that the key to s. 15 is the kind of distinction made, not the mere fact of distinction. Dworkin says, for example, that the idea of equality is not merely that people be treated equally, but that they be treated with equal respect. See Ronald Dworkin, "Taking Rights Seriously" (1977). Tarnopolsky says that the underlying ideal is to avoid invidious discrimination, by which he means distinctions which are offensive to generally accepted standards of human dignity.... Certainly the list of offending acts offered in s. 15 have in common that Canadian society accepts that, as a criteria for distinction, they prima facie offer no rational basis for distinction and have historically been examples of invidious discrimination."

[400] As has been pointed out by Brodsky & Day, *supra*, note 291 at 152, only the first two steps set out the "similarly situated" test. The third step interprets the phrase "without discrimination" in s. 15.

situated". The importance of the rule that "those who are similarly situated be treated similarly" is that, if the classes identified are not similarly situated, it would seem that there can be no violation of s. 15.

(3) Step Three

The third step of the s. 15 analysis is to determine whether differential treatment constitutes discrimination within the meaning of s. 15.

c. Critique of the "Similarly Situated" Test

McIntyre J. called this test "seriously deficient".[401] He considered it too mechanical and rigid to handle the true complexity of equality. According to him, the "similarly situated" test is a mechanism for defining away rather than addressing problems of inequality. One need simply define two groups as not similarly situated to justify treating them differently and unequally. He pointed out that a "similarly situated" test focusing on the equal application of the law to those to whom it has application could lead to results similar to those in *Bliss*[402] and could even justify the Nuremberg laws of Adolf Hitler as long as all Jews were treated similarly.[403] For all these reasons, McIntyre J. concluded that

> the test cannot be accepted as a fixed rule or formula for the resolution of equality questions arising under the *Charter*. Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application.[404]

It has to be pointed out, however, that contrary to McIntyre J.'s concern that the "similarly situated" test does not include analysis of a law's purpose or content, it appears that it

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[401] *Andrews*, *supra*, note 24 at 11.

[402] *Bliss*, *supra*, note 214.

[403] *Andrews*, *supra*, note 24 at 11-12, McIntyre J.

[404] *Andrews*, *supra*, note 24 at 13, McIntyre, J.

sometimes does. For Tussman and tenBroek,

> [a] reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law.[405]

To constitute a reasonable classification pursuant to the "similarly situated" test, therefore, the legislative classification must include all those similarly situated with respect to the purpose of the law.[406] This has also been acknowledged by Canadian courts, which have in later cases elaborated on the meaning of "similarly situated", saying that equality is an essentially relational concept and that "[t]he concern for equality is that those who are similarly situated with respect to the purpose of the law be treated similarly."[407]

In *R.* v. *Century 21 Ramos Realty Inc.* the Court pointed out that it is not always clear whether persons are or are not similarly situated, and whether, even if they are not, this is relevant to a s. 15 inquiry. It stated the following:

> It is necessary to be cautious in this classification. It is usually possible to find differences between classes of persons and, on the basis of these differences, conclude that the persons are not similarly situated. However, what are perceived to be significant differences between persons or classes of persons could be the result of stereotypes based on existing inequalities which the equality provisions of the *Charter* are designed to eliminate, not perpetuate.... [T]he determination of whether persons are similarly situated must also consider the relevance of the differences and, thus, the question ought to be whether the differences among those being treated differently

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[405] J.S. Tussman & J. tenBroek, *supra*, note 397 at 346.

[406] W. Black & L. Smith, *supra*, note 243 at 600-601 have pointed out that it is true that the test allows almost any legislation if there are no restrictions on what counts as "similarly situated" or "differently situated" - if, for example, it is permissible to count Jews as "different". But the strength of the Tussman and tenBroek article is precisely that the authors identified this flaw and attempted to correct it by requiring that the distinction be relevant to achieving the purposes of the law under challenge and that those purposes themselves be legitimate.

[407] *R.* v. *R.L.*, *supra*, note 398 at 424-25 (C.C.C.).

> by the legislation in question are relevant for the purposes of that legislation.[408]

This addition gives some guidance as to the relevant criteria for assessing similarity and difference. They are to be found in the purposes of the legislation in question. And yet, as Colleen Sheppard points out,[409] this does not render the improved "similarly situated" test unproblematic. In particular, the definition of a law's purpose can always be formulated so as to correspond rationally to the legislative classification. Moreover, differential treatment is still understood as a violation of equality; it is simply justified as reasonable in certain circumstances.[410] As has been pointed out,

> [t]he problem with a singularly distinction-based theory of equality is that it does not call into question acts of official oppression per se. It only serves as a basis to challenge oppressive treatment if someone else is seen to be unfairly favoured. The argument one is forced to make is according to the formal model: "You can only target group X, if you include group Y, because group Y is similarly situated." It does not allow an argument along the lines: "It is time you left X alone, because you have abetted her oppression for too long and now you have gone too far." The basic premise of the formal argument is that the government can oppress X as long as it oppresses Y as well. The premise of the alternative argument is that the government cannot act deliberately or recklessly to undermine the basic dignity of any group.[411]

Therefore, the "similarly situated" test appears at best to be incomplete.

An example of the deficiencies of the test is the decision of the Ontario High Court of Justice in *Karen Andrews*.[412] Adopting the old three-step system of analyzing alleged

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[408] *Regina* v. *Century 21 Ramos Realty*, *supra*, note 399 at 756-57.

[409] *Supra*, note 27 at 220.

[410] According to the liberal theories of equality, the essence of discrimination is irrational or unfair distinction. See A. Bajefsky, *supra*, note 70 at 1.

[411] MacLauchlan, *supra*, note 239 at 229.

[412] *Supra*, note 396. See also Herman, *supra*, note 136. Karen Andrews applied for Ontario Hospital Insurance Plan (OHIP) coverage. She requested that OHIP provide the

contraventions of s. 15 of the *Charter*, the Court held that homosexual couples are not similarly situated to heterosexual couples in that they do not procreate and raise children:

> [Heterosexual couples] marry or are potential marriage partners and most importantly they have legal obligations to support for their children whether born in wedlock or out and for their spouses pursuant to the *Family Law Act, 1986*, S.O. 1986, c. 4, ss. 30, 31, 32, 33. A same-sex partner does not and cannot have these obligations.[413]

Therefore, the Court concluded, refusing the applicants' inclusion in the dependents category under the *Act* was not discriminatory. Nevertheless, McRae J. further held that

> the refusal by the statutes and regulations to confer dependent status would be justified under s. 1 of the *Charter*.[414]

To determine whether the regulations in the *Health Insurance Act* offended s. 15(1) of the *Charter*, McRae J. adopted the three-step analysis. He held that "homosexual couples" could be classified as a distinct class in that such couples are required to pay the single premium

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same dependent coverage to herself and her lesbian partner as is provided to heterosexual couples. Karen Andrews and Mary Trenholm had lived together in a lesbian relationship for nine years. Trenholm's two teenage children lived with them. Andrews was employed by the Toronto Public Library Board. The Board was willing to pay dependent coverage for the applicant T.'s children, but the Ontario Hospital Insurance Commission refused to provide dependent coverage for homosexual couples. The Commission relied upon R.R.O. 1980, Reg. 452, s. 1 (c) under the *Health Insurance Act*, which defines dependent to include "the spouse of an insured person". The Commission interpreted "spouse" as meaning a person of the opposite sex. The applicants sought a declaration that spouse includes a same-sex partner and that exclusion of homosexual couples from dependent coverage violates s. 15 of the *Canadian Charter*.
The Court did not agree with the applicants' interpretation of the word "spouse", pointing out that numerous statutes in Ontario define spouse as someone of the opposite sex.
Recently under OHIP a new system of benefits has been put in place.
For other decisions that illustrate how difficult it is for a disadvantaged group, like mentally disabled persons, to break out of their assigned place under the "similarly situated" test, see *supra*, note 291 at 161-65.

[413] *Ibid.* at 589.

[414] *Ibid.* at 591.

under OHIP, whereas heterosexual couples benefit from the dependent rate.[415] The second step consisted of determining whether this "distinct class" is actually similarly situated to some other class in relation to the purpose of the law. Karen Andrews and Mary Trenholm attempted to demonstrate that their intimate relationship is qualitatively no different from that of the paradigmatic heterosexual couple. For example, Karen Andrews argued that she and her partner

> regard themselves and hold themselves out to the community as each other's spouse and intend to continue to live together as each other's spouse. Andrews and Trenholm are each other's sole domestic and sexual partners, own their home as joint tenants, have their assets in a joint bank account and have named each other as beneficiary under their wills.[416]

As Herman has pointed out,[417] the description of the relationship remarkably resembles that of the traditional family form, or at least its ideal.[418] However, few decision-makers have accepted the analogy.

McRae J. held that homosexual couples are not similarly situated to heterosexual couples biologically or legally: the two groups have different legal rights and obligations, he found, and they also differ in their apparent physical ability to engage in species reproduction. He relied on the history of lesbian and gay oppression to justify denying them equality.[419] In particular, he seemed to think that lesbian and gay partners could never have parental

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[415] McRae J. ignored the gendered nature of the claim and subsumed lesbian existence under the rubric of homosexuality by consistently identifying the relationship between Ms. Andrews and Ms. Trenholm as "homosexual". See M. Eaton & C. Peterson, "Comment: *Andrews* v. *Ontario (Minister of Health)* (1987/88) 2 CJWL 416 at 418-19.

[416] *Karen Andrews, supra*, note 396, Applicants Factum to the Supreme Court of Ontario, at 3.

[417] *Supra*, note 136 at n.26.

[418] See M. Eichler's discussion of the definition of family in *Families in Canada Today: Recent Changes and Their Policy Consequences* (Toronto: Gage Educational Publishing, 1988) at 3-9.

[419] *Supra*, note 415 at 419.

obligations.[420] In summary, McRae J. found that Karen Andrews and Mary Trenholm were like single people and that they were being treated the same as single people. In other words,[421] the Court found that Karen Andrews and her partner were not like heterosexuals because they had not been treated like heterosexuals by the law. Therefore they could not gain access to the benefit of s. 15. The circularity of this argument is evident. But it also illustrates the fundamental falseness and perversity of the "similarly situated" test:

> First, the test does not help the court get at the truth. It does not encourage the court to ask whether there is a problem of longstanding disadvantage or prejudice inherent in the circumstances. It does not lead the court to explore the full social dimensions of the case, or even to grapple fully with the facts. Rather, it encourages the court to concentrate on superficial comparisons with other classes.
> Second, disadvantaged groups typically do not have recognition in law, or status, or access to power. As this decision shows, a disadvantaged group like lesbians can be found not to be similarly situated precisely because it does not enjoy these advantages. The disadvantaged are disadvantaged. Because they are disadvantaged, they are found not to be similarly situated with those to whom they are compared. Consequently, their disadvantage is perpetuated, and the court, by its decision, sanctions and legitimizes continuing discrimination.[422]

Thus, the mere use of the "similarly situated" test virtually guaranteed that the application of s. 15(1) in this case would not produce substantive equality:

> Ms. Andrews and Ms. Trenholm personified the idealized nuclear family except for the fact that they were lesbians yet even they could not satisfy this test. The only way in which they could have succeeded would have been if they were heterosexual, which means that they could not have succeeded: The ultimate absurdity of this reasoning is that if they had been heterosexual, of course, they would not have had to have brought this equality claim.[423]

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[420] *Karen Andrews*, *supra*, note 396 at 589.

[421] See *supra*, note 291 at 160.

[422] *Ibid.* at 161.

[423] *Supra*, note 415 at 419-20.

d. **Conclusion**

The "similarly situated" test, founded as it is on formal equality theory, does not assist the courts in breaking out of the entrenched patterns of thinking that have justified discrimination against gay men and lesbians. The test

> does not allow the court to acknowledge and address entrenched disadvantage. On the contrary, it confirms and permits the continuation of the patterns of discrimination precisely because these groups are not like able-bodied heterosexual males.[424]

Its abandonment by the Supreme Court of Canada, therefore, has important implications for the protection of equality for gays and lesbians under the Charter. In short, it allows them to make new and more powerful arguments.

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[424] *Supra*, note 291 at 164-65.

Chapter 4. **Section 1 of the *Charter of Rights and Freedoms***

a. **Introduction**

The inquiry into the reasonableness of a law under s. 15 was rejected by the Supreme Court, which was unwilling to adopt the U.S. model where different "standards of scrutiny" are applied to the different classes of interests recognized under equal protection clauses. Nevertheless, it would be wrong to assume that the essence of the reasonableness inquiry disappears from equality analysis under the *Charter*. According to McIntyre J., such an analysis properly belongs under s. 1[425] of the *Charter*, under which the reasonableness of the legislation will be examined.[426] Section 1 guarantees the rights and freedoms set out in the *Charter*, but makes clear that they are not absolutes: they are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Wherever a legislative distinction burdens one group at the expense of another such that s. 15 is violated, the s. 1 analysis will have to confront the question of whether there are

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[425] The limitation clause follows the pattern of the *International Covenant on Civil and Political Rights*, to which Canada became a signatory in 1976, and the *European Convention on Human Rights*. These instruments qualify the declared rights with limitation clauses similar to s. 1 of the *Charter*.
In the October 1980 version of the *Charter*, s. 1 read as follows:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.

This version of s. 1 attracted a great deal of criticism, and it was amended to its present form in the April 1981 version of the *Charter*. Each of the changes that were made tended to narrow the limitation clause and to broaden the guarantees. Regarding the debate about what limits could be placed by Parliament on the rights that found their way into the *Charter*, see generally R. Romanow, J. Whyte & H. Leeson, *Canada - - Notwithstanding: The Making of the Constitution, 1976-1982* (Toronto: Carswell/Methuen, 1984).

[426] The Supreme Court made it clear in *Andrews*, *supra*, note 24 at 23-24, and reinforced the point in *Turpin*, *supra*, note 25 at 32, that the equality rights are to be defined, and the existence of violations assessed, at the s. 15 stage and without regard to potential justificatory factors - those come into play only at the s. 1 stage.

differences between these two groups that would justify the different treatment.

In the absence of anything equivalent to the s. 1 limit, under the *Canadian Bill of Rights* a test was developed to distinguish between justified and unjustified legislative distinctions within the concept of equality before the law itself.[427] Also the Fourteenth Amendment to the U.S. Constitution, which provides that no state shall deny to any person within its jurisdiction the "equal protection of the laws", contains no limiting provision similar to s. 1 of the *Charter*. As a result, judicial consideration has led to the development of varying standards of scrutiny of alleged violations of the equal protection provision that restrict or limit the equality guarantee within the concept of equal protection itself.[428]

The distinguishing feature of the *Charter* is that consideration of factors limiting the equality guarantee is made under s. 1:

> [W]hen confronted with a problem under the *Charter*, the first question which must be answered will be whether or not an infringement of a guaranteed right has occurred. Any justification of an infringement which is found to have occurred must be made, if at all, under the broad provisions of s. 1.[429]

For this reason U.S. attempts to impose limitations in the context of defining an otherwise absolute concept of equal protection of the laws are non-transferable to the *Canadian Charter*. It also appears to lay to rest any concerns that certain of the enumerated grounds in s. 15, such as age discrimination or physical disability, would give rise to a lower level of

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[427] While the *Canadian Bill of Rights* contains no limitation clause comparable to s. 1 of the *Charter*, the courts have not interpreted the guarantees of the *Canadian Bill of Rights* as absolutes. See *Andrews*, *supra*, note 24 at 20, with reference to *MacKay* v. *The Queen* (1980), 114 D.L.R. (3d) 393 at 423, 54 C.C.C. (2d) 129, [1980] 2 S.C.R. 370 at 407, where it is said: "... and whether it is a necessary departure from the general principle of universal application of the law for the attainment of some necessary and desirable social objective. Inequalities created for such purposes may well be acceptable under the *Canadian Bill of Rights*."

[428] For details see *supra*, notes 67-89.

[429] *Andrews*, *supra*, note 24 at 21, McIntyre J.

judicial scrutiny.[430] Section 1 of the *Charter* provides Canadian courts with a better means of dealing with the problem of justifiable distinctions. It permits limits rather than rights to be ranked in importance. This is much more realistic and fair:

> Instead of requiring courts to decide whether racial equality is more important than sexual equality for all purposes, for example, s. 1 asks them merely to determine whether a particular limit on equality is, in the circumstances, a 'reasonable limit ... in a free and democratic society'. It allows all forms of equality rights to be treated equally in Canada.[431]

However, there are striking similarities between the test outlined by Tussman and tenBroek

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[430] See W.F. Flanagan, "Equality Rights for People with AIDS: Mandatory Reporting of HIV Infection and Contact Tracing" (1989) 34 McGill L.J. 530 at 581 n.202: the issue was considered by the Ontario Court of Appeal in *McKinney* v. *University of Guelph* (1987), 24 O.A.C. 245, a case dealing with age discrimination under s. 15. The Court of Appeal held that unlike U.S. law, different standards of review ought not to be applied to the different classes of interest under s. 15 and expressly disapproved of the lower court's finding that age discrimination, because it is not typically based on feelings of "hostility and intolerance", should be viewed "less suspiciously". Noting that a "particular instance of age or sex discrimination may be massively more hurtful or immeasurably less justifiable than a particular instance of racial inequality", the Court held that all violations of s. 15 should be equally examined under s. 1. Rather than ranking the importance of the class of interest affected, the Court focused on the impact of the violation on the affected class. If this impact was severe, a closer judicial review was warranted.
Concern that the reasonableness language in s. 1 would leave the courts with too much discretion also led to the proposal that certain grounds, including sex, should never be considered reasonable bases of distinction. As Hughes, *supra*, note 214 at 79 points out, it was evident that these witnesses before the Joint Committee were worried that the U.S. standard of rational basis or intermediate scrutiny would be applied to sex discrimination if it were not explicit that a more rigorous standard of review is to be applied. According to Hughes, *ibid.*, the Supreme Court has since alleviated the fear that U.S. jurisprudence will be imported uncritically into *Charter* cases, since, although willing to examine U.S. caselaw along with that of other countries, it has embarked on a 'made in Canada' approach to interpretation. The Court has shown that it will be open to consideration of cases in the context of Canadian political, social and economic conditions.
See also Elliott, *supra*, note 249 at 247 n.77: "One thing which seems clear, at least at present, is that neither group in the Court was contemplating variable levels of judicial scrutiny, based on the nature of the discriminatory criterion, as in American law. Ironically though, two of the American criteria for determining "suspect classifications" subject to strict scrutiny ("discrete and insular minorities" and "immutable characteristics") are being adopted by our Court to determine analogous categories of discrimination in section 15(1)."

[431] See Gibson, *supra*, note 365 at 129.

and the test articulated for interpreting s. 1 in *Oakes*[432].

This chapter first discusses the *Oakes* test and the tests used by the Supreme Court in subsequent *Charter* cases. It then analyses the different approaches to s. 1, at the heart of which are differences concerning the nature and value of constitutional rights and the role of the courts vis-à-vis the legislative process. It argues that these different approaches to s 1 and the different attitudes toward the interpretation of *Charter* rights matter more than a more or less professed adherence to the *Oakes* test. It concludes that there will never be one single or one right approach to s. 1 interpretation and suggests that in cases involving issues close to the core of human-rights concerns, the standard used should be particularly rigorous. If instead a lower standard were accepted in s. 15 litigation, the definition of equality contained in the cases decided under the *Canadian Bill of Rights* and rejected in *Andrews* would be reintroduced.

b. The *Oakes* Test

In *Oakes*, Dickson C.J., speaking for himself and four other members of a seven-member panel, constructed a model for s. 1, relying on what he called "two contextual considerations" regarding its interpretation. The first is that "any s. 1 inquiry must be premised on the understanding that the impugned limit violates constitutional rights and freedoms."[433] He quoted Wilson J.'s judgment in *Singh* to the effect that the courts are to conduct the inquiry into limits on rights "in light of a commitment to uphold the rights and freedoms set out in the other sections of the *Charter*."[434] The second contextual element of interpretation of s. 1 is provided by the words "free and democratic society":

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[432] *Supra*, note 29.

[433] *Ibid.* at 225.

[434] *Singh* v. *Minister of Employment and Immigration*, (1985) 1 S.C.R. 177 at 218, 17 D.L.R. (4th) 422, 58 N.R. 1, 12 Admin. L.R. 137, 14 C.R.R. 13.

> Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society.[435]

These values, which include respect for the inherent dignity of the human person, commitment to social justice and equality, accomodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society,[436] are said to be "the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified."[437]

Dickson C.J. continued:

> The rights and freedoms guaranteed by the *Charter* are not, however, absolute It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, s. 1 provides criteria of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society.[438]

He then proceeded to treat questions of onus, standard of proof and evidence. The onus of

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[435] *Supra*, note 29 at 225.

[436] *Ibid.*

[437] *Ibid.* According to L. Eisenstat Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988) 10 Supreme Court L.R. 469 at 494, this passage emphasizes the particular nature of the *Charter*'s standard of justification for limits afforded in s. 1: "The courts are to forward an ideal of political ordering, one that reflects the very purpose for which rights were entrenched, even as they entertain arguments to justify limits upon those rights. The judicial task is to monitor adherence by Canadian governments to their constitutional commitment to freedom and democracy in the second stage of *Charter* argument, just as in the first, because the exclusive standard set for limits on enumerated rights and freedoms forwards the same values as does their entrenchment."

[438] *Supra*, note 29 at 225.

establishing the justification of a limit on a right is borne by the party seeking to uphold it.[439] The standard of proof under s. 1 is the civil standard. The proponent of the offending measure must establish its justification by a preponderance of probability, applied rigorously.[440] In most cases evidence will be required "to prove the constituent elements of a s. 1 inquiry."[441] Such evidence must be "cogent and persuasive and make clear to the court the consequences of imposing or not imposing the limit."[442] And evidence about alternative means of implementing the government's objectives should be made available. As one commentator put it, the call is for justification rather than excuse or explanation:

> Simplistic resort to statistics or history to show that the impugned policy is a "good thing" or comparison to other jurisdictions to show that it occurs elsewhere, without principled argument as to the values being forwarded, might not meet the requisite standards.[443]

Dickson C.J. then said that the following framework of analysis should be applied in assessing the reasonableness of limitation on *Charter* rights:

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R.* v. *Big M Drug Mart Ltd.*, supra at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
> Second, once a sufficiently significant objective is recognized, the party invoking s. 1 must show that the means chosen are reasonable and

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[439] *Ibid.*

[440] *Ibid.* at 226.

[441] *Ibid.*

[442] *Ibid.* at 227.

[443] Eisenstat Weinrib, *supra*, note 437 at 498.

> demonstrably justified. This involves "a form of proportionality test": *R.* v. *Big M Drug Mart Ltd.*, supra at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in the first sense, should impair "as little as possible" the right or freedom in question: *R.* v. *Big M Drug Mart Ltd.*, supra at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of sufficient importance.[444]

Oakes remains the only case in which anyone on the Court has attempted to articulate a comprehensive analytical framework for s. 1. The case has been called the watershed case as far as the Supreme Court's approach to s. 1 is concerned.[445] Prior to *Oakes*, the Court's approach to s. 1 was relatively uniform.[446] The early cases share a number of common features: in none of them was the government successfull in its attempt to justify its legislation, and in all of them the Court was unanimous in rejecting that attempt. Still another common feature is

> the reluctance on the part of the Court in any of them to commit itself to a comprehensive framework for s. 1 that would be applicable in all cases: each case is dealt with very much on its own.... [W]hat is striking about these cases

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[444] *Supra*, note 29 at 227.

[445] See R.M. Elliot, "The Supreme Court of Canada and Section 1 - The Erosion of the Common Front" (1987) 12 Queen's L.J. 277 at 313.

[446] In his discussion of the Supreme Court's approach to s. 1 Elliot has organized the cases in which the Supreme Court has examined s. 1 into three groups. The first group comprises the cases decided prior to *Oakes*, the second *Oakes* itself, and the third the cases decided after *Oakes*. The pre-*Oakes* cases include *A.-G. of Quebec* v. *Quebec Association of Protestant School Boards* (1984), [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321; *Hunter* v. *Southam Inc.*, *supra*, note 353; *Singh* v. *Minister of Employment and Immigration*, *supra*, note 434; *Big M Drug Mart*, *supra*, note 277; *Reference re Section 94(2) of the Motor Vehicle Act (1985)*, [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536. For a discussion of pre-*Oakes* cases see also P.A. Chapman, "The Politics of Judging: Section 1 of the Charter of Rights and Freedoms" (1986) 24 Osgoode Hall L.J. 867 at 875-82.

> is the strength of the commitment to liberal values they reveal and the complete absence in them of any express recognition that there may be limits to the power of judicial review under the *Charter*.[447]

Since *Oakes*, the caselaw has been characterized by the variety of approaches it has taken to s. 1.[448] An example of this is *Edwards Books*, where the division is reflected in the differing attitudes of Wilson J., La Forest J. and the Chief Justice towards the *Oakes* test. While Wilson J. clearly accepted it as the governing test, applying it rigorously in her own judgment, La Forest J. wanted little or no part of it. The Chief Justice was not prepared to renounce the *Oakes* test, but he obviously did not feel bound to apply it strictly.[449] Generally, recent decisions display heightened deference to the legislatures, recognizing that laws not be struck down merely because the Court might conceive of a fairer or better way of dealing with the conflicting interests at bar.[450]

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[447] Elliot, *supra*, note 445 at 310.

[448] Elliot analysed four post-*Oakes* cases: *R.* v. *Mannion* (1986), [1986] 2 S.C.R. 272, 31 D.L.R. (4th) 712; *R.* v. *Jones* (1986), [1986] 2 S.C.R. 284, 31 D.L.R. (4th) 569; *Retail, Wholesale and Department Store Union, Local 580 et al.* v. *Dolphin Delivery Ltd.* (1986), [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174; *R.* v. *Edwards Books and Art Ltd.* (1986), [1986] 2 S.C.R. 713. While in all of these cases reference is made to *Oakes*, it is nevertheless apparent that the hold that that case has on some members of the Court is far from strong. For a discussion of post-*Oakes* cases, see also Chapman, *supra*, note 446 at 885-93.

[449] In *Edwards Books* he followed the test closely, but on the other hand he had no difficulty signing his name to judgments in which it was either almost entirely ignored, as in *Jones*, or applied very loosely, as in *Dolphin Delivery*.

[450] See McLachlin, *supra*, note 385 at 588-89, referring to *Morgentaler, Smoling and Scott* v. *the Queen* [1988] 1 S.C.R. 30, 37 C.C.C. (3d) 449. McLachlin points out that *Morgentaler*, though bold in the result, arguably demonstrates a reluctance to embrace substantive questions and a preference for focusing on procedural issues. In fact, only Wilson J. based her decision on the rights of control of one's body which she perceived to flow from s. 7 of the *Charter*; Dickson C.J. and those who supported him decided the issue on procedural grounds; and McIntyre J., dissenting, rejected the substantive *Charter* rights that Dr. Morgentaler contended. *Ibid.* at 588 n. 31.

c. The Court's Approach to Section 1 in *Andrews*

In *Andrews* the disagreement in the Supreme Court about the correct approach to s. 1 led to divergent views about how s. 1 should be applied in equality rights cases, and to different conclusions about the constitutionality of the citizenship requirement for practising law. The Court was split evenly as to the correct standard for applying the section (La Forest J. agreeing with McIntyre and Lamer JJ. as to the standard), but held four to two, that the law was not saved by s. 1 (La Forest J. agreeing with Dickson C.J. and Wilson and l'Heureux-Dubé JJ. as to the result).

McIntyre J., joined by Lamer J., as he then was, rejected the stringency of the test set out in *Oakes*, arguing that a more flexible and deferential standard is appropriate. Legislative objectives need not be "pressing and substantial", merely "desirable".[451] He stated:

> To hold otherwise would frequently deny the community-at-large the benefits associated with sound social and economic legislation. In my opinion, in approaching a case such as the one before us, the first question the Court should ask must relate to the nature and the purpose of the enactment, with a view to deciding whether the limitation represents a legitimate exercise of the legislative power for the attainment of a desirable social objective which would warrant overriding constitutionally protected rights. The second step in a s. 1 inquiry involves a proportionality test whereby the court must attempt to balance a number of factors. The court must examine the nature of the right, the extent of its infringement, and the degree to which the limitation furthers the attainment of the desirable goal embodied in the legislation.[452]

As William Flanagan has pointed out,[453] McIntyre J. also seems to make a strategic retreat

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[451] *Supra*, note 24 at 25, McIntyre J.: "[G]iven the broad ambit of legislation which must be enacted to cover various aspects of the civil law dealing largely with administrative and regulatory matters and the necessity for the legislature to make many distinctions between individuals and groups for such purposes, the standard of pressing and substantial may be too stringent for application in all cases."

[452] *Ibid.* at 25, McIntyre J.

[453] *Supra*, note 430 at 583.

from the broad language previously employed in *Edwards*[454] to describe the proportionality test under s. 1. The test that he articulated expressly avoids the more sweeping implications of the *Edwards* test. Although under his test the impugned legislation must "further the attainment" of the legislative objective, it does not appear to have to meet the stricter standard of being "rationally connected" to this objective, as outlined in *Edwards*.[455] Although McIntyre J. would consider "the broader social impact of the law and its alternatives", this is an important retreat from the language in *Edwards*, which held that the legislation must impair "as little as possible" the right in question. While he is willing to consider alternative legislative schemes, he believes that courts ought not quickly to conclude that legislative initiatives were unreasonable:

> [I]t must be recognized that Parliament and the Legislatures have a right and a duty to make laws for the whole community: in this process, they must make innumerable legislative distinctions and categorizations in the pursuit of the role of government. When making distinctions between groups and individuals to achieve desirable social goals, it will rarely be possible to say of any legislative distinction that it is clearly the right legislative choice or that it is clearly a wrong one.[456]

McIntyre J. said that the standard used must not hold legislatures to a standard of perfection, and in the concluding passage of his judgment stated:

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[454] *Supra*, note 448.

[455] Flanagan, *supra*, note 530 at 583 seems to suggest that both Wilson J. and McIntyre J. articulate tests that expressly avoid the implications of the *Edwards* test. While it is true that Wilson J. held that "[t]he second step in a s. 1 inquiry involves the application of a proportionality test which requires the Court to balance a number of factors" and that "[t]he Court must consider the nature of the right, the extent of its infringement, and the degree to which the limitation furthers the attainment of the legitimate goal reflected in the legislation", it nevertheless appears that under her test the impugned legislation must not only "further the attainment" of the legislative objective, but also meet the stricter standard of being "rationally connected" to this objective. First, she cited *Edwards* as supporting her formulation of the proportionality test. Second, and more importantly, she expressly agreed with McLachlin J.A. that the requirement of citizenship is not carefully tailored to achieve the legislation's objective and *may not even be rationally connected to it* (emphasis added).

[456] *Andrews*, *supra*, note 24 at 26, McIntyre J.

> The Legislature in fixing public policy has chosen the citizenship requirement and, unless the Court can find that choice unreasonable, it has no power under the *Charter* to strike down or ... no power to invade the legislative field and substitute its views for that of the Legislature.[457]

Obviously McIntyre J. is very anxious to avoid involving the courts in closely weighing the merits of various legislative options to determine which ones impair "as little as possible" the right in question.[458]

There is some irony in the fact that the opinion of McIntyre J. went out of its way to distance itself from the definition of equality contained in the cases decided under the *Canadian Bill of Rights*, and then reintroduced similar notions into s. 1. McIntyre J. also appears to have forgotten that his limitation of the applicability of s. 15 to situations relating to prejudice and disadvantaging precludes widespread challenges to regulatory legislative classifications. A limitation of the scope of s. 15 to enumerated or analogous grounds further precludes these challenges. In some of the early decisions on s. 15, analysis was inspired by a concern to limit the number of cases that could be litigated under s. 15 and the number of occasions upon which government is called upon to justify the way in which it has drawn legislative distinctions. This is a thoroughly understandable concern. It becomes acute if it is assumed that any ground at all may be used to invoke s. 15, and that the *Oakes* principles for s. 1 assessment are to apply to distinctions of all types.[459] In *Andrews*, however, account

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[457] *Ibid.* at 30-31.

[458] Perhaps the most fundamental argument for limiting judicial review is that it conflicts with the principle of representative democracy, which is at the heart of our governmental system. In terms of s. 15, the argument is that it is better to entrust the protection of equality to legislators than to judges, who are neither elected nor representative of the population in terms of race, gender, age or socio-economic status. Critics argue further that judicial review forces the courts into a role that is fundamentally at odds with the judicial process because equality issues cannot be reduced to legal rules, and judges are forced to make policy decisions in the same way as legislators do. For attempts to meet these criticisms, see Black & Smith, *supra*, note 233 at 577-79.

[459] In a substantial majority of the cases that have reached the appellate level, the grounds asserted have not been enumerated in s. 15; in most of those, the grounds were not clearly akin to the enumerated ones. See Black & Smith, *supra*, note 233 at 612 n.213-14. They conclude that the concern to limit the number of cases may be keenly felt if there is

has already been taken of the constraints on the courts through the limitation of the grounds of distinction that will be considered. Thus, it is highly improbable that judicial review will unduly intrude on the other branches of government and at the same time impose an unacceptable burden on the courts.[460]

Although La Forest J. did not find the citizenship requirement to be justified under s. 1, he was in general agreement with what McIntyre J. said about the manner in which legislation must be approached under the provision. The only qualification he made was that

> [he prefered] to think in terms of a single test for section 1, but one that is to be applied to vastly differing situations with the flexibility and realism inherent in the word "reasonable" mandated by the Constitution.[461]

Wilson J. (joined by Dickson and L' Heureux-Dubé JJ.) applied the *Oakes* test in its full rigour. According to her, the Oakes test should not be abandoned and remains an appropriate standard

> when it is recognized that not every distinction between individuals and groups will violate section 15. If every distinction between individuals and groups gave rise to a violation of section 15, then this standard might well be too stringent for application in all cases and might deny the community at large the benefits associated with sound and desirable social and economic legislation. This is not a concern, however, once the position that every distinction drawn by law constitutes discrimination is rejected as indeed it is in the judgment of my colleague, McIntyre J. Given that section 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the

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a perception that the primary purpose of s. 15 - the alleviation of disadvantage of particular disadvantaged groups and of groups similar to them - is being lost.

[460] See also Black & Smith, *ibid.* at 613-14: "In our opinion, it is more appropriate for any balancing process to take place under section 1..... We think that the restriction of the grounds in the manner we have suggested makes this approach workable even with the high standard governments must meet under *Oakes*."

[461] *Andrews*, *supra*, note 24 at 41, La Forest J.

> type of discrimination against such groups is appropriately an onerous one.[462]

Andrews is thus further proof of the fact that the Supreme Court is far from a settled scheme of s. 1 application.

Elliot argues that the division stems from differing views among the justices on how strong the Court's commitment to liberalism should be and what the proper scope of judicial review should be. Generally, the Court is divided over the basic issues of interpretation raised by the *Charter*:

> Judges are divided on certain formative issues, including whether evidence need be led to establish the importance of the legislative objective, the degree to which the objectives will be closely scrutinized, whether evidence need be led that the means chosen were proportional to the objectives, and so on. These differences reflect deep divisions on the Court regarding its role, and the role of lower courts, vis-à-vis other institutions of government.[463]

While it has been argued that these differences were present on the Court from the outset,[464] it is certainly true that they were somewhat obscured by the Court's desire to establish the legitimacy of judicial review under the *Charter* and to satisfy its audiences that

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[462] *Ibid.* at 34, Wilson J. Wilson J.'s willingness to apply the *Oakes* test in its full rigour thus seems to be a function of the kinds of cases that reach s. 1 analysis. M. Gold, *supra*, note 268 at 1075 has pointed out that the cited passage is open to two readings: either a strict standard of review is justified because the scope of s. 15 is limited in some way (i.e., to enumerated or analogous grounds, or to the protection of the disadvantaged) or it is justified because not every legislative distinction will amount to discrimination under s. 15. If the former is correct, it suggests the possibility that a different standard of review would be applied were the scope of s. 15 to be broadened beyond the enumerated and analogous grounds. If the latter is correct, it would not necessarily follow that a less rigorous standard would be applied even if the scope were broadened, assuming that a legislative distinction were found to be discriminatory.

[463] M. Gold, "Of Rights and Roles: The Supreme Court and the Charter" (1989) 23 U.B.C. L.R. 507 at 521.

[464] *Ibid.* at 507.

the *Charter* would not be interpreted as narrowly as was the *Canadian Bill of Rights*.[465] Now that the activism of the Court's early decisions has given way to a more cautious and restrained approach, it will be important to ensure that s. 1 is not reduced to a mere reasonable classification test with similar problems to those outlined above vis-à-vis the "similarly situated" test.[466] The *Oakes* test is not without problems. There are, however, a number of reasons why in many *Charter* cases it remains an appropriate standard.

As has been pointed out by Bakan,[467] the translation of the ambiguous and general language of the s. 1 text into a neat four-step test was clearly an attempt by the majority to avoid having to confront directly evaluating a restriction's reasonableness and demonstrable justification in *Oakes* and in future cases:

> Such an evaluation, after all, has the appearance of an enquiry into the wisdom and political desirability of the legal prescription responsible for the restriction. The *Oakes* test functions to make the inquiry look legal rather than political, an appearance further supported by the majorities' precise specifications concerning the onus and standard of proof.[468]

Bakan continues by saying, however, that the appearance of legalistic constraint is an illusion. According to him, attempts to inject content into vague and indeterminate textual provisions cannot escape the indeterminacy of those provisions:

> Such attempts inevitably raise two questions: first, why is one definition of a vague standard necessarily better than any other; and second, how can we

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[465] *Ibid.* In the early cases the Court purported to dismiss all concerns about the legitimacy of judicial review under the *Charter* by invoking the idea that this was a role thrust upon it by the legislators. See *ibid.* at 514 n.28. For a critical comment, see Monahan & Petter, "Developments in Constitutional Law: The 1985-86 Term" (1988) 9 Supreme Court L.R. 69 at 83-87.

[466] See Sheppard, *supra*, note 27 at 221.

[467] See J.C. Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 Osgoode Hall L.J. 123 at 163.

[468] *Ibid.*

avoid the vagueness and indeterminacy of the definitions themselves?[469]

He says that it is not clear why the four criteria in the *Oakes* test constitute a uniquely correct interpretation of s. 1:

> The argument that the four-step test was determined by the text of section 1 and the purposes which supposedly underlie it is highly implausible. The majority appear to believe that the four criteria follow from the need for a "stringent" ... standard of justification under Section 1, which, in turn, follows from the *Charter*'s purpose of protecting rights and freedoms and "the fundamental principles of a free and democratic society." This chain of reasoning may be appealing, but it is hardly one that would qualify as uniquely determined.[470]

At the conclusion of his discussion of the *Oakes* test, Bakan points out that the criteria identified in *Oakes* are themselves indeterminate and do not avoid the intervention of judicial choice and discretion in s. 1 analyses.[471]

A good example of this is the *Karen Andrews* case,[472] in which the Supreme Court of Ontario (even though it purported to rule that noncoverage of the plaintiffs did not constitute discrimination) held that the failure to confer dependent status on homosexual couples could be justified under s. 1 of the *Charter*.

Adopting the strict *Oakes* test, the Court accepted the arguments put forward by the Attorney General of Ontario and held that the objective of the legislation was to confer a benefit on dependent spouses under the OHIP regime by setting up a special rate for that

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[469] *Ibid.* at 164.

[470] *Ibid.* The author suggests that the "fundamental principles of a free and democratic society" could just as easily be understood as requiring judicial deference to decisions of the legislature and, therefore, a lax standard under s. 1.

[471] According to Chapman, *supra*, note 446 at 884, the problem with the articulation of tests for the application of s. 1, as was attempted in *Oakes*, is their limited usefulness in dictating and explaining the final outcome of each balancing exercise.

[472] *Supra*, note 396.

class.[473] The Court recognized this as one aspect of the more general objective of promoting and assisting the establishment and maintenance of families. It continued by saying that this important objective was realized by providing benefits to spouses and dependent children in the traditional heterosexual context. The Court seemed to think that administrative and economic practicability mandated the exclusion of "some persons" from the scheme. According to the Court,

> [t]he legislation in question does not single out same-sex couples.... [T]hey are treated the same way as a multitude of other relationships such as family units consisting of adult siblings, extended as well as various combinations of unrelated heterosexual or homosexual adults with and without children. In order to make the scheme under the *Act* administratively and economically practicable, there needs to be an objective interpretation imposed that will necessarily exclude some persons. Simplicity and administrative convenience are legitimate concerns for the drafters of this type of legislation.[474]

As has been pointed out,[475] it is surprising that the Court would consider administrative convenience to be part of the first branch of the *Oakes* test. In fact, this consideration belongs in the second branch of the test. It would have been clearer if the Court had simply asserted that the legislative objective was to promote heterosexual families, and that the "family objective" is pressing and substantial.

The Court further held that the restriction of OHIP dependents' benefits to relationships where there are potential support obligations imposed by law is rationally connected to the government's stated general objective. The determination of where to draw the line,

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[473] As has been pointed out by Bakan, *supra*, note 467 at 166, the way the Court characterized the purpose of a legislative provision will tilt the argument about means/ends proportionality in one direction or the other: "The tightness of the fit between means and ends will inevitably depend on the level of generality at which the purpose is defined. If the purpose is tautologically equivalent to the legislative provision, then there will be an absolute fit - no other provision would be capable of achieving the purpose. On the other hand, if the purpose is defined in general and abstract terms, while the legislative provision is very specific, the fit will appear much looser."

[474] *Karen Andrews*, *supra*, note 396 at 591.

[475] *Supra*, note 415 at 420.

according to the Court, is one which should, where possible, be left to the legislators unless the line has been drawn unfairly or upon an irrational consideration.[476]
In the case in question, the Court held that the absence of legal support obligations in homosexual and other "nontraditional" relationships was a factor that was both fairly and rationally considered. The Court then concluded by saying that the governmental objective could not have been achieved with less impact on the applicants and that because of minimal economic impact, the requirement of proportionality had been satisfied.

The Court's reasoning is fairly cloudy, and the reasons put forward to prove that the exclusion of homosexual couples from dependent coverage is "reasonable and demonstrably justified in a free and democratic society" are clearly not convincing. It is questionable whether the objective of promoting heterosexual families is a pressing and substantive one. Courts cannot simply move from the public policy arguments favouring preservation of the family, which have no application once relationships between unmarried couples are legally condoned, to arguments favouring preservation of the heterosexual family. The Court in *Karen Andrews* could not substantiate the assertion that the legislative objective of establishing and maintaining traditional families is one of substantial importance. The agenda is a hidden one. In fact, the only legislative objective would be to limit costs or to prevent stable homosexual relationships.[477]

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[476] *Ibid.* at 591.

[477] According to M. Eaton & C. Petersen, *supra*, note 415 at 420, the state's interest in promoting and maintaining "traditional families" is threefold: "First, the political economy of the family is such that, as a general rule, homecentered labour is performed by women without cash payment. This bolsters the economy as a whole and frees up male labour for use in the public sphere. Second, by performing the functions of child birthing and care, women contribute substantially to the economy by reproducing human capital. Third, the power structure of the nuclear family perpetuates patriarchal domination on a microscopic scale.... The living arrangement between Ms. Andrews and Ms. Trenholm does not substantially interfere with the state's interest in the political economy of the family unit or in the reproduction of human capital.... It is evident, then, that the third element of the state's interest in promoting traditional families has been severely violated in this case. The state's real interest in the political economy of the family is not (only) in the private appropriation of women's labour and reproductive capacities, but also in male (sexual) control of women.... McRae, J. was understandably reluctant to admit this, because if he were honest, he would run counter to the history and nature of lesbian existence ... or grant the applicants' request for equality."

Karen Andrews suggests that it is not so much the question whether a court will strictly apply the principles set out in *Oakes* that matters, but a court's more general approach to *Charter* adjudication. While it is true that it is generally the "*Charter* enthusiasts"[478] who have been using the criteria set out in *Oakes*, *Karen Andrews* is clear evidence of the fact that the application of those criteria by a "*Charter* resister" can lead to entirely different results, due to the indeterminacy of the criteria, which do not, after all, avoid the intervention of judicial choice and discretion in s. 1 analysis.[479] Marc Gold has pointed out that the "*Charter* resister", favourably disposed to upholding the constitutionality of legislation, will tend to apply s. 1 in a way that evinces considerable deference to the legislature:

> Regarding the first branch of the *Oakes* test - that the legislative objective be of sufficient importance -the resister tends not to insist that actual evidence be led to establish the importance of the objective underlying the impugned law. Instead, the resister will accept the stated objective and its importance at face value.[480]

This was exactly what happened in *Karen Andrews*, where the Court accepted the arguments put forward by the Attorney General of Ontario as to the objective of the legislation without ever questioning them.

Gold continues by saying that, moreover,

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[478] M. Gold uses this term for those justices on the Supreme Court who show enthusiasm for an expansive reading of the *Charter* and for a large role for the Court. This position is most consistently expressed by Wilson J. The position advanced by McIntyre J., who shows extreme resistance to a broad reading of the *Charter* and the large role for the Court that such a reading entails, is called the model of resistance, and its practitioners the "*Charter* resisters". See *supra*, note 463 at 508.

[479] Bakan, *supra*, note 467 at 167 cites *Edwards* as an example of a case in which the Court manipulated the characterization of legislative purpose to justify upholding relevant legislation under s. 1. A note in the Yale Law Journal goes so far as to assert that it is always possible to define the legislative purpose of a statute in such a way that the statutory classification is rationally related to it, making the traditional rationality test an empty requirement and a misleading analytic device. See Chapman, *supra*, note 446 at 884, referring to Note, "Legislative Purpose, Rationality, and Equal Protection" (1972) 82 Yale L.J. 123 at 128.

[480] M. Gold, *supra*, note 463 at 522.

> the resister will tend to accept a wide range of objectives as sufficiently important for the purpose of limiting rights. For example, considerations of administrative convenience and efficiency would not be automatically excluded from consideration under s. 1, but could be invoked as arguments for upholding legislation.[481]

Again, this was the case in *Karen Andrews*, where the Court seemed to think that administrative and economic practicability warranted the exclusion of some persons from the scheme.[482]

Regarding the second branch of the *Oakes* test - that the means be proportional to the objectives -

> the *Charter* resister will tend to invoke the idea that legislative solutions cannot be perfectly tailored.... For example, the resister will be prepared to accept arguments that the means chosen were necessary to achieve these objectives without requiring any, or much, evidence. All of this will often be tied to ideas of the proper role of the courts in a democracy, whether expressed in terms of institutional competence or legitimacy.[483]

In *Karen Andrews* the Court held that the restriction of OHIP dependents' benefits to relationships where there are potential support obligations imposed by law is rationally connected to the government's stated objective. It left the determination of where to draw the line to the legislator instead of asking him to provide proof of the fact that the distinction between a relationship that involves an unmarried heterosexual couple with children and a relationship between a gay or lesbian couple with children is a fair one. The characterization of the first as a relationship where there is a potential support obligation imposed by law, in contrast to the gay or lesbian relationship where there are no obligations

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[481] *Ibid.*

[482] *Karen Andrews*, *supra*, note 396 at 591. On a number of occasions, members of the Supreme Court rejected overtures to majoritarianism, cost and efficiency as inappropriate to justification under s. 1. For more details, see L. Eisenstat Weinrib, *supra*, note 437 at 483-92.

[483] M. Gold, *supra*, note 463 at 522.

imposed by law, obscures the issue.[484] The government should have had to explain why a gay unmarried couple with children is being treated differently from a heterosexual couple with children. Further, as long as gay relationships are generally not recognized by the law, an argument based on the fact that there is no support obligation imposed by law should not be accepted. Put into other words, this argument means that gays and lesbians, because they are being treated differently by the law, can also have different - which in turn means minor - rights. The only factor that could have been fairly and rationally considered would have been one based on real differences as opposed to one based on a - discriminatory - difference created by the law.[485]

A "*Charter* enthusiast" would have approached s. 1 in a radically different spirit. As Marc Gold has pointed out,

> [i]t is not sufficient for the government to assert that a particular legislative objective is important; the enthusiast will insist that there be evidence introduced of the importance of the objective. Moreover, the quality of that evidence will be scrutinized carefully, with the enthusiast prepared to reject the objective as either insufficiently supported by the evidence or, in fact, insufficiently important. Furthermore, the enthusiast is not prepared to accept all kinds of objectives as relevant to the s. 1 inquiry. For example, enthusiasts will reject arguments based upon considerations of administrative

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[484] Besides, the key that unlocks the door to "dependents" eligibility for employment and insured benefits (which include extended health care) is, in general, not dependence at all but rather a blood or a sexual relationship. "Much can be criticized about such a system. Everyone should be entitled to adequate health, dental, insurance and pension benefits regardless of their family status. Clearly this system of benefits was devised to answer the needs of the traditional, one income nuclear family. It does not answer the needs of the majority of workers, gay or straight. Our lives and family structures are simply more diverse than that -- fewer and fewer of us fit within these structures." See Research & Equal Opportunities Depts. CUPE National, *Employee Benefits for Gay and Lesbian Workers and Their Families* (Ottawa, 1990) at B.3.

[485] Otherwise, we reintroduce the "similarly situated" test at this level. In fact, gays and lesbians would at this point have to prove that they are the same as heterosexuals. That they are different because they are being treated differently by the law should in itself never suffice to prove the rationality of a law. This does not, of course, mean that there cannot be cases in which gays' and lesbians' differences can, after fair and rational consideration, lead to their being treated differently.

efficiency or cost.[486]

Moreover, a "*Charter* enthusiast" would have applied the three branches of the proportionality test more rigorously and addressed the questions avoided or left open in *Karen Andrews*.

It is thus the different attitudes toward the interpretation of *Charter* rights and the different approaches to s. 1, at the heart of which are differences concerning the nature and value of constitutional rights and the role of the courts vis-à-vis the legislative process, that seem to matter more than a more or less professed adherence to the *Oakes* test.[487]

Generally, the "*Charter* enthusiast" will interpret *Charter* rights broadly and rarely defer to legislative judgments, while the "*Charter* resister" will interpret the *Charter* narrowly and defer extensively to the legislature.[488] In the context of s. 15 this is, however, not entirely true. Wilson J., who most clearly exemplifies the approach taken by the "*Charter* enthusiast", seems to interpret the equality provision even more narrowly than McIntyre J. Because she sees s. 15 as designed to protect those groups who suffer social, political and legal disadvantage, other groups will apparently not be able to invoke the equality provision. Accordingly, she says, the analysis conducted under s. 1 must be a strict one. I agree with this position, which most closely accords with the purpose of s. 15. McIntyre J., on the contrary, appears to contradict himself when he first dismisses the "similarly situated" test and then allows for the reintroduction under s. 1 of the same kind of arguments that characterize that test.

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[486] M. Gold, *supra*, note 463 at 523.

[487] It is important, however, to note that the "*Charter* resister" will usually apply the *Oakes* test less strictly than the "*Charter* enthusiast". What I wish to emphasize is that the application of the strict *Oakes* test alone does not guarantee less deferential opinions. The *Oakes* test is too indeterminate and allows for the intervention of judicial choice and discretion in s. 1 analyses. As a result, it is more the Court's attitude that counts than the type of test it adopts - although, of course, the type of test it chooses will also be a reflection of its general attitude towards the *Charter*.

[488] For more details, see M. Gold, *supra*, note 463 at 527.

d. **Conclusion**

What finally becomes clear is that there is no, and never will be, one single or one right approach to s. 1 interpretation. This does not, however, mean that the *Oakes* test should be abandoned. It remains a very helpful test in many ways, and for many reasons. Whatever happens to the *Oakes* test in other contexts, a rigorous application of the test is appropriate after a finding that a law or practice has caused further disadvantage to an already disadvantaged group.[489] William Black and Lynn Smith have argued that the standard used in *Andrews* was appropriate, given the nature of the infringement, but that in other cases involving issues closer to the core of human rights concerns the standard used should be even more rigorous.[490] For example, in light of the inclusion of the third prong in the *Oakes* proportionality test, the Court can insist on an approach to s. 1 that goes beyond the rationality of the provision to require the weighing of the harm caused by a violation of s. 15 against the benefit to society of allowing the inequality.[491] Further, it seems that the placement of the burden on the government means that it will have to produce evidence rather than simply invite the Court to make assumptions, at least if the Court applies the standard set out in *Oakes* where a violation of s. 15 has been found.[492]

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[489] According to D.W. Elliott, *supra*, note 249 at 247 n.76, the Court gave some indirect support to the *Oakes* test in *Turpin*: "Speaking for six judges in *Turpin*, Wilson J. agreed with Lepofsky and Schwartz ... who had criticised the similarly situated test because it required less state justification than was permitted under section 1 of the *Charter*. For Lepofsky and Schwartz, the test for section 1 was that of *R. v. Oakes*". Considering that the Court did not even consider s. 1 analysis in *Turpin*, I find it difficult to see in this passage even indirect support of the *Oakes* test.

[490] *Supra*, note 243 at 613.

[491] See C. Sheppard, *supra*, note 27 at 221. She suggests that the meaning of what is reasonble or rational could also be revised to take into account concerns with disadvantage and prejudice.

[492] *Ibid.* In *Andrews*, the extent to which there exists an empirical correlation between citizenship and the desired results (familiarity with Canadian traditions and institutions, commitment to Canada) was simply unknown. The trial judge and the dissenters in the Supreme Court were satisfied that there was a close enough connection to justify the legislation; the Court of Appeal and the majority in the Supreme Court were not As has been pointed out (see W. Black & L. Smith, *supra*, note 243 at 612), those inclined to give a substantial margin to the government in legislating to achieve social policy objectives could be satisfied on a common-sense basis that there must be some correlation sufficient to

If, instead, the lower standard supported by half the Court in *Andrews* were accepted in future s. 15 litigation, homosexuals' chances to gain, e.g., the right to serve in the military, could be severely affected. As has been pointed out by Lorraine Eisenstat Weinrib,

> [i]f the Canadian legal culture wants less sophistication from the Court and less innovation from the *Charter*, its wish will be self-fulfilling. We invite a repetition of the *Bill of Rights* jurisprudence of judicially vetted "reasonableness" - and ultimately deference by courts to legislatures - in failing to recognize the grandeur of the Supreme Court's attempt to understand the *Charter* as a new paradigm of rights protection. In *Oakes*, the Court has broken clear of the labyrinth of conventional thinking. Even if the judges do not continue to journey along this path, their original route should not remain unmapped.[493]

Further, an acceptance of responsibility for the policy-making function judges are playing should

> make them more sensitive to the wider impact of their product. The use of inappropriate judicial values and biases in rights judgments ought to be reduced. Perhaps more importantly, the possibility for growth and change in a document that is supposed to be, after all, 'a living tree' may be greatly enhanced. The opportunities are plentiful for the development of a judicial role and a corresponding theory of law that meet Canada's unique needs.[494]

Judges must be willing to come to grips with the question of the proper role of the judiciary in relation to Parliament and the legislatures. Courts should not confine themselves to interpreting the letter of the *Charter* in the context of its passage, but rather read the *Charter* expansively to create new rights with the passage of time and the emergence of new situations.

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conclude that the legislative choice was not unreasonable (as was McIntyre J.). Without the benefit of a substantial margin, however, the legislation fails. The fact that La Forest J. concluded that the law could not be upheld even though he subscribed to McIntyre J.'s less onerous formulation is evidence for this conclusion.

[493] *Supra*, note 437 at 513.

[494] Chapman, *supra*, note 446 at 895.

Chapter 5. **Implications of the Court's Decisions on Section 15 for Gay Rights**

a. **Introduction**

Many of the implications of the Court's decisions have already been pointed out. In what follows, I will concentrate on only two elements, which I consider to be of particular importance for future gay rights cases to be decided by the Supreme Court: the Court's rejection of the principle of formal equality, and its approach to s. 1. Taking as an example practices that limit homosexuals' rights to serve in the military, the chapter purports to show how under the approach taken by the Supreme Court these practices should be struck down. It argues that, generally, legal discrimination based on sexual orientation should be struck down under s. 15 and that it is under s. 1 that lesbian and gay rights are most vulnerable to being curtailed. The chapter, however, concludes that even under a less stringent *Oakes* test many of the laws and policies that currently disadvantage gay men and lesbians should not be upheld by the Supreme Court.

b. **Section 15(1) Analysis**

We have seen that legal discrimination based on sexual orientation should be struck down under s. 15 unless justified under s. 1. Because of the Court's departure from the "similarly situated" test, a homosexual seeking the right to serve in the military will not have to prove that he is similarly situated to a heterosexual. To establish a breach of s. 15, the complainant must establish only two elements: that the law or practice offends one of the equality rights guaranteed by s. 15 and that the law is discriminatory. The Supreme Court has yet to define the meaning of the four equality rights.

However, in *Turpin* Wilson J. provided the following definition of equality before the law:

> The guarantee of equality before the law is designed to advance the value that all persons be subject to the equal demands and burdens of the law and not suffer any greater disability in the substance and application of the law than others.[495]

Thus, a law violates the guarantee of equality before the law if it works to an individual's disadvantage by denying an opportunity to that individual which is available to others. It appears that any law that operates "more harshly" on gay men and lesbians than it does on heterosexuals will violate equality before the law.[496] It should also be easy to establish that the impact of the law is discriminatory: discrimination on the basis of sexual orientation is discrimination on an analogous ground, and a practice that does not allow homosexuals to, e.g., serve in the military is discriminatory because it has the effect of withholding access to opportunities, benefits, and advantages available to heterosexuals based on group status rather than individual merits and capacities.[497]

Had the Court adopted the Aristotelian principle of formal equality, the complainant's task would be more onerous:

First, he or she would have to establish that homosexuals are similarly situated to heterosexuals to gain the protection of s. 15. While this might not be difficult in the military context, there are other examples where it could be harder. For example, homosexuals would

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[495] *Turpin*, *supra*, note 25 at 1329.

[496] Ryder, *supra*, note 2, referring to *Turpin*, *ibid.* at 1329-30.

[497] See *Andrews*, *supra*, note 24 at 18, McIntyre J.: "I would then say that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."

be required to claim that gay and lesbian relationships are the same as straight relationships. To gain the right to marry, they would have to compare themselves to married couples.[498] Similar to the result in *Bliss*[499] a court might then hold that any inequality between homosexuals and heterosexuals in the area of marriage is not created by legislation but by nature.

Second, when the "similarly situated" test is applied, an unfair and unwarranted evidentiary burden is cast on the homosexual, as on any other disadvantaged in our society who seek equality. For example, a physically disabled plaintiff, alleging that he was denied a governmental benefit because of disability (for example, equal educational opportunuties) must prove that he is as capable of profiting from the desired educational opportunities as is the non-disabled child to whom he claims to be similarly situated. By virtue of the test's first step, the onus is on the handicapped person to show that his or her disability does not impose a barrier to participation in the activity involved. There is thus a presumption of his or her incapacity. In the same way, in arguing for the right to legal marriage, lesbians and gay men would be forced to claim that they are just like heterosexual couples, have the same goals and purposes, and vow to structure their lives similarly. The test provides no room to argue that they are different but nonetheless entitled to equal protection. This runs contrary to the whole thrust of s. 15, which was aimed at eradicating, not perpetuating, stereotypes about the disadvantaged.

Further, under the third step of the "similarly situated" test, even if a court found inherent disadvantage, this would only constitute discrimination contrary to s. 15 if a fair-minded

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[498] Generally, groups such as women and the handicapped are not similarly situated to men and the able-bodied in Canadian society. If women and the disabled had to establish that they are similarly situated to others to gain the protection of s. 15, then that provision would not assist them in securing equality of opportunity. See M. D. Lepofsky & H. Schwartz, "Constitutional Law - Charter of Rights and Freedoms - Section 15 - An Erroneous Approach to the Charter's Equality Guarantee: R. v. Ertel" (1988) 67 Can. Bar Rev. 115 at 118-19. As a further example, racially segregated schools would comply with a purely formalistic conception of equality. Black children are treated similarly to white children in such an arrangement. Yet overt racial segregation is a prime example of the evil which s. 15 seeks to prevent.

[499] *Supra*, note 214.

person, weighing the purposes of legislation against its effects on the individuals adversely affected and giving due weight to the right of the legislature to pass laws for the good of all, concluded that the legislative means adopted were unreasonable or unfair. Consequently, the determination would be made under s. 15 and virtually no role would be left for s. 1. In redirecting the exceptional power to judicially review the reasonableness of legislation from s. 1 to s. 15, the overwhelming burden of proving affirmatively that the impugned law is unreasonable is thrust onto the *Charter* claimant. Under the "similarly situated" test homosexuals would have to prove that the practice banning them from the military or the law disallowing them to marry is unreasonable. Under the test established in *Andrews* it will be up to the government to prove that the law or practice is reasonable.

For all these reasons it can be said that the *Andrews* case represents a significant step forward in homosexuals' battle for equal rights.[500] However, it also has to be acknowledged that wherever a legislative distinction discriminates against homosexuals in a manner that violates s. 15, the s. 1 analysis will still have to confront the question of whether there are differences between homosexuals and heterosexuals that would justify the different treatment. As has been pointed out by Ryder,[501] the s. 1 test confers a great deal of discretion on the judiciary and it is here that lesbian and gay rights are most vulnerable to being curtailed.[502]

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[500] There is concern that the "similarly situated" test and formal equality theory, though they appear to have been repudiated in *Andrews*, will seep back into the jurisprudence because they have not been properly examined and clearly rejected. See *supra*, note 291 at 209. It might be true that McIntyre J. referred only to the problems created by interpretations of "equality before the law" and did not identify the problems created by comparing a disadvantaged class to an advantaged class and finding them differently situated because of the difference that disadvantage makes (as the Ontario High Court did in the case of *Karen Andrews*). However, although the critique of the "similarly situated" test in *Andrews* is certainly incomplete, McIntyre J. did expressly say that the test cannot be accepted as a fixed rule or formula for the resolution of equality questions arising under the *Charter*. Therefore, it seems highly improbable that it will be used by courts in future equality cases.

[501] *Supra*, note 2 at n.194.

[502] Ryder, *ibid.*, cites one case in which, in response to an argument that a lesbian's exclusion from a heterosexually exclusive definition of spouse violated her equality rights, the judge gave an unelaborated one-line response: "[T]he answer is found in s. 1 of the

c. **Section 1 Analysis**

As William Black and Lynn Smith have pointed out,[503] *Andrews* is of limited value as precedent concerning s. 1 because of the even division in the Court. *Andrews* reflects and perhaps deepens the Supreme Court's division on the question of how to apply s. 1 of the *Charter*, and it leaves unresolved the central question concerning the standard of review to apply in equality cases. The appointments to the Supreme Court since *Andrews* was heard make it even harder to anticipate future trends.

However, should the Court move away from the strict *Oakes* test towards a less stringent "desirable objective/reasonable means" requirement, it could be more difficult for homosexuals to gain equal rights.

Under the *Oakes* test the lawmaker would have to show:
(i) that the government objective in denying, e.g., homosexuals the right to marry or the right to serve in the military relate to societal concerns that are pressing and substantial; and
(ii) that the denial meet the three proportionality requirements: first, it must be rationally connected to the government objective; second, it must impair the right to equal treatment as little as possible; third, there must be proportionality between the effects of the denial and the government objective.

For example, legislation that confers the right to marry but withholds the privilege along with its legal advantages from homosexuals would face a serious challenge.

What is the rationale for not permitting homosexuals to marry? What could pressing and substantial societal concerns be? The rationale of the law as interpreted in previous cases where homosexuals have sought the right to marry appears to be simply that such marriages

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Charter" (Dohm J. in *Anderson* v. *Luoma* (1986) 50 R.F.L. (2d) 127 (B.C.S.C.).

[503] *Supra*, note 243 at 610.

are prohibited. An example is the *North* case,[504] where the rationale for not acknowledging homosexual marriage was that such a marriage cannot exist.

Section 1 could invite the court, after finding a violation of equal benefit of the law under s. 15(1), to look at the legislation from a different angle. Government might assert various purposes to justify homosexuals' exclusion from marriage. A close examination, however, reveals that these purposes would not be "pressing and substantial" for the purposes of the *Oakes* test. Ryder points out that the government might assert: (1) that it is promoting heterosexuality and that there is a long moral and religious tradition behind this goal; and (2) that heterosexual families are the natural and desirable arena for procreation and the raising of children.[505] He argues that, like a law that seeks to compel observance of

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[504] *Re North and Matheson* (1974), 52 D.L.R. (3d) 280 (Man. Co. Ct.). On February 11, 1974, Chris Vogel and Richard North, two homosexual men, decided to exploit the omission of sex identification in the *Manitoba Marriage Act* and take advantage of one of the means prescribed in the *Act* to obtain a licence to marry. They obtained a Proclamation of the Banns from a clergyman and had their marriage solemnized in a ceremony conducted by a minister of the Unitarian Universalist Fellowship in Winnipeg. The couple had the papers signed, witnessed and sent to the City of Winnipeg for a certificate of marriage. The certificate had to be sent to the provincial government for approval. The application to register the marriage was refused and the couple applied under subsection 35(1) of the provincial *Vital Statistics Act* for an order requiring the Recorder of Vital Statistics of Manitoba to accept their application and register the marriage. Judge Alan Reed Philp found the marriage to be a nullity and refused the application. He noted that the Parliament of Canada had not legislated that a union between two males is not a marriage, and that the Legislature of Manitoba had not legislated that such a marriage cannot be solemnized or registered. However, he said (at 282) he could not conclude that the Legislature, in using the words "any two persons", intended to recognize the capacity of two persons of the same sex to marry. After a review of cases dealing with the constitutional questions, he stated (at 284) that the issue before him was not a constitutional issue, but rather whether or not, on the facts before him, there was a marriage. In seeking a definition of marriage, he cited various dictionary and encyclopaedic definitions of marriage. These definitions stressed that the purpose of marriage is to establish a family and bear and raise chilren. The Court found it to be "selfevident" that the ceremony was not a marriage but a nullity, and that therefore there was nothing before the respondent to be registered.
The reasoning and conclusion are along the lines of jurisprudence in the U.S., where all courts faced with this issue have relied on the premise that a lawful marriage, by definition, can be entered into only by two persons of the opposite sex (see Note, "Homosexuals' Right to Marry: A Constitutional Test and a Legislative Solution" (1979) 128 U. Pa. L.R. 193 at 195.

[505] Ryder, *supra*, note 2 at n.194-99.

Christianity, the purpose of promoting heterosexuality would not be "pressing and substantial". Indeed, it would be "fundamentally repugnant because it would justify the law upon the very basis which it is attacked for violating" *Charter* rights.[506] Also, inequality cannot be justified by promoting more of it.[507]

Concerning the argument that the state has a "pressing and substantial" interest in encouraging and protecting the formation of heterosexual family units, a closer examination reveals that it mainly is based on the argument that differences in the capacity to procreate can justify discrimination against same-sex couples. Ryder discusses three difficulties with this argument. The first is whether promoting procreation is a sufficiently pressing and substantial purpose in terms of satisfying the first branch of the s. 1 test set out in *Oakes*:

> The state interest in encouraging people to bring babies into an already over-crowded world is not self-evident.[508]

Another problem is the premise that the ability to procreate is an essential aspect of marriage. Equally problematic is the assertion that gay and lesbian couples cannot procreate. Ryder demonstrates that it is only when the courts have been confronted with the possibility of same-sex marriage that the ability to procreate has been elevated to an essential condition of the marital relationship. He concludes that, if the state purpose in promoting marriage as a union between a man and a woman is to foster procreation, the rule of heterosexual exclusivity is both over- and under-inclusive.[509] Thus, the rule of heterosexual exclusivity would fail the least restrictive means branch of the *Oakes* test:

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[506] *Ibid.*

[507] As Wilson J. stated in *Turpin*, *supra*, note 25 at 1328: "The argument that s. 15 is not violated because departures from its principles have been widely condoned in the past and that the consequences of finding a violation would be novel and disturbing is not, in my respectful view, an acceptable approach to the interpretation of *Charter* provisions."

[508] Ryder, *supra*, note 2 at n.204.

[509] The right to marry is protected regardless of its connection to procreation. Infertile heterosexuals are permitted to marry, and gay and lesbian couples interested in child-rearing are denied the right.

> In sum, the state goal of promoting procreation provides neither a coherent rationale for excluding gay and lesbian life partners from marrying, nor for heterosexually exclusive definitions of spouse in other legislative contexts....
> An insistence on the linking of procreation and sexuality is an attempt to rationalize heterosexism by seizing on the distinct feature of heterosexual relationships and elevating it to the standard with which all other sexualities must comply. Equality requires that differences be accomodated in a manner that promotes the overcoming of historic disadvantage....
> As pregnancy is to sex discrimination, the lack of a connection between procreation and sexuality is to sexual orientation discrimination. From a male, heterosexual perspective, both are biological differences that have been used to rationalize and justify disadvantage. Section 15 requires that such distinct features of members of disadvantaged groups be accomodated in a manner that promotes equality.[510]

I agree with Ryder's analysis and find that, under the *Oakes* test, it will also be necessary for Canadian courts to consider how, in continuing to ensure that homosexual couples remain unwed, we contribute to the preservation of the old family model. It would seem that in the era of the changing character of the family and its role in society in general, the old arguments centered on the perpetuity and sanctity of family institutions have lost their unassailability.[511]

If, instead, s. 1 required only that the government objective be "desirable" and its means "reasonable", the government's task would be easier. Unlike U.S. equality jurisprudence, however, where the classification of the right is conclusive, Canadian courts would also examine the extent to which the right is violated. As one commentator has pointed out,

> [t]he Court ... appears to have recognized that a highly prejudicial instance of discrimination on the basis of physical disability [sexual orientation], because of the severe extent of the violation, may command closer review than a relatively minor instance of discrimination on the basis of religion, for example, that has only a minimal impact.[512]

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[510] Ryder, *supra*, note 2 at n.213-21.

[511] Bruner, *supra*, note 2 at 474.

[512] See Flanagan, *supra*, note 430 at 584. The author assumes that implicit in the Court's formulation of the proportionality test is the recognition that discrimination on the basis of, for example, race or religion would rarely be tolerated, and the Court thus acknowledged

In any case, many statutes are likely to fail even a less stringent test: discrimination on the basis of sexual orientation cannot even be justified as "reasonably necessary".

Until very recently, the Canadian Armed Forces had a policy of not recruiting homosexuals and dismissing homosexuals, once detected, from the Forces.[513] The Parliamentary Subcommittee on Equality had long found that the Forces' arguments did not justify their policies:

> They are based on the stereotypical view of homosexuals that assumes them to be dangerous people imposing their sexual preference on others. They also give undue weight to the presumed sensitivities of others. Finally, the blackmail argument is a circular one - if sexual orientation were not a factor in employment, the main reason for any such vulnerability of homosexuals would disappear.[514]

The Canadian military has now, at least in part, reversed its policy and will no longer hunt down suspected homosexuals within its ranks. But its policy against "knowingly" hiring or promoting gays will remain in effect until the federal government completes its review of the *Canadian Human Rights Act* this year. Associate Defence Minister Mary Collins said she accepted the recommendation of an independent review that the military's security service should no longer target suspected homosexuals for investigation:

> The mere fact of being a homosexual or being suspected of homosexual activities will not be grounds for a security clearance review and the Special Investigation Unit is no longer mandated to undertake those investigations.... That recommendation has been accepted and has already been put into

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that the nature of the right affected may be a critical factor. He continues by saying that other enumerated grounds in s. 15, such as age or physical disability, which can frequently give rise to legitimate differential treatment, may not create a similar presumption.

[513] On the subject, see Jefferson, *supra*, note 228 at 86-88. As Bruner, *supra*, note 2 at 478 puts it, Canada appeared to follow faithfully in the footsteps of the United States. The Canadian policy towards homosexuals was strikingly similar to that of the United States.

[514] *Supra*, note 120 at 31.

effect.[515]

The independent review was by former county court judge R. Marin, who, in a report made public in August 1990 said there is "no reason whatsoever" for the counter-intelligence unit to single out homosexuals for investigation. Although a person's sexual orientation might in some circumstances be a cause for concern, Marin continued, those are " generic problems that are not limited to the question of homosexuality." Marin's review was ordered by the chief of the defence staff following complaints from the independent Security Intelligence Review Committee, which adjudicates disputes over security clearances and related matters. Its recommendations are not legally binding, but they do carry moral weight. On August 14, 1990 the committee criticized the special investigation unit for its deplorable conduct in investigating lesbian air-force lieutenant Michelle Douglas.[516] The government is appealing the committee' s ruling that Michelle Douglas should be reinstated and that the military policy against employing gays and lesbians violates the *Charter* and is of no force and effect.

Even under the less stringent test for s. 1 application adopted by McIntyre J. in *Andrews*, the government will have to prove that the policy serves a "desirable social objective",[517] and the courts will have to examine the degree to which the limitation furthers the attainment of the desirable goal embodied in the legislation. Given the overwhelming evidence that the Forces' arguments do not justify their policies, it will be very difficult for

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[515] Associate Defence Minister Mary Collins on Sept. 27, 1990. See the report in The Gazette (Montréal), September 28, 1990 at B1.

[516] As in many similar cases of discrimination against gays and lesbians in the military, Michelle Douglas had an exemplary career in the Forces before her dismissal. Enlisting in 1986 at age 23, Douglas graduated from basic training second in her company of 85 cadets. She recieved a top-secret security clearance in 1987, which permitted her to be posted to the Special Investigation Unit. The SIU conducts investigations into Armed Forces officers who are considered possible security risks. Many of its targets have been gay and lesbian officers. In May 1988, the commanding officer of the SIU initiated an investigation into Douglas - one of his officers - based on allegations that she was a lesbian. For more details, see J. Clark, "Canadian Army Rebuked for Firing a Lesbian" (1990) 63 Outweek 24.

[517] *Andrews*, *supra*, note 24 at 25, McIntyre J.

the government to prove the contrary.[518]

It is at this point that one of the differences between the U.S. and Canadian approaches to equality rights becomes most apparent. While under minimal scrutiny in the United States the onus is on the challenger to show that the Forces did not have a legitimate purpose in establishing the policy and that the classification does not have a rational relationship to the object of the policy, in Canada it is up to the Forces to prove that the policy serves a desirable social objective. Besides, even under a less stringent *Oakes* test, the proportionality requirements of the second step seem to require much more than merely a "rational relationship to the object of the legislation". McIntyre J. mentions examination of the nature of the right, the extent of its infringement and the degree to which the limitation furthers the attainment of the desirable goal embodied in the legislation. Also involved in the inquiry will be the importance of the right to the individual or group concerned, and the broader social impact of both the impugned law and its alternatives.[519]

Even under a less strict Oakes test, federal and provincial legislation that gives limited legal rights to unmarried couples may also be held accountable for discriminating against unmarried couples who happen to be of the same sex.[520] For example, the *War Veterans Allowance Act*[521] will treat an unmarried spouse as married upon satisfying the legislation's criteria for a stable relationship, that is, a person who "shows to the satisfaction of the Board that the veteran had, during seven years immediately prior to the date of his death, continuously maintained her as his wife." The legislation obviously assumes that all common law

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[518] But see Gold, supra, note 346 at 96. The author says that the real issue will not be one of working out the implications of the right to treatment as an equal as much as it will be one of working out the extent to which civilian judges ought to interfere with the decisions of the military in this matter, decisions that have traditionally received the support of Parliament.

[519] *Andrews, supra*, note 24 at 25, McIntyre J.

[520] See Bruner, *supra*, note 2 at 474.

[521] R.S.C. 1970, c. W-5.

spouses are of the opposite sex. The *Canada Pension Plan Act*[522] has a similar provision. Ontario recognized the "common law spouse" as a legal entity in *The Family Law Reform Act, 1978*.[523] Its drafters took care to note that such a spouse is "either of a man or woman not being married to each other who have cohabited, 1. continuously for a period of not less than five years, or 2. in a relationship of some permanence where there is a child born of whom they are the natural parents ...." Such a spouse has an obligation to provide support for himself or herself and for the other spouse in accordance with need and the ability to pay. The *Ontario Family Law Reform Act*[524] overrides the common law bar against "illegal or immoral consideration" in contract and permits "a man and a woman who are cohabiting and not married to one another" to enter into a cohabitation agreement concerning "their respective rights and obligations during cohabitation".[525] By specifying "a man and a woman" the law expressly denies status and the benefits and obligations of the law to couples of the same sex no matter how long-term their relationship may be.

The unequal treatment by the law of unmarried heterosexual couples and homosexual couples can be illustrated in many ways.[526] Even where a "no-discrimination" clause will

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[522] R.S.C. 1970, c. C-5, s. 63(1)(b).

[523] S.O. 1978, c. 2.

[524] R.S.O. 1980, c. 152.

[525] R.S.O. 1980, c. 152, s. 52.

[526] For a sample case history see Bruner, *supra*, note 2 at 475. See also The Ombudsman of Ontario, *Annual Report 1986-87*, Vol. II at 89; the Ombudsman observed that heterosexual spouses enjoy many benefits denied to same-sex spouses, including substantial tax benefits, tort recovery for wrongful death, inheritance benefits, spousal employment benefits, and funeral leave for death of a spouse. To quote directly from the report:
"Rights are generally a balancing of interests. Recently the concept of pay equity has been introduced into the public and private sector. Many individuals do not favour "pay equity", but they have been obliged to accept it. If we can accept that two people similarly situated in the workplace should be paid at the same rate, regardless of gender, it seems to follow that we may be ready as a society to accept that a worker with a homosexual mate should receive the same work-related benefit as a worker with a heterosexual mate. The Monthly Labour Review in the United States recently reported in a survey of various white collar occupations that fringe benefits were found to constitute nearly 40 % of an employer's average outly for labour expenses. Since gay families may have to subsidize these benefits

offer some protection to gay men and lesbians, same-sex relationships are often not recognized. Some judges have taken the position that even when a no-discrimination clause includes sexual orientation, it is not discriminatory to deny same-sex spouses and their families employee benefits made available to heterosexual employees and their families. This position is based on the argument that the "normal and generally recognized" meaning of the term spouse requires that in order to be a spouse you must be in a relationship with a person of the opposite sex.[527]

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out of their own pockets, the result is a wage rate based on sexual orientation."

[527] See, e.g., two unsuccessful grievance arbitrations involving discrimination on the basis of sexual orientation: *Canada Post Corporation and Canadian Union of Postal Workers (C.U.P.W.)*, Arbitration Decision Number 86-41, Montréal, March 27, 1986 and *Re Carleton University and C.U.P.E. Local 2424* (1988) 35 L.A.C. (3d) 96 (Ont.)(judicial review pending). The summaries of the decisions are for the most part taken from "Employee Benefits", *supra*, note 484 at E2 and 5-6. *Canada Post* was a grievance brought on behalf of a lesbian employee who was denied special leave to attend to the illness of her partner of 16 years. The contract prohibited discrimination on the basis of sexual orientation. Special leave was available for illness in the immediate family, defined as including common-law spouses. There was no opposite-sex definition of common-law spouse. The arbitrator held that even in the absence of a definition, the universal meaning of a common-law relationship was a heterosexual relationship and that the term could not be interpreted so as to include same-sex couples without language specifically defining it that way. Without such a definition the denial of a special leave benefit did not constitute discrimination on the basis of sexual orientation. In *Re Carleton University* the grievance was based on the denial of benefits to a same-sex couple under a contract that prohibits discrimination based on sexual orientation The benefits in question were bereavement leave, tuition fees, pension, supplementary medical insurance, OHIP, group life insurance and dental plan. The arbitrator noted that the collective agreement, while it contained a "no-discrimination" clause, also contained an opposite-sex definition of spouse, which the parties could have expanded to include same sex-spouses had they so wished. More importantly, however, the arbitrator noted that the *Ontario Human Rights Code* contains the same internal inconsistency - a prohibition against discrimination based on sexual orientation and an opposite-sex definition of spouse. The arbitrator states: "[T]hus it is very clear that the *Human Rights Code* ... itself which prohibits discrimination because of sexual orientation nevertheless regards a "spouse" as being of the opposite sex".
The Yukon government and the Public Service Alliance of Canada (that government's employees union) recently signed an agreement to redefine "spouse" in the collective agreement to include same-sex common law spouses as couples. The new definition of "spouse" reads as follows:
(i) a lawful husband or wife, or
(ii) a person living in a common-law relationship with the employee. A common-law relationship will exist when, for a continuous period of at least one (1) year, an employee has lived with a person in a relationship of some permanence as a couple, and signs a

Therefore,

> gay or lesbian workers will not be entitled to equal rights, protection or benefits of the law wherever such rights, protection or benefits turn on the recognition of a relationship, despite the fact that discrimination on the basis of sexual orientation is ostensibly prohibited.... The lack of legal recognition of gay/lesbian relationships has very wide, and often very cruel implications, both in the workplace and in every other area of life.[528]

In response to the argument focusing on the "normal and generally recognized" meaning of the term spouse, one could say that the *Charter* requires that the term spouse be interpreted in a manner consistent with the equality rights, meaning that it would then have to include relationships with persons of the same sex. Also, one could argue that the exclusion of same-sex partners from certain rights, even where they do not fall under the term "spouse", violates the equality rights section. In a recent decision, *Leroux* v. *Co-operators General Insurance Co.*,[529] Arbour J. held that the definition of spouse must be interpreted in a manner consistent with the *Charter*. She found that denying a child's claim against the insurance company based solely on his mother's nonmarital relationship with the insured man constituted discrimination on the basis of marital status. The *Charter* required that the word "spouse" be interpreted to include persons who live in a relationship of some permanence and commitment, akin to a conjugal relationship.

In any case, public policy arguments favouring preservation of the family have no application to legally condoned relationships between unmarried couples. Legislators who, e.g., limit the right of a homosexual to receive support payments, widow's and widower's allowances and to enter into a domestic contract, must labour hard to demonstrate that the limitations are reasonably justified on the grounds of meeting a desirable government objective, where the

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Statutory Declaration to this effect.

[528] *Supra*, note 484 at B1.

[529] 65 D.L.R. (4th) 702 (Ont. H. Ct). The following discussion of the case relies heavily on Ryder's, *supra*, note 2 at n.36. Ryder concludes that, although the case involved a heterosexual couple, the reasoning should be equally applicable to a cohabiting same-sex couple.

only objective or interest would be to terminate or prevent stable homosexual relationships.[530]

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[530] Jim Eagan and John Nesbit, a gay couple who have lived together for over 40 years but were denied a spousal pension, have launched a *Charter* challenge to the federal *Old Age Security Act* in the British Columbia Supreme Court, arguing that it discriminates on the basis of sexual orientation. See Ryder, *supra*, note 2 at n.26.

In determining whether limitations on the rights of homosexuals are reasonably justified on the grounds of meeting a desirable government objective, courts should be aware of the growing tendency in many countries to give rights to same sex couples.

- The Swedish legislature has awarded certain rights directly to same-sex cohabitants.
- In 1989, Denmark passed more far-reaching legislation. The first homosexual couples have already been joined in "registered partnerships" that give them all but a few of the same rights as married heterosexuals. Partners - at least one must be a Danish citizen who lives in Denmark - are liable for each other's maintenance. They also have the automatic right to inherit the other's property, regardless of whether there is a written will, and must undertake legal divorce proceedings to dissolve the partnership. They can also be forced to pay alimony and, in several circumstances, a partner can be held responsible for certain of the other's tax liabilities. But these couples cannot adopt or obtain joint custody of children And they cannot be married in church. Recently, the Danish government announced that more than 1800 homosexual couples have registered their partnerships since October 1989, an average of 260 per month. The Netherlands, Sweden and Norway also plan to allow formalized homosexual partnerships. See the report in RG (Montréal), Sept. 1990 at 30.
- In the United States, the Board of Directors of the Bar Association in San Francisco called for a change in the California marriage laws.
- Former Mayor Edward Koch took the first step toward establishing a new policy for New York city employees - homosexual and heterosexual - who live with a partner outside of marriage. By executive order, the former Mayor changed the city s bereavement policy to give unmarried employees the same right as married employees to paid leave after the death of a partner.
-Gay men and lesbians may now formalize their relationships at the city hall in Madison, Wisconsin. The Madison Common Council voted 16 to 4 to set up a system for domestic partner registration. Local couples obtain a certificate of domestic partnership from the city clerk after proving they are in a committed relationship, live together, are not married and are not already registered with someone else. The process costs $25. In June 1990 Madison also passed a new law making it illegal for "public accomodations" to discriminate against domestic partners in the offering of family membership plans. This came after the local YWCA refused to sell a family membership to two lesbians and their children. Ithaca, N.Y. has joined the growing number of U.S. cities where gay and lesbian couples may officially register their relationship at city hall. The new law, passed in August 1990, does not confer any special benefits to the couples but offers the stamp of approval from the city. Domestic partners must be unmarried, share a residence and declare that they are in a relationship of mutual support, caring and commitment. Other cities with domestic partnership laws include Seattle, Wash., Takoma Park, Md., Berkeley, Los Angeles, Santa Cruz and West Hollywood, Calif. See the report in Angles (Vancouver) (Oct. 1990) 6.

For a detailed discussion of the current legal and social situation for gay people in countries which have officially embraced greater tolerance toward gays, see Ben-Asher, *supra*, note 2 at 171-76. See also P. Girard, "The Protection of the Rights of Homosexuals Under the

We have seen that, e.g., policies excluding gay men and lesbians from the Armed Forces and laws restricting certain benefits to unmarried heterosexual couples should fail even a less stringent *Oakes* test: discrimination on the basis of sexual orientation cannot even be justified as "reasonably necessary". However, it seems unlikely that the complete absence of positive images of lesbians and gays in Canadian legislation and judicial decisions will suddenly be replaced by a new equality-based approach.[531]

Some hope that law-makers are prepared to accord legal recognition to non-heterosexual families was nevertheless generated by the case of Brian Mossop.[532] The Canadian Human Rights Tribunal had decided that homosexual couples who meet other criteria for family benefits cannot be discriminated against because they are in a same-sex relationship.[533] The fundamental issue as interpreted by the Canadian Human Rights Commission was whether the meaning of "family status" in the *Human Rights Act* included same-sex couples. The ruling said that a government employee was discriminated against on the basis of his family status when he was denied a compassionate-leave day to attend the funeral of his partner's father. He was denied the pass because his partner was of the same sex and

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International Law of Human Rights: European Perspectives" (1986) 3 C.H.R.Y.B. 3.

[531] Ryder, *supra*, note 2 at n.221.

[532] For other recent decisions that have generated some hope see Ryder, *ibid.* at n.222. He points out that a broad and functional definition of family was adopted by the New York Court of Appeals in *Braschi* v. *Stahl Associates* (74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989). On July 6, 1989, New York's highest court expanded the legal definition of a family, holding that a gay couple who had lived together for a decade could be considered a family under New York City's rent-control regulations. According to William Rubenstein, the American Civil Liberties Union staff lawyer who argued the case, the decision "marks the most important single step forward in American law toward legal recognition of lesbian and gay relationships." On *Braschi*, see Note, "*Braschi* v. *Stahl Associates Co.*: Much Ado About Nothing" (1990) 35 Villanova L.R. 361; Note, "Redefining the Family" (1990) 25 Harvard Civil Rights - Civil Liberties L.R. 183. See also *East 10th Street Associates* v. *Goldstein* (reported in (1990) 39 Outweek 14).

[533] *Brian Mossop and Department of Secretary of State, Treasury Board of Canada, Canadian Union of Professional and Technical Employees*, C.H.R.C. 6/89 (April 13, 1989) (Can.), 10 C.H.R.R. D/6064; see also the Human Rights Advocate of June, 1989 at 3. Set aside in *A.-G. of Canada* v. *Mossop*, Unreported decision of the Federal Court of Appeal, June 29, 1990 (Court file A-199-89).

therefore the government refused to recognize them as a family unit.

As we have seen, the *Canadian Human Rights Act* does not prohibit discrimination based on sexual orientation but does prohibit discrimination based on family status. Elizabeth Atcheson, sitting as a one-member Tribunal, decided that the ongoing relationship between Brian Mossop and his male partner met reasonable criteria for what constitutes a family.[534] Atcheson ruled that treating members of a homosexual family different from a family based on a heterosexual relationship is discrimination on the basis of family status.

The decision has been criticized on a number of grounds. Intervenors in the appeal argued that the Tribunal erred in law in interpreting the term "family status" as applicable to homosexuals. It was submitted that while the meaning of "family" may have evolved over the years and that household units exist other than the traditionally recognized "nuclear family" units, there is nonetheless a strong public interest expressed through the law in promoting and preserving the traditional concept of "family". According to the intervenors, biological considerations and the consequences that flow from them are fundamental in determining what in law can constitute "marriage" and cannot be disregarded in determining what is integral to the concept of "family". Like the Court in *Karen Andrews*, the intervenors refused to adopt a functional approach in defining the term "family":

> The plain meaning of the word "family" used in its ordinary and grammatical sense, does not extend to encompass two cohabiting homosexuals. The ordinary grammatical meaning should be adopted unless there is something

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[534] Testimony included extensive evidence on the nature of families. Dr. Margrit Eichler was called as an expert witness on the Canadian family. In her opinion there is no definition of "family" in Canada that is appropriate for all situations. Her evidence is that the definition of family is by no means clear. There are significant segments of the population that accept homosexual relationships as family relationships. The sociological approach is to look at familial interaction in order to determine whether a given relationship falls within the scope of "family". The relationship between Mossop and his partner was defined as a family: joint ownership of the house in which they lived together, life insurance with the other as beneficiary, joint financing, a sexual relationship, shared housework and an emotional relationship. See Human Rights Advocate, June, 1989, at 3.

to indicate that the words were used in a special sense.[535]

The Tribunal was correct in adopting a functional and inclusive approach to the definition of "family". As has been pointed out,[536] such an approach reflects the reality of diverse families in contemporary society and focuses on an amalgam of emotional, sexual and economic factors without regard to sexual orientation, and in doing so emphasizes familial interaction and interdependencies. It also reflects a practical and common-sense approach to familial relationships so as to encompass not just homosexual family relationships but also blended or re-constituted families, and even other types of families. Such an approach is especially warranted where the uncontradicted evidence is that there is no clear-cut definition of "family" or a consensus as to the meaning of the term in Canada. Furthermore, human rights legislation is public and fundamental law of general application and must be interpreted so as to advance the broad policy considerations underlying the legislation. This task ought not to be approached in a restrictive fashion so as to enfeeble the legislation but rather in a manner befitting the special nature of the legislation.[537] The central purpose of human rights legislation is remedial in that its purpose is to identify and eradicate discriminatory conditions regardless of the motives or intentions of those who cause them.[538]

The Tribunal acknowledged that in order to advance the policy considerations underlying the *Human Rights Act* and to reflect the remedial nature of the *Act* the only reasonable

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[535] See the Factum of the Intervenors (The Salvation Army, Focus on the Family Association Canada; Realwomen; The Pentecostal Assemblies of Canada; and the Evangelical Fellowship of Canada), Court File No. A-199-89 in the Federal Court of Appeal, at 7.

[536] See the Factum of the Intervenors (Equality for Gays and Lesbians Everywhere; Canadian Rights and Liberties Federation; The National Association of Women and the Law; The Canadian Disability Rights Council; The National Action Committee on the Status of Women), Court File No. A-199-89 in the Federal Court of Appeal, at 7.

[537] *Ibid.* at 9.

[538] See *Bonnie Robichaud and the Canadian Human Rights Commission* v. *the Queen* (1987), 40 D.L.R. (4th) 577, at 580-81.

interpretation of "family status" was one that included homosexual relationships. Equally, the Supreme Court of Canada has held that the values embodied in the *Charter* must be given preference over an interpretation that would run contrary to them. This requires an interpretation of "family status" that is sufficient to give an employee who is a member of a homosexual family the same right to bereavement leave as has a member of a heterosexual family; and an interpretation of "spouse" that includes same-sex partners. Under s. 1 of the *Charter*, courts should therefore no longer be justified in arguing that the objective of the legislation is to promote and assist the establishment and maintenance of only the "traditional family".

However, the Tribunal's decision was overturned by the Federal Court of Appeal in a decision rendered on June 29, 1990. The appeal court dismissed the Tribunal's approach and in so doing resorted to what many see as an archaic, somewhat biased definition of family: a group of individuals with common genes, common blood, and common ancestors which can only be extended through adoption and legal marriage. Marceau J. refused the sociological definition of family and said in the ruling that he failed

> to see how any approach other than a legal one could lead to a proper understanding of what is meant by the phrase family status. Even if we were to accept that two homosexual lovers can constitute sociologically speaking a sort of family, it is certainly not one which is recognized by law as giving its members special rights and obligations.[539]

Marceau J. also said commission tribunals cannot reject the traditional meaning of family and substitute "a meaning ill adapted to the context" and one that Parliament did not have in mind when it made family status a ground of prohibited discrimination seven years ago.

Stone J. further developed this point, saying that Parliament's objective in adding "family status" as a prohibited ground of discrimination to those already contained in subsection

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[539] At 17. As has been pointed out by Ryder, *supra*, note 2 at n.234, Marceau J., like McRae J. in *Karen Andrews*, relied upon a history of legislative exclusion of lesbian and gay relationships to justify further disadvantage by exclusion. Consequently, he interpreted family status in a manner that can only serve to further entrench the privilege of the heterosexual family.

3(1) of the *Canadian Human Rights Act* was of considerable significance in deciding upon the correctness of the Tribunal's decision. He pointed out that until the amendment was adopted on July 1, 1983, the original English version of the *Act* included only "marital status" whereas the original French version included only "situation de famille". He concluded that the amendment appears to have been introduced to resolve a discrepancy between the two versions. Stone J. then cited the following passage of testimony before a Standing Committee of the House of Commons by the then Minister of Justice:

> This concept [the "family status" concept] prohibits discrimination on the basis of relationships arising from marriage, consanguinity or legal adoption. It could include ancestral relationships, whether legitimate, illegitimate or by adoption, as well as relationships between spouses, siblings, in-laws, uncles or aunts, nephews or nieces, cousins, etc. It will be up to the commission, the tribunals it appoints, and in the final cases, the courts, to ascertain in a given case the meaning to be given to these concepts.[540]

The Minister also made it clear that the government of the day had decided not to include in the *Act* "sexual orientation" as a prohibited ground of discrimination.[541]

In the view of Stone J. this furnished a strong indication that it was the intention of Parliament to limit the new prohibited ground of discrimination in a way that did not include discrimination based on sexual orientation. He further held that, while Parliament is free to further amend the statute, it is not within the authority of the court to do

> that which Parliament alone may do. We are here concerned with the interpretation of "family status" and not with the wisdom underlying Parliament's decision not to include within it sexual orientation as a prohibited ground of discrimination.[542]

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[540] At 2 of Stone J.'s reasons for judgment, citing from the *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, Issue No. 114, at 17. (Appeal Book, Volume 3, at 326.)

[541] *Minutes of Proceeding* at 19-20 (Appeal Book, Volume 3, at 329).

[542] *Supra*, note 540 at 3.

While it is true that it is not within the authority of the court to include sexual orientation as a prohibited ground, it is also true, as Stone J. himself pointed out, that when Parliament included the term "family status" in the *Human Rights Act*, it had no precise definition in mind and wished the courts to determine its meaning. It was wrong, therefore, to refuse to accept the Tribunal's decision on the ground that to do so would be to read into the legislation a definition that Parliament had not intended to be included. Parliament had decided not to include in the act "sexual orientation" as a prohibited ground of discrimination, but expressly left open and to the courts to decide the meaning to be given to the concept of family status, thus implicitly recognizing that the concept is in flux and that there can be no clearcut definition of what it means. There is no reason why the Court could not have accepted the Tribunal's definition of "family status", which was in accordance with present-day social realities and consistent with previous interpretations of the *Charter*.[543]

In overturning the Tribunal's decision, the Court also said that Mossop's complaint was really one of sexual orientation:

> Should it be admitted that a homosexual couple constitutes a family in the same manner as a husband and wife, it then becomes apparent that the disadvantage that may result to it by a refusal to treat it as a heterosexual couple is inextricably related to the sexual orientation of its members. It is sexual orientation which has led the complainant to enter with Popert into a "familial relationship" ... and sexual orientation, therefore, which has precluded the recognition of his family status with regard to his lover and the man's father. So in final analysis, sexual orientation is really the ground of discrimination involved.[544]

Although Marceau J. acknowledged that according to *Veysey* and *Brown* sexual orientation is a ground protected from discrimination under s. 15 of the *Charter*, he refused the argument that the conclusion reached by the Tribunal would accordingly be validated by being the only application of "family status" consonant with the *Charter*.

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[543] See B. Eyolfson, "Setback for Equality" (Fall 1990) 2 The New Queen's Counsel 6 at 7.

[544] At 19-20.

He said that he did not see

> the *Charter* as capable of being used as a kind of ipso facto legislative amendment machine requiring its doctrine to be incorporated in the human rights legislation by stretching the meaning of terms beyond their boundaries.... For one thing, human rights codes impact on areas of the private sector of economic life which are not readily seen to fall within the scope of the *Charter*. It may well be that the legislatures who entrenched the *Charter* were willing to impose a more demanding standard of conduct on themselves and on the executive than they would have decided to impose on the population at large.... For another thing, the *Charter* contains within it a general balancing mechanism, in the form of section 1, which is not present in human rights codes.... If tribunals begin to read into those statutes [human rights legislation] unforeseen meanings on the basis that *Charter* jurisprudence has found such meanings to constitute "analogous grounds" under section 15, there will be no section 1 analysis, and no occasion for the development of specific exceptions to substantive rights referred to by McIntyre, J.[545]

In his separate reasons for judgment, Stone J. stressed that, while the contention that "when human rights legislation is in conflict with the *Charter*, the provisions of the *Charter* prevail"[546] would appear to be supported by *Re Blainey and Ontario Hockey Association et al.*[547] and *RWDSU* v. *Dolphin Delivery Ltd.*,[548] none of the parties had sought to demonstrate that any provision of the *Act* was in conflict with the *Canadian Charter*. The point that was argued was that the *Act* and the *Charter* are interrelated and that together they mandate an interpretation of "family status" that "does not discriminate against male and female homosexuals based on their sexual orientation".[549] While accepting that human rights legislation should be interpreted, as much as possible, in a manner consistent with the

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[545] At 20-22.

[546] Paragraph 24 of the Factum of the Intervenors Equality for Gays and Lesbians Everywhere et al.

[547] *Supra*, note 370.

[548] *Supra*, note 448 at 601-603.

[549] At paragraph 29 of the Factum.

provisions of the *Charter* and its interpretation, Stone J. said that he could not accept that the *Charter* should operate so as to mandate the courts to ascribe to a statutory term a meaning that it was not intended to possess:

> If the statutory term, construed as I think it should be construed, is thought to conflict with the provisions of the *Charter* then the constitutional validity of that term must be put in issue for the *Charter* to play a role in resolving the dispute. Having already decided that the term "family status", as it is used in the *Act*, does not import sexual orientation as a prohibited ground of discrimination, I am unable to see how the *Charter* can alter the construction of that term. The absence of "sexual orientation" from the list of grounds of discrimination prohibited by subsection 3(1) of the *Act* as infringing a right enshrined in the *Charter* is not raised in this appeal.[550]

The decision strongly suggests that further legislative action is needed to protect the rights of gay persons. If the *Charter* were left to stand alone, without an accompanying amendment to the *Canadian Human Rights Act*, the gay community would have no other recourse but the courts in the event of discrimination. An amendment to the *Human Rights Act* would make available an expeditious, inexpensive, and non-confrontational mechanism for conciliating and resolving allegations of discrimination on the basis of sexual orientation in the federal sector. Although I agree with the finding by the Human Rights Tribunal that Mossop has been discriminated against on the basis of family status, I also suggest that it is not completely satisfactory. Reliance on the ground of family status in this case had been seen by many as constituting a mere subterfuge for incorporating sexual orientation in the *Act* as a prohibited ground of discrimination even before the Federal Court of Appeal refused to accept this interpretation of the *Act*. Had the case been litigated under the *Charter*, the complaint would have been one of discrimination on the basis of sexual orientation. And - even applying a less stringent test under s. 1 - it would have been difficult for the government to prove that the limitation on the right to equal treatment is a reasonable one. Why should a heterosexual, but not a homosexual, spouse be entitled to bereavement leave?

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[550] At 5, Stone J.

It is also important to note that, as has been pointed out by Ryder,[551] the reasoning of the *Mossop* decision will not affect the interpretation of discrimination on the basis of sexual orientation prohibited by the *Charter* and by Manitoba, Ontario, Quebec and Yukon human rights legislation, even if the *Mossop* decision is not reversed by the Supreme Court of Canada on appeal.

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[551] *Supra*, note 2 at n.235.

General Conclusion

As has been pointed out,[552] *Andrews*, particularly as illuminated by *Turpin* and *Worker's Compensation Act Reference*, represents a significant departure from most of the lower court judgments concerning equality. It also provides more guidance as to the conception of equality underlying s. 15 and the framework of analysis to be used in applying the section than we had a right to expect so soon.[553]

The Supreme Court has rejected the *Canadian Bill of Rights* jurisprudence concerning equality, and has similarly resisted the temptation to follow the model established under the equal protection jurisprudence in the United States.

In *Andrews*, McIntyre J. adopted an effects-based approach that focused on the real social impact of law and policy. According to him,

> the purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component.[554]

He cited from *Reference re An Act to Amend the Education Act*,[555] where Howland C.J.O. and Robins J.A. stated that

> s. 15(1) read as a whole constitutes a compendious expression of a positive right to equality in both the substance and the administration of the law....

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[552] Black & Smith, *supra*, note 243 at 614.

[553] *Ibid.*

[554] *Andrews*, *supra*, note 24 at 15.

[555] *Supra*, note 399.

> [T]he right to equal protection and equal benefit of the law now enshrined in the *Charter* rests on the moral and ethical principle fundamental to a truly free and democratic society that all persons should be treated by the law on a footing of equality with equal concern and respect.[556]

As we have seen,[557] *Andrews* also strongly orients s. 15 in the direction of ensuring that the legal and governmental system does not exacerbate societal disadvantage of persistently disadvantaged groups, rather than in the direction of protecting against isolated incidents of arbitrary treatment of individuals who generally receive their fair share from the system.[558] Although McIntyre J. did not articulate the purpose of s. 15 so directly, the judgment as a whole reveals a concern with historical and current subordination of socially disadvantaged groups in society. The remedying of that disadvantage should constitute the central purpose of s. 15. This flows from his adoption of an effects-based approach, from his insistence on evidence of disadvantage and prejudice, and from his understanding of the enumerated and analogous grounds.

McIntyre J's failure to weave together the strands of his analysis to provide a more complete delineation of s. 15's purpose accounts for some of the ambiguities and hesitations apparent in his judgment. "But the threads are there, ready to be woven together into a constitutional approach to equality that focuses on identifying and remedying substantive inequalities and systemic discrimination in a meaningful way."[559] This was enhanced by a statement of Wilson J., who was more forceful in articulating her view of the purpose of s. 15, which she envisaged as a provision "designed to protect those groups who suffer social, political and legal disadvantage in our society."[560]

At a minimum, therefore, *Andrews* signals the possibility that courts in Canada will listen

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[556] Ibid. at 42 (D.L.R.), 554 (O.R.).

[557] *Supra*, note 269.

[558] Black & Smith, *supra*, note 243 at 614.

[559] See Sheppard, *supra*, note 27 at 228.

[560] See *Turpin*, *supra*, note 25 at 1333.

to the voices of homosexuals. The Court has not adopted an approach to equality that confines homosexuals' future arguments to a "fixed doctrinal box".[561] Instead, *Andrews* requires that s. 15 redress disadvantaging and prejudice. Moreover, as one commentator notes,[562] a purposive approach grounded in the identification of historical and current disadvantaging constitutionalizes a contextual approach to the equality guarantees.[563]

Andrews, however, does contain some signs of caution. There was an effort to restrict s. 15(1) analysis to enumerated or analogous categories of discrimination and to avoid wide-ranging consideration of reasonableness or fairness at this stage. While this will help homosexuals seeking equal rights, the refusal by part of the Court to apply the full rigours of *Oakes* to s. 1 analysis in equality cases causes some concern.

As Colleen Sheppard aptly points out,

> going to court remains risky. It is risky because women [and this applies equally to homosexuals] still bear the legal and practical burden of educating the judiciary about the subordination of women [homosexuals]. It may also prove risky to raise false hopes that the courts will solve the problem of gender [homosexual] oppression with the help of s. 15 and s. 28. Finally, it is risky because the application of the constitutional principle of equality by the courts is a deeply indeterminant and value-laden exercise.[564]

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[561] See Sheppard, *supra*, note 27 at 229, where this concept is applied to women.

[562] *Ibid.* at 230.

[563] As Sheppard, *supra*, note 27 at 230 has pointed out, rejection of formalistic, abstract legal reasoning has been an important dimension of feminist critiques of law.

[564] *Ibid.* It is important to recognize that the abstract and reified nature of legal reasoning has made it difficult in the past for judges to identify what members of disadvantaged groups would immediately recognize as inferior treatment. On the subject see "Lesbians, Gays and Feminists at the Bar: Translating Personal Experience into Effective Legal Argument - a Symposium" (1988) 10 Women's Rts. L.R. 107. Briefly stated, comments centered upon the notion that the practice of law is not devoid of human experience, perception or feeling. As a lawyer, one's personal experience is inextricably connected with one's legal analysis, and discovering and cultivating that connection enhances one's understanding of the client and the client's needs.

The "legal perspective", i.e., that of judges and other members of the legal elite, is the perspective of the ruling classes in society and interprets the world, for the most part, in terms of the interests of those classes:

> The experience of oppression by those who are not members of the ruling classes - for reasons of gender, race, class, sexual orientation, or other characteristics that differentiate them from these classes - are not part of this perspective: their history, customs, traditions do not count within it. Accordingly, the elite perspective encoded in the world view of judges leads to an impoverished understanding of domination and oppression at best, and, at worst, a denial that it exists and its further entrenchment.[565]

There is very little in the experience of most judges, drawn predominantly from the ranks of successful middle-aged heterosexual male lawyers, that would lead one to predict that they would show empathy with various aspects of the lives of gay men and lesbians. *Charter* litigation will, therefore, have to entail a process of educating judges about how, why and when gays and lesbians are oppressed in society.[566] While *Andrews* signals that the Canadian Supreme Court judges might actually be willing to listen to homosexuals and invalidate government action, the U.S. experience shows us how personal bias can prevent judges from doing so.

The question therefore is: can we litigate our way to a more equal society? We might be asking too much in expecting the judiciary to play any major role in resolving the question of equality. On the other side the right, e.g., to enter into a same-sex marriage is not likely to be won through modern enactments of legislatures:

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[565] Bakan, *supra*, note 467 at 173 n.183.

[566] See also Eberts, *supra*, note 81 at 97: "One of the most obvious methods of trying to ensure success in litigation is through preparation. In a sex [sexual orientation] equality case, this approach is undoubtedly desirable. Expert evidence concerning the background and effect of a particular measure will be of considerable help in undoing social conditioning as well as filling gaps in knowledge. One assumes that judges, being people of goodwill who wish to discharge their responsabilities admirably and fairly, will be interested in such evidence." And see McLachlin, *supra*, note 385 at 586, where she says that if judges are to be expected to make policy decisions, they must be provided with the material upon which those decisions should be based. Failure to do so runs the risk that the decisions of the courts under the *Charter* will not accord with the realities of our society.

> Opponents of judicial review sometimes adopt a somewhat utopian view of the legislative process in which the interests of all citizens are carefully and accurately balanced and any lapse is quickly remedied at the voting booth. In our opinion, there is a danger that legislatures will undervalue the interests of groups that are persistently in the minority and that have unique conditions and needs, even when the process that produced a particular piece of legislation was flawless. The ballot box is not an effective remedy when minority interests are sacrificed to appeal to the majority.[567]

Perhaps the best approach is to remember that recourse through constitutional mechanisms will always have to be balanced through political vehicles: neither will be entirely responsive to gay men and lesbians, especially when they are so poorly represented in the judiciary and the legislatures.

Recently lesbian and gay Canadians have begun legal actions to force the goverment to take the necessary measures to end discrimination. EGALE, an Ottawa-based gay-rights group, will administer $25,000 in grants for legal action in cases of discrimination against lesbian and gay Canadians. The Court Challenges Program, with funds provided by the federal Secretary of State and administered by the Canadian Council on Social Development, is designed to bring issues of equality and language rights to the high courts in an effort to ensure that federal laws respect the provisions of the *Charter*. The Program's mandate initially ended in March 1990, but on May 10 was renewed for another five years with funding of $13.75 million.[568]

Only when the Supreme Court has to deal with the question of equality and gay rights we will know whether it is ready to take homosexuals' rights seriously: chances that it will seem to be much better than in the United States.

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[567] Black & Smith, *supra*, note 385 at 244.

[568] See L. McAfee, "Egale Calls for Extension of Court Challenges Program" GO INFO (Ottawa) Dec. 1989/Jan. 1990 at 10.

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