

Same-Sex Marriage Symposium Issue
THE CASE AGAINST SAME-SEX MARRIAGE IN CANADA:
LAW AND POLICY CONSIDERATIONS
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I. Introduction

This paper was presented at the conference: *The Future of Same-Sex Marriage Claims: The Third Generation and Beyond*, held at J. Reuben Clark Law School, Brigham Young University. As a result, it caters to an American audience and provides basic information about the Canadian legal framework so that the issues pertaining to same-sex marriage may be more readily appreciated. Let us now turn to a brief summary of the pertinent events and then discuss the outline of this paper. *

On June 17, 2003, Prime Minister Jean Chretien¹ announced the drafting of a new law² that would allow for same-sex marriage.³ The draft bill, *An Act Respecting Certain*

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¹ The Governor General, the Queen's representative, governs, except in rare cases, on the advice of the cabinet led by a Prime Minister who chooses his cabinet ministers (usually 30 or more) from among the elected members of his own party who are, in turn, formally appointed by the Governor General. The cabinet ministers, who exercise executive authority, are collectively responsible to the House of Commons for policy and performing duties through the various federal departments, agencies, commissions, boards and state-owned corporations; as a general rule "[i]f a Minister does not agree with a particular policy or action of the Government, he or she must either accept the policy or action, and if necessary, defend it or resign from the Cabinet." Eugene A. Forsey, *How Canadians Govern Themselves*, 1, 5-6 (Her Majesty the Queen in Right of Canada, 5th ed. 2003), available at <http://www.parl.gc.ca/information/library/idb/forsey/toc-e.asp>.

² No bill or proposed law actually becomes law without having been approved by the House, the Senate, and then assented to by the Governor General. When a bill is initiated in the House, by either a cabinet member or private member, the bill must pass through three readings. At the first reading, the bill is introduced to House members but not debated. The second reading involves a general debate on the bill, which is then voted on. If passed, the bill goes to a parliamentary committee for consideration, where witnesses are heard, clauses are examined, amendments are made, and a report drafted. At the third reading, a brief debate ensues on the amended bill, which is then put to a vote. If this reading carries, the bill goes to

Aspects of Legal Capacity for Marriage, is presently before the Supreme Court of Canada for review. It defines marriage as "the lawful union of two persons to the exclusion of others" and allows religious groups to decide whether or not to solemnize same-sex marriages. Three questions have been put to the Supreme Court of Canada: "Does Parliament have the exclusive legal authority to define marriage? Is the proposed act compatible with the *Charter of Rights and Freedoms*? Does the Constitution protect religious leaders who refuse to sanctify same-sex marriage?"⁴ After the Justices decide the case in the fall, the draft bill will be put to a free vote in Parliament.⁵ This means that members of the Prime Minister's Liberal party, which dominates the House of Commons by a majority, need not vote along party lines.⁶

The draft bill is said to reflect Canada's evolution as a society, that is, the changing of her values toward a greater recognition of the equality and dignity of the human person. In the words of Justice Minister Martin Cauchon, "Society is not static. It's in constant evolution. It's a question of dignity. It's a question of equality."⁷ Confident that the draft bill will pass, but anticipating obstacles, Cauchon encouraged provinces to move immediately and act according to the draft bill. Presently, however, only Ontario and British Columbia have performed same-sex marriages.⁸

The draft bill is a response to the latest decision in a trilogy of cases considering same-sex marriage in the provinces of Quebec, British Columbia, and Ontario. On June 10, 2003, the Ontario Court of Appeal released *Halpern v. Canada*,⁹ the last judgment in a trilogy of cases addressing the same-sex marriage issues. *Halpern* is the most significant

the Senate and a similar process is repeated there. Once accepted by the Senate, which is generally the case, the bill then must receive royal assent from the Governor General. Forsey, *supra* note 1, at 35, 45-46).

³ Colin McClelland, Same Sex Marriage Endorsed in Canada Government Will Act to Change Law. The Wash. Post, 18 June 2003, p. A22 at <http://www.washingtonpost.com/wp-dyn/articles/A7004-2003Jun17.html>.

⁴ CBC News, Ottawa Drafts Same-sex Marriage Law, at http://www.cbc.ca/stories/2003/07/17/marriage_030717 (last updated Jun. 18, 2003).

⁵ House of Commons consists of elected representatives or members, who receive the largest number of votes, in each of the country's respective electoral constituencies, which total about 301. The number of representatives is roughly proportional to the population of each province or territory: Ontario, Quebec, British Columbia, Alberta, Manitoba, Saskatchewan, Nova Scotia, New Brunswick, Newfoundland and Labrador, Prince Edward Island, Northwest Territories, Yukon Territories, Nunavut. Parliamentary candidates may run as members of a recognized party or as independents. The party that wins the largest seats in the House of Commons forms the government and the party leader is then appointed as Prime Minister by the Governor General. The Members of the Senate, or Upper House, on the other hand, are selected from the Western Provinces, Ontario, Quebec, the Atlantic Provinces, and the territories and are appointed by the Governor-General on recommendation of the Prime Minister. Forsey, *supra* note 1, at 37-38. For details on specific regions in Canada see for example, Government of Canada: Provinces and Territories, at http://canada.gc.ca/othergov/prov_e.html (2003).

⁶ CBC News, *supra* note 4

⁷ *Id.*

⁸ *Id.*

⁹ *Halpern v. Can.*, [2003] 65 O.R.3d 161. *Halpern* was recently referred to in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), wherein the Court considered the issue whether, consistent with the Massachusetts Constitution, the state may deny the protections, benefits, and obligations conferred by civil marriage to a same-sex couple who wishes to marry. The Court answered the query in the negative, holding that the Massachusetts Constitution "affirms the dignity and equality of all individuals," and "forbids the creation of second-class citizens." *Id.* at 948. And the State has failed "to identify any constitutionally adequate reason for denying civil marriage to same-sex couples." *Id.*

of these cases since the Court had the benefit of reviewing the reasoning of the other two cases in the trilogy, namely the British Columbia Court of Appeal in *EGALE Canada Inc. v. Canada (A.G.)*, released in May 2003,¹⁰ and the Superior Court of Quebec in *Hendricks v. Quebec (A.G.)*, released in September 2002.¹¹ In all three cases, after their applications for marriage licenses had been denied, same-sex couples commenced a civil action in their respective jurisdictions. The Court, in each of the three cases, held that the prohibition against same-sex marriage contravened s. 15 (1) of the *Charter of Rights and Freedoms*, namely, the equal protection provision, and could not be saved under s. 1 as a reasonable limit.

In *Hendricks*, Justice Lemelin of the Quebec Superior Court declared the statutory bars to same-sex marriage to be in breach of the Charter and to have no force and effect; at the same time, he stayed the declaration for a two-year period to allow Parliament to remedy the situation. In reference to Art. 5 of the *Federal Harmonization Act*, the reputed juridical source of the discriminatory treatment,¹² the Court concluded: "il appartient au pouvoir législatif de choisir les mesures appropriées pour corriger la disposition discriminatoire" (the legislature has the power to choose the appropriate means to correct the discriminatory provision).¹³

The British Columbia Court of Appeal in *EGALE* found the common law definition of marriage unconstitutional and reformulated it to mean "the lawful union of two persons to the exclusion of all others."¹⁴ At the same time, it suspended the remedy until July 12, 2004, to give the federal and provincial governments the opportunity to review and revise legislation in order to bring it in line with the decision. In so doing, the Court emphasized that such a suspension period would coincide with that set by the lower court in *Halpern v. Canada*, which was necessary "to avoid confusion and uncertainty in the application of the law to same-sex marriages."¹⁵

When, however, the Ontario Court of Appeal in *Halpern* reformulated the definition of marriage as "the voluntary union for life of two persons to the exclusion of others,"¹⁶ and rendered the new definition effective immediately in Ontario, the British Columbia Court of Appeal responded by lifting its suspension. At the request of same-sex marriage advocates, and with the consent of the Attorneys General of both Canada and British Columbia, the *EGALE* appeal was reopened on July 8, 2003. The Court concluded that:

any further delay in implementing the remedies will result in an unequal application of the law as between Ontario and British Columbia, with same-sex couples being denied

¹⁰ *EGALE Can. Inc. v. Can. (A.G.)*, [2003] 13 B.C.L.R.2d 1. For case comments concerning the lower court decision: (2001) B.C.S.C. 1365, see: Jo-Anne Pickel, Judicial Analysis Frozen in Time: *EGALE Can. Inc. v. Can. (A.G.)*, 65 Sask. L. Rev. 243 (2002); Sarah Loosemore, *EGALE v. Canada: The Case for Same-sex Marriage*, 60 U.T. Fac. L. Rev. 43 (2002); Julie C. Lloyd, *Defining Marriage, Step One: EGALE v. Can.*, 39 Alta L. Rev. 963 (2002).

¹¹ *Hendricks v. Quebec*, [2002] R.J.Q. 2506

¹² *Id.* at P 205; See also *id.* at P 212 (where the Court also declared of no force and effect Art. 1.1 of the Modernization of Benefits and Obligations Act, and Art. 365 (2) of the Civil Code of Quebec).

¹³ *Id.* at P 205.

¹⁴ *EGALE Can. Inc. v. Can. (A.G.)*, [2003] 225 D.L.R. (4th) 472; (2003) 13 B.C.L.R. (4th) 1 (B.C.C.A.) at P159

¹⁵ *Id.* at P.161

¹⁶ *Halpern v. Can.*, [2003], 172 O.A.C. 276; (2003) 65 O.R. (3d) 161 (Ont.C.A.) at P 1

the right to marry in British Columbia until July 12, 2004, while same-sex couples in Ontario may marry as and when they choose to do so.¹⁷

The purpose of this paper is to explore the legal and policy related reasons behind the same-sex marriage debate. To this end, the paper is divided into four parts. Part II explores the chronology of events and the key legal developments that have paved the way for the same-sex marriage debate. Part III explains why Canadian society is now facing the same-sex marriage debate. To this end, it explores the legal institutions of Canadian society and suggests that the institution of marriage is fundamental to our constitutional structure. The philosophical foundation of the legal framework, upon which Canadian federalism is based, is established on the basis of four principles: a Christian view of man and society, pluralism, the common good, and the principle of subsidiarity. These principles have been eroded to such a degree that the very foundation of our system is crumbling, while no adequate social theory stands ready to take its place.¹⁸ Part IV articulates the real issue at stake in the same-sex marriage debate. To this end, the paper reviews two approaches to same-sex-marriage in Canada, critiques their philosophical basis, and suggests that the proponents of same-sex marriage offer no workable philosophy as a foundation for our legal system. Part V discusses a potential resolution to the debate by suggesting that the Canadian parliament return to a more objective notion of the human person and human dignity and recall its primary task to serve the common good. This Section also presents five main arguments against redefining marriage: (1) Marriage and same-sex partnerships are so radically different that to treat them the same would mean distorting the authentic meaning of human dignity and the very notion of marriage. Such redefinition would also distort the authentic meaning of equality; (2) offend the dignity of children; and (3) overlook scientific evidence essential to protecting the rights of children; (4) undermine the importance of the natural family; and (5) disturb the Canadian social order.

¹⁷ EGALE Can. Inc. v. Can. (A.G.), [2003] 228 D.L.R. (4th) 416; 15 B.C.L.R. (4th) 226 (B.C.C.A.) at 419.

¹⁸ The thesis is that of Harold J. Berman. It is considered here in the context of Canadian society. Berman argues that "law and religion are two different aspects, two dimensions of social experience-in all societies, but especially in Western society... one cannot flourish without the other." He opines that "when the existing legal and religious systems have broken down there seems to be nothing available to replace them." For Berman, the answer to the dilemma lies in society's ability to overcome the radical separation of law and religion and to move toward a renewal of "community experiences on all levels, from communes to the United Nations-that reconcile legal and religious values." Harold J. Berman, *The Interaction Of Law And Religion* 11, 15-16 (Abingdon Press, 1974) [hereinafter Berman, *The Interaction of Law And Religion*]. See also Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, 558 (Harvard University Press, 1983) [hereinafter Berman, *Law and Revolution*] ("Law is usually associated with the visible side, with works; but a study of the history of Western law, and especially its origins, reveals its rootedness in the deepest beliefs and emotions of the people."); Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* 52-53 (Scholars Press, 1993) [hereinafter Berman, *Faith and Order*] ("The crisis of the Western legal tradition. is primarily due. to the breakdown of communities on which the Western legal tradition is founded [namely] stable Christian communities) ("[S]ocial life is characterized by religious apathy and by fundamental divisions of race, class, sexes, and generations. Where the bonds of faith are weak, and bonds of kinship and of soil have given way to vague and abstract nationalism, it is useless to suppose that law can effectuate its ultimate purpose. Unless it is rooted in community, law becomes merely mechanical and bureaucratic.").

II. The Chronology

A. Introduction

The demand for same-sex marriage is the next logical step in the gay and lesbian fight for "equality" as defined by the Supreme Court of Canada. The gay community won their first victory with the decriminalization of sodomy between consenting adults on the grounds of privacy. This led to an important chain of Supreme Court decisions protecting gays and lesbians from discrimination on the grounds of sexual orientation. These cases, in turn, set the stage for important lower court decisions in regard to joint adoptions by gay and lesbian couples, as well as subsequent changes in provincial and territorial legislation.

Before embarking on a brief summary of important judicial decisions, it should be noted that the *Charter of Rights and Freedoms* operates to protect persons from breaches of governmental actors (federal, provincial, and territorial), or any delegated forms of legislation, regulations, orders in council, and so forth, as well as government appointees performing statutory duties.¹⁹ Moreover, human rights legislation has been enacted in the various provinces and territories to protect persons from breaches of non-governmental actors in the field of employment, housing, and so forth.

Jurisprudence protecting the rights of gays and lesbians has largely developed under s. 15 (1) of the *Canadian Charter of Rights and Freedoms*, which provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability.

Once an infringement under s. 15 (1) has been established, the onus shifts to the government to prove that the discrimination is justifiable under s. 1 of the Charter. In this regard, s. 1 provides: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The Supreme Court of Canada case, *R. v. Oakes*, sets out the well-established test under s. 1.²⁰ The Court considers whether or not the "objective" in limiting rights is of pressing and substantial importance, and whether or not the means chosen are reasonable and demonstrably justified. The latter consideration involves a proportionality test in which the Court considers the measure adopted, the means used, and the effects suffered in relation to the objective in question. More specifically, (a) there must be a rational connection between the goal and discriminatory distinction, (b) the right must be impaired no more than is reasonably necessary to accomplish the goal, and (c) the effect of the discrimination must be proportionate to the benefit achieved.

¹⁹ For further discussion of this point, see Peter W. Hogg, 1 *Constitutional Law Of Canada* (looseleaf) 34-7 to 34-15 (Thompson, Carswell, (1997) [hereinafter Hogg, *Constitutional Law*]. See also Joseph M. Pellicciotti, *The Constitutional Guarantee of Equal Protection in Canada and the United States: Comparative Analysis of the Standards For Determining the Validity of Governmental Action*, 5 *Tulsa J. Comp. & Int'l. L.* 1 (1997).

²⁰ *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, at 138-39

The burden of proof under s. 15 is on the claimant alleging the violation. For their part, however, the courts have not had an easy task interpreting s. 15 (1).²¹ Prior to *Andrews v. Law Society of British Columbia*²² the Court applied the Aristotelian principle of equality that persons who are alike should be treated alike, and persons who are different should be treated differently.²³ In *Andrews*, the majority judgment written by Judge McIntyre rejects the test as deficient in that it could justify laws that discriminate between various groups, such as pregnant and non-pregnant women, or persons of dark skin and light skin. As a result, s. 15 is interpreted as a prohibition of discrimination defined as a disadvantage caused by the classifications listed in or analogous categories to it. Any question regarding the justification of the discrimination is then examined under s. 1. The new approach, however, has not been embraced by all members of the Supreme Court of Canada.

The 1995 decisions of *Miron v. Trudel*²⁴ and *Egan v. Canada*,²⁵ decided the same day, best illustrate the division within the Supreme Court of Canada over the interpretation of s. 15(1). In both cases, the Court is divided into the following groups. Lamer C. J., La Forest, Gonthier and Major JJ, promote an analysis which, at the risk of oversimplification, essentially requires a distinction based on a personal characteristic enumerated or analogous to the categories in s. 15(1) that results in a disadvantage and is irrelevant to the values underlying the legislation. Sopinka, Cory, McLachlin, and Iacobucci, JJ., on the other hand, support the *Andrews* approach that differs from the first in regard to the question of relevancy. This approach rejects the proposition that discrimination would not result if a group characteristic were relevant to a legislative aim. Justice L'Heureux-Dube, drawing heavily upon gay and lesbian literature,²⁶ develops yet a third test that rejects the category-based perspective²⁷ in favor of a test that focuses on

²¹ In regard to the analysis of the law in this section, I am especially indebted to the helpful discussion of the jurisprudence by Hogg, *Constitutional Law*, supra note 19 at 52-12 to 52-27; See also L. Smith and W. Black, *The Equality Rights in The Canadian Charter of Rights and Freedoms*, (3rd ed.) at <http://www.cdp-hrc.uottawa.ca/publicat/charter.html>; L. Smith, *Judicial Interpretation of Equality Rights Under the Canadian Charter of Rights and Freedoms: Some Clear and Present Dangers*, 23 U.B.C. Law Rev. 65 (1988); M. D. Lepofsky, *The Canadian Judicial Approach to Equality Rights: Freedom Ride or Rollercoaster?*, 1 N.J.C.L. 315 (1992); C. Sheppard, *Litigating the Relationship Between Equity and Equality*, Study Paper For the Ontario Law Reform Commission (1993); M. Eichler, *The Elusive Ideal-Defining Equality*, 5 C.H.R.Y.B. 167 (1988); Pellicciotti, supra note 19; Donna Greschner, *Does the Law Advance Equality*, 27 Queen's L.J. 299 (2001).

²² *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143

²³ See Justice McIntyre in *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143, 166, (quoting *Ethica Nichomacea*, Book V3, 1131a-6 (W. Ross, trans., 1925)), when he holds: "The similarly situated test is a restatement of the Aristotelian principle of formal equality--that 'things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood.'"

²⁴ *Miron v. Trudel*, [1995] 2 S.C.R. 418.

²⁵ *Egan v. Can.*, [1995] 2 S.C.R. 513.

²⁶ See Claire L'Heureux-Dube, *What a Difference a Decade Makes: The Canadian Constitution and the Family Since 1991*, 27 Queen's L.J. 361 (2001) [hereinafter L'Heureux-Dube, *What a Difference a Decade Makes*]; Claire L'Heureux-Dube, *Making Equality Work in Family Law*, 14 Can. J. Fam. L. 103 (1997) [hereinafter L'Heureux-Dube, *Making Equality Work*]; Douglas Kropp, "Categorical Failure": Canada's Equality Jurisprudence - Changing Notions of Identity and the Legal Subject, 23 Queen's L.J. 201 (1997); Mimi Liu, A "Prophet With Honour": An Examination of the Gender Equality Jurisprudence of Madam Justice Claire L'Heureux-Dube of the Supreme Court of Canada, 25 Queen's L.J. 417 (2000).

²⁷ *Egan*, at P 53 (L'Heureux-Dube, J.) (rejecting this approach because it is "distanced and desensitized from real people's real experiences.")

impact. According to this view, the core element of discrimination is human dignity, that is, "when members of that group have been made to feel, by virtue of the impugned legislative distinction, that they are less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration."²⁸ And discrimination on this basis is judged according to a subjective-objective standard.²⁹

The analysis of Justice L'Heureux-Dube on the question of human dignity is heavily relied upon in the 1999 decision *Law v. Canada*.³⁰ In this case, the Supreme Court of Canada unanimously holds that in order to prove discrimination the distinction must be based on listed or analogous grounds and constitute "a violation of essential human dignity"³¹ which is held to mean when "an individual or group feels self-respect and self-worth."³² In brief, the approach of Justice L'Heureux-Dube is partly accepted, namely her notion pertaining to human dignity. However, the categorical approach, which she despises, remains intact.

²⁸]. *Id.*, at P 39 (L'Heureux-Dube, J.) (emphasis added). On the notion of human dignity, the following comments are particularly noteworthy: "First, I acknowledge that the above definition essentially tries to put into words the notion of fundamental human dignity. Dignity being a notoriously elusive concept, however, it is clear that this definition cannot, by itself, bear the weight of s. 15's task on its shoulders. It needs precision and elaboration. I shall attempt to demonstrate shortly how this approach to discrimination can find more concrete and principled expression using many of the criteria that have in the past proven themselves to be highly apposite under the approach taken by this Court in *Andrews*. As such, it will become evident that the approach I suggest is far less a departure from that developed in *Andrews* than may appear at first blush. I believe many of those analytical tools to be valid. The problem, in my mind, lies not with the tools but with the framework within which they have in the past been employed. In short, if the framework is not perfectly suited for the tools, then we do not use the tools to their full potential. Second, I note that although the utopian ideal would be a society in which nobody is made to feel debased, devalued or denigrated as a result of legislative distinctions, such an ideal is clearly unrealistic. The guarantee against discrimination cannot possibly hold the state to a standard of conduct consistent with its most sensitive citizens. Clearly, a measure of objectivity must be incorporated into this determination. This being said, however, it would be ironic and, in large measure, self-defeating to the purposes of s. 15 to assess the absence or presence of discriminatory impact according to the standard of the "reasonable, secular, able-bodied, white male". A more appropriate standard is subjective-objective--the reasonably held view of one who is possessed of similar characteristics, under similar circumstances, and who is dispassionate and fully apprised of the circumstances. The important principle, however, which this Court has accepted, is that discriminatory effects must be evaluated from the point of view of the victim, rather than from the point of view of the state." *Id.* at PP 40, 41

²⁹ *Id.* at P 41 (L'Heureux-Dube, J.).

³⁰ *Law v. Can.*, [1991] 1 S.C.R. 497, P 49. The Court makes passing references to other judicial statements about the importance of human dignity as a consideration and then adopts the definition of human dignity set out by Justice L'Heureux-Dube, namely her reference to persons who "have been made to feel... less capable, or less worthy of recognition or value as human beings." *Id.*

³¹ *Id.* at P 88.

³² The Court went on to note: Human dignity is harmed by unfair treatment premised upon personal traits or circumstances, which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law? *Id.*

With this brief review let us turn to the summary of events leading to where the same-sex marriage debate stands today in Canadian society.

B. Decriminalization of Sodomy

On December 22, 1967, then Justice Minister Pierre Trudeau, proposed extensive amendments to the Criminal Code, largely decriminalizing sodomy.³³ In his view, the amendments "knocked down a lot of totems and overrode a lot of taboos" toward "bringing the laws of the land up to contemporary society."³⁴ This particular revision of the Federal Criminal Code, applied across the nation, was justified on the grounds that the State had no business in "the bedrooms of the nation" and "what's done in private between adults."³⁵ The issue of sodomy was said to be relevant only when it became public or related to minors.³⁶

C. Sexual Orientation and Protected Category Status

On December 16, 1977, sexual orientation was included as a prohibited ground of discrimination in the *Quebec Human Rights Code*, and over the years other jurisdictions have followed suit.³⁷

At the federal level, from 1979 to 1996, there were numerous legislative attempts under the *Canadian Human Rights Code* to prohibit discrimination on the grounds of sexual orientation.³⁸ The Ontario Court of Appeal nudged the process along in the 1992 decision *Haig v. Canada* by ruling that the absence of sexual orientation from the list of proscribed grounds of discrimination in s. 3 of the *Canadian Human Rights Act* was unconstitutional and in violation of the equality provision in s.15 (1).³⁹

³³ See also *Klippert v. The Queen* [1968] 2 C.C.C. 129 (analysis of the law prior to the amendment); *R v. Butler* [1993] Man. R.2d 952; *Halm v. Can.* [1996] I.F.C. 547; *The Queen v. Carmen* [1995] O.A.C. 214 (analysis of the provisions of the Criminal Code with respect to minors) (I.F.C not found in recognized Canadian reporters, Appendix C, Canadian Guide).

³⁴ Owen Wood, *The Fight for Gay Rights*, CBC Online, at <http://www.cbc.ca/news/indepth/background/gayrights2.html> (Jan. 2001). See, e.g., *Trudeau's Omnibus Bill: Challenging Canadian Taboos*, CBC Archives, at <http://www.archives.cbc.ca/300c.asp?id=1-73-538>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸*Id.* See for example the discussion by Wood and Thompson concerning reports of the Canadian Human Rights Commission, and Parliamentary Committee on Equality, which recommended that sexual orientation be included in the Canadian Human Rights Act. In addition, see the reference to gay activist, MP Svend Robinson's attempted to pass Bills from 1983 to 1991 designed to protect sexual orientation as a prohibited ground of discrimination

³⁹ *Haig v. Can.*, [1992] 94 D.L.R. (4th) 1. In this case, a five year member of the Canadian Armed Forces, after informing his commanding officer that he was homosexual, ceased "to be eligible for promotions, postings or further military career training" in accordance with Canadian Armed Forces Policy. The Court noted that he felt "humiliated and stigmatized," could "no longer bring himself to work under these conditions," and would have filed a complaint against the Armed Forces before the Canadian Human Rights Commission had sexual orientation been a protected ground of discrimination. On the basis of affidavit evidence, the Court concluded that "gays and lesbians perceive that they are objects of invidious discrimination" in society. Indeed, they are "socially disadvantaged" and constitute a "historically disadvantaged group" and a "'discrete and insular minority' group." In choosing to read sexual orientation into the Act, the Court concluded that "it is surely safe to assume that Parliament would favor extending the

In 1995, the Supreme Court of Canada decision in *Egan* held that sexual orientation was a personal characteristic analogous to other enumerated grounds in s. 15 (1) of the Charter. Just three years later, in 1998, provincial and territorial opposition to including sexual orientation as a protected category came to an end. In *Vriend v. Alberta*, the Supreme Court of Canada overturned the Alberta Court of Appeal,⁴⁰ in holding that the *Individual's Rights Protection Act (IRPA)*, which omitted reference to sexual orientation as a protected category, was in violation of s. 15 (1) and not saved by s. 1.⁴¹ In particular, the Court found that legislative omissions could engage Charter scrutiny, and two distinctions had been made under the Act on the basis of sexual orientation, namely, homosexuals versus other groups and homosexuals versus heterosexuals. According to the Court, both of these distinctions resulted in the denial of access to remedial procedures under the Act in question and consequently sent a message to all Albertans that discrimination on the basis of sexual orientation was acceptable which thereby contributed to the ongoing discrimination and psychological harm suffered by gays and lesbians.⁴²

benefit of s. 3(1) of the Act to homosexual persons over nullifying the entire legislative scheme," especially since "enlightened human rights legislative policy has evolved in this country. It is now an integral part of our social fabric." *Id.* at 4, 14 (citations omitted).

⁴⁰ *Vriend v. Alta.* [1998] 1 S.C.R. 493, rev'g, [1996] 34 C.R.R. (2d) 243. Justice McClung sitting on the Alberta Court of Appeal, duly noted that the Alberta legislature had continuously voted against including sexual orientation as a protected category. He gives a scathing lecture on the proper role of courts within a constitutional system founded on democratic governance. Justice O'Leary concurred with Justice McClung, in part, finding that silence may constitute governmental action and thereby engage Charter scrutiny under s. 15 (1). But the respective Act made no distinctions between heterosexuals and homosexuals which existed independently from the Act. The Supreme Court of Canada essentially adopted the dissenting opinion, wherein Justice Hunt found a breach of s. 15 (1) because, by failing to include sexual orientation, the Alberta legislature had encouraged and supported the distinction that exists between homosexuals and heterosexuals, thus reinforcing hostile and stereotypical attitudes against homosexuals who had suffered historical disadvantage, all of which could not be saved by s. 1.

⁴¹*Id.* In this case, a teacher had been fired from his job at a college which held firm religious beliefs against homosexuality and homosexual practices. He was terminated when he refused to resign after admitting his gay lifestyle to the college president. He then filed a complaint with the Alberta Human Rights Commission, the monitoring body under the Individual's Rights Protection Act (IRPA), on the grounds that his employer discriminated against him. But the Commission refused to investigate because sexual orientation was not a protected ground of discrimination under the Act. He later filed a motion in the Alberta Court of Queen's Bench for declaratory relief, which was granted on the basis that the omission to protect persons from discrimination on the grounds of sexual orientation was a violation of s. 15 (1) of the Charter and not justified under s. 1. In a two-to-one decision, the Alberta Court of Appeal found no breach and reversed the decision. Justice McClung, in the majority decision, held that an omission of sexual orientation did not amount to governmental action for the purposes of the Charter. The silence was said to leave heterosexuals and homosexuals the possibility of privately contracting with each other without pain of sanctions under the IRPA.

⁴² It is noteworthy that in his majority decision, Judge Cory remarked that the Supreme Court of Canada had not adopted a uniform approach to s. 15 (1), but found that any differences in perspective did not affect the result in the case. (This analysis does not accord with the views of constitutional experts like Hogg who finds significant differences in the various approaches. See, e.g., Hogg, *Constitutional Law*, supra note 19, at 52-17 to 52-27). Under the s. 1 analysis, Judge Cory held, among other things, that the exclusion of sexual orientation from the Act was antithetical to its very purpose. Judge Major, dissenting in part, disagreed with the remedy and held that the declaration of invalidity should be suspended for a year to

On September 17, 2003, the House of Commons passed Bill C-250, *An Act to Amend the Criminal Code*, which expanded the prohibition against hate propaganda to include any section of the public distinguished by sexual orientation.⁴³ To appreciate how this amendment may be applied in Canada, the 2002 decision of *Owens v. Saskatchewan (Human Rights Commission)* is revealing.⁴⁴ In that case, three gay males complained about an advertisement *Owens* had placed in a newspaper, which quoted scripture that condemned homosexuality. *Owens* unsuccessfully appealed to the Court of Queen's Bench from a decision of the Saskatchewan Human Rights Court that found him in violation of the Saskatchewan Human Rights Code because he exposed the complainants to hatred and ridicule.

D. Same-Sex Couples and Joint Adoptions

The gay community made great progress when courts at the lower levels (i.e., in Ontario,⁴⁵ Alberta,⁴⁶ and Nova Scotia⁴⁷) initiated changes in provincial legislation to allow same-sex couples to jointly apply for adoption. Other jurisdictions, such as Saskatchewan,⁴⁸ voluntarily amended its legislation in response to the Supreme Court of Canada decision in *M v. H* (discussed in more detail below).⁴⁹

In regard to same-sex unions and adoption, the Ontario provincial court decision *K and B (Re)*⁵⁰ is especially noteworthy because it made important factual findings about same-sex relationships and parenting, and has been referred to, considered, and applied in various jurisdictions.⁵¹ In that case, the Court found that the definition of spouse under the Act operated to deny lesbian couples' protected equality rights under s. 15 (1) of the Charter and could not be saved by s. 1.⁵² In particular, the applicants were denied the

allow for the Alberta legislature to amend the under inclusiveness problem or to invoke s. 33 of the Charter, which permits a legislature to override the Supreme Court of Canada's decision.

⁴³ Bill C-250, An Act to Amend the Criminal Code, 2d Sess., 37th Parl., 2002-2003, 51-52.

⁴⁴ *Owens v. Sask. (Human Rights Comm'n)*, [2002] S.J.No 732; 2002 S.K.Q.B. 506.

⁴⁵ See *K and B (Re)*, [1995] 125 D.L.R. (4th) 653; 15 R.F.L. (4th)129 (Ont. Prov. Ct); Child and Family Services Act, R.S.C., ch. 11, 146(4) (1990) (Can.), available at http://192.75.156.68/DBLaws/Statutes/English/90c11_e.htm#P2853_251362.

⁴⁶ See *C and M, (Re)*, [1999] 253 A.R. 74 (Alta.Q.B.); The Miscellaneous Statutes Amendment Act, R.S.A., ch. 26, §§ 4, 25 (1999); Child Welfare Act R.S.A.C-12 (2000) (as amended).

⁴⁷ See *S.C.M. (Re)*, [2001] 194 N.S.R. (2d) 362 (N.S.S.C.); Children and Family Services Act, R.S.C., ch.5, §.72, (1990) (Can.), available at <http://www.gov.ns.ca/legislature/legc/>.

⁴⁸ Adoption Act, S.S., ch. A-5.2, §16, 23 (1998) (Can.) available at <http://www.qp.gov.sk.ca/publications/index.cfm?fuseaction=details&c=302815&id=2>.

⁴⁹ See also Jennifer A. Cooper, Opinion on Common Law Relationships, 1 Review Panel On Common Law Relationships (2001) (helpful discussion of adoption laws in various Canadian jurisdictions), available at <http://www.gov.mb.ca/justice/reviewpanel/vol1/index.html> (helpful discussion of adoption laws in various Canadian jurisdictions).

⁵⁰ [1995] 125 D.L.R. (4th) 653; 15 R.F.L. (4th)129 (Ont. Prov. Ct.).

⁵¹ Most notably, it has been referred to in the Ontario Appellate decision of *M v. H*, [1996] 31 O.R. (3d) 417, and the lower court decision, *Halpern v. Toronto Clerk*, [2000] 51 O.R. (3d) 742.

⁵² *K and B (Re)*, [1995] 125 D.L.R. (4th) at 653; 15 R.F.L. (4th) at 129. In that case, four lesbian couples filed joint applications for adoption and challenged the constitutional validity of the definition of "spouse" under the Ontario Child and Family Services Act. All of the children had been conceived through artificial insemination during the existing relationships, that is, one of the partners was the birth mother of the

benefit of applying to adopt a child on the basis of sexual orientation, which was not found to be in violation of the best interests of the child.⁵³ Indeed, the Court held that the same-sex relationships, including parenting, were virtually identical to those of the opposite sex⁵⁴ in finding that each of the lesbian couples had been "living together in committed relationships for varying lengths of time,"⁵⁵ which "might be termed 'conjugal,' in that they ha[d] all the characteristics of a relationship formalized by marriage."⁵⁶ Further, the Court held that "[h]omosexual individuals do not exhibit higher levels of psychopathology than do heterosexual individuals" in that "there is no good evidence to suggest that homosexual individuals are less healthy psychologically and therefore less able to be emotionally available to their children."⁵⁷

E. Same-Sex Couples and Benefits

A number of constitutional challenges based on claims for benefits changed the landscape of family law in Canada. Two key Supreme Court of Canada decisions were decided in 1995 and 1999, namely, *Egan* and *M v. H.*, respectively. The latter decision provoked amendments to 68 federal statutes so that same-sex couples would be assured the same benefits as heterosexual couples.

1. *Egan v. Canada*

children or child in question in each adoption application (three lesbian couples sought to apply for adoption of two children while the fourth couple sought to adopt one child).

⁵³ Under the s. 1 analysis, the Court held there was no rational connection between prohibiting a same-sex couple from applying to adopt and the objective of the Act, namely the best interests of the child; the Court found that the effects of the provision prohibiting same-sex couples from applying to adopt were disproportionate to the objective of the Act since there was no evidence that "adoption of children by homosexual partners could never be in the child's best interest." *Id.* at PP 160, 167.

⁵⁴ Concerning the ability of homosexuals to parent children, the Court gave "great weight" to the affidavit evidence of three experts (a sociology professor, psychologist, and psychiatrist), and then made several important findings. It held that "there is no reason to believe the sexual orientation of the parents will be an indicator of the sexual orientation of the children in their care," and that there is no "evidence that the homosexual orientation of the parents, especially lesbian mothers, will produce any significantly greater incidence of psychiatric disturbance, or emotional or behavioural problems, or intellectual impairment than is seen in the population of children raised by heterosexual parents." *Id.* at P 68. Other important fact findings included: (1) "the traditional family... is now a minority"; (2) "there is no reason to conclude that alteration of the family structure itself is detrimental to child development"; (3) "the most important element in the healthy development of a child is a stable, consistent, warm, and responsive relationship between a child and his or her care-giver"; (4) "[d]espite stereotypical beliefs to the contrary, there is no evidence to support the suggestion that most gay men and lesbians have unstable or dysfunctional relationships"; (5) there is "no indication that the possible stigma or harassment to which children of gay or lesbian parents may be exposed is necessarily worse than other possible forms of... stigma"; and, (6) "same-sex couples should be treated in the same manner as are opposite-sex common law couples with regard to the issue of adoption." *Id.* at PP 50-75.

⁵⁵ *Id.* at P 24

⁵⁶ *Id.* Each of the couples have cohabited together continuously and exclusively for lengthy periods, ranging from six to thirteen years; their financial affairs are interconnected; they share household expenses, have joint bank accounts and in some cases, they own property together in joint tenancy; they share the housekeeping burdens to the extent that they are able in light of their respective careers and employments; the individual partners share a committed sexual relationship. Most importantly, they all share equally the joys and burdens of child rearing.

⁵⁷ *Id.* at P 60.

In *Egan*, a homosexual couple in their sixties challenged the definition of "spouse" under *Old Age Security Act* when an application for benefits was rejected because the definition restricted the receipt of allowance to spouses in a heterosexual union, whether the couple was legally married or living common law.

In a badly split decision, five members of the Supreme Court of Canada found the definition of "spouse" to be constitutional and dismissed the appeal.⁵⁸ However, the gay community won a huge victory on account of one crucial finding. The Court unanimously held that sexual orientation was an analogous ground to those enumerated under s. 15 (1) of the *Canadian Charter of Rights and Freedoms* (i.e., sex, religion, and so forth). In particular, Justice La Forest, who later went on to give strong statements in favor of the natural family, made the following fatal concession:

I have no difficulty accepting the appellants' contention that whether or not sexual orientation is based on biological or psychological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s. 15 protection as being analogous to the enumerated grounds.⁵⁹

Due to this finding and the plurality of judicial opinions, the effect of important findings supporting the natural family were watered down. Indeed, La Forest noted that many couples who live together (i.e., brothers and sisters, friends) were excluded from receiving benefits, whatever their sexual orientation. He emphasized that the distinction between married and common law couples, on the one hand, and all other couples, on the other hand, was one "deeply rooted in our fundamental values and traditions."⁶⁰ Further, he noted that "its ultimate *raison d'être* is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that children are the product of these relationships, and that they generally cared for and nurtured by those who live in that relationship."⁶¹

⁵⁸ Id. at P 60.

⁵⁹ Id. at P 5. See also the comments by Justice L'Heureux-Dube when she noted that the distinction in question is based on sexual orientation, and described as "an aspect of 'personhood' that is quite possibly biologically based and that is at the very least a fundamental choice." Id. at P 89.

⁶⁰ Id. at P 20

⁶¹ Id. at P 21. The following are the comments of Justice La Forest in full: [M]arriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate *raison d'être* transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage. Id. He also speaks to the distinction between married and non-married heterosexual couples, wherein he states: But many of the underlying concerns that justify Parliament's support and protection of legal marriage extend to heterosexual couples who are not legally married. Many of these couples live together indefinitely, bring forth children and care for them in response to familial instincts rooted in the human psyche. These couples have need for support just as legally married couples do in performing this critical task, which is of benefit to all society. Language has long captured the essence of this relationship by the expression "common law marriage." Id. at P 23.

As previously discussed, L'Heureux-Dube, in her dissenting opinion, took a very different approach to s.15 (1) emphasizing a discriminatory effects based test, which eventually led to important findings favoring same-sex marriages. In particular, she found that the homosexual couple had been marginalized as poor, elderly, and homosexual.⁶² Moreover, they had been "directly and completely excluded, as a couple, from any entitlement to a basic shared standard of living for elderly persons cohabiting in a relationship analogous to marriage. This interest is an important facet of full and equal membership in Canadian society."⁶³

In her consideration of s. 1, L'Heureux-Dube reached two important conclusions for the same-sex marriage debate. First, in that case, she framed the issue as one of interdependence and found that any assertion that same-sex couples "were somehow less interdependent than opposite-sex relationships is, itself, a fruit of stereotype rather than one of demonstrable, empirical reality."⁶⁴ Second, she rejected the argument that "homosexual relationships have a distinct biological reality-namely that homosexuality is non-procreative," finding instead, this proposition "dangerously reminiscent of the type of biologically based arguments" that had been proffered to support unjust distinctions between pregnant and non-pregnant women, distinctions that had been rejected by the Supreme Court of Canada.⁶⁵

2. M. v. H

In the 1998 case *M v. H*,⁶⁶ a lesbian couple had lived together for about nine years in H's home. During the relationship, they started their own business, and purchased property together. When the relationship ended, M sought an order for partition and sale of the house and other relief under the *Family Law Act*.

The main issue was whether the term "spouse" in s. 29 of Ontario's *Family Law Act* discriminated against same-sex partners by denying them the possibility of seeking relief under the Act, and whether it could be saved by s. 1.⁶⁷ The Court found that the Act failed to accord cohabiting same-sex couples the same benefits as cohabiting opposite-sex couples on the basis of sexual orientation, an analogous ground of enumeration. This, in turn, exacerbated the preexisting disadvantage, vulnerability, stereotyping, and

⁶² Id. at P 89

⁶³ Id. at P 90 (emphasis original).

⁶⁴ Id. at P 94.

⁶⁵ Id. at P 95 (comparing *Bliss v. Can., (A.G.)* [1979] 1 S.C.R. 183 at P 190, with *Brooks v. Can. Safeway Ltd.*, [1989] 1 S.C.R. 1219 at P 1243-44).

⁶⁶ [1999] 2 S.C.R. 3. It is noteworthy that the couple eventually settled their property dispute before the appeal went to the Supreme Court of Canada, which rejected the argument that the issue was moot on the grounds that only the Ontario Attorney General had sought and was granted leave to appeal.

⁶⁷ Id. at P 68. Section 29 of the Ontario Family Law Act had expanded the traditional meaning of spouse (married man and woman) to include a broader range of couples (unmarried man and woman) seeking assistance relating to mutual support obligations. In this regard, "spouse" meant unmarried couples who had "cohabited continuously for a period of not less than three years or in a relationship of some permanence, if they are the natural or adoptive parents of a child." In turn, cohabitation was defined as living together "in a conjugal relationship, whether within or without marriage." The Court eventually interpreted "conjugal" to include "shared shelter, sexual and personal behavior, services, social activities, economic support and children, as well as societal perception of the couple," and found that gays and lesbians were capable of being involved in conjugal relationships.

prejudice against gays and lesbians by failing to provide access to a system or set of procedures that could confer economic benefit and protect the economic interests and financial need of individuals in intimate relationships.⁶⁸

According to the Court, the appeal had "nothing to do with marriage *per se*."⁶⁹ Indeed, "the rights and obligations that exist between married persons play[ed] no part in the analysis" since the Act did not extend them to unmarried couples in all circumstances."⁷⁰

3. *Modernization of benefits and obligations act*

In the year following the *M v. H* decision, the House of Commons passed a motion that upheld the monogamous and heterosexual notion of marriage and maintained that Parliament would do what was required to preserve this definition.⁷¹

The *M v. H* decision eventually led to significant changes in federal legislation. parliament, however, made serious efforts to stop any future claims for same-sex marriage. In particular, the traditional definition of marriage was reaffirmed in the *Modernization of Benefits and Obligations Act* which extended federal benefits and obligations to all unmarried couples who have cohabited in a conjugal relationship for at least one year, regardless of their sexual orientation.⁷² The Act amended sixty-eight federal statutes (i.e., *Income Tax Act*, *Canada Pension Plan*, *Old Age Security Act*, *Bankruptcy and Insolvency Act*, and *Criminal Code*). Yet, Clause 1.1 preserved the traditional definition of marriage: "For greater certainty, the amendments made by this Act do not affect the meaning of the word 'marriage,' that is, the lawful union of one man and one woman to the exclusion of all others."

As was argued by the Attorney General of Canada in the *Halpern* appeal, the legislative history of the Act reveals that the inclusion of Clause 1.1 was a result of heated debates in the House of Commons and *Parliament's Standing Committee on Justice and Human Rights* and *the Standing Senate Committee on Legal and Constitutional Affairs*. The concern among many committee witnesses, senators, and members of parliament was that "the legislation would erode the distinctiveness of marriage or alter its definition by equating common law same-sex relationships and common law opposite-sex relationships with opposite-sex marriages."⁷³ During the process, The Honorable Anne McLellan, Minister of Justice, then Attorney General of

⁶⁸ Id. at P93. Under the s. 1 analysis, the Court rejected arguments that the overall purpose of the Act, and the support obligations in particular, were meant to encourage and support the family, to remedy disadvantages suffered by women in opposite-sex relationships, and to protect children. Rather, the Court defined the purpose more broadly, ultimately concluding that there was no rational connection between "the equitable resolution of economic disputes that arise when intimate relationships between financially interdependent individuals break down,' and 'to alleviate the burden on the public purse..." Id. (citation omitted).

⁶⁹ Id. at P 52.

⁷⁰ Id. at P 53. And on another occasion the Court stated that the appeal did not "consider whether same-sex couples can marry, or whether same-sex couples must, for all purposes, be treated in the same manner as unmarried opposite-sex couples." Id. at P 55.

⁷¹ *Halpern v. Can. (A.G)*, Factum of the Appellant, The Attorney General of Canada, and the Attorney General of Ontario, Docket Number: C39172 and C39174, Toronto, 10 January 2003, at P 44.

⁷² *Modernization of Benefits and Obligations Act*, R.S.C., ch.12 (2000) (Can.).

⁷³ *Halpern v. Can.*, Factum of the Appellant, The Attorney General of Canada, and the Attorney General of Ontario, Docket Number: C39172 and C39174, Toronto, 10 January 2003, at P 41.

Canada, assured Canadians on two separate occasions that the legal definition of marriage and the societal consensus about its nature would be preserved, once before the *Committee on Justice and Human Rights*⁷⁴ and another time before the *Senate Committee on Legal and Constitutional Affairs*.⁷⁵

Just three years later, on June 17, 2003, the government's position changed dramatically when, immediately following the release of the Appellate level decision in *Halpern*, Prime Minister Jean Chretien announced that a new law would be drafted allowing for same-sex marriage.

4. *Same-sex couples and marriage: Halpern as a case study*

In the *Halpern* case, the last case in a trilogy of cases concerning same-sex marriage, seven gay and lesbian couples applied for civil marriage licenses from the Clerk of the City of Toronto who, having put these applications in abeyance, applied to the court for direction. The Clerk's application was eventually stayed when the couples commenced their own application. Meanwhile, two of the couples decided to marry in a religious ceremony at the Metropolitan Community Church of Toronto (MCCT), a Christian Church which registered the marriages, issued marriage certificates, and then submitted the documentation to the Office of the Registrar General who refused to accept the documents on the grounds that same-sex marriages were prohibited by law. MCCT launched an application that was eventually consolidated with that of the seven couples.⁷⁶

In finding that the prohibition against same-sex marriage contravenes s. 15 (1) of the *Charter of Rights*, the *Halpern* Court put respect for the dignity of the human person at the core of equality.⁷⁷ In its analysis of s. 15 (1), the Court, relying on Justice Iacobucci in *Law v. Canada*, argued that a violation would occur when the impugned legislation conflicts with the purpose of s. 15 (1) "to prevent the violation of essential human dignity

⁷⁴ Id. (quoting Minister McLellan: "Bill C-23 will modernize federal legislation to extend benefits and obligations to common-law same-sex couples in the same way as to common law opposite-sex couples. What is equally important is that Bill C-23 does so while preserving the existing legal definition and societal consensus that marriage is the union of one man and one woman, to the exclusion of all others, as defined by the courts. Let me briefly elaborate on this point. The definition of marriage, which has been consistently applied by the courts and governments in Canada and was reaffirmed last year through a resolution of this House, dates back to 1866. Let me be clear: this definition will not change. This bill is not about marriage. In fact, the approach chosen in this bill deliberately maintains the clear legal distinction between marriage and unmarried common-law relationships.").

⁷⁵ Id. at P 43 (quoting Minister McLellan: "First, since the day Bill C-23 was introduced in the House of Commons I have repeatedly said that this bill is about fairness and tolerance. It is not about marriage and will not, in any way, alter or affect the legal meaning of marriage. However, it did become clear during consideration of the bill in the House of Commons that it was necessary for the government to reassure some Canadians by stating this fact in the bill itself. Clause 1.1 was added to clearly indicate that the legal meaning of marriage as the lawful union of one man and one woman to the exclusion of all others would not be changed by this bill.").

⁷⁶ Several parties were granted intervener status: The Interfaith Coalition on Marriage and Family, The Association for Marriage and the Family in Ontario, the Canadian Coalition for Liberal Rabbis for Same-sex Marriage and the Canadian Human Rights Commission.

⁷⁷ *Halpern v. Can.*, [2003] 65 O.R.(3d) 161. The Canadian same-sex marriage trilogy raised numerous constitution-based arguments concerning federalism and the Charter. For the purposes of Part II of this paper, only the s. 15 (1) Charter issue will be raised. Issues relating to federalism will be explored in Part III.

and freedom" and "to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society."⁷⁸ The Court then set out a three-part test:

- (1) whether the impugned law: (a) draws a formal distinction on the basis of one or more personal characteristics; or (b) fails to take into account the claimant's already disadvantaged position resulting in substantively differential treatment on the basis of one or more personal characteristics;
- (2) whether the differential treatment is based on one or more enumerated and analogous grounds; and
- (3) whether the differential treatment discriminates by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration.⁷⁹

In regard to part (1), the Court found that the common law definition of marriage created a formal distinction between same-sex and opposite-sex couples on the basis of sexual orientation. The Attorney General argued that the basis of differential treatment was legislation granting governmental rights and obligations associated with marriage, rather than the institution of marriage itself. Further, since the *Modernization of Benefits and Obligations Act* had ensured that same-sex couples receive equal rights and duties in federal law, the source of this differential treatment had consequently been abolished.⁸⁰ The Attorney General also appealed to objective claims about marriage, arguing that marriage is not a common law notion, but rather, a basic institution of society, which predates the State and is entitled to its protection and support. Lastly, by its very nature, the institution of marriage is "a unique opposite sex bond," a key feature found "across different times, cultures and religions as a virtually universal norm."⁸¹

The Court was not persuaded; it held that the Attorney General's analysis required the existence of a distinction, the source of which was irrelevant. It did not matter whether the common law definition had "adopted, rather than invented, the opposite sex feature of marriage."⁸² Further, once the federal and provincial governments chose to give legal recognition to marriage and support it with a "myriad of rights and obligations,"⁸³ the State was "obliged to do so in a non-discriminatory manner."⁸⁴ In regard to the very nature or essence of marriage, the Court rejected any appeal to universal claims, holding that such reasoning was "circular" since one could argue that "marriage is heterosexual because it 'just is.'"⁸⁵

⁷⁸ Id. at P 60 (quoting *Law v. Can. (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, P 88).

⁷⁹ Id. at P 61.

⁸⁰ Id. at P 66.

⁸¹ Id. at P 66.

⁸² Id. at PP 68, 70.

⁸³ Id. at P 69.

⁸⁴ Id. at P 69.

⁸⁵ Id. at P 71.

In dealing with the second part of the s. 15 (1) test, the Court, relying on the Supreme Court of Canada decision *Egan*, found that sexual orientation is a "deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs."⁸⁶

With respect to the third part of the test, the Court appealed directly to the notion of human dignity and defined it in a purely subjective manner as whether or not "an individual or group feels self-respect and self-worth."⁸⁷ The Court then purported to apply a subjective-objective test whereby it considered "the individual's or group's traits, history, and circumstances in order to evaluate whether a reasonable person, in circumstances similar to the claimant, would find that the impugned law differentiates in a manner that demeans his or her dignity."⁸⁸

To determine whether the impugned law demeaned one's dignity, the Court identified four contextual factors which focus on the impact of discrimination again, a largely subjective consideration. The four factors are: (1) pre-existing disadvantage, stereotyping, or vulnerability of the claimants; (2) correspondence between the grounds and the claimant's actual needs, capacities, and circumstances; (3) ameliorative purpose or effects on more disadvantaged individuals or groups in society; and (4) the nature of the interest affected.

After considering these factors, the Court concluded that homosexual persons had suffered from an historic disadvantage, consisting in violent crimes, public harassment, verbal abuse, discrimination and stigmatization and cited the Supreme Court decisions of *Egan* and *Vriend* as authority.⁸⁹ It then went on to give a functional definition of marriage, stating that any law that prohibited same-sex couples from marrying ignored the needs, capacities, and circumstances of these couples since "same-sex couples are capable of forming 'long, lasting, loving and intimate relationships.'"⁹⁰ Moreover, the Court noted that an increasing amount of same-sex couples were raising children either biologically conceived or acquired by means of adoption, surrogacy arrangements, or artificial reproduction technology.⁹¹ Further, the Court held that same-sex couples who had been excluded from the scope of the ameliorative law had "experienced historical discrimination and disadvantages."⁹² The Court minimized the fact that opposite-sex couples experienced economic disadvantage in comparison to same-sex couples since they bear the burden of raising the majority of society's children. It held that this was but one factor since "[p]ersons do not marry solely for the purposes of raising children."⁹³ Finally, the Court found that the exclusion of same-sex couples "from a fundamental societal institution perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In so doing, it offends the dignity of persons in same-sex relationships."⁹⁴

⁸⁶ Id. at P 74.

⁸⁷ Id. at P 78

⁸⁸ Id. at P 79

⁸⁹ Id. at P 83

⁹⁰ Id. at P 94.

⁹¹ Id. at P 93

⁹² Id. at P 98.

⁹³ Id. at P 99.

⁹⁴ Id. at P 107.

In brief, the Court found that the very dignity of the human person in same-sex relationships had been violated by their exclusion from the institution of marriage in violation of s. 15 (1).

The Court then moved on to consider whether the breach of equality rights could be justified under s. 1 of the Charter as a reasonable limit in a free and democratic society.

The *Halpern* Court applied the test in *R v. Oakes*⁹⁵ for determining whether the law was a reasonable limit. In sum, the objective of the law must be "pressing and substantial" and the means chosen must be "reasonable and demonstrably justified in a free and a democratic society." This means that the rights violation must be "rationally connected to the objective of the law," that the impugned law must "minimally impair the Charter guarantee," and that proportionality exists "between effect of the law and its objective."

The Court articulated the purpose of the common law definition of marriage to be: "i) uniting the opposite sexes; ii) encouraging the birth and raising of children of the marriage; and iii) companionship."⁹⁶ The first purpose was found to demean same-sex couples since it favored one type of relationship over another.⁹⁷ The second objective was regarded as pressing and substantial but not constituting a valid reason for limiting marriage to heterosexuals since lifting the ban against same-sex marriage would not hinder this objective for heterosexual couples. Moreover, it would facilitate the raising of children in same-sex homes.⁹⁸ The third goal was considered laudable but could not justify excluding same-sex couples from marriage especially because "[e]ncouraging companionship between persons of the opposite sex perpetuates the view that persons in same-sex relationships are not equally capable of providing companionship and forming lasting and loving relationships."⁹⁹

The Court then concluded that the rights violation, namely maintaining marriage as an exclusively heterosexual institution, was not rationally connected to the objectives of marriage; further, the means chosen by Parliament to achieve its objectives did not impair the rights of same-sex couples as minimally as possible since same-sex couples had been "completely excluded from a fundamental societal institution," the societal significance of which could not be calculated in merely economic terms.¹⁰⁰

5. Summary and implications

As we have seen, the decriminalization of sodomy led to changes in some provincial and territorial human rights legislation whereby sexual orientation became a protected category. However, proposed changes at the federal and some local levels continued to meet stiff resistance. This was countered by the Supreme Court of Canada decision in *Egan*, which made sexual orientation a protected category in the *Charter of Rights of Freedoms*.

⁹⁵ Id. at P 113-14 (citing *R. v. Oakes*, [1986] 1 S.C.R. 103, 138- 39).

⁹⁶ Id. at P 118.

⁹⁷ Id. at P 119.

⁹⁸ Id. at P 120-123

⁹⁹ Id. at P 124.

¹⁰⁰ Id. at P 136-39.

The pivotal finding in *Egan* that sexual orientation is a "deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs" effectively marginalized all those who have not embraced the gay social agenda and, in particular, those who have been seeking treatment. In effect, it put an end to any free and open discussion of empirical data challenging such a proposition.

The same year *Egan* was decided, the Ontario Provincial Court in *Re K and B* released its influential decision allowing same-sex couples to bring joint applications for adoption. In that case, the Court held that same-sex relationships were equivalent to heterosexual relationships in almost every respect, including parenting. Again, these findings effectively silenced the expression of contrary opinions founded on medical science. This decision, along with the key Supreme Court of Canada decisions mentioned above, paved the way to changes in other provincial and territorial jurisdictions.

Two years after *Egan*, the Supreme Court of Canada in *Vriend* acted again in response to "hold out" jurisdictions, such as Alberta, that refused to include sexual orientation as a protected category. The Court followed up with *M v. H* to require equal treatment of same-sex and opposite-sex partnerships.

In light of all this, the demand for same-sex marriage can be understood as the next logical step in the gay and lesbian fight for "equality" as defined by the Supreme Court of Canada and supported by some provincial and territorial jurisdictions. As one gay activist put it: "Marriage is the last frontier."¹⁰¹

The same-sex marriage debate, however, has been unduly narrowed from the start. The fact that various religious groups intervened in the same-sex marriage trilogy, arguing that the recognition of same-sex marriage could negatively impact the freedom of religion, resulted in the reduction of the same-sex marriage debate to overly simplistic terms, with opposition seen only as a fundamentalist religious reaction to "(evil, sinful) lifestyles."¹⁰² Some have even gone so far as to argue that "religious underpinnings" to the prohibition against same-sex marriage are the only "remaining barriers."¹⁰³ Both of these points will be countered in Parts IV and V of this paper where it will be rationally demonstrated that redefining marriage to include same-sex relationships offends basic biological and psychological facts, authentic notions of equality, and the dignity of the child, and will ultimately lead to a serious and grave subversion of the social order.

III. The Fundamental Crisis

A. Introduction

The main problem in Canada is not the debate over same-sex marriage *per se*. This phenomenon is simply the logical extension of a Judeo-Christian culture in decay, one which has lost an authentic vision of the human person not only in terms of his or her true rights and obligations, but also in regards to his or her deepest yearnings and aspirations.

¹⁰¹ Margaret Philip, Gay Adoption Breaks New Ground: Court Rulings Have Forced Most Provinces to Allow Same-sex Couples to Adopt Children, *Globe and Mail*, July 9, 2001.

¹⁰² Barbara Finlay, All in the Family Values, 14 *Can. J. Fam. L.* 129, 130 (1997).

¹⁰³ Bruce MacDougall, The Separation of Church and State: Destabilizing Traditional Religion-Based Legal Norms On Sexuality, 36 *U.B.C. L. Rev.* 1, 4 (2003).

The human person, created male and female, comes together in marriage for the good of the spouses, children, and society. It is the bedrock upon which Canadian institutional structures are founded whose erosion, therefore, affects the stability of Canadian society.¹⁰⁴ The interrelationship between law and religion, an important part of this foundation, has come apart at the seams and precipitated the dissolution of the link between law and morals.¹⁰⁵ Such a scenario threatens the very integrity of the Canadian citizen who has become a subject "radically separated from object, person from act, spirit from matter, emotion from intellect, ideology from power, the individual from society."¹⁰⁶

The separation of law and religion, along with the subsequent separation of law and morals,¹⁰⁷ has had profound ramifications for Canadian social structures and, in particular, the institution of marriage, which requires the harmony of these elements for its support and protection. Liberal philosopher Joseph Raz highlights this point when he states: "Monogamy, assuming that it is the only valuable form of marriage, cannot be practiced by an individual. It requires a culture which recognizes it, and which supports it through the public's attitude and through its formal institutions."¹⁰⁸

Raz's argument raises two questions for the purposes of this paper: Is there a Canadian constitutional framework that has protected and supported marriage? If so, what are its philosophical underpinnings? To address these two questions, the next part of this paper is divided into two sections. Section B outlines the constitutional framework in which the institution of marriage is embedded. Section C focuses on the philosophical foundation of the constitutional legal system and then discusses changes in public attitudes.

B. The Constitutional Framework

Canada is a constitutional monarchy under the British Crown.¹⁰⁹ The head of state is the Queen, generally represented by the Governor General, and the head of government is the Prime Minister. In essence, the Canadian system is a federal parliamentary-cabinet democracy founded on the rule of law, which means that the arbitrary will of a person or persons, including judges, is rejected in favor of the sovereignty of law.

As a Federal State, Canada brings together a number of different political, religious and cultural communities, organized within ten provinces¹¹⁰ and three territories,¹¹¹ under a common central government. In Canada there are two official languages (English

¹⁰⁴ Berman, *The Interaction of Law and Religion*, supra note 18, at 16 (4.2).

¹⁰⁵ Id.

¹⁰⁶ Id.

¹⁰⁷ See Francis Cardinal George, *Law and Culture*, 1 Ave Maria L. Rev. 1 (2003) (discussing how law is integrally bound up with culture and morals in reference to American society).

¹⁰⁸ Robert P. George, *The Unorthodox Liberalism of Joseph Raz*, in *Liberalism at the Crossroads: An Introduction to Contemporary Liberal Political Theory and its Critics* 151, 155 (Christopher Wolfe & John Hittinger eds., 1994) [hereinafter *George, Unorthodox Liberalism*] 165 (quoting Joseph Raz, *The Morality of Freedom*, 160 (Clarendon Press, 1986)).

¹⁰⁹ This section presents a brief overview of the basic principles pertaining to the Canadian legal framework as explained by Forsey, supra note 1, and Hogg, supra note 19.

¹¹⁰ British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova Scotia, Newfoundland, Prince Edward Island, New Brunswick.

¹¹¹ Northwest Territories, Yukon and Nunavut.

and French) and two legal systems: the common law system¹¹² and the civil law system.¹¹³ The common law tradition has been adopted throughout Canada, except in the province of Quebec, where the French civil law tradition prevails.

The rules of Canadian federalism are set out in the *British North America Act, 1867*¹¹⁴ (renamed the *Constitution Act, 1867* in 1982) that accomplished Confederation and, together with its amendments, served as Canada's Constitution until 1982.¹¹⁵ The *Constitution Act, 1867* established the rules for partial Canadian autonomy since amendments to this Act were possible only through an act of the British Parliament and final appeals were heard before the Judicial Committee of the Privy Council in England until 1949.¹¹⁶ The *Canada Act, 1982*,¹¹⁷ a statute of the British Parliament, incorporates the *Constitution Act, 1982* as Schedule B, terminating parliamentary authority of the United Kingdom over Canada, provides an amending formula,¹¹⁸ and contains the *Charter of Rights and Freedoms*.

The *Constitution Act, 1867* and the *Constitution Act, 1982*, then, are the basic documents of Canada's written constitution, which is comprised of thirteen statutes in total. But these statutes are only part of the full set of constitutional arrangements. For example, rules pertaining to the Supreme Court of Canada, responsible government, the federal cabinet, and political parties, all key features of the Canadian system are found elsewhere in imperial statutes, as well as orders, Canadian statutes, custom, and jurisprudence.

1. Distribution of powers and marriage

¹¹² The common law system derives from the English legal tradition. It is largely based on judge-made law, which evolves over time through the decisions judges make in the cases brought before them. As a result, together with law made by parliament, judicial precedents are one of the most important sources of law in the common law system. Under this system, judges play an important role both in developing case law and in interpreting legislation.

¹¹³ Under this system, the essential task of judges is to apply the Civil Code, the Quebec Charter of Human Rights and the Federal Criminal Code (modeled on the English common law tradition). According to civil law Professor Ernest Caparros, the Code must be interpreted according to its nature as a code, which is not equivalent to that of a mere statute. Ernest Caparros, *La Cour supreme le Code civil*, in *The Supreme Court of Canada: Proceedings of the October 1985 Conference 107-13* (Gerald A. Beaudoin ed., Yvon Blais Inc., 1985). The role of the courts is to apply the principles that are codified within the code, not to recast or reformulate them. Indeed, no single judgment or set of judgments can cause a change in the law. The rule of precedent, *stare decisis*, is not applicable in the civil law system since an isolated decision binds only the parties to the dispute. Jurisprudence and writings of scholars play an important role in the interpretation of the Code assuring the fruitfulness of the "sous-jacents."

¹¹⁴ *Constitution Act, R.S.C.*, app. II, No. 5, (1985) (Can.).

¹¹⁵ Forsey, *supra* note 1, at 10-20. In particular, the Act contains provisions which establish the structure and powers of the federal and provincial legislatures; vest formal executive power in the Queen, creating her Privy Council for Canada (the legal foundation for the federal cabinet); delineate the roles of the Queen's representatives (the Governor-General for Canada and lieutenant-governors for the provinces); grant parliament the power to establish the Supreme Court of Canada; and guarantee limited language rights to the English and French, separate schools for Protestant and Roman Catholic minorities in Quebec and Ontario, and the civil law system of Quebec.

¹¹⁶ See Alan C. Cairns, *The Judicial Committee and Its Critics*, 4 *Can. J. Pol. Sci.* 301 (1971).

¹¹⁷ *Canada Act, (U.K.)*, 1982, c.11.

¹¹⁸ For a discussion of the variety of formal and informal amending procedures, see Hogg, *supra* note 19, at 4-1 to 4-41. See also J. R. Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects* (Minister of Supply and Services, 1996).

Canadian legislative, executive, and judicial powers are separated into three discrete bodies. At the federal level, for example, legislative power resides in the House of Commons and the Senate, while executive power rests in the Prime Minister and Cabinet. Of course, the Supreme Court of Canada exercises the ultimate judicial power.

The powers are distributed according to the *Constitution Act, 1867*, wherein federal and provincial legislative powers are distributed under sections 91 and 92, respectively. The federal government is charged with the common good of Canada, while the provincial or territorial governments watch over particular interests, or the common good, in their respective political communities or regions.

The family, founded on heterosexual marriage, predates Canadian society and its confederation and is so fundamental to the Canadian culture that both the federal and provincial governments share jurisdiction. A review of the parliamentary debates prior to the passage of the Act reveals that marriage and solemnization were the subject matters of considerable debate because they were something very important to Canadians.¹¹⁹ The federal government has power over "Marriage and Divorce" under § 91(26) of the *Constitution Act*, while the provinces have power over the "Solemnization of Marriage" under §92(12) of the same Act, which in essence reflects the central role religion plays in protecting and supporting marriage.¹²⁰

2. Common and civil law definitions of marriage

The Court of Appeal in the *Halpern* held that the definition of marriage, within the Canadian common law tradition, derives from the English common law definition, predating 1867 *Constitution Act*.¹²¹ The English Court defined marriage in the 1866 *Hyde v. Hyde* case¹²² as "the voluntary union for life of one man and one woman, to the exclusion of all others." The definition has been followed and applied in Canadian courts and, to this day, Canadian statutory law has not attempted a definition since it has been assumed that marriage "is a concept so well understood that definition would be superfluous."¹²³ The *Halpern* Court also held that the "common law definition of marriage is reflected in s. 1.1 of the *Modernization of Benefits and Obligations Act*, which refers to the definition of marriage as 'the lawful union of one man and one woman

¹¹⁹ The Attorney Generals made the argument in *Halpern v. Canada (A.G.)*, Factum of the Appellant, The Attorney General of Canada, and the Attorney General of Ontario, Docket Number: C39172 and C39174, Toronto, 10 January 2003, at P 25.

¹²⁰ The Attorney General made the point in *Halpern*. Id. at PP 25-28. It was also noted that the laws on marriage and solemnization are founded on the canon law of the Roman Catholic Church, which also governed norms for marriage in England. Marriage was prohibited on a number of grounds, for example, consanguinity or affinity, and polygamous or polyandrous relationships. Eventually, clandestine marriages were prohibited by the English parliament. English statutes dealing with the solemnization of marriage reflect the important role the Church played in performing and recording marriages. Initially, then, English law on marriage established which marriages within Canada were prohibited. See also Berman, *Law and Revolution*, supra note 18, at 225-30.

¹²¹ *Halpern v. Can.* [2003] 65 O.R. 3d. 161(Ont. C.A.) at PP 35-37.

¹²² *Hyde v. Hyde*, 1866, L.R. 1 P&D 130 at 133.

¹²³ *Halpern v. Can. (A.G.)*, Factum of the Appellant, The Attorney General of Canada, and the Attorney General of Ontario, Docket Number: C39172 and C39174, Toronto, 10 January 2003, at P 21.

to the exclusion of all others."¹²⁴ The *Hendricks'* decision noted that the common law definition of marriage did not apply within the civil law system.¹²⁵ The *1866 Civil Code of Lower Canada* articulated the conditions for the capacity to marry and while the Code did not define marriage, the Court drew inferences from article 115 of the 1866 Code that marriage could not be contracted by persons of the same-sex: "l'homme, avant l'age de quatorze ans revolus, la femme, avant l'age de douze ans revolus, ne peuvent contracter mariage."¹²⁶ (A man, before 14 years of age, and a woman, before 12 years of age, cannot enter into marriage.)

This provision continued in force after confederation but the Quebec Legislature eventually proposed amendments and from about 1981 to 1994, there were two civil codes in force: the *Civil Code of Lower Canada*, with many of its articles on marriage still in force, and the partial *Civil Code of Quebec of 1980* dealing with family law. These two Codes were later repealed with the adoption of the *Civil Code of Quebec* coming into force January 1, 1994. According to the 1994 Code, article 365(2) provides: "Il ne peut l'etre qu'entre un homme et une femme qui expriment publiquement leur consentement libre et eclaire a cet regard."¹²⁷ (Marriage may be contracted only between a man and a woman openly expressing their free and informed consent).

Then on May 7, 2001, with a view to harmonizing the definition of marriage in Quebec civil law with that of federal law, the federal Parliament enacted the *Federal Law-Civil Law Harmonization Act*. Section 5 provides: "Le mariage requiert le consentement libre et eclaire d'un homme et d'une femme a se prendre mutuellement pour epoux."¹²⁸ (Marriage requires the free and informed consent of a man and a woman to take each other as spouses).¹²⁹

3. Marriage and constitutional amendment

The question raised is whether a constitutional amendment is required in order for Parliament to change the definition of "Marriage" as it is understood in s. 91 (26) of the *Constitution Act, 1867*. The question requires renewed evaluation given the findings of the Court of Appeal in *Halpern*, which answered the query in the negative.¹³⁰

¹²⁴ Halpern. [2003] 65 O.R. 3d. 161 (Ont. C.A.) at P 37.

¹²⁵ *Hendricks v. Quebec*, [2002] R.J.Q. 2506, at P 49.

¹²⁶ *Id.* at P 49

¹²⁷ *Id.* at P 52

¹²⁸ *Id.* at P 55

¹²⁹ It is noteworthy that on June 24, 2002, Quebec responded to the Supreme Court of Canada decision *M v. H.*, [1999] 2 S.C.R. 3, PP 60-62, favoring same-sex relationships by enacting legislation recognizing civil unions.

¹³⁰ The position set out here is essentially that laid out in the written submissions of the Interfaith Coalition for Marriage in EGALE. See for example its written submissions to the Supreme Court of British Columbia, dated August 27, 2001, No. L002698, Vancouver Registry. The arguments were accepted by Pitfield J. of the Supreme Court of British Columbia but rejected on appeal. (For an academic critique of the decision see Jo-Anne Pickel, *Judicial Analysis Frozen in Time: EGALE Canada Inc. v. Canada (Attorney General)*, 65 Sask. L. Rev. 243 (2002)). Similar arguments were made in *Halpern* and rejected. In particular, the *Halpern* Court found that the question whether same-sex partners could marry was a matter of capacity which clearly fell within Parliament's power under "Marriage and Divorce" pursuant to s. 91 (26) of the *Constitution Act, 1867*, and was, therefore, an issue that could be changed by parliament. Furthermore, failure to include same-sex couples would amount to "freez[ing] the definition of marriage to whatever meaning it had to 1867" and would be contrary to the rules of constitutional interpretation,

To this end, one must appreciate the principle of progressive constitutional interpretation which has essentially been limited to two basic situations: where an existing head of power has been ambiguous and where it has involved an innovation incidental to the main head of power. The leading case on the topic is *Edwards v. Canada (A.G.)* wherein the Privy Council considered the meaning of "persons" and Lord Sankey articulated the principle that the constitution "planted in Canada a living tree capable of growth and expansion within its natural limits."¹³¹ In that case, the Court considered the question whether women were persons within the meaning of s. 24 of the *Constitution Act, 1867* and thus eligible for appointment to the Canadian Senate. It looked to the Act itself as well as extraneous evidence and found that the authentic meaning of person was inclusive of both sexes, male and female but that the word "person" in the Constitution was ambiguous, sometimes referring only to men while at other times alluding to women.

This is clearly distinguishable from the present debate where there is nothing in the Canadian context, which permits a serious argument to be made that the notion of marriage has ever been ambiguous as sometimes referring to same-sex couples.¹³² Rather, due to its very nature and essence, marriage has only ever referred to opposite-sex unions.

The principle of progressive interpretation has also been applied in situations where an innovation has occurred which is incidental to the main term. In *Alberta (A.G.) v. Canada (A.G.)*, the Court considered the definition of "banking" under s. 91(15) in relation to certain business transactions, which involved loans to bank customers that exceeded the liquid assets of a bank, and held that the question is not whether the present innovation or style of banking was the same extent and kind as that in 1867 "but what is the meaning of the term itself in the Act" and whether "subsequent developed styles" of banking were expressly conferred.¹³³

Again, this is distinguishable from the present debate where the definition of marriage has never been ambiguous; it has always been understood as the union between a woman and man, and in light of this definition, same-sex marriage is not merely incidental to the original meaning of marriage but rather expands the term well beyond its "natural limits." Such an interpretation thus constitutes an amendment, which requires the invocation of proper constitutional amendments procedures.¹³⁴

namely the living tree approach, established in *Edwards v. Can. (A.G.)*, and later reaffirmed by Dickson J. in the 1984 Supreme Court of Canada case of *Hunter v Southam* wherein he noted that the constitution must "be capable of growth and development over time to meet new social and political and historical realities often unimagined by its framers." *Halpern v. Can.*, [2003] 65 O.R.3d 161 at P 42 (citing *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 155). In response to the argument that changing the definition would allow the Charter of Rights and Freedoms to improperly invalidate provisions of the Constitution, the Halpern Court held that "whatever compromises were negotiated to achieve the legislative distribution of power relating to marriage, such compromises were not related to constitutionally entrenching differential treatment between opposite-sex and same-sex couples." *Id.* at P 48.

¹³¹ *Edwards v. Can. (A.G.)*, [1930] 1 D.L.R. 98, 106-7 (emphasis added).

¹³² Similarly, in Reference as to Whether the term Indians in Head 24 of s. 91 of the British North America Act, 1867 includes Eskimo inhabitants of the Province of Quebec [1939] S.C.R. 104, the Court considered the meaning of the term "Indians" in the Constitution and found it to be ambiguous.

¹³³ In *Alta. (A.G.) v. Can. (A.G.)*, [1947] 4 D.L.R. 1, 9.

¹³⁴ See also *P.A.T.A. v. Can. (A.G.)*, [1931] A.C. 310 (Privy Council examined the notion of "Criminal Law" under section 91 (27) and found that its definition was broad enough to cover new crimes not enacted

Moreover, the restriction against inclusion of same-sex unions can not be seen as a mere issue of capacity and therefore within the Parliament's jurisdiction to change since by its very social and legal nature marriage is a union between an opposite-sex couple.¹³⁵ Furthermore, the redefinition of marriage is insulated from Charter review on the grounds that the Charter cannot be used to override other Constitutional provisions.¹³⁶

4. Marriage and parliamentary sovereignty

In Canadian representative democracy, parliamentary supremacy is a fundamental principle that has remained intact through s. 33 (the "notwithstanding clause") of the *Charter of Rights and Freedoms*, which permits the Parliament and legislatures to override certain provisions of the Charter, including s. 15.¹³⁷

The *Halpern* decision of the Ontario Court of Appeal, which redefined marriage, and immediately legalized same-sex marriage in Ontario, is an "especially egregious example of judicial activism" that serves to underline that "Parliament, not the courts, is the place to forge an appropriate legislative response to the complex and multi-layered issues surrounding the public definition of marriage and the legal recognition of same-sex unions."¹³⁸ While the issue is now properly before Parliament, considerable damage has been done to parliamentary supremacy through the granting of marriage licenses in Ontario, and the comments by Minister of Justice Martin Cauchon encouraging other provinces to follow suit.

C. The Philosophical Underpinnings

Having studied the constitutional protection of marriage and having found that the *Halpern* Court usurped the principle of parliamentary supremacy and constitutional amendment procedures, let us consider the nature and goals of the Federal State to determine what philosophical changes, if any, the *Halpern* Court is promoting.

back in 1867); *Toronto v. Bell Tel. Co. of Can.* [1905] A.C. 52 (The Privy Council found that telephones fell under 92 (10)(a) of "Other Workings and Undertakings.").

¹³⁵ To consider the treatment of this issue by the *Halpern* Court see supra note 130.

¹³⁶ See, e.g., *Bill 30 Reference*, [1987] 1 S.C.R. 1148; *Alder v. Ontario*, [1996] 3 S.C.R. 609. For consideration of the point by the *Halpern* Court see supra note 130.

¹³⁷ Section 33 may be invoked in cases regarding fundamental freedoms pertaining to religion, conscience, expression, assembly, and association (s.2) as well as legal rights (ss. 7-14) and equality rights (s. 15). It may not be applied in cases concerning democratic rights (ss. 3-5), mobility rights (s. 6), or language rights (ss. 16-23). The override clause is subject to a temporal restriction; after a period of five years, the legislature must expressly declare the re-enactment. To date, however, s. 33 has rarely been used: about fifteen times in Quebec, once in Saskatchewan, Alberta, and the Yukon Territory, respectively. This is most likely due to the constraints involved since legislatures must expressly declare that the legislation shall apply notwithstanding the Charter protection, thereby opening the door to controversy and public criticism. For a discussion of the s. 33 of the Charter see, Hogg, *Constitutional Law*, supra note 19, at 36-1 to 36-8.

¹³⁸ Daniel Cere & Douglas Farrow, *Statement on the Status of Marriage in Canada*, Institute for the Study of Marriage, Law and Culture, at <http://www.marriageinstitute.ca/pages/stmt.htm> (Jun. 18, 2003).

To this end, the 1956 *Report of the Royal Commission of Inquiry on Constitutional Problems* (hereinafter called the "Tremblay Report") is of particular relevance.¹³⁹ This Commission, which was established in 1954 by the government of Quebec, had the specific goal of buttressing Quebec's claim "to provincial primacy in the field of direct taxation."¹⁴⁰ The Commission's report, however, is not remarkable for the central argument on this point. Rather, as Political Science Professor David Kwavnik notes, what is exceptional is the report's attempt "to expound the unarticulated major premises of a society's existence and to justify these premises by reference to what it believed to be the absolute and immutable standards of eternal verity."¹⁴¹

According to the Commission, the "heart of the question" is the philosophy of man and society underlying "federalism as a system of social organization."¹⁴² To quote from the Report:

What kind of man and what kind of society do we want? What kind of civilization do we claim to be building? On the answers we make, in practice, to these questions in our daily life depends the fate of our political system because... federalism implies a certain concept of Man and Society and it can only expand and maintain itself where this concept flourishes.¹⁴³

The central organizing principle of federalism¹⁴⁴ is not a promotion of uniformity or individualism, but rather association between individuals and groups founded on four philosophical bases: "the Christian concept of man and of society, the fact of social life's variety and complexity of social life, the idea of the common good, and the principle of the subsidiary function of every community."¹⁴⁵

1. From Christianity to the cult of self

Canadian society is founded on a Judeo-Christian belief system,¹⁴⁶ which embraces a profound understanding of the dignity of the human person. According to scripture, man created male and female-is made in the image and likeness of God through an act of love and is called to eternal life. These two propositions serve as the foundation for a rich teaching on the origin, nature, and end of the human being in what is commonly referred to as the Christian anthropological view.¹⁴⁷

¹³⁹ See David Kwavnik, *The Tremblay Report* (McClelland & Stewart, 1973); See also Tremblay Report and Provincial Autonomy In The Duplessis Era (1956), at <http://www2.marianopolis.edu/quebechistory/readings/tremblay.htm>.

¹⁴⁰ Id. at viii

¹⁴¹ Id. at vii.

¹⁴² Id. at 87.

¹⁴³ Id

¹⁴⁴ The Commission asked the questions: What is Canada? What is meant by Confederation? The answer to these questions was essentially that Canada is a country and legal and social framework in which various communities with their own particularities would attend to daily needs of the citizens (i.e., family, school) and would live together under a central government that respected the local jurisdictions while providing general services (i.e., administrative, military and technological). Id. at xi-xii.

¹⁴⁵ Id. at 1-32 to 1-36.

¹⁴⁶ See, e.g., Berman, *Law and Revolution*, supra note 18 (discussing Western legal tradition).

¹⁴⁷ For a biblical analysis on the meaning of the human body, see for example John Paul II, *The Theology of the Body: Human Love in the Divine Plan* (Pauline Books & Media, 1997). For a commentary on The

In brief, this means that a human being has a nature different from other creatures. Possessing both body and soul, a person is endowed with conscience, reason, and free will in order to know what is good and then to do what is good. Something of the divine is reflected in the human being who feels himself drawn toward personal relationship with God as his ultimate end. Communion, then, is a requirement of human nature, and man is fundamentally a social being. This is evident in marriage where a man and woman come together to form an intimate union of love and life in a complementarity ordered toward the good of children, society, and the spouses themselves. For this reason, marriage is a sacrament constituted by the freely contracted and publicly expressed indissoluble bond of matrimony. As the first community of persons, marriage is the fundamental unit of society, predating the State. Like ripples in a pond, families create more families, which are then organized into villages, towns, cities, states and nations.

The Christian anthropological view does not depend on divine revelation alone, but on reason. Throughout the ages, numerous married couples of every religious and non-religious persuasion have given witness to freely contracted and publicly expressed total (life long), faithful (monogamous), and fruitful (procreative) marital love. In other words, even one who does not embrace the Christian faith can reasonably conclude that the human person is made for a love, which involves the intellectual, spiritual, and emotional union of man and woman founded on the physical union through reproductive acts. And that such a love grows deeper in the sharing of the joys and troubles of daily life within the context of a faithful and an exclusive partnership for life. Further, one can reasonably ascertain that the begetting and education of children contributes to the welfare of both parents and society. And that responsible parenthood is tied to knowledge of and respect for the biological life-giving functions involved in the transmission of life as well as to the correlative rights/duties of spouses to each other, their children, and society at large. Lastly, one can reasonably grasp that certain tendencies of instinct and passion in relations between a man and woman, outside as well as inside marriage should be dominated by reason and will. At one time, the Canadian tradition harmonized faith-based and rational perspectives in their insistence that natural or common sense motives for action are assisted by adherence to one's duties to God and neighbor and respect for the objective moral order. The "sexual revolution" in the 1960's, however, challenged the authentic nature of conjugal love, as well as sexual morals relating to marriage. The 1960's saw the emergence of a more superficial understanding of human sexuality based primarily on the pleasure principle. As a result, mastery of self through reason and will was viewed as repressive and "old school" and the begetting of children began to be seen as an unnecessary burden. With the advent of artificial birth control¹⁴⁸ and abortion, non-marital sexual relationships and marital infidelity became easier and avoidance of pregnancy was expected. This, in turn, led to increased rates of marriage breakdown (separation and divorce) and the forming of new family relationships, blended re-married

Theology of the Body, see Christopher West, *Theology of the Body Explained* (Pauline Books & Media, 2003).

¹⁴⁸ For a recent discussion on contraception and its link with same-sex marriage see Same-Sex Marriage and Its Relation With Contraception: Janet E. Smith Links Rejection of "Humanae Vitae" to Acceptance of Homosexuality, Zenit News Agency, at www.zenit.org/english/visualizza.phtml?sid=43006 (Oct. 17, 2003); Bishop Victor Galeone, Marriage: A Communion of Life and Love, in *When Spouses Speak the Truth With Their Bodies: Bishop Victor Galeone on God's Plan for Marriage*, Zenit News Agency, at www.zenit.org/english/visualizza.phtml?sid=44188, (Nov. 11, 2003).

families, single parent families, and de facto unions. These radical changes in family form interfaced with the law as it attempted to resolve disputes between non-marital cohabitants, as well as issues pertaining to the use of new assisted reproductive technology and surrogate motherhood.

These developments, among others (i.e., industrialization, economic independence of women, and so forth), provoked Harvard Professor Mary Ann Glendon to study "the new family" which she ultimately described as having "increasing fluidity, detachability and interchangeability."¹⁴⁹ She noted that the reduced and loose bonds between persons applied to relationships between: (1) parents, (2) children and parents, and (3) relatives and families.¹⁵⁰ She argued that the net effect was an increased emphasis on the autonomy of individuals rather than the community life of the family (nuclear or extended). This led her to conclude that the "new family" would be transitional and "identified with a period of extreme separation of man from nature."¹⁵¹

It can be said, therefore, that in a certain sense the gay and lesbian community is correct in raising "a sharp moral challenge to the hypocrisy and decadence of our culture. that the sexual license extended to 'straights' cannot be denied to them."¹⁵² However, the sexual acts of homosexuals and lesbians have their own particular bent insofar as they offend basic biology. Further, the answer to the dilemma is not more of the same societal decay, but rather a return to common sense positions about the authentic notion of human dignity, and the proper meaning of love and marriage. The *Halpern* Court does not provide this common sense position but rather embraces gender ideology and defines human dignity in a completely subjective manner that actually demeans the richness of humanity and thereby furthers the crisis.

What is gender ideology? In contemporary usage, the term "gender" denotes that "one's biological sex is a natural given" while all other sex-related differences, such as masculinity, femininity, manhood, womanhood, motherhood, fatherhood, and heterosexuality are culturally constructed "gender roles" and, hence, artificial and arbitrary.¹⁵³ This approach to human sexuality is clearly borrowing from radical feminist

¹⁴⁹ Harry D. Krause, *Family Law in a Nutshell* 1 (5th ed. 2003).

¹⁵⁰ *Id.* at 1-8

¹⁵¹ *Id.* at 8.

¹⁵² Hadley Arkes et al., *The Homosexual Movement: A Response by the Ramsey Colloquium*, 41 *First Things* Mar. 1994, at 51-21. (The Institute on Religion and Public Life sponsors the Ramsey Colloquium which is a group of Jewish and Christian thinkers who meet periodically to discuss issues of public life, morality, and religion. Other scholars who participated in the Colloquium on this question include: Rabbi David Dalin, Ernest Fortin, Jorge Garcia, Rabbi Marc Gellman, Robert George, Rev. Hugh Haffner, John Hittinger, Russell Hittinger, Robert Jenson, Gilbert Meilaender, Jerry Muller, Fr. Richard J. Neuhaus, Rabbi David Novak, James Neuchterlein, Max Stackhouse, Philip Turner, George Weigel, Robert Wilken). See also Patrick Fagan, *A Culture of Inverted Sexuality*, at <http://catholiceducation.org/articles/sexuality/se0049.html> (2000).

¹⁵³ The term has been defined as follows: "Gender is a concept that refers to a system of roles and relationships between women and men that are determined not by biology but the social, political and economic context. One's biological sex is a natural given: gender is constructed... gender can be seen as the process by which individuals... are born into biological categories of... women and men through the acquisition of locally defined attributes of masculinity and femininity" United Nations International Research and Training Institute for the Advancement of Women, *Gender Concepts in Development Planning: Basic Approach*, U.N. Doc. Instraw/SER.B/50, U.N. Sales No. 96.III.C.1 (1995), available at <http://www.un-instraw.org/en/resources/publications.html#a7> [hereinafter, "INSTRAW"]. See also Dale O'Leary, *The Gender Agenda: Defining Equality* 120 (Vital Issues Press, 1997) (discussing the

ideology where the word "gender" has become "the focus of the feminist revolution."¹⁵⁴ From a gender perspective, motherhood, a vocation necessarily unique to women, is frequently undermined by this kind of thinking since the goal of statistical equality between men and women in the work force, women's autonomy, and access to political power can never be met "if even a significant percentage of women choose mothering as their primary vocation."¹⁵⁵ From this perspective, then, being a man or woman is not determined primarily by sex but by a culture, which has inordinately influenced people's choices on how they live out being a man or woman. It is this line of reasoning that won out in the Supreme Court of Canada cases dealing with sexual orientation and in this way, the very basis of traditional notions of marriage, the family, and interpersonal relationships of every kind are attacked and undermined. The *Halpern* case furthers the onslaught by defining the notion of human dignity in a completely subjective manner, namely as self-respect, and in so doing thereby reduces the role of the State to recognizing individual choices regardless of their content, and the individual right of equality, based on this faulty notion of human dignity, is given priority over the State's fundamental duty to protect the institution of marriage.

2. From unity in diversity to relativity in pluralism

development of the term in feminist literature and its employment within the context of UN conferences, i.e., the Cairo and Beijing Conferences.); Martha L. de Casco et al., *Empowering Women: Critical Views on the Beijing Conference* (Little Hills Press, 1995) (similar analysis within the scope of the Beijing Conference); Rosemarie Putnam Tong, *Feminist Thought: A More Comprehensive Introduction* (Westview Press, 2d ed. 1989) (brief overview of feminist thought); *Human Rights of Women: National and International Perspectives* (Rebecca J. Cook ed., University of Pennsylvania Press, 1994) (overview of feminist thought in the field of human rights).

¹⁵⁴ O'Leary, *supra* note 153, at 120. It is important to note that the term "gender" may mean different things to different people. For example, many who participate within the United Nations system, especially those who work at the local level, may understand the term to mean simply male and female. In the countries of Africa, for instance, it is common knowledge that girls do not, as a general rule, receive the same level of education as boys and so references to "gender discrimination" or initiatives designed specifically for the "girl child" may seem reasonable. For further discussion of this point in reference to the Convention on the Rights of the Child see Jane Adolphe, *The Holy See and the Convention on the Rights of the Child: Moral Problems in Negotiation and Implementation*, (forthcoming 2004) (manuscript on file with the Linacre Center and author).

¹⁵⁵ *Id.* at 120-21. This deconstruction of motherhood is a recurring theme in the INSTRAW booklet, where the following quote from Maureen Macintosh appears: "[N]othing in the fact that women bear children implies that they exclusively should care for them throughout childhood..." INSTRAW, *supra* note 153, at 18. The booklet continues: "The fact of sexual difference is used to arbitrarily limit women's autonomy, economic activities and access to political power" *Id.* at 19. To eradicate the problem, INSTRAW advocates increasing, "[w]omen's access to political and economic power" and the development of a "broad view of human reproduction activities," including abortion and contraceptive services, thus articulating the connection between production and reproduction *Id.* at 21-22. O'Leary's review of feminist literature reveals that any woman who aspires to mothering is seen as a threat to other women who have not been so "socially conditioned to want the wrong things" O'Leary, *supra* note 153, at 124. For a review of some of the feminist literature, see *Toward a Feminist Theory of the State*, (Catharine A. MacKinnon, ed. 1989).

Canada brings together a number of different political, religious, and cultural communities, organized within ten provinces¹⁵⁶ and three territories¹⁵⁷ under a common central government. From its inception, respect for the principle of unity in diversity has been a constant preoccupation and struggle. Back in 1667, Intendent Talon made the following comments in regard to New France: "I work as much as I can to unite the isolated settlements and bring them closer together. The People are a medley being composed of several elements the temperaments of which do not always accord, they seemed to me quite united for the whole length of my sojourn."¹⁵⁸

With the successive generations of immigration in Canada and the ongoing mix of cultures, values, and traditions, an authentic pluralism and tolerance was necessary to ensure dialogue between the various sectors of society, including the civil and religious traditions in which Canadians are rooted. Unfortunately, in recent times, a form of pluralism has come to be promoted in Canada which is antagonistic not only towards religion, but more seriously, to objective truth discernible by right reason. This is born out in the following comments found on the website of the Department of Foreign Affairs and International Trade. The foundation that supported foreign policy in the past has eroded: the old external military threat posed by the confrontation of superpowers has all but gone; ideologies and religion do not unify; nor in many countries, is ethnic identity held in common. In countries like Canada, unity springs from pride in the civil nationality based on shared values and tolerance, respect for rule of law and thoughtful compromise that its citizens share.¹⁵⁹

We have here the appearance of a disingenuous notion of tolerance that bases civil nationality not on objective truths, but on "shared values."¹⁶⁰ In reality, this kind of tolerance, namely, moral neutrality (i.e., the rejection of the duty/right to judge between good and evil) is logically and practically impossible;¹⁶¹ it necessarily opposes objective truths and leads inevitably to the oppression of those who refuse to compromise in order to reach a so-called consensus of values.¹⁶²

¹⁵⁶ British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova Scotia, Newfoundland, Prince Edward Island.

¹⁵⁷ North West Territories, Yukon and Nunavut.

¹⁵⁸ Government of Canada, *A Time for Action*, (1978) at <http://www.solon.org/Constitutions/Canada/English/Proposals/tfa.html> (quote is taken from the Prologue of this document which outlines, among other things, the reasons for the new constitution).

¹⁵⁹ Department of Foreign Affairs and International Trade, *Canadian Foreign Policy Review* (1995), at http://www.dfait-maeci.gc.ca/foreign_policy/cnd-world/chap1-en.asp (last visited Jan. 15, 2004).

¹⁶⁰ See J. Budziszewski, *True Tolerance: Liberalism And The Necessity Of Judgment* 5, (2000) ("True tolerance is one of the virtues. Virtues are complex dispositions of character, deeply ingrained habits by which people call upon all of their passions and capacities in just those ways that aid, prompt, inform, and execute their moral choices instead of clouding them, misleading them, or obstructing their execution." The notion presupposes "that there are objective goods and evils, objective rights and wrongs, sometimes harder and sometimes easier to discern.").

¹⁶¹ The liberal tradition has come under heavy attack by those who argue that the claim of neutrality is a fallacy. The point is succinctly put by Notre Dame Law Professor Gerard Bradley when he submits that the proposition, "law ought to be morally neutral about marriage, or anything else for that matter, is itself a moral claim." Gerard V. Bradley, *Same-Sex Marriage: Our Final Answer in Same-Sex Attraction* 124 (John F. Harvey & Gerard V. Bradley, eds. 2003).

¹⁶² A similar idea is articulated by Cardinal Joseph Ratzinger stating: The "end of metaphysics," which in broad sectors of modern philosophy is superimposed as an irreversible fact, has led to juridical positivism which today, especially, has taken on the form of the theory of consensus: if reason is no longer able to find

In the same-sex marriage debate, a judicial minority has so far largely determined what is to be regarded as just and true. When the Parliament and other legislatures fail to override judicial overreaching, Canadians live under an altered constitutional system based on a new ideology not defined or desired by government but rather developed in an ad hoc manner through case law. As scholar Russel Hittinger notes in the American context, such a profound change in constitutional law "is often hidden by political and judicial rhetoric."¹⁶³ Certainly, in the same-sex debate, gender ideology has been promoted through the courts with the assistance of rights rhetoric. In the case of same-sex marriage, one may argue that the *Charter of Rights and Freedoms* is "being used as a tool of cultural genocide"¹⁶⁴ to condemn cultural, religious, and moral beliefs and practices which do not conform.

3. *From the common good to consensus*

Jacques Maritain articulated the central idea of the common good when he argues "[t]here is a correlation between this notion of the person as a social unit and the notion of the common good as the end of the social whole. They imply one another."¹⁶⁵ The human person finds himself in serving the group, and the group attains its goal only by serving the person. Part of the group's service of man is the realization that every human being has aspects which go beyond the group, as well as an ultimate calling that the group does not encompass.¹⁶⁶ According to Maritain, that which constitutes the common good and promotes the perfection of man's life and liberty includes public services (i.e., roads, schools), structures (i.e., governmental bodies, military power), good customs, just laws, wise institutions, cultural treasures and heritage, as well as basic human virtues and

the way to metaphysics as the source of law, the State can only refer to the common convictions of its citizens' values, convictions that are reflected in the democratic consensus. Truth does not create consensus, and consensus does not create truth as much as it does a common ordering. The majority determines what must be regarded as true and just. In other words, law is exposed to the whim of the majority, and depends on the awareness of the values of the society at any given moment, which in turn is determined by a multiplicity of factors. This is manifested concretely by the progressive disappearance of the fundamentals of law inspired in the Christian tradition. Matrimony and family are the increasingly less accepted form of statutory community. Cardinal Joseph Ratzinger, *On the Crisis of Law, Address on the Occasion of Being Conferred the Degree of Doctor Honoris Causa by the LUMSA Faculty of Jurisprudence in Rome*, (Nov. 10, 1999), at <http://www.cin.org/docs/ratzlaw.html>.

¹⁶³ Russel Hittinger, *A Crisis of Legitimacy*, 67 *First Things* Nov. 1996, at 25-29. See also Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (A.E.I. Press, 2003) (discussing judicial activism which includes treatment of the Canadian situation).

¹⁶⁴ David M. Smolin, *Will International Human Rights Be Used as a Tool of Cultural Genocide? The Interaction of Human Rights Norms, Religion, Culture and Gender*, 12 *J. L. & Religion* 143 (1995-96) (arguing that human rights instruments are being used as a tool of cultural genocide which raises the question whether a nation's own bill or charter of rights may be manipulated so as to accomplish the same thing).

¹⁶⁵ Jacques Maritain, *The Person and the Common Good* 49 (1946) [hereinafter, Maritain, *Common Good*]. See also John Finnis, *Natural Law and Natural Rights* 155 (1980) [hereinafter John Finnis, *Natural Law*] (defining the common good as "a set of conditions that enables the members of a community to attain for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively or negatively) in a community."); *Catechism of The Catholic Church* PP 1905-1912 (Doubleday, 1995).

¹⁶⁶ Maritain, *Common Good*, supra note 165, at 66.

civic rights and responsibilities. In brief, the common good presupposes respect for the human person, requires social development of the group, and promotes stability and security through a just political order. The term "common good," therefore, does not refer to the sum total of individual interests, but rather, to an assessment of particular values and their integration with other values in balanced association with the human person in his or her social nature.

The loss of the sense of objective truth and the meaning of human dignity have made it difficult for the Canadian government to make decisions aimed at the common good. Instead of examining a question on the criteria of justice and the common good, decisions are made in accordance with other criteria, such as tolerance based on the willful ignorance of important differences, or the interests of individuals and minority groups wielding considerable financial influence and power, or the claims of others promoting a liberal ideology. Indeed, due to the fear of public criticism, § 33 has not been used to avoid the implementation of judicial decisions which are not in the interest of the common good. This has resulted in a domino effect bringing the same-sex marriage debate to where it stands today. Common good arguments that justify state protection and support for the traditional definition of marriage are no longer valid before the courts. This is borne out in *Halpern* where, under the s. 1 analysis, courts repeatedly rejected the common good position articulated by the various state agencies.¹⁶⁷

4. From subsidiarity to the individualistic welfare state

The Canadian government's action in these matters has not been tempered with due attention to the principle of subsidiarity. This principle maintains that a community at a higher level (i.e., the Canadian federal government) should not interfere in the daily life of a lower level community (i.e., the natural family), thereby depriving it of its own purposes and functions. On the contrary, the higher-level community should support and assist the lower level community with a view to the common good. This thinking is based on common sense: those who are closest to a situation can best understand the problems involved and lend the necessary assistance which, in many cases, may involve emotional as well as financial support.

As previously discussed, laying the groundwork for acceptance of same-sex marriage involved key changes that were promoted through the vehicle of court challenges to state benefits on the grounds of equality. However, through *the Modernization of Benefits and Obligations Act*, the gay and lesbian community has received benefits almost equivalent

¹⁶⁷ For a succinct example of a common good analysis pertaining to marriage see *Egan v. Canada*, [1995] 2 S.C.R. 513 at 536, 538-39, where Justice LaForest states:

[Marriage] is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage. None of the couples excluded from benefits under the Act are capable of meeting the fundamental social objectives thereby sought to be promoted by Parliament. These couples undoubtedly provide mutual support for one another, and that, no doubt, is of some benefit to society. They may, it is true, occasionally adopt or bring up children, but this is exceptional and in no way affects the general picture.

to marriage. To carry the benefits issue to its logical conclusion, the 2001 Report of the Law Reform Commission entitled "Beyond Conjuality" argues that it is time for governments to go beyond the traditional understanding of marriage and create legal structures to support a broad range of "close personal relationships."¹⁶⁸

This suggestion completely dismantles the notion of marriage-based family as society's fundamental social unit, replacing it with individual interest. What follows is a dramatic increase in bureaucracy as well as government spending to provide for all relationships, regardless of need and contribution to the public good. Also ignored is the fact that the government has a fundamental concern for children and the development of their character through nurture and education so that they may responsibly and effectively participate in the political process: raising children is not simply another lifestyle choice.¹⁶⁹

5. *Summary and implications*

This part of the paper has traced the erosion of the Judeo-Christian foundation in Canadian society by first emphasizing how the institution of marriage is embedded in the Canadian constitutional framework. Secondly, it has shown how the Judeo-Christian belief system, founded on a vision of the human person, based on faith and reason, has been undermined and replaced by pure relativism, which leaves Canadian society adrift without any moral and legal compass. In particular, there has been a philosophical transformation from the Christian concept of man to the cult of self; from respect for variety and diversity to a faulty notion of pluralism that embraces relativity; from the idea of the common good to that of consensus, and from respect for the principle of subsidiarity to its rejection in favor of a welfare state that promotes the individual rather than the family as the fundamental unit of society.

IV. Towards a New Philosophy

A. Introduction

What then is the *Halpern* decision really promoting? This part will explore how the gay and lesbian community in Canada is divided in its approach to the question of same-sex marriage. By way of a brief overview, there are two different trends mutually opposed in their socio-political foundational principles: the liberal and the libertarian. The former argues that same-sex couples are equivalent to opposite-sex relationships and that marriage should be redefined in an inclusive manner. On the other hand, libertarians argue that both types of relationship are fundamentally different and that marriage should be abolished as an antiquated and "homophobic" institution. They suggest that in its place a state registration system should be erected which would confer benefits to all close

¹⁶⁸ Law Commission of Canada, *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships* (2001), available at <http://www.lcc.gc.ca/en/themes/pr/cpra/report.asp> (last updated Jun. 25, 2002).

¹⁶⁹ See Mary Ann Glendon, *Rights Talk: The Impoverishment Of Political Discourse* (1991) (discussing these points in the American context). But, see Robert A. Licht, *Rights and Wrongs About Rights*, 20 *First Things* Feb. 1992, at 48-52 (critiquing Mary Ann Glendon's book).

personal relationships. While differing in their socio-political perspective on same-sex marriage, the two positions agree with the fundamental assumption that there can be no objective discussion on what it means to be a human person. They both push for the institutionalization of a universal ethic that offers no workable philosophy for society since they reject right from wrong, female from male, and normality from deviancy. The answer to the dilemma lies in returning to authentic definitions of the human person and marriage, and a clearer vision of the role of the State.

B. The Liberal (Assimilation) Approach

Some same-sex couples claim that the law should clearly show its acceptance of the fact that same-sex attraction is not a disease, nor the symptom of a personality disorder, but rather, normal and very similar to opposite-sex attraction. Consequently, rather than merely tolerating same-sex relationships as a private reality, the Canadian government has a legal obligation to ensure that the law does not discriminate against couples on the basis of their identity or sexual orientation. Same-sex relationships should be openly and freely accepted, as are heterosexual relationships, and the institution of marriage, which they purport to value, should be opened up to homosexuals since many same-sex cohabitants are already living in long-term, loving relationships, and raising children. At the heart of this argument is the proposition that, were the Canadian government to do anything less than radically alter the traditional notion of the family based on heterosexual marriage, it would necessarily show a profound lack of respect and concern for the dignity of homosexuals as persons, effectively reducing them to second-class citizens and, thereby, destroying their self-esteem.

The methodology behind this argument is twofold: on the one hand, it seeks to align its case with the point of view of those at the margins of society; on the other hand, it hones in on the actual experience of those living in the context of long-term, same-sex relationships, thereby avoiding any reference to objective truths or universal values.¹⁷⁰ This approach translates into the argument that "marriage" means different things to different people and that the current legal definition of marriage presumes a static set of facts, namely, that a man and a woman marry in order to reproduce - a notion that does not correspond to current realities.¹⁷¹ Men and woman do not marry solely for the purpose of reproduction; many marriages are childless, and often couples re-marry when they are beyond child-bearing years. People marry for a number of reasons: love, companionship, stability, financial and emotional support, and sometimes to reproduce. Hence, the best that the State can do is to adopt a flexible or functional approach to the definition of marriage.¹⁷² As noted above, this is essentially the line of argumentation that won out in the *Halpern* case.

C. The Libertarian (Anti-Assimilation) Approach

¹⁷⁰ See Joy Freeman, *Defining Family in Mossop v. DSS: The Challenge of Anti-Essentialism and Interactive Discrimination for Human Rights Litigation*, in David Dyzenhaus & Arthur Ripstein, *Law and Morality: Readings in Legal Philosophy* 15.4 (2d ed. 2001).

¹⁷¹ *Id.*

¹⁷² *Id.*

Other same-sex proponents claim that homosexuality is normal though different from heterosexuality, that the government has a legal obligation to protect people from discrimination on the basis of sexual orientation, that same-sex relationships should be accepted as fully as heterosexual relationships, and that the legal institution of marriage should be abolished. Indeed, this group "oppose[s] the idea of same-sex marriage as a tribute to a sexist and homophobic institution."¹⁷³

Once again, the methodology here is to argue from the fringe, buttressing the argument with reference to the experience of those who are living together with no legal status in "close personal relationships." Some advocates of this view suggest that the institution of marriage be replaced with a private contract, ascription, or an optional state registration scheme by which heterosexual and homosexual couples alike, as well as a wide range of relationships, can be protected and supported.

As we have seen, this line of thinking is behind the 2001 "Beyond Conjuality" report, which argues that the narrow focus on spousal or conjugal relationships does not promote the State's interest in close personal relationships because it excludes other important relationships.¹⁷⁴ To justify the State's abolition of marriage, the report argues that "[t]he State's interest in marriage is not connected to the promotion of a particular conception of appropriate gender roles, nor is it to reserve procreation and the raising of children to marriage;" rather, the State has an interest in ordering private affairs by "providing an orderly framework in which people can express their commitment to each other, receive public recognition and support, and voluntarily assume a range of legal rights and obligations."¹⁷⁵

D. Critique

Francesco D'Agostino, a philosophy of law professor, argues that both the same-sex positions fall within the liberal tradition; however, each position supports same-sex marriage from a completely different socio-political perspective.¹⁷⁶ The first position relies heavily on a classical liberal tradition that concentrates in theory and practice on a form of government which is inspired by a pluralistic vision of society which inherently embodies individualism, moral relativism, and anti-religious sentiment.¹⁷⁷ Similarly, Joy Freeman, a lawyer, argues that challenges to the traditional family involve a

¹⁷³ Freeman, *supra* note 170, at 461 (Freeman makes clear that she is not a proponent of this approach).

¹⁷⁴ Law Reform Commission of Canada, *supra* note 168, at 9 (found in Executive Summary).

¹⁷⁵ *Id.* at 23-24. The report recommends a registration scheme as the best solution to accord legal recognition to a full range of these relationships which include those who are married or live with conjugal partners, (both same-sex and heterosexual relationships), in addition to those who share a home with parents, other relatives, friends, and caregivers (i.e., in the case of the elderly and disabled, *id.* at 21-25). Should the State not be willing to abolish marriage immediately then, in the interim, the report suggests that marriage be redefined in order to include same-sex couples, *id.* at 23-25).

¹⁷⁶ Francesco D'Agostino, *Should the Law Recognize Homosexual Unions?* in *Christian Anthropology and Homosexuality* 85-87 (L'Osservatore Romano Reprints Collection By Mario Agnes), (L'Osservatore Romano, Vatican City, 1997).

¹⁷⁷ *Id.* at 85-86.

postmodernist or deconstructionist paradigm¹⁷⁸ which rejects the proposition "that what is tradition is natural and therefore good," on the grounds that such a position suppresses others.¹⁷⁹ Freeman also argues that the range of "relationships between normality and deviance is hierarchical, and socially constructed."¹⁸⁰

The second approach, embodied in the "Beyond Conjugal" Report, one might argue is highly utopian and founded on libertarian and anti-law sentiment. Same-sex marriage would presumably be the first step in eventually eliminating the need for family law the beginning of an absolutely new model of social living based on a radical individualism liberated from the weight of the law.¹⁸¹

However, as time passes, they both show their true face in a push for the institutionalization of a seemingly universal sexual ethic that recognizes and protects personal choices without giving preference to any of them. In order to institutionalize this universal ethic, law must be reformulated along with the traditional institutions it has historically protected and supported.

Bruce MacDougall, law professor and gay rights advocate, takes this position to its logical conclusion when he argues that rules relating to all sexual unions need to be re-examined: as gay and lesbian unions are being legally recognized, so rules respecting other forms of unions, polygamous, incestuous, and so on will be re-examined such as trans-sexual and trans-gendered persons. As some religious institutions are deemed to be government actors, and thereby made subject to constitutional norms like s. 15 of the Charter, so other 'private' institutions and organizations will face the same treatment and teachings and attitudes about sexuality in those institutions will be challenged.¹⁸²

Pedophilia is presently a subject matter open to debate. In order to advance their agenda for decriminalization of pedophilia, man-boy love advocates have been relying upon the deconstructionist type of argumentation when they claim that age is arbitrary.¹⁸³ And they have received support in the medical community, in which the question whether pedophilia should be removed from the forthcoming edition of the psychiatric manual for disorders was recently debated at a symposium sponsored by the American Psychiatric Association.¹⁸⁴

¹⁷⁸ Freeman, supra note 170, at 465.

¹⁷⁹ Id.

¹⁸⁰ Id. at 466.

¹⁸¹ D'Agostino, supra note 176, at 85-86.

¹⁸² Bruce MacDougall, *The Separation of Church and State: Destabilizing Traditional Religion-Based Legal Norms on Sexuality*, 36 U.B.C. L. Rev. 1, 6 (2003).

¹⁸³ See, e.g., the North American Man-boy Love Association (NAMBLA), at <http://www.nambla.org> (last visited Feb. 21, 2004).

¹⁸⁴ For example, an article entitled "A Meta-analytic Examination of Assumed Properties of Child Sexual Abuse Using College Samples" was recently published in the American Psychological Association's *Psychological Bulletin*, which concluded that "negative effects [of sexual abuse] were neither pervasive nor typically intense." For a discussion of this study see: Joseph Nicolosi, Dale O'Leary, *On the Pedophilia Issue: What the APA Should Have Known*, at <http://www.narth.com>. Furthermore, in May 2003, the American Psychiatric Association hosted a symposium in San Francisco that discussed whether pedophilia should be removed from the upcoming categories of mental illness. For a discussion of this event see: Linda Ames Nicolosi, *Should These Conditions Be Normalized: American Psychiatric Association Symposium Debates Whether Pedophilia, Gender Identity Disorder, Sexual Sadism Should Remain Mental Illnesses* at <http://www.narth.com>. On the same website also see: Linda Ames Nicolosi, *The Pedophilia Debate Continues and DSM is Changed Again*; Linda Ames Nicolosi, *International Academy of Sex Research Joins the Debate: Is Pedophilia a Mental Disorder?* and finally see the paper on *The Problem of*

Having denounced the distinctions between right and wrong, normality and deviancy, and male and female as being hierarchical and socially constructed, that is, artificial and meaningless, those who maintain these distinctions and cling to traditional structures must be challenged and suppressed. The suppression of contrary thought is clearly evident in current discourse when those who provide reasoned arguments are dismissed outright for being "homophobic" or for promoting hatred.¹⁸⁵

E. The Universal Approach

1. Authentic meaning of human dignity

In terms of what the two approaches have in common, D'Agostino argues that they share a tragic presupposition typical of modernity: "Both the libertarians and the liberals have no trust in the possibility of engaging in an objective discussion about the human person, his expectations, his authentic and profound needs, his duties."¹⁸⁶ The real battle against the traditional monogamous and heterosexual model of marriage, then, is a struggle against the idea that there is no objective truth or natural interpersonal union that the law should recognize, formalize, regularize, protect and support.¹⁸⁷ How can the Canadian government resolve this conflict? Is there any way to defend the truth of the human person, a truth that has been recognized and reaffirmed throughout history by all the great cultural traditions and religious systems in the world?

Pedophilia. See also a recent article discussing the battle of pedophiles to gain acceptance in society, Russ Flanagan, I'm Tired of Being Forced into the Shadows by Society, the Express-Times, February 22, 2004, http://www.nj.com/specialprojects/expresstimes/index.ssf?/news/expresstimes/stories/molesters1_otherside.html.

¹⁸⁵ See, e.g., Vancouver Archbishop Threatened, CBC News British Columbia, Oct. 2, 2003, available at <http://vancouver.cbc.ca>. Threats were made against Archbishop Adam Exner when he announced that the Catholic Church would cut a program in church schools that was supporting the gay and lesbian community. The Chicago Sun Times accused the Pope of a launching a global hate campaign against gays. See Headline Saying Pope Attacks Gays Draws Ire of Chicago Cardinal, Catholic News Service, Aug. 4, 2003, available at <http://www.catholicnews.com>. Dr. Peter Forster, the Bishop of Chester, Great Britain, was put under criminal investigation for his remarks that homosexuals should seek medical treatment to "reorientate" themselves. See Richard Alleyne, Bishop's Anti-Gay Comments Spark Legal Investigation, Telegraph, Oct. 11, 2001, available at <http://www.telegraph.co.uk>. A civil liberties group in Ireland accused the Catholic Church that its recent statement on homosexual relationships offends Ireland's law that prohibits hate speech. See Mike Wendling, Vatican Homosexuality Document May Conflict With Irish Law, Cns News, August 20, 2003 available at <http://www.crosswalk.com>. See also Paul E. Rondeau, Selling Homosexuality to America, 14 Regent U. L. Rev. 423,449 2001- 02) (explaining the technique used by gay rights advocates that portrays "all detractors as victimizers."); William C. Duncan, Symposia Homophobia in the Halls of Justice: Sexual Orientation Bias and Its Implication Within the legal System: Sexual Orientation Bias: The Substantive Limits of Ethic Rules, 11 Am. U. J. Gender Soc. Pol'y & L. 85, 96-97 (2003) (referring to a situation where the state attorney was called a "homophobic" for arguing to uphold the laws in the State of Massachusetts favoring the traditional definition of marriage; David Orgon Coolidge & William Duncan, Definition or Discrimination? State Marriage Recognition Statutes in the "Same-Sex Marriage Debate," 32 Creighton L. Rev. 3, 26 (1998) (suggesting that deliberation and debate on the issue must take place with dignity).

¹⁸⁶ D'Agostino, *supra* note 176, at 88.

¹⁸⁷ *Id.* at 88-89.

One avenue of discussion is the 1948 *Universal Declaration of Human Rights* (hereinafter "UDHR").¹⁸⁸ The *UDHR* stands as a truly universal statement based on the "common conscience of humanity,"¹⁸⁹ one in which the peoples and nations of the world went beyond ideologies to ground rights in the nature of the human person.¹⁹⁰ Indeed, the *UDHR* does not purport to create rights, but merely recognizes and proclaims universal rights that flow from the inherent dignity of the human person. In this way, the concept of human dignity is the interpretive key: "Whereas recognition of the inherent dignity and of the equal and alienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world."

But how are the notions of human dignity and the human person to be defined? According to art. 1: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." From this article, one can reasonably argue that the human person is an integral being comprised of physical, psychological, emotional, and spiritual elements and, further, possesses rights and duties with regard to others. For its part, the concept of human dignity is a quality of being that "springs from the excellence of [a human being's] very personhood."¹⁹¹

Hence, the concepts of the human person and human dignity are capable of definition; they are not empty notions void of meaning, nor are they completely subjective as defined by the *Halpern* Court. If authentic equality is tied to the concept of human dignity, then it is linked to the very nature of the human person, a free being endowed with reason and conscience. From reason and human experience, it can be shown that the

¹⁸⁸ Universal Declaration of Human Rights, G.A. Res. 271A (III) U.N. GAOR, 3rd Sess., U.N. Doc.A/810 (1948).

¹⁸⁹ Pontifical Council for the Family, *The Family and Human Rights*, at http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc20001115_family-humanrights_en.html (Nov. 15, 2000) (wherein the Universal Declaration of Human Rights is analyzed and found to be consistent with a Christian anthropological perspective of the human person). Indeed, despite cultural and religious differences, state delegates responded to the call of reason in the face of "barbarous acts which... outraged the conscience of mankind." G.A. Res. 271A (III) U.N. GAOR, 3rd Sess. at preamble para. 2, U.N. Doc.A/810 (1948).

¹⁹⁰ See also Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 *Notre Dame L. Rev.* 1153, 1153 (1998) ("The United Nations Universal Declaration of Human Rights of 1948 is the single most important reference point for cross-cultural discussion of human freedom and dignity in the world today.") Mary Ann Glendon, *Rights Babel: Thoughts on the Approaching 50th Anniversary of the Universal Declaration of Human Rights*, Reverend Thomas J. Furphy Lecture, DeSales University (1996), at <http://www4.desales.edu/~philtheo/Glendon.html>.

¹⁹¹ Thomas Williams, *The Question of Human Dignity*, Catholic Dossier, July/August 2000, available at <http://www.catholic.net/rcc/Periodicals/Dossier/2000-08/article3.html>. Professor Williams states the following on the topic of human dignity: The Latin word dignitas, from the root dignus (worthy, deserving), means in the first place worth, worthiness, or desert; and, in the second place, the grandeur, greatness, or excellence that is the cause for the effect. This two-tiered meaning has been carried over into English, where dignity denotes "an excellence deserving esteem or respect." Thus a person of high rank or position is said to possess a dignity, an excellence that merits special regard. In this case, dignity is superadded to the notion of personhood, and distinguishes one person from the another. It is commonly thought, however, that there is a dignity proper to the human person as such. Such a dignity would spring from the excellence of his very personhood, and would make all men worthy of a particular regard not due to other creatures. Embodying both "excellence" and "worth," dignity forms a sort of "bridge concept" that spans the gap from the metaphysical/anthropological sphere of what man is to the ethical sphere of how man should therefore be treated. *Id.* (emphasis added).

human person is born male or female and that this sexual complementarity allows couples to come together in marriage to form a family. This human drama is presented in logical sequence in art. 16 of the *UDHR*: (1) "Men and women of full age, without any limitation due to race, nationality or religion," have the right to marry. (2) Entrance into marriage is with the "free and full consent of the intending spouses." (3) Marriage is the basis of the family, "the natural and fundamental group unit of society, and is entitled to protection by society and the State."¹⁹²

2. Authentic meaning of marriage

This brings us to an essential point in the discussion: Same-sex unions cannot be recognized in law as marriage because the relationship of same-sex partners can never be a marriage. Obviously, there are a myriad of ways for people to live in union with others, and many such relationships have immense significance while possessing little or no legal relevance because such unions are fundamentally private.¹⁹³ Friendship is a perfect example.

Marriage is the union through reproductive-type acts between a man and a woman who are equal in dignity as human persons but complementary in their respective masculinity and femininity, for the procreation and education of children, the good of the spouses, and the common good of society. As a basic institution of society, marriage is unique in that it predates the State and is the only institution that can realize all of its goods simultaneously. Marriage is not institutionalized because it is an affective union, but rather, because it is a state in life that has public relevance as something that creates the publicly acknowledged roles of husband and wife, mother and father.¹⁹⁴ Such status

¹⁹² Emphasis added. To suggest that the UDHR is an appropriate point of encounter is not to ignore contentious issues within the international human rights arena, including the basic questions concerning human rights (What are they? What is their origin? Do they have limits?) which frequently involve differences pertaining to understandings of man and society, opportunistic interpretations of various rights, practical problems in application, and so forth. As Mary Ann Glendon notes, the UDHR founders anticipated these problems and deliberately grounded the document in an ultimate value, human dignity. They then integrated certain limitations in the document, which was itself to be read as an integral whole. Glendon argues that many people do not understand the UDHR, which has been erroneously interpreted as a list of unrelated rights, something that was never intended. She traces its history in an effort to show the original beauty of the Declaration as envisioned by civil law jurist Rene Cassin. She explains: Cassin often compared the Declaration to the portico of a temple. (He had no illusions that the document could be anything more than an entryway to a future where human rights would be respected). He saw the Preamble, with its eight "whereas" clauses, as the courtyard steps moving by degrees from the recognition of human dignity to the unity of the human family to the aspiration for peace on earth. The general principles of dignity, liberty, equality, and fraternity, proclaimed in Articles 1 and 2, are the portico's foundation blocks. The facade consists of four equal columns crowned by a pediment. The four pillars are: the personal liberties (Article 3 through 11); the rights of the individual in relation to others and to various groups (Article 12 through 17); the spiritual, public and political liberties (Article 18 through 21); and the economic, social and cultural rights (Articles 22 and 27). The pediment is composed of the three concluding articles, 28 through 30, which establish a range of connections between the individual and society. Glendon, *Knowing the Universal Declaration of Human Rights*, supra note 190, at 1163. For a more in-depth study of the history of the UDHR See also Mary Ann Glendon, *A World Made New: Eleanor Roosevelt And The Universal Declaration of Human Rights* (2001).

¹⁹³ D'Agostino, supra note 176, at 89

¹⁹⁴ Id. at 88-89

can only be acquired by a formal and public manifestation of free consent because of the unique human and social significance that transcends the couple.¹⁹⁵

Marriage, then, has an inherently public dimension. It is the foundation of the family, the fundamental unit in society, where human sexuality is regulated toward the finality of new human life, where new citizens learn how to live responsibly and engage in the political process. This is not simply a cultural or historical reality, but rather, a principle manifestation of what it means to be human. After all, only human beings not animals are called husband, wife, father, mother, brother, or sister. And children develop their personality and gender identity by assumption of family roles created within the institution called marriage.¹⁹⁶ Implicit in this view of marriage is the understanding that human sexuality is a value of the whole person in his or her biological, psychological, emotional, ethical, and spiritual reality, expressed in and through the body by which two persons consummate their marriage and are able to become mother and father.

This view of marriage contrasts sharply with same-sex relationships which, in essence, involve participation in non-reproductive-type acts by members of the same-sex, who are equal in dignity as human persons, but not complementary qua masculinity and femininity. Lacking this complementarity, the same-sex couple cannot further the common good of society by creating and nurturing a new human life in a way worthy of human dignity. Underlying this approach is the view that human sexuality in a relationship between persons of the same-sex is not a value of the whole person since it lacks a central component, namely, the fundamental biological participation in reproductive-type acts which are the foundation of the psychological, emotional, and moral reality of the couple, expressed in and through the body by which they consummate their marriage and are able to become mother and father. Lastly, while the gay community may be made up of partners who are raising children, this fact alone does not render their relationships more "marriage like," nor do the loving aspects or long term nature of their bond.

3. The proper role of the State

This brings us to the role of the Canadian government: What should be the proper socio-political attitude towards same-sex couples?

As mentioned above, according to the *UDHR*, Article 16, the natural family as "the fundamental group unit of society is entitled to protection by society and the State." In confronting the reality that same-sex partnerships comprise a mere 0.5% of all couples in Canada, the Canadian government must appreciate two things: (1) its fundamental role to provide for the common good; and (2) the need to make distinctions between tolerance, promotion, and preference.¹⁹⁷

¹⁹⁵ Id.

¹⁹⁶ Id. at 89.

¹⁹⁷ The figures released by Statistics Canada in 2002 indicate that same-sex couples in all of Canada comprise about 3% (34,200) of 11 million households. The figure represents nearly 3% of common law couples counted, or about 0.5 % of all couples, both married and common law. The study indicates that "[f]emale same-sex couples were five times as likely to have children living with them as their male counterparts. About 15% of the 15,200 female same-sex couples were living with children compared with only 3% of male same-sex couples." For the actual study see the 2001 Census: Marital Status, Common Law Status, Families, Dwellings and Households, at <http://www.statcan.ca/>

The notion of the common good, as previously discussed, is centered on the human person as a free and unique being with reason and conscience, and social in nature. The common good requires those social conditions which allow the human person to freely develop and flourish. In this regard, the State is called upon to make assessments about what will promote authentic human flourishing. Consequently, in realizing the common good, the State is in the business of making distinctions which may require the prohibition of a certain behaviors, the toleration of many others, the promotion of some, and the preference of a few.

In the case of same-sex relationships, tolerance does not involve the coercive power of the State. This is evident in the decriminalization of sodomy. Canada, however, has gone well beyond the mere tolerance of same-sex relationships by promoting them through the extension of benefits and recognition, in some jurisdictions, of civil unions or domestic partnerships. One might well argue that preference has been shown for cohabiting, same-sex couples through the extension of benefits that have put them on the same par as marriage. If so, does this mean that the debate over same-sex marriage concerns only a label? The next section of the paper argues that marriage is not only about benefits. A lot more is at stake than the mere granting of a title.

4. Summary and implications

Halpern is really promoting the institutionalization of a universal sexual ethic that offers no workable philosophy for Canadian society. To find an adequate philosophical compass, Canadian society must return to authentic notions of man and the state, which necessarily requires the protection and support of the natural family based on marriage.

V. Why Canada Should Not Follow Halpern's Lead

A. Introduction

There are important reasons why Parliament should not accept *Halpern's* redefinition of marriage to include same-sex relationships. The *Halpern* decision offends common sense or human wisdom for a number of reasons, namely it: (1) denies the difference between opposite and same-sex relationships, a denial which, in turn, distorts the legal meaning of equality; (2) it shows a disrespect for the rights of children in failing to consider their best interests, both pre-natal and post-natal; (3) it fails to consider important empirical data and as result ignores the rights and duties of children; (4) it obscures the meaning of human sexuality and the natural family, which is the fundamental unit of society; and (5) put Canadian political order and stability at risk.¹⁹⁸

Daily/English/021022/d021022a.htm (last visited Oct. 22, 2002). For newspaper reports on the study see Erin Andersen, Same-Sex Census Numbers Due Today, *Globe and Mail*, Oct. 22, 2002, at A1; Mark Hume, 0.5% of Canadian Couples are Gay, *National Post*, Oct. 23, 2002, at A08; Chris Bolin, Census includes Gay, Lesbian Households for First Time, *National Post*, Oct. 22, 2002.

¹⁹⁸ This paper does not purport to provide every possible argument against same-sex marriage. For a more comprehensive treatment of the subject, see generally The Marriage Institute, at <http://www.marriageinstitute.ca>. See also Katherine K. Young & Paul Nathanson, *Marriage a la mode: Answering the Advocates of Gay Marriage* (2003), at <http://www.marriageinstitute.ca/image/mmmode.pdf>

B. Halpern Distorts the Meaning of Equality

1. *Equality in fact*

The redefinition of marriage to include same-sex unions would give the same legal status to a partnership, which is fundamentally different from an opposite-sex union since the former lacks the intrinsic public dimension founded on the complementarity of the sexes and their capacity to reproduce.¹⁹⁹

Objections to this line of reasoning usually stress that such a vision of marriage, (1) effectively disenfranchises all infertile heterosexuals; (2) does not accord with the reality that many couples choose not to have children; and (3) ignores the law's requirement for the consummation of marriage, not children.

In response to the first objection, there is a fundamental difference between "the 'infertility' of some heterosexual couples and the 'impossibility' of all same-sex couples to procreate through same-sex bonding."²⁰⁰ Moreover, even when spouses are sterile,

(last visited March 13, 2004); Lynn d. Wardle et al., *Marriage and Same-sex Unions: A Debate* (2003); Congregation for the Doctrine of the Faith, Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19861001_homosexual-persons_en.html (last visited March 13, 2004); The Pontifical Council for the Family, Family, Marriage and "De Facto" Unions, at http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_20001109_de-facto-unions_en.html (last visited Nov. 9, 2000); Congregation for the Doctrine of Faith, Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons, at http://www.vatican.va/romancuria/congregations/cfaith/documents/rc_con_cfaith_doc20030731_homosexual-unions_en.html (June 3, 2003); Conference of Catholic Bishops, *Marriage in the Present Day*, at <http://www.cccb.ca/ca/Files/marriagemessage.html> (last visited Sept. 10, 2003); United States Conference of Catholic Bishops, *Between Man and Woman: Questions and Answers About Marriage and Same-Sex Unions*, at <http://www.usccb.org/laity/manandwoman.htm> (last visited Nov. 12, 2003) (offering the Catholic perspective); Daniel Cere, *Wars of the Rings: Revisioning Marriage in Postmodern Culture*, *Montreal Gazette*, March 30, 2002; Katherine Young & Paul Nathanson, *Keeping it all in the Family*, *Globe and Mail*, May 2, 2003; Douglas Farrow, *Culture Wars are Killing Marriage*, *National Post*, May 2, 2003; Russel Smith, *Marriage: Who Needs it Anyway?*, *Globe and Mail*, May 14, 2003; Margaret A. Somerville, *Put Kid's Rights Ahead of Gay Marriage*, *National Post*, May 15, 2003 [hereinafter Somerville, *Ahead of Gay Marriage*]; Claude Ryan, *Les Couples Homosexuels et Le Mariage - Une Decision Qui Doit Etre Portée En Appel, Le Devoir*, June 12, 2003; Maggie Gallagher, *What Marriage is, For*, *8 Weekly Standard*, Aug. 4, 2003; Michael Bliss, *Politicians Playing With Fire*, *National Post*, Aug. 2, 2003; Chantal Hebert, *MPs in a Flap Over Same-Sex Marriage*, *Toronto Star*, Aug. 8, 2003, at A-27; Andrew Coyne, *Where's the Harm in Gay Marriage?*, *National Post*, Aug. 9, 2003; Ted Morton, *The New Game of Charter Politics*, *National Post*, Sept. 2, 2003; Norman Spector, *Marriage Not Gay in France*, *Globe and Mail*, Sept. 9, 2003.

¹⁹⁹ See, e.g., Margaret A. Somerville, *The Case Against "Same Sex Marriage": A Brief Submitted to the Standing Committee on Justice and Human Rights*, at <http://marriageinstitute.ca/images/somerville.pdf> (last visited Apr. 29, 2003) [hereinafter Somerville, *The Case Against "Same Sex Marriage"*] (stating that marriage involves public recognition of the spouses' relationship and commitment to each other but that recognition is for the purpose of institutionalizing the procreative relationship in order to govern the transmission of human life and to protect and promote the well-being of the family that results).

²⁰⁰ Daniel Cere, *Redefining Marriage? A Case for Caution*, at <http://www.marriageinstitute.ca/images/cere.pdf> (last visited Feb. 12, 2003) [hereinafter Cere, *Redefining Marriage?*]. See also D'Agostino when he argues that there is no analogy between same-sex couples and

reproductive-type sexual intercourse promotes the well being of the partnership by reinforcing the one-flesh union whereby the two become one (physically, emotionally, intellectually, and so forth).²⁰¹

In answer to the second objection, the fact that couples do not choose to have children does not change the reality that they engage in reproductive-type activity. Indeed, one need only reflect upon what lengths an average couple must go to in order to avoid the procreative reality of heterosexual bonding.²⁰²

Finally, in regard to the third objection, marriage is good for the spouses, children, and society, and no other institution achieves these goals simultaneously. Consummation is the confirmation of the two-in-one flesh reality, which cannot be mirrored by non-reproductive-type acts.

2. *Equality in law*

Given that same-sex relationships and marriage are essentially different, it follows that any re-definition of marriage to include same-sex unions on the grounds of equality undermines the legal meaning of the term "equality".²⁰³ As was discussed in Part II of this paper, the Supreme Court of Canada is divided as to the proper approach to s. 15(1) and *Halpern* represents just one of many possible approaches.

The Canadian Parliament should look to an authentic definition of equality, which furthers the common good by requiring the State to make proper distinctions in accordance with justice (i.e., to give each what is his or her due). As was noted earlier, a key notion of equality is expressed in the Aristotelian principle that similarly situated persons should be treated similarly.²⁰⁴ A violation of this principle occurs when the law treats an individual worse than others who are similarly situated. While it no longer represents a "fixed rule or formula for the resolution of equality questions" in Canada, the

heterosexual couples "who can be sterile in fact, by choice of the parties, because of age or due to pathologies." D'Agostino, *supra* note 176, at 90.

²⁰¹ See Robert P. George, *In Defense of Natural Law* 146-47 (1999) arguing that the intrinsic point of sex in any marriage, fertile or not, is the basic good of marriage itself, considered as a two-in-one flesh communion of persons that is consummated and actualized by acts of the reproductive-type).

²⁰² Cere, *Redefining Marriage?* *supra* note 200 (noting that heterosexual bonding typically demands the deployment of a significant battery of technological instruments and societal policies [contraception, abortion, education against teen pregnancy] to contain and constrain its profoundly procreative nature).

²⁰³ Pertinent to the issue are the following comments by Justice McIntyre in the majority decision of *Andrews v. Law Society of B.C.*, [1991] 1 S.C.R. 143, 164: Equality is a protean word. It is one of those political symbols--liberty and fraternity are others--into which men have poured the deepest urgings of their heart. Every strongly held theory or conception of equality is at once a psychology, an ethic, a theory of social relations, and a vision of the good society. It is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises. 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. This proposition has found frequent expression in the literature on the subject but, as I have noted on a previous occasion, nowhere more aptly than in the well-known words of Frankfurter J. in *Dennis v. United States*, 339 U.S. 162 (1950), at p. 184: It was a wise man who said that there is no greater inequality than the equal treatment of unequals.

²⁰⁴ See Peter W. Hogg, *2 Constitutional Law of Canada* 52-14 to 52-15, (Thomson Carswell, ed., 4th ed. 1997) [herein after Hogg, *Constitutional Law* 4th Ed.] (discussing the similarly situated test). (This text differs from that referenced in note 20, which is a newer edition).

Aristotelian principle has not been wholly discarded.²⁰⁵ Indeed, it should be reasserted as an important component of the notion of equality.

A common argument made against the employment of the Aristotelian principle in the same-sex marriage debate is that prohibiting the marriage of gays is similar to prohibiting interracial marriage, a ban that has for a long time been recognized as unjust. But these two unions are not similarly situated. First, anti-miscegenation laws had the purpose and effect of racial segregation and oppression, while marriage laws have the purpose and effect of providing for the well-being of spouses and society through the procreation, nurturing, and education of children. Laws concerning marriage do not have as their primary purpose "to exclude homosexual relationships because they are homosexual."²⁰⁶ If there is any discrimination, it is a secondary effect "not desired but unavoidable, and it is justified or excused by the primary purpose which otherwise cannot be realized."²⁰⁷ Second, even if homosexual or lesbian tendencies have a biological component, there is no evidence to suggest that there is a "gay gene" that is wholly determinative of the issue thereby rendering homosexuality or lesbianism an immutable characteristic like race.²⁰⁸ Third, "same-sex marriage is not singled out for disfavor." Society has always disapproved of certain kinds of sexual relationships, such as those between: (1) adults and children, (2) friends, (3) certain relatives, (4) persons and animals, (5) one man and more than one woman (polygamy), or (6) one woman and more than one man (polyandry).²⁰⁹

Another objection is that the Aristotelian equality principle itself is wholly deficient in so far as it justifies discriminatory laws against minority groups. In response, constitutional law expert Peter W. Hogg argues that the Aristotelian approach is not wrong in principle simply because it does not provide guidelines with respect to whether or not persons are similarly situated, or whether or not certain behavior is appropriate;

²⁰⁵ See Justice McIntyre giving the majority judgment in *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143, 168, wherein he holds that the Aristotelian principle "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. 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."

²⁰⁶ Somerville, *The Case Against "Same Sex Marriage"*, supra note 199

²⁰⁷ *Id.* (arguing that this type of discrimination is similar to that involved in affirmative action programs where "the harm it involves, can be justified when it is to achieve a greater good that cannot otherwise be achieved").

²⁰⁸ See, e.g., A. Dean Byrd et al., *Homosexuality: The Innate-Immutability Argument Finds No Basis in Science*, *The Salt Lake Tribune*, May 27, 2001, at AA6. Byrd, a trained scientist, clinical psychologist, and Vice President of NARTH, together with Shirley E. Cox, a licensed clinical social worker, and Jeffrey W. Robinson, a licensed marriage and family therapist conclude that the innate-immutability argument is "bad science." For an additional discussion as to whether there is a "gay gene" see generally <http://narth.com>. See also the discussion and the accompanying footnotes under my discussion of the Halpern Court's failure to address empirical data wherein various authorities are cited which advocate that there is ample evidence that homosexual attraction may be diminished and change is possible. See also David O. Coolidge, *Should the Government Recognize Same-Sex Marriage? Session Two: Legal, Equitable, and Political Issues*, 7 U. Chi. L. Sch. Roundtable 33, 39 (2000) (suggesting that the gay community knows there is no "gay gene" but continues to make the argument for rhetorical purposes to set up a "clash between victims and victimizers" instead of a "clash between view points," *id.* at 42).

²⁰⁹ See George Dent, *Should the Government Recognize Same-Sex Marriage?: Session Two: Legal, Equitable, and Political Issues*, 7 U. Chi. L. Sch. Roundtable 33, 46 (2000).

rather the principle is valid because any determination of equality requires a comparison with others but the problem is how to make more refined determinations.²¹⁰

Another objection emphasizes that the Aristotelian notion of equality does not give priority to the way the law makes one feel in terms of the respect required from others. In response, an authentic understanding of "equal respect" means appreciating a person qua person, as unique, unrepeatable, and endowed with reason for the purpose of self-determination. The human person has free choice but is subject to limitations, which in some cases prevent him or her from acting reasonably because of habit, weakness, or uncontrolled desires and emotions. Robert P. George, Professor of Law at Princeton University, argues, "Governments are obliged to show respect to persons qua persons, not to all of the person's acts and choices."²¹¹ Moreover, any discussion of equal respect and concern must distinguish between how a person feels about a law and whether the law is in fact in breach of equality rights since the former is irrelevant to a determination of the latter. According to George, even if the legislator were to be "in fact profoundly contemptuous of the person whom they restrict, and further, even if they make the attitude well known to him, they have no significant capacity to injure his self-respect."²¹²

In the case where a citizen has a propensity for certain conduct which is prohibited by law and agrees that his conduct is unworthy but finds it difficult to restrain himself, he might conclude that it is difficult to retain his self-respect. But, in this event, damage to the individual's self-respect is not properly attributable to the law (or the lawmakers), but to his own moral failings and his self-awareness of them. His self-respect will be restored to the extent that he (perhaps assisted by the law) reforms his character and conforms his conduct to the standard required.²¹³ On the other hand, in the case where a citizen does not accept the law and finds it "backward, stupid, insensitive, or unjust," he might express anger, lobby to repeal the law, or commit acts of civil disobedience, "but, so long as he regards himself as right and the law as wrong, his sense of self-respect does not suffer."²¹⁴

C. Halpern Fails to Consider the Rights of the Child

The Court in considering the same-sex marriage issue failed to consider the fundamental rights of children. *The United Nations Convention on the Rights of the Child* has achieved near universal acceptance having been ratified or acceded to by 191 States.²¹⁵ It is a legally binding document, which was ratified by Canada in 1992. According to Preambular para. 9, the "child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."²¹⁶ This is a well-established principle in international law,

²¹⁰ Hogg, *Constitutional Law* 4th Ed., supra note 204, at 52-13 to 52- 15.

²¹¹ Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* 102 (1995) [hereinafter George, *Making Men Moral*].

²¹² Id. at 97

²¹³ Id. at 98.

²¹⁴ Id.

²¹⁵ *Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, 44th Sess., 61st plen. mtg., U.N. Doc. A/RES/44/25 (1989).

²¹⁶ Id.

first recognized in the 1959 *United Nations Declaration on the Rights of the Child*.²¹⁷ Harkening back to the 1948 *Universal Declaration of Human Rights*, another key principle is that found in Preambular para. 5 which states that the family is "the fundamental group in society and the natural environment for the growth and well-being of its members and particularly children" (emphasis added). Preambular para. 6 then adds that "the child, for the full and harmonious development of his personality, should grow up in a family environment."

Logic dictates that same-sex marriage necessarily leads to increased access to means of artificial reproduction and/or surrogate motherhood in order that same-sex couples may make up for their biological reality.²¹⁸ And such couples will likely press "for full access to new assisted reproductive technologies"²¹⁹ and the right to produce children in whatever way they choose.²²⁰

Recourse to technology in this manner, however, means that a child is not received as a gift, that is, as a human being, but as a product manufactured in a laboratory and/or carried to term out of necessity by a woman who intends to sever her maternal bond and relinquish the child to another at birth.

This adult-centered approach to the issues of same-sex marriage and artificial reproduction violate the fundamental right of children to be born and raised by their biological mother and father. Indeed, it promotes an assisted-reproduction industry that undermines the connection between biological parents and children and thereby reconfigures the family.²²¹ Same-sex advocate William Eskridge admits as much when he notes that reconstructing the law according to the gay experience involves the reconfiguration of family de-emphasizing blood, gender, and kinship ties and emphasizing the value of interpersonal commitment. In our legal culture the linchpin of family law has been the marriage between a man and a woman who have children through procreative sex. Gay experience with "families we choose" delinks family from gender, blood, and kinship. Gay families of choice are relatively ungendered, raise children that are biologically unrelated to one or both parents, and often form no more than a shadowy connection between the larger kinship groups.

What is required is a more child-centered vision, which includes the idea that society should continue to function based on the "presumption that, if at all possible, children have a valid claim to be raised by their own biological parents."²²² Indeed, human wisdom has shown that a child "needs a mother and a father and, if possible and unless there are good reasons to the contrary, preferably its own biological mother and father as its raising parents."²²³ The importance of the biological connection is supported by the empirical data discussed below and the human drama of adopted children, or children

²¹⁷ Declaration on the Rights of the Child, G.A. Res 1386 (XIV), 14 U.N. GAORSupp. (No. 16) at 19, U.N. Doc. A/4354 (1959).

²¹⁸ Somerville, *The Case Against "Same Sex Marriage,"* supra note 199; Cere, *Redefining Marriage?*, supra note 200.

²¹⁹ Cere, *Redefining Marriage?*, supra note 200.

²²⁰ Somerville, *The Case Against "Same Sex Marriage,"* supra note 199.

²²¹ Cere, *Redefining Marriage?*, supra note 200.

²²² Id

²²³ Id

born from reproductive technology, who seek to know the identity of their natural parents.²²⁴

A common objection raised to this line of argument is that same-sex couples need to marry for the sake of children who are already being raised by same-sex parents. In response, one might argue that parents, children, and society would be better off in both the short and long term if marriage is not redefined, since such redefinition would: (1) fundamentally change the understanding of marriage as an institution that symbolizes an inherently complementary and procreative relationship; (2) violate the rights of children and lead to increasing amounts of children created in the laboratory from the genetic patrimony of multiple parents whom they may never know; (3) reconfigure the natural family, undermining the biological connection between parents and children; and (4) treat children in a same-sex relationship as the general rule rather than the exception.²²⁵

In sum, setting the biological model aside in favor of new and deliberately invented models, which are not in the best interests of the child, is a form of "social experimentation" that places the burden of proof on those wishing to carry out such an experiment. Those who wish to replace the natural family with something else must "show that it is reasonably safe to do so," especially in light of the vulnerable persons involved, namely, children.²²⁶

D. Halpern Fails to Consider Important Empirical Data

The same-sex marriage debate inevitably raises arguments that rely upon scientific evidence. Indeed, empirical data has been used to demonstrate that gay and lesbian lifestyles are normal and healthy, on the one hand, or to show that they are abnormal and unhealthy, on the other hand. As was discussed in Part I of this paper, the court is not the proper arena to address these complex issues, but nonetheless they have forged ahead and made important decisions that effectively shut down the possibility of free and open debate on the matter. In so doing, these decisions have had the additional effect of marginalizing Canadian citizens who are seeking treatment for same-sex attraction as well as those treating them and others advocating or supporting such efforts (e.g. various religious groups).²²⁷

The issue of empirical data has renewed concern when one considers the rights of children and the correlative duty of Parliament, with the care over the common good of society (inclusive of all children), to ensure free and open dialogue with a view to the best interest of the child. In particular, Parliament should address a number of questions that were not addressed in *Halpern* but have been raised in the scientific community. The following are just some of the questions which should be addressed:

1. Does exposure to the gay lifestyle have a negative impact on children? While some sexual behavior occurring among both heterosexuals and homosexuals may be diagnosed as having a negative impact on health and well-being, does "medical and social science evidence [indicate] that homosexual behavior is uniformly unhealthy;" in other words,

²²⁴ Id

²²⁵ Id

²²⁶ Id

²²⁷ For the authorities on this point see supra note 184

does "Men having sex with other men [lead] to greater health risks than men having sex with women, not only because of promiscuity but also because of the nature of sex among men," namely anal cancer and HIV?²²⁸ Is the gay lifestyle associated with psychological problems; in other words, are gay and lesbians at an increased risk of psychiatric illness and suicidal behaviors?²²⁹

2 Does the absence of either mother or father, in lieu of two women or two men, have a negative effect on children?²³⁰ If there is no definitive answer because the phenomenon

²²⁸ Medical Downside of Homosexual Behavior, Zenit News Agency, at <http://www.zenit.org/english/visualizza.phtml?sid=41158> (last visited Sept. 18, 2003) (interview with Dr. Richard Fitzgibbons). See also Homosexuality and Hope, Catholic Medical Association, at <http://www.cathmed.org>; John R. Diggs, Jr., The Health Risks of Gay Sex, at http://www.corporateresourcecouncil.org/white_papers/Health_Risks.pdf.

²²⁹ Medical Downside of Homosexual Behaviour, *supra* note 228 ("Two extensive studies appearing in the October 1999 issue of the American Medical Association's Archives of General Psychiatry confirm a strong link between homosexual sex and suicide, as well as a relationship between homosexuality and emotional and mental problems. One of the studies by David M. Fergusson and his team, found that 'gay, lesbian and bisexual young people are at increased risk of psychiatric disorder and suicidal behaviors.'" In that study, Fitzgibbons notes that youths suffering from these problems are more likely to suffer from other disorders: major depression (four times more), generalized anxiety disorder (three times more), conduct disorder (five times more), nicotine dependence (five times more), multiple disorders (six times), and attempted suicide (six times more). In addition, Dr. Fitzgibbons discusses a recent study conducted in the Netherlands, (which accepts the gay lifestyle and has legalized gay marriage), that increased rates of suicide are not attributable to homophobia, but rather, to higher rates of psychiatric disease commonly associated with same-sex activity).

²³⁰ See Young & Nathanson, *supra* note 198 (arguing that "[t]hough much more similar than dissimilar both sexes are distinctive. Boys cannot learn how to become healthy men from even the most loving mother (or pair of mothers) alone. And girls cannot learn how to become healthy women from even the most loving father (or pair of fathers) alone.... And the problems they reveal apply not only to gay parents but also to straight single parents. Yes, there have always been single parents due to death, divorce, or desertion. But these were the exceptions."). To name just a few of the studies they cite to prove the ills suffered by children in situations of absent fathers and/or mothers, see David Blankenhorn, *Fatherless America: Confronting Our Most Urgent Social Problem* (1995); Chris Coughlin & Samuel Vuchinich, *Family Experience in Preadolescence and the Development of Male Delinquency*, 58.2 *J. Marriage & Fam.*, 491ff (1998); Robert J. Sampson & J. H. Laub, *Urban Poverty and the Family Context of Delinquency: A New Look at Structure and Process in a Classic Study*, 65 *Child Dev.*, 523 (1994); Robert J. Sampson, *Urban Black Violence: The Effect of Male Joblessness and Family Disruption*, 93 *Am. J. Soc.* 348 (1987); Ross L. Matsueda & Karen Heimer, *Race, Family Structure and Delinquency: A Test of Differential Association and Social Control Theories*, 52 *Am. Soc. Rev.* 171 (1987); George Thomas & Michael P. Farrell, *The Effects of Single-Mother Families and Nonresident Fathers on Delinquency and Substance Abuse*, 58.4 *J. Marriage & Fam.*, 884ff (1996); Lingxin Hao, *Family Structure, Private Transfers, and the Economic Well-Being of Families with Children*, 75 *Soc. Forces* 269 (1996); Frank F. Furstenberg & Andrew Cherlin, *Divided Families: What Happens To Children When Parents Part* (1991); Adam Shapiro & James David Lambert, *Longitudinal Effects of Divorce on Quality of the Father-Child Relationship and on Fathers' Wellbeing*, 61 *J. Marriage & Fam.* 397 (1999); Rebekah Lein Coley & P. Lindsay Chase-Lansdale, *Stability and Change in Paternal Involvement Among Urban African American Fathers*, 13.3 *J. Fam. Psychol.* 416 (1999); Judith S. Wallerstein et al., *The Unexpected Legacy of Divorce*, (Herpion, 2000); Sara McLanahn & Gary Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* (1994); Paul R. Amato & Alan Booth, *A Generation at Risk: Growing Up in an Era of Family Upheaval* (1997). See also Hector Franceschi & Joan Carreras, *Antropologia Juridica de la Sexualidad*, (S.E.A., 2000)

is relatively new, is this something to which the Canadian community should take a wait and see approach?²³¹

3. Are same-sex relationships inherently unstable and if so, what is the effect on children? Isn't change possible, especially with the assistance of the medical community,²³² outreach programs like "Courage,"²³³ and the support of others (i.e. religious communities, family friends, recovering gays and lesbians and so forth)?²³⁴ If so, how are children affected by changes from straight relationships to gay relationships and vice versa? Are homosexual relationships shorter in duration and less monogamous, on average, than heterosexual relationships?²³⁵ If so, what are the effects of these two factors on children?

²³¹ Dr. Fitzgibbons argues that the phenomenon is relatively new and "goes against the values of the common inheritance of humanity." He emphasizes that studies are available which link various disorders in children with absent fathers and/or mothers, and that the potential for an incorrect conclusion, and the consequences that would result, demand further research before any more changes in law. Medical Downside of Homosexual Behavior, *supra* note 228. A similar argument is made by Dr. Somerville who also contends that statistics show that a child raised without the benefit of parents of both sexes is deprived of the possibility for complete and normal development. Somerville, The Case Against "Same Sex Marriage," *supra* note 199.

²³² See, e.g., National Association for the Treatment and Research of Homosexuality (NARTH), at <http://www.narth.com> (last visited Jan. 2004); International Association of Catholic Medical Association, at <http://www.Flame.org> (last visited Jan. 2004); Catholic Medical Association, at <http://www.cathmed.org> (last visited Jan. 2004). See also Gerard Van Den Aardweb, *Homosexuality and Hope* (1985); Gerard Van Den Aardweb, *On the Origins and Treatment of Homosexuality* (1986); Joseph Nicolosi & Linda Ames Nicolosi, *A Parent's Guide to Preventing Homosexuality* (2002); Joseph Nicolosi, *Omosessualita Maschile, Un Nuovo Approcio* (Sugarco Edizioni, 2002) (original title in English: *Reparative Therapy of Male Homosexuality: A New Clinical Approach*; David Morrison, *Beyond Gay* (1999) (providing a personal testimony on Christian conversion and the struggle with homosexual attraction).

²³³ See John F. Harvey, *The Truth About Homosexuality: The Cry of the Faithful* (1996). John Harvey, a Catholic priest and founder of the organization "Courage," has been helping persons with a homosexual orientation to live chaste lives for almost twenty years. He refuses to label people "homosexual" or "lesbian" and insists that human beings share something more fundamental: every human being is equal because he or she is created in the image and likeness of God and, by His grace, may enter into eternal life, that is, union with God. In his book, *The Truth about Homosexuality*, Harvey argues that even a person who has never deliberately chosen a same-sex orientation may change "through deliberate choice of the means of change found in the order of nature and of divine grace." *Id.* at 72-73. In his comprehensive study of the issue, he devotes an entire chapter to "The Possibility of Change of Orientation" in which he cites the work of numerous experts who have devoted their lives to the treatment of same-sex attraction and believe change is possible. *Id.* at 69.

²³⁴ On this point, a recent book by former gay activist David Morrison is revealing. In *Beyond Gay*, Morrison outlines how he experienced his first same-sex affair at age 13 or 14 and went on to identify himself with the gay community. Ultimately, however, he made the decision to change and live with same-sex attraction while refusing to be defined by it. In regard to whether or not change is possible, his comments are revelatory: "This, then, is the reason for the book: To give witness to the truth about same-sex attraction and activity both as they are expressed in theology and philosophy and as I have found them in my life and observed them in the lives of my friends. By drawing from an understanding about human nature that is defined in both dogma and daily life, I hope to reveal a humanity that goes deeper than mere sexual inclination. There is so much more to life than sex. Our stage as human beings is so much larger if we would but open our eyes." Morrison, *supra* note 232, at 24.

²³⁵ See, e.g., Amy Fagan, *Study Finds Gay Unions Brief*, *The Wash. Times*, July 11, 2003, at A01 (discussing various studies including a study by Dr. Maria Ziridou showing that men in homosexual relationships have, on average, eight partners a year outside their steady relationships. See also, footnote

E. Halpern Obscures the Meaning of Human Sexuality and the Natural Family

The bedrock of all human rights is the universal principle that the human person is an end in himself/herself and can never be used as a means. By giving same-sex relationships marital status, the Canadian government would be accepting a notion of human sexuality that obscures the significance of the inherent dignity of the human person and his or her fundamental social unit: the natural family.

The true dignity of the human person requires that he or she be treated as a whole, as a physical, intellectual, emotional, and spiritual being. In some activities, individual males and females are complete in and of themselves, for example, when they eat, speak, or think. But reproduction requires a man and woman to communicate through a bodily union.²³⁶ In other words, marriage is the physical union of two in one flesh communion of persons that are complementary. Such sexually reproductive-type acts reaffirm the couple's communion whether or not they are capable of conceiving children.²³⁷ Only reproductive-type acts can be "truly unitive, and thus marital" since reproduction is the only act that is performed by the married pair as an organic whole.²³⁸

Common objections to this line of reasoning often include the following: (1) many non-reproductive-type sexual acts, including sodomy, can achieve personal union because they are an expression of love or pleasure; and (2) using the body as an instrument is not dehumanizing or offensive to human dignity because, as human persons, we are obliged to do so, as in the case of eating and drinking.²³⁹

With respect to the first objection, if non-marital sexual acts were merely expressions of love or pleasure, then sexual acts between (1) an adult and a child, (2) an animal and a human being, or (3) a father and daughter would be irreproachable. In regard to the second objection, activities such as eating, drinking, or chewing gum greatly differ from sexual intercourse where passions are intense, the action is completely focused, and another person is integrally involved.²⁴⁰ All of which, in addition to human weaknesses

245, and in particular the work of Nicolosi, *supra* note 232, at 97-99, who argues that promiscuity is a fundamental part of same-sex attraction disorder.

²³⁶ See Robert P. George, In Defense of Natural Law 139-53, 161-83 (1999) [hereinafter George, In Defence of Natural Law].

²³⁷ *Id.* at 140-41

²³⁸ *Id.* at 141. George admits that this vision of the human person carried to its logical conclusion means that an entire range of sexual acts offends the person's human dignity since these gratifications are private experiences not directed toward interpersonal unity or communion: sodomy (anal and oral sex between married couples and unmarried couples and between persons of the same-sex), masturbation (mutual or solitary), pre-marital sexual intercourse, adultery, and contracepted sexual intercourse, even between married couples. In other words, these acts do not embody the personal communion which not only requires marriage, a stable personal relationship that rejects the notion that persons are substitutable or interchangeable, but reproductive-type acts initiating and renewing procreative power through real organic union. *Id.* at 171, 175. See also John Finnis, The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations, 42 *Am. J. Juris.* 97 (1997) [hereinafter Finnis, The Good of Marriage].

²³⁹ See Stephen Macedo, Homosexuality and the Conservative Mind, 84 *Geo. L.J.* 261, 261-300 (1995); Michael J. Perry, The Morality of Homosexual Conduct: A Response to John Finnis, 9 *Notre Dame J.L. Ethics & Pub. Pol'y* 56 (1994).

²⁴⁰ George, In Defense of Natural Law, *supra* note 236, at 168 (Sexual acts are not just signs or symbols of cordiality, such as a smile or handshake, but are acts that intensely engage the participants).

(i.e., selfishness, pride and so forth), play into the temptation to reduce persons to a fragment of their total reality merely the physical component.²⁴¹

F. Halpern Undermines the Social Order

The judicial redefinition of marriage is a fundamental change, and one that is wrong because any such redefinition requires the special amendment procedures, or at the very least the intervention of Parliament. When courts exceed their jurisdiction in so important a policy question, their legitimacy as a judicial body is put into question. The failure to respect special amendment procedures also undermines the Canadian democratic system when established procedures are not followed.

There is an important rationale for the special procedures that govern Constitutional amendments. As Professor Lederman argues, they "are of a fundamental kind, made directly by custom, precedent and practice over significantly long periods. Underlying custom, precedent and practice are of course the established expectations of the people about the process."²⁴² Quite appropriately, he acknowledges that expectations may change incrementally through time but for fundamental changes "the special amendment process does accordingly require a degree of democratically mandated consent, well-distributed across the regions of this broad and somewhat loose-jointed country."²⁴³ Moreover, the notion of democracy "implies basic tenets which are the core of its very existence."²⁴⁴ In other words, authentic democracy entails agreement on fundamental values about life in common, values which are discoverable through reason; a democratic society is not simply a neutral system in which all possible conceptions of life compete for public acceptance. To proclaim, as did the UDHR, that the natural family is the fundamental unit of society means that it is a universal value, which has been recognized, asserted, and protected by various cultures and traditions from time immemorial; that the natural family exists prior to the State and must therefore be respected and protected by the State; and that any rejection of the natural family as this fundamental unit constitutes a complete restructuring of human relationships which will inevitably result in social disorder.

Lastly, the Halpern Court accepted the argument that gay marriage is necessary for the self-esteem of a minority, namely gay couples. The fundamental line of reasoning is that life is intolerable "merely by virtue of being in the minority."²⁴⁵ This position, however, undermines the very meaning of democracy, which "by definition, consists of both a

²⁴¹ While the institution of marriage does not eliminate one spouse from using or abusing the other, it certainly militates against the problem. Professor John Finnis notes that marriage, the exclusive commitment of a lasting nature, has strong implications for the integrity and reasonableness of sexual activity. He further, observes: "Those who propound gay ideology or theories of same-sex marriage or 'sexual activity' have no principled moral case to offer against (prudent and moderate) promiscuity, indeed the getting of orgasmic sexual pleasure in whatever friendly touch or welcoming orifice (human or otherwise) one may opportunely find it in." Finnis, *The Good of Marriage*, supra note 238, at 133.

²⁴² EGALE, *Written submissions of the Intervenor, The Interfaith Coalition for Marriage*, supra (quoting W.R. Lederman, *Continuing Canadian Constitutional Dilemmas*, 91 (1981)).

²⁴³ *Id.*

²⁴⁴ Jacques Maritain, *Man And The State* 99 (1951) [hereinafter Maritain, *Man And The State*].

²⁴⁵ Young & Nathanson, supra note 198, at 13-14.

majority and one or more minorities,"²⁴⁶ and necessarily operates on the assumption that minorities will politically organize to meet their own self interests but not with total disregard for the needs of the society at large.²⁴⁷

In sum, to accept the Halpern redefinition of marriage is to accept a fate articulated by lawyer and scholar Iain Benson: "Citizens of Canada no longer live in a democratic society. The illusion of democracy continues, but the reality is that major decisions regarding fundamental matters are no longer made by elected officials."²⁴⁸ Indeed, authentic democracy is possible only in a State which respects the rule of law founded on a true conception of the human person and his or her human dignity, which is integrally tied to the natural family based on marriage. When objective truth does not guide and direct government, Pope John Paul II aptly points out, "then ideas and convictions can easily be manipulated for reasons of power. As history demonstrates, a democracy without values easily turns into open or thinly disguised totalitarianism."²⁴⁹

VI. Conclusion

This paper has explored the legal and policy-related reasons behind the same-sex marriage debate. We have seen that marriage is a fundamental Canadian institution protected in the Canadian Constitution. However, the philosophical underpinnings of Canadian federalism (i.e., the Christian view of man and society, the notion of unity and diversity, the principle of the common good, and the principle of subsidiarity) have gradually eroded leaving Canadian society adrift in a sea of subjective opinion with no adequate vision of the human person to serve as foundation for its legal system. Approaches to same-sex marriage in Canada reveal the poverty of the liberal and

²⁴⁶ Id. (arguing that this line of thinking implies that any single person should succumb to serious self-loathing, and expect the State to cure the problem, or at the very least, confer on the suffering person his or her self-esteem).

²⁴⁷ Id. at 20

²⁴⁸ Iain Benson, *Canadian Courts Impose Rule By Law* (2003) (unpublished manuscript, on file with author).

²⁴⁹ Pope John Paul II, *Encyclical Letter, Centesimus Annus*, available at http://www.vatican.va/edocs/ENG0214/_P7.HTM (May 1, 1991). See also Raymond DeSouza, *Religious Voices Belong in the Public Square*, *National Post*, August 7, 2003 (stating, 'The more erudite National Post editorial board approved of those who said the Vatican should butt out.' Butt out? Sticking its nose into 'the business of state'? Who would have thought that a church speaking on marriage would be accused of trespassing on exclusively secular territory? But that is the consequence of a state that grows ever larger, inserting itself into more and more sectors of social life and civil society. The totalitarian impulse demands that wherever the state advances, the churches and everyone else must retreat."); Smolin, *supra* note 164, at 143-44 (defining totalitarianism: Totalitarianism can be said to involve an attempt to place all aspects of the life of a people under a control of a centralized political authority. Totalitarianism is particularly hostile to independently functioning intermediary institutions and association, such as religious groups, labor unions, and independent media or academic institutions that might form an alternative source of association, organization, loyalty or authority. Totalitarianism seeks political control of the total life, individual and collective, private and associational, of human beings. Totalitarianism thereby attempts to equate the State with the entire civil society, and subsumes the 'nation' within the State. Totalitarianism tends not to perceive proper boundaries or limitation to the political; in this sense, the political becomes quasi-religious (even if in the form of a 'secular' ideology), in that it comprises the sphere of ultimate concern. Totalitarianism, whether of the right or of the left, views its political mission as the ultimate good; we might call it a form of political messianism.)

libertarian perspectives which reduce the richness of the human being to the subjective framework of "self-esteem and self respect."

The Canadian parliament must return to a more objective notion of the human person in the fulfillment of its primary task to legislate for the common good. Only in this way can the whole truth of the human person remain at the core of legal and political analysis, as well as the Canadian Parliaments deliberations concerning the redefinition of marriage. To this end, the Parliament must take as its first premise that heterosexual marriage and same-sex marriages are radically different and, hence, to treat them the same as the Halpern Court did: (1) distorts the true notion of marriage, and undermines the meaning of equality, (2) offends the dignity of children, (3) overlooks important studies which relate to the rights of children, (4) obscures the meaning of human sexuality and the natural family, and (5) disturbs the social order.

In light of the above reasons and the accompanying harm that would be caused to Canadian society, all parliamentarians of good will should conclude that there is no authentic liberty claim that can be advanced to justify the redefinition of marriage.