

No. L001944
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF APPLICATIONS FOR LICENCES BY
PERSONS OF THE SAME SEX WHO INTEND TO MARRY;

and

IN THE MATTER OF THE MARRIAGE ACT and the
JUDICIAL REVIEW PROCEDURE ACT

No. L002698
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:
EGALE CANADA INC.,

DAVID SHORTT AND SHANE MCCLOSKEY,
MELINA ROAY AND TANYA CHAMBERS,
LLOYD THORNHILL AND ROBERT PEACOCK,
ROBIN ROBERTS AND DIANA DENNY,
WENDY YOUNG AND MARY THERESA HEALY

PETITIONERS

AND:

THE ATTORNEY GENERAL OF CANADA,

THE ATTORNEY GENERAL OF BRITISH COLUMBIA, AND
THE DIRECTOR OF VITAL STATISTICS FOR BRITISH COLUMBIA

RESPONDENTS

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DAWN BARBEAU AND ELIZABETH BARBEAU

PETER COOK AND MURRAY WARREN

JANE HAMILTON AND JOY MASHUHARA

PETITIONERS

AND:

THE ATTORNEY GENERAL OF BRITISH COLUMBIA

THE ATTORNEY GENERAL OF CANADA

RESPONDENTS

AFFIDAVIT OF DANIEL CERE

I, **DANIEL CERE**, of the City of Montreal, in the Province of Quebec,

MAKE OATH AND SAY:

Introduction

1. The purpose of this affidavit is to give a Roman Catholic ethical and religious perspective on marriage and its context in civil society in terms of the relevant principles as they are understood within Catholicism. In particular I shall discuss some of the implications for society of any extension of the category of marriage

beyond heterosexual relationships. I shall discuss these implications in light of the Catholic religion's understanding of the nature and meaning of sexual relations, marriage, and the understanding of society that emerged in the Western tradition and that is shared by various religious and non-religious perspectives but which is central to the Catholic tradition.

My affidavit is divided into the following sections:

- Discussion of my qualifications and expertise;
- Effect on Catholicism and other religions of a change to the definition of marriage
- Necessary background to the challenge: Social Constructionism, Religion, and Same Sex Unions
- Why the language of “Heterosexism” and “Homophobia” is problematic for civil society including religious traditions.
- Is heterosexual bonding a significant difference?
- Recognition, religion, & the public sphere.
- Summary and conclusions

Part 1. QUALIFICATIONS AND EXPERTISE

2. I hold a Ph.D. in Comparative Religious Ethics from Concordia University, Montreal and lecture in the Catholic Studies Program in the Department of Culture and Values within the Faculty of Education at McGill University. I also have a Masters Degree in Political Philosophy where I worked closely with Professor Charles Taylor prior to switching to religious ethics from my previous focus on political philosophy. I maintain a keen interest and scholarly focus on the inter-relationship between religion, ethics and socio-political theory. I am the Director of the Newman Centre which serves as the Catholic Chaplaincy at McGill University in Montreal. I am also the Director of the Newman Institute of Catholic Studies which supports the new Chair and Program of Catholic Studies in the Faculty of Arts at McGill University. I am one of the founders of the McGill Marriage Law Workshop (1998), an interdisciplinary group of academics interested in questions surrounding the status of and challenges to marriage in our time.

3. In addition to these offices, my scholarly interests and expertise is in the area of sexual ethics and marriage. I teach a credit course on "Catholic Perspectives on Sexuality and Marriage" in the Faculty of Education at McGill. I have published articles in learned journals on themes related to human sexuality and the family and have a Chapter in a book that is currently in press. I am currently working on a book in the area of marriage and contemporary culture in which I will examine marriage in its post-modern cultural context. Attached as Exhibit #1 to the Affidavit is a copy of my Curriculum Vitae.

- EFFECT ON CATHOLICISM AND OTHER RELIGIONS OF A

CHANGE TO THE DEFINITION OF MARRIAGE

- In his commentary on the new Code of Canon Law, Thomas Doyle points out that more canons (which are devoted to marriage than to any other subject. This extensive concern reflects the central importance of marriage for Catholicism. (T.P. Doyle, 737) Marriage is one arena in which there is a profound intermeshing of religious and the civil concerns. These two jurisdictions meet in marriage. In what follows, I am not going to comment on the specifically Catholic conception of marriage (e.g. the doctrines of sacramentality, indissolubility, and so on). No religious group lives in isolation from fellow citizens and law should be concerned to develop principles which further the common-good and justice for all citizens not just those of religious faith.
- Most religious traditions stress the pivotal importance of marriage for their faith. In Canada, most couples, even if they are not practicing their religious faith, desire a religious wedding ceremony. The pervasiveness of 'religious' marriage ceremonies represents an implicit acknowledgment of very deep connections between marriage and religious conceptions. Those who choose to get married in a religious context while ignoring, in many ways, the remaining aspects of religious life only serve to underscore this implicit sense of the interconnection of marriage and faith. Statistical evidence supports the suggestion that, in practice, for most people, a "real" wedding is a "religious" wedding. These two dimensions of public life are inextricably bound together. Marriage is a complex human, social, and religious reality.
- The legal recognition of marriage of same-sex couples would fragment this rich intermeshing. It would place religions such as Catholicism in something of a quandary. Religious traditions have always operated on the basis of an assumed common ground between civil and religious jurisdictions on the question of marriage. The Code of Canon Law defines the essential nature of marriage in these broad terms: "The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life, is by its nature ordered toward the good of the spouses and the procreation and education of offspring." (para. 1055) The recent document from the Pontifical Council for the Family, Family, Marriage, and "De Facto" Unions (July, 2000), indicates the critical importance of this debate about the nature of marriage and the need for the Catholic tradition "to contribute in a positive way" to this "dialogue" and "socio-political debate" about a problem which has such fundamental significance for the Church and the world. ("Presentation," Family, Marriage, and "De Facto" Unions July, 2000). This document reiterates Catholic teaching that the "juridical recognition" of the "equivalency" of same sex unions with marriage would have a damaging affect on the "identity of the matrimonial union".
- Although civil and religious understandings of marriage are different, nevertheless, there has always been a recognition of some rudimentary common ground. Both civil and religious perspectives acknowledge that marriage is a male/female bond. The acknowledgment of this male/female married bond is also linked to an acknowledgment that this male/female bond is the procreative fulcrum of human life as well as the long-term parental attachments and responsibilities to biological offspring. The church argues that neither the church nor the state have the authority to redefine the nature of marriage: "The conjugal community is established upon the consent of the spouses... A man and a woman united in marriage, together with their children, form a family. This institution is prior to any recognition by public authority, which has an obligation to recognize it." (Catechism of the Catholic Church, 2201, 2202). Marriage is "not created by any public authority", nor does have the right to redefine it as it sees fit. The nature of marriage exceeds "in an absolute

and radical way, the sovereign power of the State.” (Family, Marriage, and “De Facto” Unions par.9) Canon law recognizes the “competence of civil authority concerning merely civil effects” of marriage (The Code of Canon Law, Canon 1059). By civil effects it means such things as changes of name, succession, inheritance, and tax regulations, among others. (Thomas Doyle 744) However, Catholic religious understanding does not recognize any authority on the part of the state to redefine the nature or the essential properties of marriage.

- Acknowledging same-sex unions turns civil marriage into an institution which does not affirm the intrinsic significance of any of the three essential elements of marriage (the male/female relationship, procreative potential, and parenting of biological offspring). Same-sex inclusion forces a basic reconfiguration of the nature of civil marriage. In a sense, it de-legitimizes the civil institution as an institution of ‘marriage’. The civil institution would emerge as a legal entity which explicitly excludes or brackets out the central elements of the definition of marriage. Accordingly, there would be no meaningful connection between this new kind of “civil same sex marriage” and religious marriage. Indeed, there would now be fundamental contrasts between these two forms of ‘marital’ arrangement.
- The Catholic Church would have to examine this new situation very carefully. It seems to me that canon law would have to consider a number of fundamental questions. Should the Church continue any form of collaboration with this new civil institution? In many jurisdictions members of the clergy solemnize marriages for the state. The law makes members of the clergy, in a certain sense, agents of the state for this purpose. This is particularly important since, for a vast majority, a religious marriage is a “real marriage.” In the public’s mind there is no “bright line” between religious and civil marriage since marriage is seen as a unified religious/civil event. If the courts require that the state must recognize same-sex marriages what will happen when members of the clergy refuse to marry a same-sex couple on the grounds that their religious communities do not allow same sex marriage? In Canada almost 50% of Canadians are Catholic. How could Catholic clergy continue to act as agents of the state and refuse same-sex marriages? Would this new civil arrangement be suitable for Catholic couples to participate in? Why should Catholic couples bother to register in an institution they perceive to be fundamentally different from marriage? Would religious communities, in conscience, have to recommend that their membership withdraw themselves from co-operating with this civil arrangement? Since it is no longer ordered to the essential purposes of marriage, it is no longer marriage. It creates a “relationship arrangement” which explicitly violates fundamental principles of Catholic teaching about the nature of marriage.
- Anyone who understands marriage as the social, religious, philosophical, cultural, and legal mainframe for heterosexual bonding will find difficulties with this new arrangement. They will have a hard time recognizing a place for themselves in this legally redesigned landscape. Marriage will effectively evaporate from the legal map to be replaced by the legal recognition of close relationships which involve cohabitation plus some type of sexual relationship.
- This new juridical category would not be impartial or neutral. It represents the deliberate deconstruction of heterosexual bonding as a significant category in law. It is not simply the inclusion into a category but the evisceration or explosion by over-extension of a category. As such it represents the legal entrenchment of social constructionism (see below). Philosopher of law, Professor Christopher Gray, writes:

The current regime, far from infringing rights, protects the rights of association. The marital institution is one mode of association, which persons have a right to exercise, given their prerequisites. It is the form of association which has as its defining character the gender difference of its participants. If that association is

no longer available but is replaced by a different one wherein sexual difference has become irrelevant, this is not the same institutional association. The right to associate by means of it is not the same right. That right has, instead, been obliterated.” (Gray, 598)

II. SOCIAL CONSTRUCTIONISM, RELIGION, AND SAME SEX UNIONS

- What is the basis for a deconstruction of the heterosexuality of marriage? The current phase of academic discourse on sexuality and society is dominated by a spectrum of theories that fall into the big tent of social constructionism (and its variants poststructuralism and deconstructionism). These popular schools of thought offer highly contested theories on the nature of truth, language, and power. They are prominent features of much homosexual and lesbian theory and the current debate over same-sex marriage. The claim that the human rights of homosexuals and lesbians are violated by the state's acknowledgment that marriage is a male/female bond is a claim that springs out of this new ideology of gender and sexuality. The recent Church document on marriage and “de facto” unions highlights the central importance of this new “ideology of gender” which challenges “the very bases of the family.” (Family, Marriage, and “De Facto” Unions par.8)
- Social constructionist, (poststructuralist, and deconstructionist) theories share a number of common perspectives on gender and sexuality. It is important to understand the nature of and problems with these theories in order to appreciate the Catholic philosophical and religious perspective on the issues raised by social constructionists. First, social constructionism is not just a theory about sexuality but a theory about the nature of knowledge itself. The theory has profound implications for our understanding of meaning and society and, therefore, for religion and its relation to society as well. Social constructionism maintains that language or discourse is central to our construction of reality. There is no objective truth, no right or wrong. All our perspectives of reality are socially constructed. Accordingly, all definitions of sex, gender, body, heterosexuality, homosexuality are constructed. All is malleable in the infinite fluid possibilities of language. Catholic teaching at its highest levels has recognized that what is at issue in this new ideology of sexual relationships: "According to this ideology, being a man or a woman is not determined fundamentally by sex but by culture." (Family, Marriage, and “De Facto” Unions par.8)
- Second, social constructionism has great difficulty dealing with the material reality of the body. Those who accept the theory tend to operate with a bifurcated view of human existence with the body seen as mere “raw resource” while culture is the “constructor” of all dimensions of human life including sexuality, gender, and the body itself. Michael Kimmel writes: “Biology provides the raw materials, while society and history provide the context, the instruction manual, that we follow to construct our identities.” (Kimmel 2000, 87)
- Third, social constructionists challenge the two-sex model of human sexuality. Recently, Anne Fausto-Sterling has written on the “five sex” model suggesting that we might be ready for a significant expansion of what we consider to be sexual identity. (Fausto-Sterling 1993). Social constructionists argue that all binary polarities such as male/female, heterosexual/ homosexual, black/white, are suspect since they tend to classify reality in ways which privilege one and victimize the other. Thus heterosexuality is a social category that is intrinsically suspect. Since marriage is a form that works with a binary opposition of male and female, it too is intrinsically suspect.
- Social constructionism, poststructuralism and deconstructionist theories are currently in fashion within the

academy. However, they are also relatively new, hotly contested, extremely selective, morally charged, and based on disputed research. Should law be based on such theories? First these theories are relatively new and untested. It is difficult to say how long social constructionism will be a leading voice in current debates about gender. It has been dominant in the 1980s and 1990s. However, academic trends in the social sciences and humanities tend to be generational (e.g. Marxism in the 1960s and 70s). Society needs to exercise caution about basing major decisions too closely in the wake of these latest academic trends.

- Second, social constructionist approaches are densely theoretical and typically circular in their reasoning. Much of the literature in the field is exclusively theoretical, with little or no effort to offer any type of empirical evidence for the claims being staked out. Indeed, some of the fundamental claims of social constructionism amount to philosophical or moral positions that defy meaningfully empirical testing. The empirical studies that are done are typically subject to serious challenge because of problems in research methodology. This is the case with a great deal of the research purporting to demonstrate the equivalence of outcomes for same-sex and opposite-sex parenting. (Lerner and Nagai, 2001).

- Third, social constructionists are impatient and dismissive of any attempt to engage in a serious discussion of the significance of heterosexual bonding. A basic tenet of social constructionist theory is that there must be “no distinction between same-sex or opposite-sex couples in terms of their treatment by the state” (Margrit Eicher, *Family Shifts*, 144) Any mention of the “reality” of our embodied male and female existence (a reality which infuses religious thought) immediately invites the charge of “essentialism.” Evolutionary psychologists and sociobiologists are dismissed by social constructionists as tainted with the heresy of “essentialism.” Evolutionary psychology does bring one crucial perspective to current debates. It reconnects courtship with procreation. It offers a powerful exploration of the intrinsic connections between sexuality, heterosexual bonding, reproductive success, and investment in offspring. This view provides a corrective to other theoretical approaches which tend to bracket out the question of children and child-rearing from inquiries about sexuality, sexual attraction, sexual bonding, and marriage. Social constructionists are ideologically closed to any discussion of the socio-biology of heterosexual bonding. They insist that social policy and law must be based on social constructionist principles. In this way social constructionists do not address the issues at the heart of the beliefs of religious communities.

- Fourth, social constructionist theories employ rhetorical strategies that disparage rather than engage alternative approaches. They regularly label certain attitudes, practices, and forms of life in terms that are inherently negative: “homophobic”, “sexist”, “essentialist”, “patriarchal,” “heterosexist,” or “heterosexual hegemony.” [e.g. Susan Ehrlich's Affidavit, pars. 9, 10, 11, and passim] This type of inflammatory rhetoric leads to a lack of respect for divergent viewpoints and tends to marginalize other stakeholders such as religious groups or communities. Social constructionists develop a contrived and negative model of the so-called “traditional or patriarchal family” that dismisses valid concerns by packaging them in with archaic and outmoded positions (Professor Margrit Eichler's Affidavit and her study *Family Shifts*, 9-12). In Professor Margrit Eichler's map of the various approaches to family, the rejection of same-sex marriage falls into this “unrealistic and actively harmful” category of the “Patriarchal model of the family.” A telling indicator of the unfair disparaging tone of this approach is Professor Eichler's sweeping rejection of the work of two prestigious and widely acclaimed sociologists of family life, David Popenoe and Norval Glenn, with the dismissive remark that they are part of a “vocal minority that clamours for a return to family policies based upon the “traditional family.” (Eichler #24). Professor Eichler's preferred model, the ‘social responsibility’ model of family, is a social constructionist model. (*Family Shifts*, ch. 7)

- Fifth, social constructionist theories are highly selective in their account of social reality. While offering a

strong affirmation of the role of culture in the determination of human sexuality, social constructionist theories struggle to offer any meaningful insight into the biological dimensions of the social-sexual ecology of human life. Some authors do attempt to offer an “interactionist” model, however, we are far from any convincing theoretical approach. Typically, social constructionists can only offer vague acknowledgments that they “might” be some significant biological constraints or influences on human sexual life.

- Many religious traditions, including Catholicism, would agree with one aspect of social constructionism: its affirmation of the importance of human freedom and agency. However, human freedom is ‘situated’, not absolute (Charles Taylor 1979, 154 f.). Social constructionism implies a radical freedom to fundamentally recreate the foundations of our sexuality. In Catholic thought, freedom operates within specific biological, sexual, and social environments. These contexts have their own dynamics and laws which can be studied and creatively worked with. These biological, sexual, and social ecologies sustain us in very universal and personal ways. Ideological exploitation and manipulation of these ecologies may diminish, rather than enrich and expand, human development.

- Furthermore, most religious traditions, including Catholicism, reject the dualism between body and mind that is implied in social constructionism. The new Catechism states that “the human body shares in the dignity of the “image of God.” The body does not determine human freedom, however there is a profound complementarity between the body, freedom, and the spirit. The human person is an incarnate spirit: “spirit and matter in man are not two natures united, but rather their union forms a single nature” (Catechism of the Catholic Church, # 364). Furthermore, human embodiment is male and female. The bodily/bi-sexual/spiritual reality of the human person is thick with meaning and significance.

- In conclusion, social constructionism remains a highly controversial and problematic philosophy of human existence. The social constructionist contention that heterosexuality is a socially constructed, fluid, and malleable product of history subverts any affirmation of the significance of the male/female distinction and the importance of heterosexual bonding for human life. A codification of social constructionism in public policy is bound to have a significant impact upon a whole set of debates about surrogate parenting, reproductive technologies, and, down the road a bit, the issue of legal recognition for polygynous, polyandrous, and multiple partnership arrangements. Society through its social policy has not been prepared to follow social constructionism to its anti-heterosexual marriage conclusion. The affirmation of same-sex unions would effectively rule out any meaningful recognition (in law or social policy) of the distinctive character of heterosexual bonding and would be unwise and imprudent in the view of the Catholic tradition and other religious and moral traditions. To date, religious and civil societies have shared a modest, but critical, common ground about the role of marriage as a main frame for heterosexual bonding. If social constructionism becomes the ‘official’ view in the secular forum (which includes religious citizens as well as non-religious ones) then that common ground is destroyed.

III. WHY THE LANGUAGE OF ‘HETEROSEXISM’ AND ‘HOMOPHOBIA’ IS

PROBLEMATIC FOR CIVIL SOCIETY INCLUDING RELIGIOUS TRADITIONS

- The word ‘homophobia’ first appeared in print in 1969 in *Homosexual*, a national newsweekly in the United States. It was coined by American psychologist George Weinberg. Weinberg used homophobia to label heterosexuals’ dread of being in close quarters with homosexuals as well as homosexuals’ self-loathing. In his 1972 study, *Society and the Healthy Homosexual*, Weinberg developed the concept of ‘homophobia’ at some length. He argued that homophobia was an entrenched feature of American as well as Western

culture. He claimed that in world views infected by homophobia “homosexuality itself is considered a problem.” A characteristic feature of homophobic world-views is an “unwarranted distress over homosexuality.” (Weinberg 1972, 4). Given this very loose construction of “homophobia” and the question-begging nature of what is meant by “unwarranted”, it is likely that if by “unwarranted” Weinberg means, “concerned about the implications of homosexual and lesbian conduct” then most major religious traditions would have to be considered “homophobic.” This kind of rhetoric is hardly helpful in terms of the kind of distinctions necessary within civil society. It stigmatizes religious communities and seeks to destroy the credibility of religious thought which has been, and remains, a fundamentally important source in building the concepts that guide and govern society. This relationship between religion and religious principles and contemporary liberal societies has been widely recognized by many contemporary political philosophers (including Jean Bethke Elstain, Alasdair MacIntyre, and Charles Taylor).

- The meaning of the term homophobia was also extended to include “internalized homophobia”—“the conscious or subconscious adoption and acceptance of negative feelings and attitudes about homosexuals or homosexuality by homosexual men and lesbians.” Internalized homophobia is evidenced in a variety of ways including denial or discomfort with being a homosexual, low self-esteem, and depression. The concept of “internalized homophobia” is often employed to suggest a direct causal link between the levels of psychological or emotional pain or distress among homosexual and lesbians and the ‘culture of homophobia’ maintained by heterosexuals.
- A variety of strategies for measuring homophobia have been devised. Hudson and Ricketts have developed the “Index of Homophobia” in order to identify variations between “high grade homophobics” and “low grade homophobics.” (Hudson and Ricketts 1980). However, there is considerable debate about the reliability and validity of these instruments. Some researchers argue that heterosexuals’ ‘anti-homosexual’ attitudes cannot reasonably be considered to be a phobia in the clinical sense. The limited data available suggest that many heterosexuals who may express hostility toward homosexual and lesbian behavior do not manifest the typical physiological reactions to homosexuality that are associated with phobias. (Shields, S. A., & Harriman, R. E. 1984)
- A third component in the evolving discourse on homophobia was the development of the concept of “heterosexism.” Patricia Beattie Jung and Ralph E. Smith describe heterosexism as a system of reasoned prejudice which maintains that heterosexuality “is the measure by which all other sexual orientations are judged” (Beattie Jung and Smith 1993, 13-14). Heterosexism expresses itself in “heteronormativity” which attributes some form of superiority or privilege to “heterosexuality.” William Countryman defines heterosexism as a view which perceives heterosexuality to be a “key to our social morality.” (Countryman 2000, 171). According to Margrit Eichler, “The heterosexist bias is treating the heterosexual family as ‘natural’, thereby denying family status to lesbian and gay families.” (Family Shifts, 9).
- Heterosexist ideologies, according to this view, are a form of social bias. The “pervasiveness of heterosexism and homophobia in our culture” is considered to be a “given.” (Susan Ehrlich, par. 11). For social constructionists, these global biases deeply structure our definition of marriage. On this view, heterosexism supports the belief that heterosexuality or heterosexual bonding do have some kind of unique or special place in human life and, therefore, can make a case for recognition in public policy and law. Heterosexism expresses itself in the exclusion of homosexual persons and bonds from key public policies and procedures. This exclusion of same-sex bonds from the institution of marriage is, by definition, ‘heterosexist’ (i.e. according to this definition of heterosexism).

- James T. Sears 'retrospective' on the 25 year evolution of these concepts celebrates the success of this project. He points out that the concepts of homophobia and heterosexism have been well integrated into social science literature. Their impact have been felt both on policy makers as well as the judiciary: Sears concludes that “ homophobia has evolved from a psychologist's construct to a marcher's chant.” (Sears 1997, 15-16)
- However, the discourse on homophobia and heterosexism has many problematic features. First, this is still relatively new. There is a problem with consistency in the use of the terms as technical constructs. The term homophobia can be employed in the restricted sense of irrational hatred or fear of homosexual persons. It can also be used in the more global sense of the cultural and political privileging of heterosexuality. Even its proponents point to the fact that this is still largely uncharted terrain that needs more research and debate (Sears and Williams). These diverse constructs (homophobia, heterosexism, heteronormativity) have not been subject to the vigorous academic debate necessary to fully assess the claims and implications of this discourse. Furthermore the academic discourse is closely tied to an advocacy position. Much of the current social science discourse on these terms is generated by those who are active in the fight for homosexual and lesbian rights.
- Secondly, the inner logic of this discourse compels us to conclude that all discourse about the essentially heterosexual nature of human life and the critical role of heterosexual bonding is morally tainted. The terms homophobia and heterosexism have been directly linked to racism and anti-Semitism (Blumenfield 1997 131-40). This explicit linkage implies those who speak to the central role of heterosexuality and heterosexual bonding in human life are essentially no different from 19 th advocates of slavery, 20 th century Nazi apologists for anti-Semitism, or contemporary proponents of white supremacy. The mere attempt to argue for the critical significance of heterosexuality and heterosexual bonding is, by definition, morally suspect.
- The question of human sexuality and marriage is fundamental to religious traditions such as Catholicism. Given the broad sweep of these newly constructed “isms” how can religious traditions such as Catholicism evade being stereotyped as “homophobic” or “heterosexist”? If “internalized homophobia” is taken seriously, how can these traditions avoid being held directly responsibly and liable for the emotional pain and depression of homosexuals in their communities? These loosely constructed stereotypes are highly controversial. They have the effect of systematically stigmatizing religious traditions and fracturing civil discourse.
- Third, the discourse on homophobia typically tends to overlook the crucial moral distinction between the person and the act. The Catholic Church rejects any “unjust discrimination” against homosexuals (Catechism of the Catholic Church art. 2358). However, non-discrimination does not imply that the particular actions, claims, or policy demands of homosexuals always need to be recognized and affirmed. In the same way, non-discrimination against persons of different racial, religious, or ethnic communities does not necessitate public affirmation of the particular beliefs, policies, or practices that their communities may embrace.
- In particular, a non-discriminatory stance towards homosexuals does not mean that society has to treat homosexual bonding in the same way as it treats heterosexual bonding. The institution of marriage does not privilege heterosexuals in themselves. It does privilege a particular form of heterosexual bonding. In fact, society and religions do not treat all forms of heterosexual bonding in the same way—they do not recognize incestuous relationships, adult-child relationships, polygamy, prostitution or short-term sexual liaisons as included in the category of marriage. Many forms of heterosexual bonding and heterosexual conduct fall outside of both legal and religious definitions of marriage. (Family, Marriage, and “De Facto” Unions,

2000).

- Current constructions of the discourse on homophobia and heterosexism tend to be circular in their logic: a) homophobia/heterosexism is wrong since it privileges heterosexuals and heterosexual practices and denigrates homosexuals and homosexual practices; b) marriage privileges heterosexual bonding; therefore, c) the exclusion of homosexual bonds from marriage is wrong. Thus, according to Patricia Beattie Jung and Ralph E. Smith, reconfiguring marriage is key to “dismantling heterosexism” (Jung & Smith, 1993, ch.6). This kind of circular logic arbitrarily cuts off any serious debate about the substantive differences between homosexual and heterosexual bonding and stigmatizes any affirmation of the critical place of heterosexual bonding in the human social ecology as inherently heterosexist.

IV. IS HETEROSEXUAL BONDING A SIGNIFICANT DIFFERENCE: A RELIGIOUSLY INFORMED PHILOSOPHICAL PERSPECTIVE?

- Religion, race, and sex are not grounds for discrimination within human society. However, the debate about same-sex unions is not a debate about this type of discrimination. There is no legal impediment to homosexuals or lesbians entering into the institution of marriage as a form of heterosexual bonding. They can, and do, marry members of the opposite sex, procreate, and raise children. Particular types of sexual orientation and/or particular levels of sexual desire are not impediments to entry into marriage.

- The debate about the inclusion of same-sex unions is a debate about legal recognition and inclusion of a particular type of social-sexual bond: homosexual or heterosexual. Some argue that homosexual bonding is essentially the ‘same’ as heterosexual bonding and should be treated the same in law. Catholic social teaching recognizes that various “ways of living sexuality can exist.” (Family, Marriage, and “De Facto” Unions par.21) This religious tradition shares a common ground view that heterosexual and homosexual bonding are different and should be treated as such in law. Same-sex and heterosexual bonding are very distinct types of social-sexual ecologies that have very different social outcomes. This widely held view seems self-evident for most people despite the consistent attempts of recent academic theories to convince us otherwise.

- Legal, religious, and cultural traditions have operated on the principle that marriage is an elemental cultural main-frame for heterosexual bonding. Same sex advocates argue that there are no significant differences between heterosexual and homosexual bonding. Professor Margrit Eichler, for example, argues that same sex couples show the same ‘degree of variation’ on a whole set of indicators: duration of unions, emotional quality, social networks, friendship patterns, relationships towards blood relatives, and so on. She bases her arguments for the essential sameness of heterosexual and homosexual bonding on “close relationship theory” (see Professor Eichler's Affidavit discussion of Peplau, Renzetti, Rubin, et al. #47-48). Close relationship theory is a school of thought that emerged in the early 1980s. It attempts to probe the common interpersonal patterns in all intimate dyadic relationships (friendships, dating, cohabitational relationships, marriages, sibling relationships, and so on). Close relationship theories deliberately treat dyadic interpersonal relationships as a ‘generic’ category—all close sexually intimate relationships are perceived to be cut from the same cloth. Close relationship theory is not designed to shed much light on differences between various forms of sexual bonding. The intellectual bent or bias of this approach needs to be critically acknowledged (Cere 2001).

- Is difference significant? Heterosexual bonding differs from that of same-sex bonding in at least three fundamental ways. Despite the incredible historical and cultural diversity of various forms of marriage, nevertheless there have been some broad invariables. First, heterosexual bond bridges the male-female division within the human species. Heterosexual bonding is sex/gender-inclusive. Same-sex bonding does not cross the sex/gender divide. Human beings are, by and large, heterosexual. Heterosexual division and heterosexual bonding are pervasive and fundamental characteristics of the human species. Heterosexual orientation is a major force within human experience. Studies indicate that well over 90% of human beings are exclusively heterosexual (Potts and Short 1999, 75-76). Heterosexual bonding has and will remain the most significant form of sexual attraction, bonding, procreation within human existence. The “man-woman relationship” is a “fundamental’ form of “human cohabitation”. (Family, Marriage, and “De Facto” Unions par.21)

- Heterosexual division and heterosexual bonding are not equivalent to skin colour or doctrinal beliefs. They are central to the social sexual ecology and the survival of the species. The evolution and survival of humans on this planet is the product of heterosexual bonding. Over six billion people on this planet are birthed and generally reared in this bond. The human species could continue as one single race or one single religion. It could not continue as one single sex.

- Second, marriage offers a social context for the procreative power of male/female bonding. The male/female bond is the only sexual union which is procreative. Sexual bonds with all other species and all variations of same sex bonding lack procreative potential. The heterosexual bond is the only bond with procreative potential. The reproductive ecology of the human species is heterosexual. The “‘alleged’ lack of procreative potential” (Eichler, # 49) of same sex bonding is a reality not an allegation.

- Same sex marriage advocates are quick to point out that not all heterosexual bonds are procreative. There are specific incidents of heterosexual bonding that are sterile or infertile. This is the case for most older married women beyond menopause. Same sex marriage advocates suggest that the extension of marriage to infertile heterosexuals is a complete answer that shows the irrelevance of procreative potential for a discussion of marriage. Put simply, their argument against the linkage between marriage, heterosexuality, and procreativity is this: “a) Some heterosexuals are infertile; b) some of these infertile heterosexuals are married; c) therefore, procreation is irrelevant to marriage.” If infertile heterosexuals are in, then procreation is out; if procreation is out, then same sex unions are in.

- However, the contention that there is flat out contradiction misrepresents the fundamental issues at stake in this discussion. Individual variations among heterosexuals do not undermine the fact that heterosexual bonding is procreative; same-sex bonding is not. Marriage provides a social form to affirm and support the generative power of heterosexual bonding. Civic and religious law has affirmed the significance of the procreative potential of heterosexual bonding while extending marriage to all heterosexuals irrespective of their specific capacities for procreation (there are impediments due to age, consanguinity, etc.). There are a wide variety of reasons for this extension. First, 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. By its very nature heterosexual bonding has the ‘potential’ for procreation. Incidents of heterosexual ‘infertility’ are included as part of the wide-tent affirmation of the essentially procreative nature of heterosexual bonding. However, same-sex bonding is a different type of sexual bonding since it is devoid of procreative potential.

- Second, marriage must be malleable enough to capture the variables in heterosexual procreativity. If we were insisting on a flatfooted linkage between marriage and heterosexual procreation then we would have to conclude that heterosexual couples are only truly 'married' during the three or four fertile days of a woman's menstrual cycle since this is the only time at which procreation is possible. Third, there are sex differences in the procreative potential of men and women. Age is a limiting factor for women. Insistence on actual heterosexual fertility as a sine qua non of marriage would create a discrepancy between older males and older females. Finally, the attempt to sort out fertile and infertile heterosexual couples would create an incredible social morass. Marriage acknowledges the fundamental procreative nature of heterosexuality without attempting to sort through specific cases.

- For these and for other reasons, diverse human cultures and religions have extended marriage to all heterosexual couples, including the infertile or post-fertile, while simultaneously celebrating the procreative nature of heterosexual marriage. The contention that this extension represents a flat-out negation of the significance of heterosexual procreativity for marriage misconstrues the issue and ignores the important arguments for this extension.

- Finally, heterosexuals have biological offspring who require long-term nurturing. The attachments between biological parents and their offspring are usually mutually deep, complex, and abiding. We know these attachments exist and flourish even if we cannot provide a complete or satisfying social scientific or psychological account of them. Marriage provides a cultural frame to support and sustain the attachments, duties and responsibilities of biological parents to their biological offspring. Although other forms of parenting exist and require social support, especially single parenting, nevertheless, marriage attempts to zero in on one primordial form of parenting that sweeps across historical, cultural, and racial divides. The heterosexual bond of marriage supports a whole set of complex kinship relationships that have retrospective and prospective temporal depth (children, grandchildren, grandparents, descendants, ancestors). The biological parenting of marriage is a rich geneological reality.

- Law has always incorporated an implicit recognition of the elemental role of heterosexual bonding in human existence. The courts have repeatedly defended a view of marriage that is consistent with the basic intuitions of religious traditions. In *Egan v. Canada*, four of the majority judges agreed that:

... [the] ultimate *raison d'être* [of 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 (*Egan v. Canada* , (1995) 124 D.L.R. (4 th) 609 at 625 per La Forest J.).

- One critical component in the rhetorical strategies of social constructionism is to keep off the table any serious discussion of these unique characteristics of heterosexuality and heterosexual bonding. Professor Margrit Eichler's response to the above passage in *Egan v. Canada* is illuminating. Professor Eichler deconstructs marriage from a type of bond into a set of distinct roles or patterns of interaction (sexual, economic, emotional). She argues that there has been a "particularly drastic" conflation of spousal, parental, and marital 'roles' by the judges in *Egan v. Canada* —namely, too much focus on the male/female parental unit. She downplays the significance of the parental unit (mother and father) and seeks, from her feminist perspective, to isolate out the 'mother-child unit' as the truly "unique" unit. Curiously, one biological unit (mother-child) now seems to take precedence over another biological unit (mother-father-child). (Eichler,

- For social constructionists like Professor Eichler, marriage is a whole set of fragmented patterns of interaction that can be pieced together in a myriad of ways. Heterosexual bonding and procreation becomes just one of many “interactive” options.(Eichler Affidavit, #38). This view is radically at odds with the vision of marriage that has informed Canadian culture including the wide diversity of Canadian religious culture to date. Marriage has served as a remarkable institution which takes up the unique dimensions of heterosexual attraction and procreativity and forges them into a social reality for long term bonding and the raising of biological offspring. Social constructionism would have us dismantle this unique role. To suggest that contemporary jurisprudence should not sustain an institution that gives recognition to the special role of heterosexual bonding within the human existence suggests that law must begin to operate with a profoundly disembodied and fragmented view of heterosexual bonding and parenting—an abstract legal social constructionism that systematically factors out fundamental features of our sexual ecology.
- The establishment of same-sex marriage fragments the meaning of marriage. It relativizes the critical significance of heterosexual bonding, procreativity, and biological offspring. In Professor Eichler's “Social Responsibility” model, which not developed in detail in her Affidavit, the significance of the heterosexual bond must be minimized; “functioning relationships” now constitute “family”, the individual becomes the “unit of administration”, and distinctions between same-sex and opposite-sex couples are eliminated (Eichler, Family Shifts , 144-145). The only “anchors” of marriage would be the vague and malleable categories of “intimate relationships” and “family interactions.” Marriage would be a free floating institution no longer anchored by the pivotal, historically long standing, and culturally near universal concerns for male/female bonding, procreativity, and parenting of biological offspring. These key features could no longer serve to guide public policy making. The destabilizing impact of this inclusion would be profound. It would force us into more extensive ‘reforms’ to accommodate radically new reproductive strategies, new types of interpersonal ‘arrangements’, and new types of “parenting’.
- ‘Same-sex marriage’ is not just an extension of marriage to a discriminated minority. It inevitably requires something more aggressive: a thoroughgoing transformation of marriage that slices into its internal meaning. Marriage would be radically reconfigured so that its defining characteristics, heterosexual bonding, procreation, and nurturing biological offspring are eliminated. Some same-sex advocates celebrate the radical deconstructive implications of same-sex inclusion into marriage. They hope to censure any attempt by law or public policy to attend to and support the social significance of heterosexual bonding.
- The Catholic tradition does not question the existence of “de facto” same-sex unions. It recognizes the “existential reality of individual freedom of choice.” However, the demand for “public recognition” and inclusion into marriage involves something far more than claiming an “individual area of freedom.” (Family, Marriage, and “De Facto” Unions par.12) To affirm same-sex marriage is more than just an act of inclusion, tolerance, and respect for homosexuals. It is the exclusion of a whole set of widely shared views of human sexual identity from the legal system. It rejects any special place, and ‘form’, or any institution that gives special recognition to heterosexual bonding. It concludes that the difference between heterosexual and homosexual bonding is no more significant than the differences between skin colour, ethnicity, or differences in belief.

- The legal affirmation of 'same-sex marriage' will lead to a fundamental disconnect between religious communities and law on the question of marriage. There have been tensions in the past, but never a fundamental disconnect. Indeed, law and religious faith traditions have always managed to find enough common ground to work together in this vital area. If law embraces the new ideology of 'social constructionism' and radically relativizes the significance of heterosexuality and heterosexual bonding, then any form of common ground has dissolved.
- Religious traditions do not expect that the legal system adopt their own particular theological anthropology. Indeed, religious traditions do not necessarily share a common anthropology with each other. However, they do share a very broad consensus that our sexual embodiedness, our heterosexual bonding, and the procreative nature of that bonding, do count for something. Our social sciences and life sciences do not put us in a position to ignore or bracket out the crucial significance of heterosexuality and heterosexual bonding. Public policy and law has acknowledged marriage as the social and cultural main frame for these primordial dimensions of human life. Margrit Eichler notes that "'marriage' is imbued with unique cultural meaning that cannot be replicated by some other means of partnership recognition" (#55). However, our religious and civic traditions of Canada recognize that this "unique cultural meaning" is profoundly connected to some key "essentials:" heterosexual bonding, procreativity, and the parenting of biological offspring.

V. RECOGNITION, RELIGION, AND THE PUBLIC SPHERE

- The emergence of the homosexual community into the public forum has been a relatively recent event. The homosexual and lesbian communities have gone through a tumultuous ride since the famous Stonewall riot in 1969. The process of coming out has been both exhilarating and turbulent. The debate about marriage is part of this turbulence.
- Homosexual and lesbian advocates of same sex marriage tend to adopt two distinct lines of argument. Some socially conservative voices within the homosexual community express impatience for the celebrations of unregulated promiscuity and anonymous sex by the radical edges of homosexual and lesbian liberation. They long for stability and respectability. They see marriage as a safe haven and refuge from the troubled waters of homosexual liberation.
- Other homosexual and lesbian theorists argue that entry into marriage is a way of sabotaging this hoary old heterosexist institution and imploding it from within. They argue that inclusion effectively redefines and dismantles a central pillar of heterosexual hegemony.
- Homosexual and lesbian opponents of same sex marriage also tend to adopt two distinct lines of argument. Some argue that marriage is so incurably 'heterosexual' that it is unredeemable. Homosexuals and lesbians should keep their distance and work for the creation of radically new sexual cultures. At the other end of the spectrum, there are a few lonely voices in the homosexual and lesbian community who value marriage as a heterosexual institution. They worry about the ways in which this institution has been weakened over the last few decades. They are critical of what they see as narrow-minded rights driven arguments for same-sex marriage. They believe that the evolution of homosexual lifestyles and community is compatible with the existence of a flourishing heterosexual marriage culture.

- For many, the first line of argument elicits the most sympathy. They hear the emotive plea of homosexuals and lesbians who want “family values” and stability, who want to be recognized as ordinary married folk. They understand their complaint about feeling “left out” of this unique world of heterosexual coupledness. These feelings of estrangement and lack of connection do need to be addressed both within homosexual and lesbian communities and in dialogue with others. However, inclusion in marriage is not a resolution of these issues. There are a number of important reasons to question whether anyone will find much satisfaction in the ‘recognition’ gained by entry into marriage.

- First, homosexuals are not alone in feeling “left out.” The largest group of the ‘non-married’ are heterosexual singles. Singles are a huge, growing, and largely overlooked segment of the adult population (“Le célibat, nouveau style de vie,” Metro 10 Avril, 2001). Singles also feel an inevitable sense of disconnection from marriage culture. In some cases they would like to be married, but have not found the right partner. The problem of feeling excluded is a fairly common human experience. There are many communities (professional, ethnic, religious, etc.) from which individuals feel exclusion. This is an inevitable feature of the situated complex nature of social life. Homosexuals and lesbians have chosen a distinct form of sexual bonding. It is a form of sexual bonding that does not fit with the institution of marriage. We need to find ways to live with difference, not collapse it.

- Second, surely other forms of social bonding can successfully compete with marriage in terms of social recognition and cultural meaning. Within the Catholic tradition there are innumerable examples of diverse forms of non-married communal bonds which have been perceived to be higher order forms of interpersonal communion than marriage. From the fourth century onwards a wide variety of communities of non-married monks, nuns, sisters,

brothers, friars, and fraternities of priests, have sprung up. They forged lifestyles that rapidly achieved social recognition and acclaim. The challenge facing gay and lesbians communities is to forge unique types of enduring communal bonds. Marriage serves as a cultural institution for a unique form of heterosexual social bonding. Marriage shouldn't be used as a one-shoe-fits-all-sizes category. The creation of this inflated category doesn't do justice to the varied types of communal pluralism that should exist within society.

- Third, marriage has undergone a considerable amount of legal and political tinkering over the last few decades. The establishment of no-fault divorce, attempts to disconnect marriage and procreation, the blurring of distinctions between marriage and cohabitation, and reconfigurations of parent/child relationships, the unfair taxation burdens on the “married,” the pressure of the workplace, have profoundly affected the institution in numerous ways. Political interventions have had their impact. Divorce rates have soared, birth rates have plummeted, cohabitation rates have increased dramatically, fewer and fewer children are reared from birth to adulthood by their biological parents. In short, the institution of marriage is not the warm publicly affirmed haven that homosexual and lesbian advocates seem to suggest that it is. It is an institution under considerable stress.

- We are only just beginning to assess the impact of these changes on the social ecology of modern societies. Now we are being urged, with little time for substantive public debate, and scanty academic research, to press on with a radical reconfiguration of this primordial institution. We need to reassess what has happened to marriage over the last few decades. We need to stop and reassess what has transpired:--divorce rates, changes in child/parent relationships, child welfare, the financial and social pressures on families, the status of cohabitation vis a vis marriage—before we press blindly on with destabilizing changes to the very

nature of marriage.

- Third, advocates of same sex marriage want access to some of the “unique cultural meaning” that pervades marriage (Eichler, #55). But arguably that “unique cultural meaning” has everything to do with the rich and varied world of heterosexual bonding, procreativity, and biological offspring and, for many, religious blessing. Marriage in all its diverse expressions has been a cultural main frame for heterosexual bonding. In a sense, it is an institution crucial to heterosexual identity. It provides a context for heterosexuals to bond as ‘husband and wife’, to procreate as ‘mother and father’. Stripping heterosexuality from the internal definition of this institution radically reconfigures and diffuses the “unique cultural meaning” to which some homosexuals and lesbians seek access.

- Fourth, marriage remains deeply interconnected with religion. The vast majority of civil marriages are solemnized in religious ceremonies. For most couples, a ‘real’ marriage is a religious one. The battle for recognition immediately will run up against the deeply entrenched affirmations of the heterosexuality of marriage in religious traditions. Almost 50% of Canadians are Catholic. What will marriage become for them if it is changed? Should the definition be changed, the ‘real’ meaning of a religious marriage and its goals will, therefore, become elusive. How will entrenched religious opposition to homosexual marriage be dealt with in the public sphere; particularly when “resistance” is stereotyped as an “ism” akin to racism? This is hardly a recipe for civic harmony or workable pluralism consistent with a recognition of equality for those of different ethnic and national origins, multi-cultural perspectives and religious commitments.

- It is important to realize that one aspect of the context of this whole area relates to the nature of public education. It ought to be obvious, and certainly is to me as I work in the education faculty, that the pressures to adapt the curriculum to reflect changes to what might be termed “public morality” are relentless in their zeal to affirm tolerance and inclusion. Such zeal, however, must be maximally respectful of both the role of parents as the primary educators of their children and the diversity (ethnic and religious) of the many groups of citizens who have a shared interest in being citizens of a diverse and respectful political regime. Jamming a particular vision of sexual conduct into the public schools is hardly consistent with this respect and, should it occur, might smack of nothing so much as a return to a new kind of indoctrination. It would be highly ironic and retrogressive if the social constructivist approach to sexuality (a highly controversial theory rejected by virtually all religious groups) were to be given a privileged recognition within society that is pledged to further democracy, pluralism and multiculturalism.

- Many groups of Canadians, some of them new citizens with minority religious views, do not wish their children indoctrinated in particular beliefs about human sexuality. However, whether or not a group is a minority ought not to be the necessary prior condition for a citizen to be accorded respect, dignity and freedom from discrimination. Here there is a need to develop a richer conception of how to share the public sphere than what I have seen represented in the approach advocated by the Affidavits of E.J. Graff, and Professors Eichler and Ehrlich or that can be formulated by the “social constructivist” perspective.

- Finally, the legalization of same-sex marriage would, in my opinion, exacerbate polarization and conflict, not settlement. Heterosexuals are bound to feel that an institution critical to their identity has been fundamentally redefined. There can be little doubt that there will be a substantial reaction that will be immediate and enduring. Entry in marriage won't solve the pain, anomie, and confusion felt by homosexuals and lesbians as they strive try to find their place. It may actually add to it.

VI. SUMMARY & CONCLUSIONS

• From the perspective of religious traditions such as Catholicism, the inclusion of same sex unions in the category of marriage is not simply an inclusion or an extension of the category, but a fundamental deconstruction of the existing category of marriage. The claim that the human rights of homosexuals and lesbians are violated by the State's acknowledgment of marriage as a male/female bond can only be sustained by a particular ideology of sexuality, sexual relationships, and society that puts forward an a priori condemnation of any attempt to acknowledge any real significance to human heterosexual bonding, procreation, and sex-inclusive parenting of biological offspring. There are a whole variety of human relational bonds that are excluded from the category of marriage (dependent relatives, sibling relationships, close friendships, same sex unions, and so on). If the state wishes to recognize these varied close relationships in some way, it may do so—but it should not dissolve the category of marriage in order to accomplish that end nor stereotype as “heterosexist” those who have a deeply rooted and historically significant commitment to a different vision of human persons in relationship - - a vision that places male and female marriage at the center of family and community life in a free and democratic society.

SWORN BEFORE ME at the City of)

)

Montreal , in the Province of Quebec)

)_____

this day of April, 2001) DANIEL CERE

)

A COMMISSIONER, etc.

“This is Exhibit “1” referred to in the Affidavit of Daniel Cere,

sworn before me at the City of Montreal ,

Province of Quebec , Canada , this day of April, 2001

Signed by Commissioner, Notary etc.

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