# Sexual Orientation and the Law:

# An Examination of the Discourse on Two Federal Acts in Canada

*A thesis submitted to the Faculty of Graduate Studies*
*University of Manitoba*

*In partial fulfillment of the requirements for the degree of*
*Master of Arts in Sociology*

by

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# SEXUAL ORIENTATION AND THE LAW: AN EXAMINATION OF THE DISCOURSE ON TWO FEDERAL ACTS IN CANADA

BY

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A Thesis/Practicum submitted to the Faculty of Graduate Studies of The University of Manitoba in partial fulfillment of the requirements of the degree

of

MASTER OF ARTS

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## ABSTRACT

This thesis examines the place of law and rights-based legal reform within the struggle for gay and lesbian liberation. Specifically, I explore whether reformist strategies involving engagement with the law can offer evidence of a shift in the current hegemonic order over ideas about gays and lesbians in modern Canadian society. Through an analysis of two recent enactments by Parliament that placed the phrase 'sexual orientation' into Canadian law – *Bill C-41* (1994) and *Bill C-33* (1996) – I address the problems and possibilities of counterhegemonic discourses in confronting those of dominant ideologies which collectively shape and impact upon issues of concern to gays and lesbians.

This study utilizes the discursive data found through Parliamentary debate and media and organizational documentation concerning these legislative acts in the attempt to uncover aspects of how gay and lesbian sexualities 'fit' into the configuration of law and society. It is revealed that legal rights reform and the political context from which it emerges do offer some opportunities for transcending the hegemony enforced through homophobia and heterosexism. For gays and lesbians, however, evidence of resistence to the ideas of progressive change is also implicated in the form and discursive elements of minority rights law and the political process of legal reform. I conclude that while gay and lesbian movements will not see the demands and desires of the liberationist project fulfilled solely through the present legal system, recognition of the varied exigencies of rights-based legal strategies and their social repercussions should assist in providing invaluable insight for activists and other agitators against the status quo in both legal and non-legal domains.

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# INTRODUCTION

In the period between 1993 and 1997, which comprised the first mandate of Canada's current Liberal government, two federal acts were passed by Parliament that effectively coded 'sexual orientation' into two different federal statutes. Over the past number of years, particularly since the inception of the *Canadian Charter of Rights and Freedoms* in 1982, there have been numerous incidents of both successful and failed litigation and legal amendments involving various levels of government in Canada surrounding the legal rights and privileges of lesbians and gay men. However, *Bill C-41* (introduced in 1994, passed in 1995) and *Bill C-33* (introduced and passed in 1996) represent the only moments in the legislative activity of the present federal government where the notion of sexual orientation was actively and formally addressed in the cause of legislative reform. Each of the enactments produced interesting, sometimes emotional and often complicated debate, both inside and outside of Parliament, over the idea of entrenching sexual orientation as a legal category. This project investigates some of the ideas and dialogue that emerged from these events as constructed by a variety of actors and organizations including politicians, reporters, academics, activists, political parties and Canadian citizens. Before a more explicit direction and framework are delineated, a brief detailing of these bills will be offered.

*Bill C-41* was first read in the House of Commons on June 13, 1994, and did not receive final passage until just over one year later on June 15 of 1995. This legislation concerned the general issue of criminal justice sentencing reform. One component of

*Bill C-41* was to make offences motivated by an identifiable hatred based on a victim's race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disabilities or sexual orientation subject to the imposition of longer sentences by judges. Although this 'hate crimes' reference was but one provision of many other (relatively unrelated) changes to the criminal justice system proposed in the legislation, in the opinion of one MP, "most of the debate ... focused on the sexual orientation aspect [of the entire sentencing overhaul]" (*Hansard*, 15 June 1995, 13977). Indeed, the stage for political theatre may have been set early during the bill's life in Parliament, when Roseanne Skoke, Liberal MP for Central Nova in Halifax, made the following comments during debate:

> .... The inclusion of this wording in effect gives special rights, special consideration, to homosexuals. The reference to sexual orientation in the [criminal] code ... gives recognition to a faction in our society which is undermining and destroying our Canadian values and Christian morality...
>
> Canadians do not have to accept homosexuality as being natural and moral. Homosexuality is not natural, it is immoral and is undermining the inherent rights and values of our Canadian families and it must not and should not be condoned. (*Hansard*, 20 Sept. 1994, 5910)

In the days that followed this pronouncement, many MPs expressed their displeasure and outrage at such remarks. One Bloc Québécois MP, Réal Ménard, publicly acknowledged his identity as a gay man for the first time in the House of Commons as part of his rebuke of Skoke's speech (*Globe and Mail*, 28 Sept. 1994, A2). Still others, in less graphic language, expressed opposition to the legislation along similar lines, reflecting an apparent fear of the consequences of coding sexual orientation into law. Despite the opposition, the bill eventually passed by a margin of 168 to 51, with Reform Party MPs accounting for the bulk of opposition to the legislation.

It is interesting to note the political climate in which this piece of legislation, as well as the then forthcoming *Bill C-33*, emerged. During the time that the criminal sentencing reform bill was before the House of Commons, some MPs were presenting petitions urging Parliament not to proceed with any legislation that would add sexual orientation as a category to the *Canadian Charter of Rights and Freedoms* or the *Canadian Human Rights Act (CHRA)*. Clearly, the opposition to any such potential amendments was worried about further 'gay rights' initiatives that they perhaps anticipated as on the horizon. The government, it can be intimated, might have been worried as well and embarrassed over the furor caused by the hate crimes component of *Bill C-41*.

The second enactment of sexual orientation legislation did not make its appearance in the federal Parliament until almost another full year later when, in the spring of 1996, *Bill C-33* was introduced in Canada's House of Commons. This legislation would amend the *Canadian Human Rights Act* by adding the words 'sexual orientation' to the prohibited grounds for discrimination included in the *CHRA*. Such action had been promised by several governments at the federal level since the mid-1980s, and similar amendments had been adopted before 1996 by most provincial governments. Finally, on May 9th, 1996, not even two weeks following its first reading in the House of Commons and after the government moved to limit debate on the legislation, the bill passed third and final reading on a vote of 153 to 76. An unusually high number of MPs in the governing Liberal Party voted against the legislation, a reflection of the free vote permitted by the government for its members. Almost every Reform Party MP voted against the bill, while

the House Members from the Bloc Québécois supported the initiative. Yet, according to columnist Jeffrey Simpson, only a few weeks prior to the introduction of *Bill C-33*, the justice minister was claiming that, as the Parliamentary timetable was excessively tight, the *CHRA* amendment was not about to become an immediate priority of the government (*Globe and Mail*, 1 May 1996, A22). Simpson claims that the Prime Minister "sensed political danger or at least internal caucus dissent" if the government was to proceed. It was the "stinging indictment of government inaction by Human Rights Commissioner Maxwell Yalden and the endorsement of Mr. Yalden's indictment by so many editorial pages and other places of public comment" that helped force the Prime Minister to change his mind. This indictment, combined with a perceived lack of integrity over other policy blunders, was enough to justify the introduction of a controversial bill as an action intended to "quell the criticism that the government lacks resolve." As in the debate over *Bill C-41*, the days of debate and media coverage of *Bill C-33* produced some significant and sometimes controversial moments and insights, but what did this amendment really mean?

For some gays and lesbians, the inclusion of sexual orientation in the *CHRA* meant that discrimination encountered in areas that fall under federal jurisdiction (such as the relationship between a public servant and the federal government as employer or federally regulated industries) could be brought before and "investigated by a regulatory commission" and possibly result in quasi-legal adjudication through a human rights tribunal (Herman, 1994:20). It could also result in formal legal proceedings through the court system, depending on any judicial review of the earlier adjudicated decisions

(Herman, 1994:20). The provincial statutes provide similar avenues for individuals to follow if they wish to pursue a claim of discrimination based on sexual orientation in matters of provincial jurisdiction such as housing and employment (Herman, 1994:20). The amendment to the *CHRA*, much like those introduced its provincial human rights act counterparts, reflects a general strategy of 'rights' lobbying (and litigation) that has come to play an important role in the progressive activism of gay and lesbian movements. These movements have sought to access legal equality for gays and lesbians pertaining to a range of issues such as spousal benefits, adoption and the formal recognition of homosexual partnerships.

While the awarding of legal rights and benefits is, in and of itself, a primary concern and understandable goal of gay and lesbian movements, the process of engaging the law and the consequences of the influential position that law holds throughout society have become concerns for critical legal theorists and other scholars interested in the law/society relationship. This form of circumspection moves beyond the recognition of individual 'victories' for gays and lesbians in the legal domain, and considers the potential impact that the law has on other issues that matter to gays and lesbians, including the homophobia that may still remain pervasive despite legal reforms in certain areas. It is from this understanding that an investigation of *Bill C-41* and *Bill C-33* can proceed.

I am interested in finding out what role legal reform - resting on the abstract notion of rights - has in the movement toward gay and lesbian liberation. If gays and lesbians aspire to live in a society where their sexuality ceases to exist as a catalyst for homophobic and heterosexist injustice, how might law be implicated for assisting in this liberationist

project? In order to address this issue, it is necessary to investigate some aspect of legal reform so that the relationship of sexuality to the configuration of law and society will become clearer. Uncovering elements of this relationship should assist in evaluating how progressive social change for gays and lesbians might emerge through legal reform or, conversely, where barriers to gay and lesbian liberation might exist in the form and content of law. In this thesis, the discourses on *Bill C-41* and *Bill C-33* will be reviewed to ascertain what these legislative acts reveal about the potential to attain gay and lesbian liberation through rights-based legal reform. In essence, I will investigate whether the discursive evidence, located within the political context of the time the two bills were before Parliament, points in the direction of meaningful social change, or away from it. An analysis of this evidence should provide insight into the connections between law, society and sexuality in Canada, heading towards the new millennium.

The discussion will be organized in the following format. Chapter One provides a short overview of gay and lesbian activism/movements at certain historical moments to illustrate some continuities, changes and important ideas that have emerged over the years in the struggle for gay and lesbian liberation. In Chapter Two, I build on these ideas of reform, activism and liberation by laying out a more detailed discussion on some of the previous theoretical and empirical work conducted from a critical perspective in the territories of sexuality, social change and legal rights. Chapter Three outlines the methodological considerations of my research project, and indicates some specific questions for inquiry (as framed by Chapters One and Two) that guide the process of discourse investigation. Chapters Four and Five are focused on *Bill C-41* and *Bill C-33*

respectively; each chapter contains a delineation of the discourses on these legislative enactments, and an analysis of these as guided by the questions set out in Chapter Three. The conclusion to this thesis allows for an overview of findings, and a re-visiting of the research problematic with which I am concerned.

# CHAPTER ONE:
# GAY AND LESBIAN MOVEMENTS

Before moving into a more confined discussion over issues such as sexual orientation and the law, gay and lesbian legal rights or the politics of rights discourse, it may be helpful to sketch a brief overview of how some of these concerns came into being in the first place. Such an exercise entails looking at selected instances of, and changes in, what can be called the 'gay and lesbian movements.' By this it is meant to suggest that there certainly is/was not *one* homogenous and identifiable conglomerate that represents lesbian and gay activism. Different periods over the past century have produced different kinds of homosexual political and social action and reaction, from the very radical to the very innocuous or mainstream, but I believe it is fair to posit that they all seem to share the common element of struggle, seeking to improve the often marginalized life situation of men and women who form same-sex sexual relationships or express homo-sexual desire. This struggle has taken on many forms at various historical moments, and a review of some of these forms will help situate this project within a broader context of changing meanings, strategies and social realities relating to the drive for gay and lesbian 'liberation.'

## *The Early Years*

Lauritsen and Thorstad (1974:5) note that the 1969 Stonewall riots in New York City are generally regarded by many as the major impetus for the beginnings of the

contemporary (American) gay liberation movement. The riots, prompted by the confrontational and even violent reaction of "drag queens, dykes, street people, and bar boys" to a police raid on the Stonewall bar in Greenwich Village marked a new form of collective resistence against police authorities' monitoring of the "powerless and disrespectable" (Adam, 1987:75). The same authors point out, however, that certain forms of what we might consider today to be the gay and lesbian movements - or gay liberation - can be readily traced to about one hundred years previous, particularly in Germany (Laurtisen and Thorstad, 1974:5-31). Here, some of the earliest recognizable forms of collective behaviour, lobbying and generally 'speaking the love that dare not speak its name' can be found. Notably, in 1897, the first gay liberation organization came into existence in Germany - the Scientific Humanitarian Committee (SHC). The activities of this group included publishing information on both matters of homosexuality and sexuality, and attempting to facilitate the dissemination of this information within the German states and beyond their borders. A central focus of its efforts took the form of a petition campaign against *Paragraph 175* which would amend the penal code for the Second Reich to criminalize sexual activity between men. This campaign would continue into the early twentieth century and would at times involve women's organizations as subsequent penal code drafts arose to outlaw female homosexual activity as well.

Other signs of a growing liberation movement consisted of the opening of The Institute for Sexual Science (with ties to the SHC) in 1919 in Berlin as a veritable warehouse for scholarly information on sexuality; its archives, research and exhibits attracted many foreign scientists and writers throughout its fourteen year existence.

Furthermore, the immediate years following World War One were witness to an increase in gay publications, coverage of the 'homosexual issue' in newspapers, and the formation of a gay theatre in Berlin in 1921. Twenty-five years after its inception, the SHC had around twenty-five branches throughout Germany, and many connections to international homosexual liberation organizations. However, the authors indicate that between 1933 and 1935, "the gay movement was brutally exterminated" with the rise of fascism in Germany, and faced a similar demise in the Soviet Union under Stalinism after what initially appeared to be a more lenient approach to homosexuality following the Bolshevik revolution (Lauritsen and Thorstad, 1974:43,62-67).

In these early German (and other European) struggles, the 'natural' or 'inborn' aspects of homosexual activity were stressed and promoted to counter those views which held that this type of sexual expression should be criminally proscribed (Lauritsen and Thorstad, 1974:7). A predominant idea forwarded in the late nineteenth century was that homosexuals were a sort of "third sex" or "intermediate sex" - in the case of male homosexuals, "a woman's mind in a man's body" (Lauritsen and Thorstad, 1974: 9,33). These conceptions were representative of the "beginnings of what could be called scientific interest in homosexual behavior (Lauritsen and Thorstad, 1974:8). However, the medical and scientific professions did not simply 'descend upon' those early pioneers of gay liberation with their pronouncements; the term 'homosexual' "was actually elaborated by professional men who were engaged in same-gender sex in order both to name what they experienced as their 'inborn' difference and to protect themselves from the law" (Kinsman, 1987:48). Still, this articulation was "trapped within the confines of the system

of sexual definition and regulation" which was "then emerging in the medical, psychiatric, and legal professions" (Kinsman, 1987:48). Thus, the homosexual category was "removed from the context of experiences" of those who first described it "and became part of the official discourse of the legal system, the police, the medical professions, the media, and, later, social work" (Kinsman, 1987:48-9). This discursive (trans)formation reflects the Foucauldian and interactionist view that "sexuality is organized not by repression but through definition and regulation," and the creation of social categories capacitates this regulation (Weeks, 1991:27).

It should be noted that the lives of these early homosexual liberation proponents "were never completely defined by the State and the medical professionals; there was always resistence and subversion," and in Germany, it took on "visible and collective forms" (Kinsman, 1987:51). The events in Germany, and to a lesser extent in other European nations, seemingly 'set the stage' for future homosexual and gay and lesbian movements and foreshadowed that issues such as publicity and legal reform would occupy a pronounced place within their agendas. Also, it can be acknowledged that the early debate over the nature of homosexuality, and particularly the reformist advancement of the idea that it should be defined in scientific terms rather than moral ones, would lead toward new ways of thinking and talking *about* homosexuals for both gays and lesbians themselves and for everyone else. These developments, of course, should not be necessarily regarded as positive achievements in all of their manifestations, yet must be understood as an important legacy from which fallout continues to be experienced today. As Jeffrey Weeks (1991:95) suggests: "Modern gay and lesbian identities are not the

results of sexological or medical labelling, let alone the invention of historians. They are the results of that process of definition and self definition ... which has been the constant feature of homosexual politics over the past century."

*North America in the 1950s, 1960s, 1970s ... and the onset of AIDS*

Margaret Cruikshank (1992:67) indicates that in 1950 a political organization of American homosexuals materialized in California in the form of the Mattachine Society, some of whose members were Marxists "believ[ing] that prejudice against them was not a problem individuals could solve because it was deeply ingrained in American institutions." They came to view themselves and all homosexuals as an oppressed minority, and sought to "popularize the idea of  a homosexual minority" and "develop group consciousness." A split in the organization left the radical viewpoints of the Marxists eclipsed by an approach that proposed homosexual integration into mainstream society, seeking sympathetic treatment from 'experts' and professionals in the field of sexuality (Cruikshank, 1992:67, citing D'Emilio). This approach may have had more appeal to many of those involved in the organization considering the reality of the McCarthy era in which they operated (Cruikshank, 1992:67-8). The Mattachine Society, together with the "pioneer lesbian group Daughters of Bilitis...described themselves as 'the homophile movement'" - 'homophile' meaning 'love of same' (Cruikshank, 1992:68) - and by the end of the 1950s each had chapters in various cities across the United States (Adam, 1987:69). As a political movement, it proceeded very slowly; one homophile protest involving public pickets occurred in 1965 in front of the White House and was comprised

of "seven men and three women" (Cruikshank, 1992:68, citing D'Emilio). Yet, other efforts did come in the last half of the 1960s, including the establishment of a legal fund, the sponsoring of further protests and various other tactics aiming to push homophile concerns into the public eye (Cruikshank, 1992:69).

Despite the activities of the homophile organizations, the 1960s brought with it a reassessment of tepid homophile strategy "as a new militancy began to sweep black people, students, war draftees, Chicanos and women" (Adam, 1987:68). For many gays and lesbians, "the proliferating social movements of the decade, which came to be known as the New Left, engendered a militancy" in their communities "that overturned the homophile approach" (Adam, 1987:68) of agitating for mainstream inclusion and acceptance of homosexual women and men within the existing social order. Mattachine and Daughters of Bilitis organizations were again split between supporting the 'old guard' homophile ways and a more radical militant approach, and battles for the leadership of various local chapters ensued (Adam, 1987:70-2). This development was part of the homosexual political culture leading up to the Stonewall riots at the end of the 1960s. In the final few years of the decade, gay and lesbian groups in the United States and Canada increased in number from "fifteen in 1966 to fifty in 1969" (Adam, 1987:73, citing D'Emilio) and, by the early 1970s, "almost every sizable city in North America and Western Europe would see a gay liberation front in its midst" (Adam, 1987:74). As Adam (1987:74) imparts, the homophile plea for tolerance and sympathy was being replaced by something else:

> .... [L]ike the black nationalists, the gay and lesbian veterans of the New Left movements no longer wanted to define themselves in terms left over to them by the heterosexist opposition; rather, they sought to build a new gay culture where gay people could be free. Civil rights and integration seemed like endless begging for the charity of liberals who conveniently ignored the everyday physical and psychological violence exerted by homophobic society.

In Canada, Gary Kinsman (1987:160) indicates that the federal government's adoption of the recommendation of the British Wolfenden Report to decriminalize consensual and private sexual activity between persons regardless of sex in 1969 was somewhat influenced by the "emergence of visible gay culture in the cities and the growth of a small homophile movement that organized limited popular education and law reform initiatives." However, echoing the radicalized approach to gay and lesbian issues sparked in the 1960s, a "Canadian coalition of gay and lesbian liberation groups" responded to the decision to adopt the Wolfenden submission in a statement produced in 1971, part of which reads:

> In 1969 the Criminal Code was amended so as to make certain sexual acts between consenting adults, in private, legal. This was widely misunderstood as 'legalizing' homosexuality and thus putting homosexuals on an equal basis with other Canadians. In fact, this amendment was merely a recognition of the non-enforceable nature of the Criminal Code as it existed. Consequently, its effects have done but little to alleviate the oppression of homosexual men and women in Canada. In our daily lives we are still confronted with discrimination, police harassment, exploitation and pressures to conform which deny our sexuality. (cited in Kinsman, 1987:172)

Despite the critical response by some to the lifting of the legal impediment, Kinsman (1987:172) explains that its removal served to "set the stage" for post-homophile "gay and lesbian liberation movements and for the expansion of gay ghettos and communities."

While struggling to be included within the confines of legal equality did not cease to be a concern in the 1970s, the growth and development of gay and lesbian communities,

both physically real and intuitively perceived, was a significant occurrence for the gay and lesbian movements. Cruikshank (1992:119) proclaims that, while gay culture existed before the 1970s and Stonewall, "[w]hat had been a few sparks became a great blaze." Kinsman (1987:182-85) provides a discussion of this phenomenon. In this decade, more gay businesses and "commercial facilities" opened, such as bars, baths, bookstores and restaurants, and those who patronized these "helped define and consolidate a sense of gay identity and community." Not only have these "commercial ghettos" developed, but so too have gay and lesbian residential enclaves in major cities, located in close proximity to places of commerce. The 1970s also gave rise to the "gay market" - the attempt to target a gay, and to a lesser extent, lesbian consumer audience by both homosexual and heterosexual businesspeople. Kinsman suggests that the sum total of the institutions, clubs, businesses, etc. "can be seen as an attempt to deal with the contradictions that heterosexual hegemony presents" for gays and lesbians; gay and lesbian communities are not naturally existing entities but are 'historically produced through constantly shifting struggles and relationships."

An important reality of this era of gay and lesbian liberation efforts is the schism that existed between gay men and lesbians with regard to issues such as strategy, beliefs and community development. Certainly, in the years previous to this time, gays and lesbians did not simply share a unified and unanimous set of principles and goals from which political and social activity emerged. Many authors, however, signify that throughout the 1970s and into the early 1980s the impact of lesbian feminist thinking highlighted a significant challenge to the alliance between lesbians and gay men. In the

words of Steven Seidman (1997:119), "gay men and lesbians went their separate ways." Seidman indicates the gay subculture that developed was "created largely by and for men" noting that "newspapers such as *The Advocate*, with its promotion of consumerism and expressive-hedonistic values, symbolized the personalistic emphasis of this community" (1997:119-20). Although lesbian culture(s) "exhibited a preoccupation with lifestyle concerns," its "radical" and "self-consciously ideological" nature (Seidman, 1997:120) informed by the feminist movement and critiques of sexism, in part, necessitated an independent development.

It was not merely that lesbians lacked the "economic resources as independent women" thus limiting their involvement in a "consumer-oriented, urban middle class lifestyle" (Kinsman, 1987:184). Urvashi Vaid (1995:63) explains that gay male culture - including bath houses, sex clubs and "other sites organized to deliver sex" - reflected a clear commitment to regard sexual freedom "in stark political terms: moralism versus libertarianism." This approach to politics is open to a (lesbian) feminist problematic; the focus on "sexual availability, no holds barred, still leaves intact the existing norms of gender role, power, and privilege" (Vaid, 1995:63). As lesbians questioned these "power dynamics inherent in sexual relationships" they were vulnerable to reactions by gay men who deemed them as 'anti-sex' (Vaid, 1995:63), thus (further) undermining gay/lesbian alliances and resulting in some instances in a "tense climate of uneasy dislike between lesbians and gay men" (Vaid, 1995:293). According to Becki Ross (1995:119-20), despite the "evidence of a gay-positive lesbian sexual fringe, most activist lesbians throughout the 1970s remained highly uncomfortable with what they saw as unabashed

sexual objectification practiced by gay men." In the last decade prior to the AIDS crisis, a primary difference between gays and lesbians centred on the separateness of the development of their cultures, political and otherwise. While women created an "autonomous lesbian-feminist culture" (Vaid, 1995:64), the "institutionalization ... of mainstream gay political organizations," (Vaid, 1995:64) focused largely on obtaining civil rights (Seidman, 1997:120), were primarily the project of gay men (Vaid, 1995:64).

Meanwhile, as the commercial and social aspects of communities continued to bloom, the various types of liberation groups did as well (Kinsman, 1987:181-2). Their growth was not limited to the largest cities; in Canada, groups formed in centres such as Halifax, Saskatoon and Ottawa, "spawn[ing] social service, self-help and political organizations." The main political and activist focus was on a burgeoning 'human rights strategy,' with a key goal of securing the addition of "sexual orientation protection in human rights legislation." However, many of the political organizations and groups that formed coalitions to lobby for such changes fell apart in the late 1970s, according to Kinsman (1987:182), because of "their own internal contradictions, political differences, and the difficulties of organizing across the vast expanse of the Canadian State." The drive for legal reform and the engagement of the state would not be abandoned for long.

The advent of AIDS can be regarded as a catalyst for the renewal of lesbian/gay solidarity as their movements and organizing "began to be more mixed" (Vaid, 1995:293). Vaid (1995:326) insists that "AIDS more than any other factor helped build a national [American] gay and lesbian movement." The impact of AIDS on gay and lesbian communities, of course, was not confined to those in the United States; the negative,

heterosexist anti-gay and lesbian forces found much medical and moral ammunition to put those it regarded as sexual deviants on the defensive (Seidman, 1997:91) across a range of nations. The AIDS crisis had demanded the reliance on "former adversaries - the medical profession and government agencies - for badly needed information and resources" (Kinsman, 1987:211). While I do not wish to detail the extent of new organizations, lobbies, etc. that materialized in the age of AIDS, it is sufficient to note that this era produced both a requisite working relationship with various 'authorites' and a return to more visible radical activism (Seidman, 1997:91) in the form of organizations such as ACT UP and Queer Nation. The perils, suffering, compassion and frustration of this period are well documented elsewhere, but I would like to impart that the arrival of AIDS seemed to have marked, or indeed required, the beginning of the latest attempt by gay and lesbian movements to enter into the mainstream of social and political life. While this public visibility and involvement was often defensive and out of necessity vis-a-vis the realities of AIDS, the augmented presence of gays and lesbians in the public domain perhaps allowed for a variety of attempts to push other gay and lesbian agendas (legal, educational, etc.) forward.

In considering some of these events and happenings throughout the 1970s and into the 1980s (as influenced by the two decades preceding), it seems clear that the expansion of services, organizations and businesses has helped to construct, through the proliferation of gay and lesbian culture, a definite sense of community among and sometimes between many gays and lesbians who may otherwise not share a common heritage or language (Altman, 1982:55). Dennis Altman (1980:61) indicates that homosexuals are emerging as

a type of ethnic minority and are therefore looking for a similar recognition (legal, social) as other ethnic minorities. Others believe that gays and lesbians must be regarded in a different manner for they are "regulated by a system of sex and gender relations, not by a system of ethnic regulations and relations" (Kinsman, 1987:191). In the regulation/relation system facing gays and lesbians, a sense of community is created through a consciousness formed through the "conflict between gay resistence and heterosexual hegemony" (Kinsman, 1987:192). Furthermore, it is perhaps appropriate to realize that gay and lesbian movements are not so much about an oppressed minority as an oppressed *sexuality* (Kinsman, 1987:1992). The representation of gays and lesbians as distinct minorities and the ensuing political strategy relies on problematic notions of biologism, excludes how some people might experience their own sexuality, and "directs us away from challenging the dominant forms of social life" (Kinsman, 1987: 192-3).

It would appear that the arguments against advancing a case for gay and lesbian liberation along the 'minority approach' are quite sensible and pragmatic. Yet, the sense of community that had apparently developed as a result of the initial rejection of liberal politics back in the 1960s, the subsequent creation of safe(r) homosexual spaces (residential/commercial communities, etc.) and the revitalization of activism and coalitions of gays and lesbians focused on the AIDS crisis may be occasioning a return to the challenge of law reform and other activities that attempt to engage the state. Certainly there are policies and regulations that should be challenged, but will this necessarily invite negative repercussions if done within the same boundaries that often act to marginalize? Or might this open up new possibilities for further liberation?

*Engaging the State: Politics, Policy and the Law*

> A belief that it is possible to influence the exercise of state power has motivated social forces to go beyond an 'external' perspective to try and enter what they perceive as the apparatus of the state itself. Indeed, movements which began with strategies that entailed pressuring a coherent, voluntaristic state, for example, homosexual law reform organizations, often found what seemed a solid entity to be porous and penetrable. (Cooper, 1995:65)

Perhaps after building up stronger and more vibrant communities and then being thrust into the public spotlight over AIDS, gays and lesbians felt the need to tackle the formal components of the state system (law, policy-making) beyond the decriminalization of consensual homosexual sex that had touched most of the Western world by the 1970s. This hypothesis does not suggest that protest, community-building or other 'external' projects ceased or declined with the arrival of the 1980s, but it rather submits that it *may* be more possible than ever before for gays and lesbians to play an active role in influencing the dominant order of the oppression of sexuality. While newer organizations such as GLAAD emerged in the United States, the Gay and Lesbian Alliance Against Defamation which casts a critical eye to "mainstream media coverage and respond to it when it is homophobic or heterosexist" (Cruikshank, 1992:87), other groups and individuals are endeavouring to directly challenge state apparatus through such channels as running for public office or launching law suits against policy deemed unfair to gays and lesbians. There have been mixed reviews on the success of these undertakings.

Davina Cooper (1995:100) has studied the process whereby control over certain urban councils in the United Kingdom in the early 1980s were "seized" by "Labour left-wingers ... intent on institutionalizing a new, radical, communitarian politics." While

acknowledging that the structure of state power was such that "its utilization by gays and lesbians" involved in the new urban Left "remained constrained," Cooper investigates whether gay and lesbian actors were able to challenge these barriers and "refigure the discursive and disciplinary character of municipal governments" (Cooper, 1995:101). She begins by reviewing some of the differences in "sexual politics" among the various players, and notes that there were variances "both between and within individual [council] authorities" (Cooper, 1995:102-5). Divergent opinions were held by councillors and community activists and there also were rifts between lesbian and gay male activists over appropriate strategies and ideological dispositions. Cooper reveals that lesbians "tended" to adopt a more radical stance while gay men, according to one lesbian policy officer, "had problems understanding heterosexism because they didn't understand sexism." On the whole, however, gays and lesbians usually worked fairly well with one another in council, and together faced the "less radical sexual politics" of senior officials as a common threat to "lesbian and gay policy development." However, it was not solely the personal viewpoints of senior councillors that worked to constrain gay and lesbian activism. The structural position of these leaders as mediators of external opposition and internal division, plus the construction of homosexual oppression (i.e. heterosexism) as primarily requiring the inclusion of gays and lesbians within local government's vague language of equality, fairness and justice, all contributed to the restraining of more radical gay and lesbian sexual politics.

Moving towards the more specific manifestations of gay and lesbian-driven initiatives, Cooper (1995:105-6) indicates that these included: library stocking, adult

education classes, youth groups, AIDS work, cultural events, assistance facilitating adoption and fostering (when permissible), developing school curriculum policies and working against harassment. Despite these positive developments, there was some discontent among gay and lesbian actors over what was perceived as the failure of "state power" to "generate more substantial results." Cooper explains that the bureaucratic nature of the councils held up the implementation of certain policies in certain situations where either front-line officers were not cooperative with mandated initiatives or their discretion was not successfully utilized by activists. This reality, combined with the problem that many gay and lesbian proposals at council underwent rather extensive scrutiny, led to a lethargy among activists and provided opposition the time to organize (Cooper, 1995:107). The opposition to what were regarded as the councils' commitment to leftist ideological activism came in large measure from conservative factions within Thatcher's administration: "the Thatcher government [was] vigilant to police the borders of what it [saw] as acceptable local policy innovation" (Cooper, 1995:114 citing Mather). The discursive construction of local authorities as not being the appropriate channel for "[*e*]*xplicit* attempts to achieve ideological restructuring" and, moreover, the liberal state (at any level) as needing to steer clear of the 'private matters' of citizenry, notably sexuality and personal belief, struck at the heart of much of gay and lesbian involvement in local government (Cooper, 1995:114-5). Even initiatives that were seemingly wrapped in the widely acceptable aims and goals of liberal equality found opposition once publicly articulated into specific practice - such as gay men's swimming sessions and anti-heterosexism training. Perhaps these articulations of homosexuality in "liberal precepts ...

may have given previously mainstream notions a radical tint" (Cooper, 1995:115), indicating the potentially tenuous nature of even liberalism and its promise of tolerance and formal equality. In other words, when vague conceptions of equality are translated into tangible entities, they run the risk of being constructed as stepping outside liberal equality; homosexuals and those with reformist agendas know the warning - not to go too far (Wilson, 1993:175).

Despite the setbacks and disappointments that gay and lesbian activists experienced by engaging the state through participation in local government, Cooper cites a number of laudable achievements of such activity, including gay and lesbian networking, the visibility of gay and lesbian existence and meaningful service provision (1995:117-8). Her research on the 1980s movement of gay and lesbian activists into council involvement ends with the positing of some fundamental questions: "can state power transform the organization of sexuality if its technologies of power do not themselves change? Indeed, how can such technologies remain when state power is deployed in behalf of new, oppositional objectives?" (Cooper, 1995:119). Certainly the efforts of gay and lesbian municipal work did not produce the most desired results for those involved. There was a constant struggle against one another, the personal beliefs of the local hierarchy, the opposition of the national government and, underlying all, the structure of a system that in so many ways did not seem readily pre-disposed any sort of rapid and transformative change. But if *some* positive changes can be admitted, is that enough to continue investing significant energies in mainstream political action, including working 'inside the system' or strategies of litigation that might rely on an unstable idea of 'rights?' The

question of whether and exactly how rights reform, particularly through promoting the inclusion of the category of sexual orientation within a legal framework, can be seen to represent a progressive and worthwhile pursuit for gays and lesbians, will be explored in the following chapters.

*Conclusion*

In the three preceding sections my intention has not been to provide a complete or comprehensive treatment of the history of the struggle for gay and lesbian liberation, but rather to indicate by way of historical occurrences and analyses some important themes that can inform an understanding of the following discussion in this thesis. Specifically, gay and lesbian movements seem to consistently have had a close association with, and involved the contestation of ideas over, the procuring of equality, identity, rights and community. Although different meanings are sometimes attached to these terms, one often cannot be discussed without reference to the others in the context of gay and lesbian movements. With regard to each of these terms, there does not seem to be one correct meaning. As gays and lesbians have adopted, adapted, resisted and advocated for more than a century, each of these terms or ideas has taken on differing and transient meanings to reflect what is produced in the clash between sexual honesty and that which constructs such an elusive end as some how 'less-than' that which is socially acceptable. Having suggested these things, I will still attempt to impart a simple message of what I believe might represent the paramount goals of today's gay and lesbian movements: "an end to all laws and practices that discriminate against lesbians and gay men," and "complete

acceptance of their sexuality" (Cruikshank, 1992:59). These two goals, abstractly stated, will require much more struggle and contestation in the years to come, and how they might be actually realized remains the subject of much debate. The rest of this project, beginning with a chapter concerned with the empirical and theoretical basis of the thesis, will deal with one aspect of that debate - the notion of gay and lesbian legal rights and how these may be regarded in light of the goals of gay and lesbian liberation.

# CHAPTER TWO:

# THEORETICAL/EMPIRICAL CONSIDERATIONS

## The Politics of Rights

It is perhaps appropriate to begin this chapter by examining some of the debates and assertions surrounding a key, yet often confusing, idea embedded in certain sexual orientation legislation - the notion of 'rights' or a 'right.' I will not attempt to define *precisely* what a right *is*, but at the very minimum I believe it is fair to suggest that rights, outlined across a variety of fora in the late twentieth century Western world, relate closely to (other difficult to define) ideals such as 'equality' and 'justice.' Carol Smart (1989:140, citing Mitchell) imparts that the notion of equality, as espoused by liberal thinking in the nineteenth century, meant "an equality of individuals *under the law*, in the context of structural inequalities based on class, race, and gender." Somewhat conversely, rulings by the Supreme Court of Canada in recent years have suggested that the principles underlying legal equality rights include redressing and alleviating social and historical disadvantage (Smith, 1998:7-8). Today, it is common to witness individuals and groups justifying positive claims to fairness and tolerance and negative claims against prejudice and social inequality in the language of rights through both legal and non-legal tactics. Alan Hunt (1991:241-42) indicates the difference between these two types of rights discourses:

> Rights-claims are interests interpellated into the normative language of rights that embody some claim to legitimation by analogy or extension from other rights ... A legal right is a rights-claim ... that has secured legal recognition that involves a capacity to mobilize public resources for its assertion or defense.

Similarly, Evelyn Kallen (1996:207) notes that:

> When human rights principles become incorporated into the law of a country, they become legal rights that can be invoked by persons or groups who perceive that their human rights have been violated, in order to seek redress for the alleged violations.

For my purposes, both kinds of definitions, emerging out of legal and non-legal notions of rights, are involved in the debate over the *Canadian Human Rights Act* amendment because there was an attempt to code a general rights claim to fairness and equality into law. However, most of my discussion implies the securing of and significance over *legal* rights and their consequences, including the 'negative' rights (provision for punishment) as found in the hate crimes component of *Bill C-41*.

In democratic nations, governing bodies across a range of jurisdictions have introduced and amended acts, constitutional documents, bills and such regulatory constructs which outline particular versions and visions of how their nation, territory, organization, etc., regards, interprets and promotes an understanding of equality and related principles. As mentioned, in conjunction with these developments, a variety of rights-seeking individuals and groups, sometimes representing recognizable social movements, have lobbied governments to make legislative changes or have entered into litigation in an attempt to procure, safeguard or enforce both legal protection from discriminatory action and the extension of tangible manifestations of the ideals embodied by rights that they believe are being denied to them. This sort of activity certainly does not summarize the extent of legal proceedings surrounding the notion of rights, but it does indicate the prevalence of tactics involving the law utilized by activists and those representing the marginalized, oppressed or otherwise ill-treated members of society.

*The Debate Over Legal Rights*

In Canada, it is easy to recognize how prevalent legal or quasi-legal rights have become in this nation. Whether in the form of a complaint to a Human Rights Commission, a legal challenge to an existing piece of legislation or any other of a number of possibilities, Canadians are constantly reminded, particularly through the media, that the elusive notion of rights is continuously being debated, discussed and decided upon in relation to a host of diverse issues. As legal rights and concerns have become such a significant component of popular discourse in many nations, including Canada, it is not surprising that the academic world has shown a marked interest in this tenet of liberal democracy. In a broad sense, it appears that those who have taken up the task of discussing and debating the entrenchment of rights into legal documents fall along a continuum of opinion on the utility and wisdom of resorting to rights; their arguments can normally be placed somewhere along one side of the continuum whereby they either, to a greater or lesser extent, caution against such strategies or suggest that promise exists with them. It is important to realize, however, that rarely do analysts present their views in an unabashedly one-sided manner; most are able to acknowledge the insights offered up by those of differing points of view. In many cases, the support or criticism of a rights-based strategy depends on the specific right or legal reform that is sought. Examining some of the general arguments found within the 'rights debate' will provide an opportunity to help situate the gay and lesbian movements alongside ideas such as equality and meaningful social change.

*Rights as Problematic*

There are many approaches to the critical study of law that maintain either the inefficacy or potentially precarious nature of a rights-based strategy for progressive social movements. While acknowledging the appeal that claims to rights have attained in many liberal democracies, Smart (1989:144) indicates that legal rights are often misleading because they can amount to the oversimplification of "power relations" that are anything but simple or straightforward. A granted or established legalized right may lead to the belief, either of policy-makers or activists themselves, that the 'problem' or 'issue' under consideration has been properly addressed or "solved" - which Smart explains as an essentially misleading assertion that results from "transpos[ing] the problem into one that is defined as having a legal solution" (Smart, 1989:144). Emerging from this logic is the "myth of rights" - making an ingenuous connection "of litigation, rights, and remedies with social change" (Scheingold, cited in Hunt, 1991:228). Closely related to these ideas is the criticism that progressive movements adhering to the language and legal strategies of rights must undergo a de-radicalization of principles and demands in order to properly 'fit' its claims and arguments into the discourse of law (Fudge and Glasbeek, 1992:59). This compromise or acquiescence might leave untouched the fundamental bases upon which experiences of marginalization are realized.

Writing specifically on the feminist movement, Frances Olsen (1990:208) notes that reforms in the area of basic legal rights obtained through earlier lobbying efforts should not to be derided or belittled, but seen for what they were - the removal of "legal privileges" from the male population that came at the expense of women (Smart,

1989:138-9). Thus, blatant discrimination in the law premised on a societal view of inequality between the sexes should be eliminated, but it is important to understand that it is merely the law that has changed and not necessarily (or at all likely) the magnitude of structural inequality (i.e. patriarchy) that is manifest in many (and sometimes less) visible areas of modern life other than the law. This argument reflects the axiomatic approach of many critical legal theorists from a variety of perspectives; the ideal of equality promoted by liberal thinking - a *legal* equality of "opportunity"- is insufficient for facilitating a meaningful transformation of barriers to a 'true' equality, such as patriarchy, poverty or the assumptions of heterosexism (Smart, 1989:140). In discussing the potential of law to augment the equality of condition for women, Laureen Snider (1994:103-4) argues that while engaging certain types of law, such as civil or administrative law, can emphasize "positive, empowering and ameliorative agendas," feminism often suffers when it adopts those which are "punishment and injury-obsessed" - as invariably found in the criminal justice system. The type of law engaged or challenged, and any potential negative consequences of so doing, then, become significant factors for consideration.

When considering specific issues that at times fall under the jurisdiction of the law through court rulings on individual cases or over existing regulation or legislation, it is possible to see the dangers and uncertainty of resorting to rights. Smart (1989:145) suggests a consideration of the possibilities of competing rights claims by those who might have adversarial agendas to equality-seeking groups and the appropriation of rights by the non-marginalized, which might serve to hinder the struggle for equality and fairness. These prospects demonstrate how rulings on legal rights can seemingly nullify their

protective or beneficial reach - the very ideal upon which their existence is promoted and defended within liberal democracies. Smart (1989:145) notes the example of how a "prior right to a particular form of trial" might impinge on the altering of established court proceedings to facilitate and aid in the testimony of children in cases of sexual abuse. As ideals are translated into the realities of legal proceedings, the shortcomings and risks of rights can become uncomfortably clear.

This critical view of the politics of rights is similarly developed by those writing from a Marxist perspective, some of whom contend that the proliferation of rights-seeking groups in recent decades has refracted attention away from the primary cause of oppression and inequality toward the various complex of ways through which its negative effects emerge and are experienced by groups and individuals. Judy Fudge and Harry Glasbeek (1992:60-2) allege that the "new social movements," a diverse and fragmented collection of progressive campaigns which often resort to the rights tactic, relegate the working-class struggle and class politics to the status of merely "another group engaged in the pluralist struggle for democracy." This configuration fails to demonstrate an understanding of "the structural conditions which generate the political struggles which give rise to concrete social formations, such as gender, race and ethnic relations, at any one time in history" (Fudge and Glasbeek, 1992:63). The same authors offer examples of how the *Canadian Charter of Rights and Freedoms* has not produced many progressive dividends since its inception; the lesson being that litigation efforts in the arena of liberal democratic rights are necessarily premised on "libertarian individualism

and the commodification of everything" and thus do not result in outcomes that are "transformative in nature" (Fudge and Glasbeek, 1992:55).

Although this brief introduction to the problematic take on rights by many writers is not meant as an exhaustive treatment of their arguments, it does indicate two general and important themes - one relating to specific instances of litigation and one encompassing the general relationship between progressive social movements and the legal avenues through which their goals are in part pursued. The former reveals that, not only can relying on legal rights to protect the vulnerable result in being on the losing end of court decisions, potential consequences that threaten personal security may in fact gain an increased likelihood if the awarding and acknowledgment of rights is blind to existent power imbalances. The latter theme moves from the undesired outcomes of individual cases to the broader issue of the inability of rights-based legal strategies to effectively implement the agendas of progressives. The warnings of potential short-term dangers, and limited long term progress, as witnessed within the context of liberal (legal) democracy, signify the need for strategies and means of adjudication based on ideas fundamentally different from, and perhaps outside of, the established framework and discourse of law.

Running somewhat contrary to these views are those espoused by analysts who deem the struggle for rights as holding the *potential* and *possibility* for progressive societal change. Arguments made in favour of lobbying for legal rights have been voiced as capable of holding benefit on both a personal level and a larger level reflecting the long term goals of a particular movement. Reviewing a few ideas of the pro-rights faction will demonstrate how it differs from the approach taken by rights skeptics.

*Rights as Possibilities*

The work of Hunt (1991) can help grasp some of the key arguments behind the advocation of legal rights. Drawing on Gramsci's concept of 'hegemony,' Hunt suggests that it is an "active process involving the production, reproduction, and mobilization of popular consent" (Hunt, 1991:229) for "the general direction imposed on social life by the dominant fundamental group" (Gramsci cited in Hunt, 1991:229). If any "hegemonic project" is "to be dominant" it must have room for alternative ideas and "some aspects of the aspirations, interests, and ideology of subordinate groups" (Hunt, 1991:230). It is here that the idea of 'counterhegemony' becomes relevant. Because hegemonic ideologies and practices must incorporate elements that stand as opposing challenges to the dominant order to facilitate the maintenance of legitimacy, the possibility exists for counterhegemonic strategies to alter and re-define this dominant order through participation in a range of areas in public life, such as politics (Hunt, 1991:231-3). This re-configuration of "the elements that are constitutive of the prevailing hegemony" cannot simply come to fruition 'outside' of the domain of the reigning order. Consequently, a counterhegemonic strategy must utilize the words, conventions and routines that are widely or universally understood and accepted (i.e. that which is hegemonic) while aspiring to "add to or extend" what already exists (Hunt, 1991:232-3). In this way, it is conceivable that the newly introduced element can eventually become entrenched as part of the common public awareness of what is considered proper and "good sense" (Hunt, 1991:233). Finally, because rights provide a realm of "linguistic currency" virtually accessible to all people (Smart, 1989:143), they can assist the articulation of *specific*

agendas (e.g. those of feminism, gay and lesbian movements, etc.) in a *universal* framework, progressively emerging as "common sense" and "articulated within social practices" (Hunt, 1991:247).

According to Didi Herman, evidence of such an transformative shift in hegemony may be found in the way in which gays and lesbians have moved from the status of 'deviant' to one of 'rights-deserving citizen' (Herman, 1993:32), permitting an empathetic consideration of the barriers and discrimination they encounter - surely in part accomplished through the language and process of liberal legalism. This progression indicates that not only can a recognizable transformation of the hegemonic order involve a shift *from* the assumptions and ideals of liberal rights *toward* a more radical proposition, but arguably it also may occur during the passage *into* the liberal framework. We must recognize that social movements can be located in different historical contexts and therefore will seek different remedies to marginalization and utilize (at times) different strategies to accomplish this. There may be more tangible, "politically important" (Smart, 1989:139) reasons for certain progressive movements to resort to rights as part of their activist strategy, yet a staunch anti-rights critique would not consider the particularities and unique characteristics of various movements closely enough, perhaps to the detriment of those involved. It is with this in mind that we can look at a few other arguments in support of *rights as possibilities*.

As the general notion of rights has an often strong appeal and respect among the populace, issues claimed as matters of rights are often granted legitimacy (Smart, 1989:143) almost as a matter of course. It becomes difficult, then, to reject claims to

rights, including the rights claims of progressive movements, without being seen as opposing the human rights to which all people are supposed to have access, or as tolerating, being indifferent to, or promoting the negative experiences of oppression (Herman, 1993:38). Furthermore, the politics of competing interests, such as social conservatism, can similarly be forced to abandon certain controversial discursive strategies or other actions, which could lead to their "dying away or exhaustion" as hegemony shifts (Hunt, 1991:233). Failing this de-radicalization, a overtly negative or "dirty" campaign waged against, for instance, gay and lesbian rights by focusing on issues like 'moral depravity' or 'perversion,' may in fact backfire "by offending liberal sensibilities" (Herman, 1994:35, citing Rayside).

On another front, Herman observes that for gays and lesbian organizing, rights struggles are important in securing publicity for gay and/or lesbian politics and for mobilizing support and involvement of others; to accrue an actual "material benefactor" is celebrated for its symbolic significance as much as its substantive provisions (Herman, 1993:33). Moreover, although there are visible impediments to gay and lesbian legal equality remaining in Canadian law, litigation failures to overcome these are not greeted with a singular sense of loss. The process of struggle itself in many progressive movements can provide for those involved an empowering and self-affirming experience (Herman, 1994:72, 1993:33-4, 37) that should not be dismissed, particularly in light of antithetic suggestions of potential danger for marginalized individuals engaged in litigation (Smart, 1989:145). This does not mean that the latter concern is not entirely valid, but only that all experiences in the legal arena do not yield the same (negative) results.

Overall, the faction that claims rights to hold the *potential* for meaningful progressive social change seems to indicate that assessing the impact and relative success of these social movements requires evaluating "the way in which ... substantive issues are conceived, expressed, argued about, and struggled over" (Hunt, 1991:240). This would be an important area for gay and lesbian movements to focus on as the necessary stated goal of publicity and its resultant effect of drawing attention to a variety of ideas concerning homosexuality are undeniably fostered through rights-based legal strategies that often garner media coverage. Many of the federal and provincial gay/lesbian legal struggles in Canada, since the inception of the *Charter*, have revolved around the areas of 'protective law,' such as anti-discrimination statutes, and concern the place of 'sexual orientation' within such acts. These attempts to have sexual orientation become part of the minority rights paradigm have potential implications for both future judicial interpretations and political initiatives on a range of issues (e.g. same-sex spousal recognition). Part of the outcome and consequences of these legal reforms can be witnessed though the evolution of the reaction by politicians, citizens, media outlets and other commentators to the issues that emerge from general debate over 'gay rights,' including discussions over sexuality and the place of gays and lesbians within society.
As mentioned earlier, it should not be suggested that the warning flags raised by many rights-skeptical theorists and analysts are irrelevant; indeed, despite the possibilities of apparently positive shifts in hegemony, these are not guaranteed. However, given that gay and lesbian movements partly utilize rights struggles to procure access to the media and

society-at-large, the notions of publicity and public discourse merit further investigation of some of the claims made by both sides in the debate over rights.

*A Turn to Discourse*

In order to avoid a "deterministic analysis of law" (Herman, 1993:31) that sweeps all progressive causes together and pronounces them incapable of creating any meaningful change in dominant hegemonic forms (e.g. patriarchy, heterosexism, etc.) through struggles over rights, we should look to examples and instances of how the law actually shapes discursive arguments and ideas. In describing a Foucauldian notion of discourse, Mary Louise Adams (1997:6) notes that discourse "refers to organized systems of knowledge that make possible what can be spoken about and how one may speak about it." This understanding rests on the premise of a "socially constructed nature of reality," and a "socially constructed reality of nature" (Macnaghten, 1993:54). Discourses employed by various actors or organizations are not simply random musings disconnected from social life. As "our experience of reality is constituted in and through discourse" (Macnaghten, 1993:54), discourses reveal, reinforce and shape various ways of understanding issues, concerns, debates and problems that are found in the social world. Therefore, "discursive constructions" serve a "social function," for example, with regard to social relationships, the "outlook they engender" and the "activities they legitimate" (Macnaghten, 1993:55). As such, the struggle for gay and lesbian liberation, like any construct of social life, involves many different ways of understanding that are promoted, defended and argued over, at the discursive level.

A review of the ways in which one area of concern for gay and lesbian movements - struggles within a *legal* context based primarily on claims to human rights - has been presented, discussed and decided upon, can provide insight for evaluating the place of human rights reform within the progressive liberationist project. This directive entails an investigation of political struggles over legal equality and the process and outcome of litigation that attempts to situate many of the significant concerns and discussions of those writing from a critical legal perspective into the realm of discourse. In so doing, concepts such as 'equality,' 'transformation,' 'hegemony' and 'counterhegemony' will take on meaning specifically appropriate to gay and lesbian movements, allowing for a foundational basis upon which an empirical study of gay and lesbian rights discourse can be articulated.

**Law, Ideology, Discourse and Gay/Lesbian Rights**

In looking more closely at the actions and strategies of progressive social movements, it is first necessary to briefly discuss the concept of ideology. Laureen Snider indicates that "[a]s components of people's lived experiences, ideologies guide and mould ways of seeing the world and interpreting day-to-day living" (Snider, 1994:80). Further, "[d]issident groups and practices ... are typically marginalized through hegemonic constructions of reality" and this hegemonic consciousness will "reinforce certain interpretations of reality and ignore or deny others" (Snider, 1994:80-1). As a marginalized group, gays and lesbians face a societal ideology that casts them outside of the norm of heterosexuality, and must struggle against this by challenging the very aspects

of a hegemonic order that contribute to its unquestioned maintenance. An ultimate task of gay and lesbian movements would, therefore, be the proliferation and circulation of ideas and awareness that somehow impact upon widely-held ideologies and their discursive hegemonic incarnations. If all discriminatory laws and practices against lesbians and gay men are to end, and if acceptance of non-heterosexual expression is to become a reality, a discursive shift in the understanding and ideas of the hegemonic order should be pursued whenever possible. The dominant ideas within society at a particular moment in time are pervasive across a large spectrum of institutions and discourses and are tied to the interests of those most able to exercise power (Ramazanoglu, 1989:147), thus reproducing and maintaining prevailing values and norms. It is against this configuration that radical discourses and ideas can be introduced in an attempt to create a counterhegemonic drive with the intent of shifting that which maintains a preeminent status.

The work of many writers, especially Didi Herman (1991, 1993, 1994), allows for an outline of a dualism of ideology that has characterized much of the response to and experiences of gay and lesbian rights movements, particularly in countries such as Canada. The decisions, pronouncements and polemics of judges, lawyers, activists and others, made within the context of some sort of homosexual rights struggle, have tended to fall *primarily* within the discursive territory of either liberal or conservative ideology. In general, liberal ideology affirms the currently predominant view that all individual persons deserve the right to *legal* protection from discrimination premised on the notion of a 'compassionate' or 'tolerant' society that also recognizes and 'accepts' (but need not affirm) expressions of difference based on membership in a recognized minority group.

Conservative ideology would regard the liberal approach as too willing to promote the whims of special interests and would be wary of the potential for further, more tangible gains, such as same-sex spousal recognition, or the possibility of an 'activist' court system subverting the will of elected bodies, and thus the values and beliefs of society as a whole, if any coded legal rights were utilized justify further 'gay rights.' While necessarily publicly supporting the (obscure) principle of rights for all, the conservative approach offers up arguments to counter the rights claims of progressive movements, sometimes relying on moral or ethical considerations as the basis for their arguments. A third perspective, which might be termed 'counterhegemony,' can be seen to represent the ideas and insights that attempt to uncover, expose and transcend the hegemonic order (of homophobia and heterosexism). This approach moves beyond simply removing liberal legal impediments for gays and lesbians, and strives to promote structural change from within the confines of the legal system.

In addition to these pronouncements over legal rights for gays and lesbians, the language of each approach helps construct an image of persons who claim a non-heterosexual identity which must also be considered in light of the gay and lesbian movements' desired goal of advancing a counterhegemonic offensive through law. Different discourses offer often incongruous views on who gays and lesbians exactly are, and because these can be seen in many ways as closely linked to the dissemination of information that emerges through legal struggle, the content of these perspectives must be addressed. It is the potential impact on the gay and lesbian transformative project by the social construction of homosexuality and homosexuals themselves, including the variety of

ways in which gay and lesbian rights are considered, that provides the impetus for a more diligent consideration of the three central discursively constructed perspectives.

*Liberal Ideology*

Douglas Sanders (1994:113-4) indicates that, in 1986, the federal government was faced with a recommendation by a Parliamentary Committee on Equality Rights to add sexual orientation as a prohibited ground for discrimination to the *Canadian Human Rights Act*. Based on the legal opinion of the Canadian Bar Association that sexual orientation was an analogous ground under the equality section of the *Canadian Charter of Rights and Freedoms*, the Department of Justice announced the intention of making the amendment to the *CHRA* to bring it "into line with the *Charter*." Sanders notes that Justice Minister John Crosbie made it clear that he was not endorsing homosexuality, but simply acting on legal advice (1994:114, 118). This early foray in the realm of gay and lesbian rights in the post-*Charter* era exemplifies the tone of many court rulings and political pronouncements that have arisen over the years. Of importance is how the support for homosexual rights or sexual orientation legislation is qualified as an opposition to discrimination and other such evils; the *validation* of (homo)sexual difference is refused while the *recognition* of (homo)sexual difference coded in the ideals of liberalism is granted. Gays and lesbians are allowed legal equality as long as their sexuality is not condoned (Sanders, 1994:120).

The discourse of liberal ideology is not limited to heterosexual politicians defending their support of rights legislation; consider the following excerpt from a brief

submitted to Ontario MPPs in 1986 during that province's Parliamentary wrangling over *Bill 7* - a human rights code sexual orientation amendment introduced by the provincial Liberal government:

> Most Canadians appreciate the difference between acceptance and tolerance - and most are prepared to be tolerant. Citizens of our country tend to believe that all people, even those whose views and practices they cannot accept, should be treated equally by the law. The law should not try to force acceptance, but it should enshrine tolerance. (cited in Herman, 1994:39)

This rationale was part of the appeal of the coalition that lobbied for the amendment's passage, demonstrating how progressive forces themselves see the obvious merit of invoking the "liberal tradition" (Herman, 1994:39). As well, Herman (1994:39) describes how MPPs in favour of *Bill 7* decreed the virtues of "pluralism, tolerance, and society's commitment to fighting discrimination against minorities" during legislative debate. It can be argued that this signifies how the language, limits and form of liberal rights reveal a weakness that many gay and lesbian legal activists and reformers neglect - the undertaking to promote the end of heterosexism and homophobia through the legal arena might not go far enough if equality under the law merely achieves and represents the "paternalistic benevolence of political patriarchs" (Herman, 1994:43). In reviewing a judgment of the British Columbia Supreme Court where an HIV positive plaintiff argued that the refusal of the B.C. government to provide the drug AZT for free violated his *Charter* rights, Herman (1991:68-9) cites Justice Coultas' comments as "perhaps exemplify[ing] the best that liberal law has to offer":

> I have found that the funding policy does not contravene the law. Nevertheless, I recognize that AIDS is one of the great tragedies of our age. It behoves those in private life and in government, whose actions affect the well-being of those suffering the disease to act decently, fairly, compassionately.

Here, appeals to decency, compassion and fairness signal that these attributes may be possible to attain but that the law itself cannot be responsible for their provision. This understanding begs the question of whether legal equality and gay and lesbian rights should be prioritized as the locale around which to base efforts to transform societal heterosexism.

A number of writers have pointed to the perils of relying on a system that enshrines legal rights to recognized minorities. One argument states that, by classifying persons on the basis of their perceived identity within a particular minority group, they are categorized as somehow being outside of an unquestioned norm or standard (Bumiller, 1988:69). What follows from this is a failure to problematize the valourized convention thereby missing an opportunity to get at, or at least deflecting attention away from, the heart of the cause of the prejudice that has led to the coding of the marginalized in the first place. Smart (1995:103) notes that the "idea of there being a natural binary sexual differentiation constantly prioritizes heterosexuality" while "demot[ing] non-heterosexual expression and desire." The essentialist and biological undertones (re: sexual orientation) that accompany this binary division expressed through the law serve to regulate the minority identities "in ways that contain their challenge to dominant social relations" (Herman, 1994:44) by encouraging the "expression of immutability arguments within the mainstream lesbian and gay rights movement" (Herman, 1994:51). In other words, in order to make a strong case for their inclusion in the liberal minority rights framework, gays and lesbians must submit to a process that discursively helps to create and reproduce their precarious social placement.

Carl Stychin (1995:112) explains that a key tenet of identity theory holds that universal subject positions are "constructed through the erection of boundaries." This means that the universal (hetero)sexual subject has come into being because the sexual subjectivity of gays and lesbians (among many others) has been denied; to maintain the "stable heterosexual subject, the creation of a negative image of the outsider must be attached to the homosexual" (Stychin, 1995:112). Stychin's explanation of sexual identity reflects the feminist view that when we recognize that women cannot be reducible to a biological essence, "we can begin to acknowedge that there are strategies" through which categories of people, gendered or otherwise, "are brought into being" (Smart, 1995:193). Depending on one's point of view, liberal ideology either mostly reinforces the problematic homo/hetero divide (a legal strategy), even through its reliance on expressions of equality and tolerance, or can be the possible beginning of the deconstruction of discourses and identities that "expand[s] the realm of the universal sexual subject" (Stychin, 1995:113). Those who criticize the hegemony of liberal legalism in gay and lesbian rights struggles can provide much evidence of the prevailing dominance of the current order of things in the comments and rationales offered by judges, politicians and activists. What may not be entirely clear is whether if, over the course of time, liberal rights *assist* in "put[ting] in place a new or transformed discourse" (Hunt, 1991:240) such that substantive issues beyond abstract anti-discrimination platitudes find their way into the hegemonic enclosure.

*Conservative Ideology*

Under the hegemony of liberal legalism, conservative discourses expressing an outrage over such concerns as the 'perverse homosexual agenda' are perhaps increasingly unlikely to feature prominently in both the public debate over gay and lesbian rights and their mainstream media coverage. As mentioned earlier, this can be regarded as the de-radicalization of groups and individuals espousing conservative politics over some issues pertaining to sexual orientation. Herman (1993:38-9) reveals how, in the 1989 *Mossop* rights case, the "conservative Christian coalition intervening in the litigation saw its sexual politics, emphasizing the 'unnatural' and 'depraved' aspects of homosexuality, entirely excised from the legal process." She argues that the religious right in Canada acknowledges that gay and lesbian rights have achieved a "certain institutional legitimacy" (Herman, 1994:74), therefore the public expression of its politics has been constrained. However, the possibility exists for a resort to competing liberal rights claims by religious and social conservatives on the basis that their value-laden and morally-infused beliefs must be granted protection as freedom of religious expression. As Herman (1994:74) notes, this is all the more likely now when considering how "past ... attempts to shock and appal Canadians with tales of homosexual depravity have been largely unsuccessful." It remains to be seen whether these potential clashes on the stage of legal rights is primarily problematic (Smart, 1989:145) or a "distinct merit" (Hunt, 1991:242) that "draws each claimant into the community and grants each a basic opportunity to participate in the process of communal debate" (Minow, 1990:296).

There exists a strong conservative *resistence* to how the liberal paradigm is seen to *favour* certain groups of people over others. This is evidenced by such things as opposition to affirmative action and the discursive tactic of opposing 'special rights' for some which are seen to supplant the equality and liberty of *individuals*. Herman (1994:105) relates how during an interview with REAL Women president Judy Anderson, the anti-feminist crusader decried the undemocratic nature of the *Charter*, as it provided an unaccountable few the means to "in one fell swoop change the whole force of Canadian jurisprudence and social norms." In a similar vein, Canada's Supreme Court Justices were recently referred to in the *Edmonton Sun* as "secular high priests" for their 'imposing' ruling against the government of Alberta over an issue of gay and lesbian rights (*Winnipeg Free Press*, 4 April 1998, A17). Clearly, some conservatives believe that the mechanisms already in place either ignore true democratic principles or have the potential to transform society, albeit in a wholly negative manner. This present arrangement raises the spectre of the loss of rights for minority or equality seeking groups, or at least having these diminished if the current hegemonic order is altered in some manner to reflect conservative prerogatives. In this regard, Smart (1989:143) believes that the "[liberal] political power resources" provided by rights should be evaluated "more in terms of losses if such rights diminish, than in terms of gains if such rights are sustained."

There are also indications of conservative ideology within the established 'liberal judiciary' through judgments that refer to the "controversial" nature of legal outcomes and general beliefs regarding sexual orientation (Ryder, 1993:13). Bruce Ryder (1993:13) alludes to the "incredulous tone" of some judges' declarations when confronted with

plaintiff submissions or arguments that seem to push the homosexual subject beyond the confines of its minority status of a liberal equality-seeking group. Occurrences such as these remind us that judges are people with subjective views and, despite law's ability as a discourse to claim 'truth' and 'neutrality' (see Smart, 1989), equality in some cases might only go so far as the personal beliefs of the individuals charged with rendering litigious decisions. A morbid illustration of this comes from as recent as a 1986 Supreme Court case where "both the majority and minority opinions accepted without comment the notion that an accused charged with murder should be entitled to raise a provocation defense if the murder followed a 'homosexual advance' by the deceased" (Ryder, 1993:37-8). This clearly posits gay sexuality as something justifiably to be feared and against which an act of revulsion that fatally utilizes violence might be permissible and acceptable. Such reasoning holds resonance with homophobic characterizations of gays (and sometimes lesbians) as sick, perverted or otherwise abnormal.

Conservative ideology and its resultant discourses are not simply the home of a fanatical hate-spewing segment of society; its elements can pervade a wide variety of factions and institutions. It can be differentiated from dominant liberal discourse not only by its adherence to a particular pattern of moral beliefs, and, therefore, a preference for either the status quo or a romanticized past, but by the public expression of these so that certain gay and lesbian legal advances are deemed problematic. Whereas liberal ideology might mask the homophobic beliefs or heterosexist assumptions of its partisans through a general support of some form of gay and lesbian legal equality, conservatives would

question both the drive for minority rights recognition and possibly the contentious ethical issues that surround such a recognition.

*Counterhegemony*

The final category suggests that the struggle for gay and lesbian legal equality through rights campaigns produces meaningful discourse that transcends the existing hegemony of liberalism. This discursive approach would include attempts to infuse the debate over ideas with reference to the causes of the marginalization of homosexual women and men, and to resist the tendency of law to cast the discourse over gay and lesbian sexuality solely as issues involving an abstract appeal to rights. During the previously mentioned *Bill 7* debate in 1986 in Ontario, Herman (1994: 41-42) takes note of the "remarkable" nature of part of the speech given by New Democratic MPP Evelyn Gigantes for both its content and unique perspective on the issue, unlike any other "reported contribution from any amendment campaigners":

> I feel deeply offended by the understanding that some men will organize in religious and business groups to say that men who are not like them are traitors to a system where sex is a rightful means of oppression. Some of those men are hypocrites. Some are not telling the truth. Some know they are not heterosexual. Some of those women are strangers to what is best in the female sex, directness and honesty.
>
> There are 125 elected representatives in the Ontario Legislature: 10 are women. If the sexual numbers and the social power were reversed, I believe the clauses of section 18 relating to sexual orientation might not even be necessary. Women do not feel threatened by homosexual people, male or female. It is the maleness of economic and social domination of our society that is threatened this reform; not the womanness or the childness, but the maleness that so profits by its domination through being male.
>
> .... [I]t is my humble opinion that the hatred and victimization of homosexual people is part of a male-dominated system, dealing with men who do not join as if they were traitors.

Gigantes does not merely present a compassionate 'homo-positive' argument that appeals to liberal sensibilities, she introduces feminist insight to the issue at hand in responding to the conservative element of the debate by dealing with her perception of the structural basis of homophobia. While still arguing on behalf of the liberal legal amendment, she challenges conservative ideology *directly*, bypassing a resort to a vague and easy reference to liberal idealism.

It is this sort of pronouncement that would indicate an attempt at counter-hegemony through a radical discourse that acts to debunk or deconstruct the ideology of either liberal or conservative consciousness, or both. As Hunt (1991) intimates, the infiltration of a radical or counterhegemonic discourse is a strategy that can utilize certain elements of the dominant order while advancing a new perspective so that eventually the novel ideas become part of a re-configured hegemonic landscape. This view is consistent with the postmodern espousal that hegemonic ideology and discourse is "never actually totalised" or closed:

> .... [T]he possibility exists for active intervention by the marginal subject, historically defined as the other against which the universal subject is constituted, in the very structure that creates the appearance of the universal ... Thus, an identity can be forged within the very discourse through which one's subjectivity has been denied articulation. (Stychin, 1995:22)

The dominant order of liberal notions of rights and equality *must* have room for discursive interventions and resistence that contain the possibility to transcend its reliance on components and ideas (e.g. liberal law) that operate to stymie such challenges in the first place. If not, the objectives of gay and lesbian movements seem unlikely to be realized. The question remains whether or not such changes are actually happening, and at what

rate and at what consequence to gay and lesbian movements and their paramount goals and aspirations.

*Conclusion*

In moving from the overview of the 'politics of rights' toward the more specific issues that emerge when gay and lesbian legal rights and the legal coding of sexual orientation are considered, it becomes apparent that much of the critical focus revolves around the conception and understanding of gays and lesbians themselves. The process of engaging the law, either through direct litigation activities or lobbying efforts directed at policy-makers, introduces and facilitates a key means by which information about gay and lesbian sexuality is presented and discussed within Canadian society. In this way, a legal framework can be seen to shape and contour the debate around many concerns that are of appreciable and great importance for gay and lesbian movements. It is therefore imperative that the substance of this debate is not lost or forgotten in the drive to secure a broadened legal equality. The discursive components that accompany attempts at legal reform do not necessarily proscribe turning to the law - they merely demand some attention and consideration. If gay and lesbian movements are going to play an active role in determining a part of how 'their' issues are understood by society-at-large, a closer look at the struggle for 'homosexual rights' and the coding of sexual orientation into law is surely merited.

The insights and contributions of the diverse fields of postmodernism and feminism to critical legal theory are implicated in this undertaking. Questions have been posed

surrounding: the (homo)sexual subject; the extent to which the 'myth of rights' is believed by those who struggle for legal and social change; potential dangers of engaging the law; and the in/ability of rights and liberal law to transcend the hegemonic order. I approach the discourses and circumstances of the debate over *Bill C-41* and *Bill C-33* with all this in mind. I advocate from the general position that gay and lesbian legal rights, granted through the category of sexual orientation, represent an overall worthwhile pursuit on the path toward liberation. The positive developments, frustrating transgressions and moments of impasse are available for consideration along the way.

## CHAPTER THREE:

## METHODOLOGICAL CONSIDERATIONS

The central idea or concept employed in this project is 'discourse.' Specifically, I conduct a discourse analysis to examine some of the discussion and debate surrounding the hate crimes provision of the 1994 sentencing reform bill and the 1996 'sexual orientation' amendment to the *CHRA*. It is important to indicate that, at perhaps its most basic level, this investigation is concerned with how we can understand the impact of legal reformist activity vis-à-vis its discursive power to shape and influence gay and lesbian movements' desires to transform the heterosexist and homophobic beliefs and assumptions of present-day society. By using an approach which "identifies and names language processes people use to constitute their own and others' understanding of personal and social phenomena" (Gavey, 1989:467), I hope to be able to both illustrate and assess several of the main arguments raised in critical legal theory over the issue of social movements and legal rights. Nicola Gavey notes the "Foucauldian idea that language is always located in discourse" (Gavey, 1989:463) and indicates that discourse is "a product of social factors, ... powers and practices, rather than an individual's set of ideas" (Hollway cited in Gavey, 1989:464). The various discourses of the pro and anti-reformist factions reflect, in many ways, identifiable ideologies and ideas, such as those outlined in the preceding chapter on previous empirical and theoretical insight in this subject area. This has allowed for "comment on social processes which participate in the maintenance

of structures of oppression" (Burman and Parker, 1993:9) with which gays and lesbians may be routinely faced.

It has already been suggested that one of the purposeful results of gay and lesbian legal rights engagement is publicity (e.g. see Herman, 1993). Therefore, it becomes necessary to ask what *kind* of publicity was generated through the arena of legal reform? In other words, as gay and lesbian campaigns targeted at legal reform can tend to dominate the dissemination of any information about sexual orientation through mainstream media outlets, thereby impacting upon and reflecting discursive understandings over legal and non-legal issues of concern to gay and lesbian movements, it is important to be cognizant of the possible implications of such information and the context in which it is communicated.

A number of concerns and ideas raised by those who write on sexuality and the politics of rights are amenable to an analysis of discourse and this project can be regarded as an attempt to 'test' some of the assertions and arguments by way of two relatively recent 'cases' - *Bill C-41* (1994) and *Bill C-33* (1996). While it is certain that this undertaking will not be able to answer or speak to all questions and intricacies that have emerged in this field of research, I believe that a number of pertinent concerns are addressed so as to justify the turn to discourse as a useful analytic undertaking. These acts of legislation, while not representative of *all* attempts at gay, lesbian or sexual orientation legal reform, are noteworthy for several reasons. For one, the government's introduction of *two* bills during its mandate that involved the coding of sexual orientation into law allows for an analysis of the politics involved in such initiatives as well as providing insight

into how political considerations play out in the discursive and strategical aspects of this type of legal reform. Also, while arguably other important issues of legal concern to gays and lesbians are not explicitly included in these pieces of legislation (i.e. the definition of spouse as involving only opposite sex partners), this project reveals that much attention and regard were placed on more specific topics that moved beyond the vague category of sexual orientation. Therefore, it can be suggested that sexual orientation, even in the form of its entrenchment in the *CHRA* and hate crimes provisions, was discussed, debated and questioned with regard to a wide range of related concerns. This kind of scope can help provide an understanding of the uncertainty, confusion, significance and potential meaning of the place of sexuality in the law/society configuration. Lastly, and in relation to the preceding point, these bills allow for an overall investigation into an area that has gained much attention by those who study and analyze law from a critical perspective: the potential or lack thereof when resorting to perhaps a foundation of liberal law - anti-discrimination and minority 'protection,' instead of concrete or positive benefits - for attaining meaningful or transformative progressive societal change.

*Data Sources*

In endeavoring to produce a discourse analysis concerning these two different enactments of 'sexual orientation legislation,' three sources of 'data' became readily apparent: federal Parliamentary debate over the legislation; print media coverage of the issue; and organizational publications. The Parliamentary debate is obtainable through House of Commons *Hansard* reports containing statements by members over the

legislation itself and any proposed amendments to the original bills. A review of *Hansard* provides for a detailed exposition of a number of divergent points of view expressed in the mainstream political arena; for example, during the time that the issue of the *CHRA* amendment was before the House of Commons, over seventy MPs spoke on *Bill C-33*, several of those more than once. The official transcripts of House of Commons proceedings allows for a sense of how both individuals and political parties and other factions expressed concern, support or questions over the bills under consideration. For *Bill C-33*, nine days of House of Commons proceedings are reviewed, including April 29, 1996 to May 9, 1996; this covers the period from when *Bill C-33* was first introduced to when it received third and final reading before its passage.

The print media component of my investigation encompasses newspaper and news magazine coverage of the issues and events that were produced for public consumption regarding these pieces of legislation. I review the content of one large circulation daily, the *Globe and Mail* (at the time, the only 'national' newspaper in Canada), for information that emerged from news stories, editorials and letters from readers. The selection of this daily is meant to take into account its relatively large readership and prestige. For *Bill C-33*, I review the *Globe and Mail* coverage beginning a few days before the bill was actually introduced for first reading in the House of Commons and concluding a week after its successful adoption - the vast majority of newspaper material surrounding this issue was offered in a period closely paralleling the bill's proceeding through the House of Commons. *Bill C-41* was in Parliament for around one year, so tracking the newspaper coverage during this time frame is limited to a week before and after each period

encompassing second and third reading of the legislation, the time when media coverage was highest.

News magazine articles and stories also play a role in this investigation. I consult the following for the purposes of my investigation: *Alberta Report*, *Xtra West* and *Herizons*. In addition, the policy newsletter, *Canadian Citizen*, published by the organization Focus on the Family, is also utilized in this process. The inclusion of news magazines and the newsletter provide for views that sometimes fall outside the general scope of the mainstream newspaper coverage, particularly as they are targeted or appeal to a certain audience (e.g. religious or social conservatives, gays and lesbians, women/feminists). My examination of these sources generally coincides with the periods of time that *Bill C-41* and *Bill C-33* were under consideration by Parliament.

Finally, I consider position/information publications - those issued by the Department of Justice and the gay/lesbian legal lobby organization Equality for Gays and Lesbians Everywhere (EGALE) - obtained through internet searches of organizational websites. In some instances, these provide for a more detailed and straightforward look at policy positions than is available in *Hansard* or through media outlets.

*Data Analysis*

This investigation deals with many of the perceptions and views that critical legal theorists have offered over the issue of the relationship between legal rights and progressive social change. As a tool for research, discourse analysis allows for an investigation of the "various processes - language and social practices - which make

possible the statement of the 'truths' that order our social world" (Adams, 1997:6). For my purposes, the truths or understandings discursively presented by those who contributed to the debate over *Bill C-41* and *Bill C-33* will be examined in order to analyze the efficacy of a rights-based strategy in pursuit of gay and lesbian liberation. Using my theoretical framework of the established ideological responses to 'gay rights' as a guide - discourses reflecting liberalism, conservatism or counterhegemony - the various data are subject to scrutiny so that I may ascertain how the discourses on *Bill C-41* and *Bill C-33* can inform an understanding of what meanings are imparted through the debate arguments about several themes and issues of consequence to gay and lesbian liberation. In coding the information gathered about the two bills, I note the general 'pro' and 'anti' rights groupings of responses and arguments and, within these, several key ideas are at the forefront of my description of the arguments: how legal rights are understood; how sexual orientation and law is understood; and how the homosexual subject and sexuality were presented within the framework of legal reform. I also take note of developments that would assist in building a discussion of the political context and its impact on the debates.

In reviewing the rhetoric characterized by its approval of the government initiatives, I look for the extent to which the dialogue and reasoning reflect the hegemony of liberal legalism, and for any evidence of a counterhegemonic discourse to build on the foundation of liberal equality and minority rights while introducing information that transcends the mere tolerance of and protection of certain groups within a pluralistic society. In other words, are those who supported the legislation advocating legal rights and provisions as an end? Or are arguments presented that decry the heterosexist

assumptions within and homophobic nature of modern Canadian society, perhaps targeting liberal equality as a step along the way to substantial change? Also, a review of the pro-sexual orientation discourses includes an indication of how the homosexual subject is constituted: how is (homo)sexual orientation and sexuality understood? Are gays and lesbians regarded as immutable minorities needing protection? Or are more radical ideas introduced in any capacity, such as those that decry the ignoring of separate lesbian concerns by making gay men "the measure of all things and make women's experiences 'invisible' or 'less' or 'pale'" (Robson, 1992:33-4). The answers to these and related issues are discussed in light of concerns such as those raised by writers who problematize the placement of the 'marginalized' into categories to be held up against perceived norms or standards.

Those who voice disapproval and argue against the two sexual orientation legislative initiatives are addressed in a similar manner. I consider whether those espousing a conservative ideology question the hegemony of minority legal rights in general and the advancement of gay and lesbian rights in particular, as indicated through previous research efforts (e.g. see Herman, 1994). Furthermore, an appreciation of how the opponents speak to issues of sexuality is sought: are gays and lesbians dismissed as existing outside a realm of heterosexual morality? Or are other and less controversial discursive tactics utilized so as not to upset the sensitivities in a liberal hegemonic order - possibly reflecting the "socialization of procreative behavior" (Foucault, 1978:104) so that the 'traditional family' is held as an esteemed unit serving vital social functions above any or all other 'alternative lifestyles'? On another front, is the non-conservative position that

radical transformation cannot or should not occur with the confines of liberal legalism - a progressive rights-skeptical approach - represented at all?

Finally, in examining the different positions offered up surrounding the legislative debates, I seek to locate these within the political climate and developments of the period. What can be concluded about the government's decision to restrict debate over *Bill C-33*? How does this affect the government's management of this second piece of legislation dealing with 'gay rights?' I believe that the circumstances producing these types of questions have not been adequately dealt with through previous research and theorizing in this subject area - the important dynamics of the political arena (where, of course, these kinds of legislative changes must occur) is therefore scrutinized as part of my overall analysis.

This process of reviewing and analyzing the data in the manner indicated facilitates comment on what is perhaps the key question of this thesis: can the discourse on gay and lesbian legal rights emerging from the legislation under consideration be regarded as indicating any successful shifts in the hegemony of dominant liberal and conservative ideologies? As I suggest earlier, if gay and lesbian liberation is to include rights reform as part of a meaningful liberationist strategy, there must be room for resisting hegemonic ideas and discourses in the attempt to invoke a change in, and re-casting of, the discursive forms that perpetuate homophobia and heterosexism. As part of answering this question, I consider where these dominant liberal and conservative ideologies might be more vulnerable or resistant to counterhegemonic discourses, and the role of the political context in shaping the field upon which the struggle over discourse is played out. The

overall result of this research pursuit should assist in responding to question of what role the pursuit of legal rights for gays and lesbians has in the vast project of creating a society where gay and lesbian sexuality is largely no longer denigrated or challenged, but accepted.

# CHAPTER FOUR:

# BILL C-41 (1994)

In 1993, the Liberal Party regained the seat of government after a nine year hiatus on the opposition benches in the House of Commons. The new Parliament was unlike any previous one; the now deposed-from-governing Progressive Conservatives were unceremoniously reduced to only two seats in the House by a dissatisfied Canadian electorate, while the only other party to hold seats in the Parliament prior to 1993 - the New Democrats - joined the Progressive Conservatives in the political hinterland as *un*officially recognized parties in Parliament due to their small number of seats. The Québec nationalist Bloc Québécois became the official opposition on account of their popularity with voters in that province, while the grassroots conservative populist Reform Party emerged with solid support from western Canada to hold the third largest number of members among parties in the new Parliament. This composition was to ensure that the opposition to any government initiatives on 'gay rights' or the coding of sexual orientation in law would be rather pronounced, primarily because of the presence of the Reform Party and its socially conservative philosophy on many issues. The Reform challenge to both *Bill C-41* and *Bill C-33* was both vocal and almost always unanimous among the ranks of its MPs, and undoubtedly contributed to the tone and content of the debates that occurred.

*Bill C-41* was the first of two pieces of legislation introduced by the Liberals during the 35$^{th}$ Parliament that undertook to introduce the term 'sexual orientation' into federal statute - its eventual successful enactment being something which had been

promised, yet never realized, by previous Liberal and Progressive Conservative governments at the federal level in Canada. A lengthy bill concerning sentencing in general, *Bill C-41* offered up seemingly significant changes to the criminal justice system including: providing direction to the courts on the purposes and principles of sentencing; allowing the courts more options in sentencing offenders of non-violent, less serious crimes (including community-based sentences instead of incarceration); and permitting the input of victims at early parole eligibility hearings. On another front, section 718.2 of *Bill C-41* directed the courts to consider as an aggravating circumstance in determining a sentence any criminal act that is motivated by hate, prejudice or bias toward a victim based on grounds enumerated in the legislation. These grounds mirrored those laid out in the equality section 15(1) of the *Canadian Charter of Rights and Freedoms* except for one - sexual orientation was listed along with the others for judicial consideration pertaining to the sentencing directive. Despite the many aspects of this sentencing legislation that might have drawn close attention from the opposition benches, section 718.2 in general, and its inclusion of sexual orientation in particular, produced the most substantial amount of critical discord. The Reform Party, in chorus with social conservative media outlets and organizations and joined by several outspoken Liberal MPs, led the charge to discredit the government's approach to dealing with hate crimes, including the coding of sexual orientation into law. The government, along with representatives of equality-seeking groups, was put on the defensive in its attempt to maintain public support and ensure the safe passage of *Bill C-41* through Parliament.

**The Debate: Bill C-41**

> There is only one part of this bill which is controversial. Let us cut to the chase and talk about that one part, namely crimes motivated by hatred, particularly hatred of a person's sexual orientation. (*Hansard*, 14 June 1995, 13828)
>
> - Patrick Gagnon, Liberal MP

The arguments and debate over the hate crimes sentencing provision of *Bill C-41* dominated both House of Commons proceedings and media coverage of the legislation's entirety. Except for September 20, 1994, the first day of second reading debate on the bill when the first few speakers following the justice minister barely touched up the contents of section 718.2, most MPs had something to say about the controversial component of the legislation; Reformers and a few dissident Liberals went on the offensive, while government members tried to diffuse the pointed opposition attacks. Between the time when the uproar unfolded during debate over the bill's second reading in the autumn of 1994 and until its eventual passage in the early summer of 1995, MPs on both sides spoke out in Parliament and through the media on the issues raised surrounding *Bill C-41*. At the same time, the mainstream press weighed in with editorial and news pieces while gay and lesbian and social/religious conservative media outlets and organizations contributed to the politics of the hate crimes component of the government's sentencing reform legislation. Overall, the focus of the debate for the proponents and opponents of section 718.2 can be organized into three identifiable subject areas: (1) issues pertaining to legal categories overall; (2) issues pertaining to the legal category of 'sexual orientation' in particular; and (3) issues pertaining to notions of sexuality and sexual orientation in

general. These debate foci will each be examined in detail, followed by an analysis of the debates and a discussion of the political context and developing events during the time which *Bill C-41* was under consideration before Parliament.

*Legal Categories*

The categories in section 718.2 reflected the bases on which it was deemed Canadians might (and do) encounter illegal hateful discrimination; 'gay bashing' could be encompassed by the ground of sexual orientation while defacing a synagogue with spray painted swastikas would fall under the category of religion. The arguments put forth by the government and its supporters reflected a recognition that crime motivated by this kind of identifiable hatred was a problem that required, at least in part, a criminal justice solution. These assertions by those who defended section 718.2 reflected general ideologically liberal viewpoints, premised on the ability of law to assist in confronting the problems faced by members of minority groups. Proponents of the section 718.2 sentencing directive outlined in *Bill C-41* first identified the problem - that hate crime was a real, increasing and prevalent threat to Canadian society - and also expanded upon the impact and nature of these criminal acts motivated by hatred. A Liberal MP told the House of Commons: "Hate Crime is increasingly manifest in Canada. There are over 40 organized hate groups operating in Canada today, and there is no evidence that the number is abating (Sue Barnes (Lib) *Hansard*, 14 June 1995, 13831). The justice minister, Allan Rock, echoed this worrisome scenario: "Every major group among identifiable minorities reports in recent years a troubling and significant increase in hate

motivated crime" (*Hansard*, 15 June 1995, 13924). He cast the situation as a "rising social problem in the country" (*Hansard*, 15 June 1995, 13925) that is "undermining the social fabric of Canadian society" (*Hansard*, 15 June 1995, 13924). Another MP implored the House to support the hate crime sentencing provision by remembering the "people who walk, every day of their lives, down the city streets and are targets of attacks" (Bill Graham (Lib), *Hansard*, 15 June 1995, 13936). The overall message was that hateful criminal acts pervade our society and impact heavily on minority groups in a way that demanded some sort of response.

Besides a justification for section 718.2 on the basis of the existence and extent of hate crime, proponents of the legislation also discussed their nature and impact. A victim of an attack "because of a belief, ethnocultural background, skin colour or sexual orientation" was deemed to suffer an exacerbated assault (Mary Clancy (Lib), *Hansard*, 13 June 1995, 13785) as crimes "motivated by hate or prejudice have a profound impact on the victim" (Pierrette Venne (BQ), *Hansard*, 13 June 1995, 13773). The impact of hate crime was not merely on its immediate victims: "When people are attacked because they belong to a group, whether it is a religious group or whatever, it is a kind of terrorism against the group" (Geoff Regan (Lib), *Hansard*, 13 June 1995, 13795). As stated in a submission of the gay/lesbian legal lobby organization, EGALE, to the House of Commons Standing Committee on Justice and Legal Affairs:

> Hate crimes by their nature are more serious because they affect a broader class of victims than the person directly targeted. All members of the target group are made to feel insecure because they know that the violence could just as easily have been directed at them.

Finally, one MP suggested that hate crimes are inherently often-repeated acts, thus necessitating the meting out of harsher sentences at the sentencing stage as directed by section 718.2 (Karen Kraft Sloan (Lib), *Hansard*, 15 June 1995, 13961).

The other theme in the proponents' message was one of remedy; the problem having been identified, a sentencing directive was purported to be, in one sense or another, a tool for developing a solution. Perhaps the most common sentiment heard on this front was that of the need and appropriateness of sending an "important message" to minority communities and to the public at large (Allan Rock (Lib), *Hansard*, 20 Sept. 1994, 5871). This idea was premised on the belief that "[s]entencing practices should be a reflection of Canadian values ..." (Jean Augustine (Lib), *Hansard*, 15 June 1995, 13952) and that these values underscored the "government's commitment to protecting the fundamental right of all Canadians to live without being afraid, to live in peace and security and to live as equals" (Sheila Finestone (Lib), *Hansard*, 20 Sept. 1994, 5902). An MP explained:

> We are seeking to give our judiciary the opportunity to send a signal to society. The purpose of sentencing is to send signals to society; it is not just retributive justice. The purpose of sentencing is to send signals to society as to what conduct is tolerable in a civilized society and to enable the court to give extra time for such behavior to indicate to people that this type of behavior will not be tolerated. (Bill Graham (Lib), *Hansard*, 15 June 1995, 13937)

By utilizing the symbolic power of criminal justice sentencing to promote tolerance and freedom from hatred, it was implied that the hate crimes measures of the bill could directly have an impact on the problem at hand by targeting the causes of criminal activities and not merely the results (Shaughnessy Cohen (Lib), *Hansard*, 22 Sept. 1994, 6051). Submitted one Member: "I am defending this clause because I believe that if any time

someone is attacked for no other reason than being part of a minority group, surely the law has to take a much stronger measure in preventing others from doing the same" (Andrew Telegdi (Lib), *Hansard*, 18 Oct. 1994, 6822). The ability of the legislative change offered up in section 718.2 to challenge the issue of hate-motivated crime received more explicit attention:

> What we must do in this House, if we see ourselves as living in a mature democracy that has embraced certain basic rights, is not only to believe in these rights but also to ensure that some groups in our society do not become the victims of intolerance. (Don Boudria (Lib), *Hansard*, 14 June 1995, 13826)

One MP dismissed opponents of section 718.2 as wanting to "discredit the notion of a modern, compassionate, intelligent criminal law that seeks to root out or extirpate evils in society: hatred, racism, homophobia and other forms of intolerable civil behavior" (Bill Graham (Lib), *Hansard*, 15 June 1995, 13936). For another Liberal MP, *Bill C-41* showed even greater promise when she announced that: "The bill before us would ensure the function of our communities, as I said in my remarks, and would ensure the safety of every individual within society regardless of race, colour, creed, nationality, age, sex or sexual orientation" (Jean Augustine (Lib), *Hansard*, 15 June 1995, 13953).

Other remarks suggested a slight diversion from resorting to criminal sentencing to solve the problem of hatred. The Secretary of State for Multiculturalism and the Status of Women expressed the need to work in both legislative and non-legislative areas, and indicated that the educational programs about hate and hate crime developed and implemented through her department could be enhanced through learning about the substance of bills such as *Bill C-41* (Sheila Finestone (Lib), *Hansard*, 20 Sept. 1994,

5902). Another Member also associated a response to hate as including working to promote education about such matters in our communities in addition to the measures the government had presented (Jean Augustine (Lib), *Hansard*, 15 June 1995, 13952). Despite this departure from the mechanisms directly available in *Bill C-41*, most Members still seemed to focus on the sentencing provision as outlined in the legislation.

The remedy of section 718.2 to confront the realities of crimes of hatred was promoted as a necessary means for addressing the concerns of the minority groups which are "typically the victims of hate motivated crime" (Allan Rock (Lib), *Hansard*, 15 June 1995, 13923):

> Minority groups came to the committee. ... They cried out for help saying that judges do not believe they are being beaten up just because they are members of these minority groups. Judges give a light sentence as though it were a normal case of assault that just happened on the street. (Peter Milliken (Lib), *Hansard*, 13 June 1995, 13792)

Through appropriate sentencing, the belief that Canadians want "punished accordingly" crime that is "motivated by hate based on race, nationality, colour, religion, sex, age, disability or sexual orientation" (Shaughnessy Cohen (Lib), *Hansard*, 22 September 1994, 6051) became a validated rationale for pursuing the measures as outlined in *Bill C-41*. The Liberal government was able to fulfill an election promise made to "equality seeking groups" regarding concern over hate crime activity (Allan Rock (Lib), *Hansard*, 15 June 1995, 13923), through what it likely believed to be a non-contentious aspect of a bill whose many other components could have received much more antagonistic fodder from the opposition than what actually materialized. While the proponents of the legislative change outlined in section 718.2 were trumpeting the crackdown on hate "by coming

down hard on those who chose to victimize Canadian communities" (Stan Keyes (Lib), *Hansard*, 14 June 1995, 13819), the opposition to the sentencing directive took the government to task over its decision to confront the problem of hatred through legally entrenched coded categories that were regarded as unfair, unequal, divisive and politically motivated.

The bulk of the opposition to having a list of enumerated grounds included in the legislation was indicative of the assumptions of conservative ideology. Special rights, unwanted ulterior agendas and the inequality of Canadians created by this legislation were promoted as reasons for rejecting the government's plan for changes to hate crime sentencing. Opponents of section 718.2 complained first and foremost that the grounds listed in the bill would create an unequal treatment of individuals under the law. Reform MPs and other conservative voices questioned the logic behind the idea that someone convicted of a violent criminal act should be sentenced differently than someone convicted of perpetrating an identical act simply because one of the incidents satisfied a government imposed delineation of against whom illegal hateful conduct could not be committed. One Reformer implored her Parliamentary colleagues to assess a savage assault where the definition of a hate crime as outlined in section 718.2 would not apply in relation to an example given by proponent of the legislation where it would:

> I ask the House to consider the senseless death of a 31 year old Coquitlam man, I believe it was Mr. Niven, who outside a convenience store was brutally kicked and beaten to death just recently. Is there really any difference in the savagery of such a crime? Can we really state that one is worse than the other?

> Does one deserve a harsher penalty than the other? Has not in each case a man been brutally beaten to death? Is one life worth more than another? I sincerely hope not. Is not all life precious and of equal value? I sincerely hope so. (Daphne Jennings (Ref), *Hansard*, 22 Sept. 1994, 6047)

Another Reform Member argued along similar lines and concluded that, by listing the characteristics to consider when deciding on aggravating circumstances for sentencing, the government was promoting a "two-tiered system" (Garry Breitkreuz (Ref), *Hansard*, 20 Sept. 1994, 5920) of justice. Statements were made in Parliament that decried the granting of "special protection or status before or under the law" (Jack Ramsay (Ref), *Hansard*, 13 June 1995, 13761), including the charge by a Liberal MP that "in an attempt to attack discrimination the law itself would discriminate" and thus the punishment would no longer fit the crime (John Nunziata (Lib), *Hansard*, 13 June 1995, 13783). In effect, section 718.2 would create a "hierarchy of victims" (Val Meredith (Ref), *Hansard*, 22 Sept. 1994, 6049); from "fat people" (Myron Thompson (Ref), *Hansard*, 13 June 1995, 13766) to politicians - "who are not looked upon very highly" (Elwin Hermanson (Ref), *Hansard*, 13 June 1995, 13791) - some would invariably be left off the list and selective justice would ensure that punishment of the offenders was inconsistent and unfair as crimes where no aggravating factor is cited may be "just as damaging to the victims" (Val Meredith (Ref), *Hansard*, 22 Sept. 1994, 6049).

The government approach rooted in such inequality was suggested to promote other problems as well. Among those mentioned, prominent was judging the motivation of offenders. A Reform MP warned that the "bill attempts to play God by looking into people's heads and deciding whether or not they hate and whether or not the crime they

committed was based on their hate, prejudice or bias" (Elwin Hermanson (Ref), *Hansard*, 13 June 1995, 13790). Others weighed in with warnings of "thought control" (Herb Grubel (Ref), *Hansard*, 15 June 1995, 13977) and any attempt to "get into the mind of the perpetrator of the crime" (Ken Epp (Ref), *Hansard*, 18 Oct. 1994, 6827); such "mind reading games" (John Williams (Ref), *Hansard*, 22 Sept. 1994, 6060-1) necessitated by section 718.2 could result in "more avenues of appeal by the criminal" and thus more "profit of lawyers and self-styled psychologists and psychiatrists who will soon become legal experts on the subject" (Val Meredith (Ref), *Hansard*, 22 Sept. 1994, 6049). This futile exercise of "Orwellian thought policing" (Val Meredith (Ref), *Hansard*, 22 Sept. 1994, 6049) would occur alongside the equally repugnant possibility of offenders "getting off lightly because they cannot be found guilty of hate, prejudice or bias" (Sharon Hayes (Ref), *Hansard*, 18 Oct. 1994, 6819).

The opponents of section 718.2 in *Bill C-41* also contended that the government was not taking the issue of hate crime seriously through its recommended legislative changes. Critics from the government's own benches spoke out on this matter, including an MP who would eventually vote against the legislation:

> I have looked to the various applications of the legislation and where it will have its greatest impact. If we are serious about changing hate crimes, particularly as our red book suggested in terms of hate propaganda, ought we not to be correcting sections 318 to 320 of the Criminal Code rather than treating hatred in a rather cavalier fashion, in a rather superfluous or superficial fashion under an omnibus bill on sentencing? (Dan McTeague (Lib), *Hansard*, 13 June 1995, 13770)

This viewpoint was expanded upon by a Reform Member when he told the House:

> If we want to reduce the degree of hate crimes within our country, this bill does not contain the power to do it. How do we eliminate those emotions that give rise to hate and to hate crimes? In all my lifetime the only way I have found to do that is by understanding and love. (Jack Ramsay (Ref), *Hansard*, 15 June 1995, 13931)

A questioning of the efficacy of the sentencing provisions in *Bill C-41* for addressing hate crime was also advanced by a *non*-conservative voice in a feminist, 'alternative media' outlet. A writer raised concerns over the possibility of hate crime sentencing being used disproportionately against those it was intended to protect, reflecting the idea that "laws are interpreted and enforced in the context of a broader culture and its institutions" (*Herizons*, Winter 1996, p.39).

Others pointed out that courts and judges already consider hatred and prejudice as aggravating circumstances in sentence determination, leading one Reformer to pose the following query : "I ask the justice minister, if something is already being done in the courts on a regular basis with innovation and flexibility, why is it necessary or appropriate to write them into the code and thereby stultify what is presently working?" (Paul Forseth (Ref), *Hansard*, 14 June 1995, 13823). A connection was made by opponents of the legislation between the seemingly duplicitous and unnecessary content of section 718.2 and its relatively meager capacity to enact any meaningful changes in criminal activity; the hate crime sentencing component of *Bill C-41* was cast as "motivated by politics, not by the principle of impartial justice" (John Nunziata (Lib), *Hansard*, 13 June 1995, 13783).

The opposition to section 718.2 launched an attack premised on the belief that the government was pandering to special interests:

> It is evident that section 718.2 is not presented for any criminal justice purpose but rather to mollify some loud political voices. This section of the Criminal Code is for a social fashion purpose, what is currently politically and socially correct as defined by the Liberals. (Paul Forseth (Ref), *Hansard*, 14 June 1995, 13824)

Accusations that the government was merely "making politically correct statements" (Jack Ramsay (Ref), *Hansard*, 14 June 1995, 13802) were in abundance. This led some to conclude there was an ulterior agenda behind the controversial element of *Bill C-41*- a political ploy to perhaps facilitate an easier entrenching of 'sexual orientation' into other pieces of federal legislation:

> If it is the government's intention to have sexual orientation as a defined part of the human rights act, the government should bring forth legislation as it promised to do in the election campaign and in its red book. It should show the courage of its convictions and do it through the front door honestly and honourably, not try to slide it in the back door through this legislation. (Ian McClelland (Ref), *Hansard*, 13 June 1995, 13782)

> I agree with my colleagues that this is an attempt by the Minister of Justice to get the unnecessary and undefined term sexual orientation into a piece of legislation so it can be used as justification for amending the Canadian Human Rights Act. (Garry Breitkreuz (Ref), *Hansard*, 14 June 1995, 13820)

Gwen Landolt of REAL Women, an anti-feminist organization, asserted that the sentencing directive in section 718.2 could result in "a designated group with more rights than anyone else, and that will ripple right through the legal code" (cited in *Alberta Report*, 12 Dec. 1994, p.8). Opponents thus undertook to evince that the enumerated grounds outlined in *Bill C-41* were primarily either a political payoff to its special interest supporters, or a means to get the category of sexual orientation coded into federal statue and thereby set a precedent that could have an impact upon future decisions made in both the political or legal arenas.

A final theme to emerge from opposition forces out of the debate over the notion of the legal categorization of groups or characteristics centred on the purported negative impact of such a strategy, legal or otherwise. One Reform MP summarized this sentiment with the following: "The whole concept of identifying Canadians by groups instead of as individuals is a disturbing trend in Canadian society" (Chuck Strahl (Ref), *Hansard*, 13 June 1995, 13786). A spokesperson for the anti-violence citizens group, CAVEAT, testifying at the committee stage of *Bill C-41*, chastised the approach of section 718.2 in the following manner: "It's so dangerous to codify different castes in your legal code. It took South Africa 50 years to get rid of apartheid, and now some want to establish it in Canada" (cited in *Alberta Report*, 12 Dec. 1994, p.9). Some Reform members implicated the influence of the *Charter* in this regard:

> Since the passage of the Charter, Canadians from coast to coast have fought against the entrenchment of these divisions in the quest to simply become Canadians above all else, not hyphenated Canadians, not divided Canadians.
> .... There is a message here. Canadians are tired of the divisions, tired of the classifications. They are seeking parity. They want equality.
> (Philip Mayfield (Ref), *Hansard*, 15 June 1995, 13970-1)

Whatever the cause, the result was clear: the coding of groups or categories into law has a negative impact on society by promoting jealousy, resentment and division among citizens. While denouncing existing prejudice as regrettable, one MP claimed that:

> creating false inequalities through arbitrary criminal sentencing will hardly address the problem. If anything, it will increase intolerance by creating the justifiable perception that some groups are getting preferential treatment under the law.
> (Jay Hill (Ref), *Hansard*, 13 June 1995, 13795)

Others followed suit in suggesting that it is the government's strategy itself that contributes to the problems of hatred in our society:

> One of the principle concerns I hold though lies in this bill's further entrenching of the divisions between Canadians as outlined in section 718.2. This entrenching does nothing to pull Canadians together and reinforce the principles of fundamental justice. If anything, it stigmatizes Canadians, classifies Canadians, divides Canadians and raises suspicions between Canadians. (Philip Mayfield (Ref), *Hansard*, 15 June 1995, 13970)

The critique of 'the list' contained in section 718.2 led to proposed amendments to eliminate the enumerated grounds altogether, leaving behind the stated principles and directives on sentencing for those convicted of hate-motivated criminal acts. Reform and other opponents saw nothing much more than political opportunism on several fronts behind the coding of categories into law. Moreover, instead of attacking the issue of hatred through a fair and effective vehicle, the Liberal government and its supporters were accomplishing very little in the effort to reduce hate and prejudice in Canada; indeed, some were suggesting their actions would contribute to the overall cause of the social discord. If the opponents of section 718.2 objected to its overall list of enumerated grounds, further dissatisfaction was expressed over the specific ground of sexual orientation.

*The Legal Category of Sexual Orientation*

> Let us not forget that if this legislation passes, the term sexual orientation will appear for the first time in any Canadian legislation ever passed in the House. People are very concerned about that. (*Hansard*, 15 June 1995, 13963)
>
> - Dick Harris, Reform MP
>
> For heaven's sake, do not add sexual orientation. That is the last thing we need in this country. (*Hansard*, 13 June 1995, 13766)
>
> - Myron Thompson, Reform MP

While both sides of the debate over section 718.2 were able to present a number of arguments either outlining its rationale and need or its deficiencies and hazards, discussion surrounding the coding of sexual orientation into law as a ground to be considered when sentencing offenders of hate crimes proceeded in almost a uniformly one-sided manner. Opponents of including sexual orientation both questioned and disparaged the initiative, leaving the government and its supporters scrambling to defend its inclusion in the legislation. The opposition to specifically having sexual orientation as a category on the legislation, as seen in the discussion over legal categories in general, mirrored the ideological conservatism described in previous research and theorizing. The foundation point of opposition attack was to suggest that the mention of sexual orientation effectively conferred special rights or status based on peoples' "sexual preferences" (Jay Hill (Ref), *Hansard*, 13 June 1994, 13794) - explained by a dissident Liberal MP as something with which he was not comfortable (cited in *Globe and Mail*, 28 Sept. 1994, A2). Furthermore, as one Reform member insisted, "homosexuals already have the same rights and privileges as all other Canadians as guaranteed by the Charter of Rights and Freedoms," and deserved no special mention or legal coding comparable to the grounds found in the *Charter*, as sexual orientation had not been adequately established as immutable nor was it commensurate with "the universally accepted positive characteristic of religion" (Sharon Hayes (Ref), *Hansard*, 18 Oct. 1994, 6819).

The danger in these rights or this special status was linked to a potential collision with and impingement upon other rights or privileges. Outspoken Liberal MP Roseanne Skoke issued the following edict:

> Canadians are not prepared to silently acquiesce in legislative change which will affect their right to speech, right to expression, opinion and belief, the right to freedom of religion and most important, the right to openly practice all of those freedoms openly without fear of intimidation, coercion or criminal sanction. (Roseanne Skoke (Lib), *Hansard*, 13 June 1995, 13773)

Skoke further suggested that the "inherent and inviolable rights of family and the rights of the church" would be in peril (Roseanne Skoke (Lib), *Hansard*, 13 June 1995, 13773). This clash of rights was already happening, according to another Liberal MP, when he relayed to the House several accounts of religious organizations such as the Salvation Army and Catholic school boards being forced to compromise principles and beliefs in the face of pro-gay sentiments or policies (Dennis Mills (Lib), *Hansard*, 14 June 1995, 13822). Because of this worrisome trend, many feared that things had already taken a turn for the worse, and certainly were not prepared to assist in society's further descent down that 'slippery slope' of gay rights and privileges and their consequences. The opportunity for eventual "governmental redefinition of the family" or the courts being "given full licence to redefine what marriage is" (Art Hanger (Ref), *Hansard*, 13 June 1994, 13783-4) was raised, as was the spectre of homosexuals infiltrating school curriculum and adopting children (*Alberta Report*, 17 Oct. 1994, p.52). Other concerns on the matter of the legal coding of sexual orientation included an impact on broadcast regulations (for religious programming) and "possibly even the suppression of gay recovery programs" (*Alberta Report*, 12 Dec. 1994, p.9). Underlying these fears was the belief that coding sexual orientation into law provided for the promotion or at least the condonation of homosexuality:

> Simply put, the criminal sanction of section 718.2 will ultimately operate to elevate the existing Canadian legal test of tolerance to a higher legal standard whereby Canadians are required not only to be tolerant of homosexuals and their chosen lifestyles, but they must condone, accept and endorse homosexuality as being natural and moral. (Roseanne Skoke (Lib), *Hansard*, 13 June 1995, 13774)

One MP complained that to "legitimize the homosexual lifestyle in this way is a wrong direction" (Ken Epp (Ref), *Hansard*, 18 October, 1994, 6828), supported by another's determination that "protection will turn into promotion" (Art Hanger (Ref), *Hansard*, 13 June 1995, 13784). The suspicions raised with regard to the government's ulterior motives behind section 718.2 were spelled out in more detail as opponents of *Bill C-41* debated the finer points of adding sexual orientation into federal statute. Yet one other possibility, perhaps unintended, was exhorted by many who spoke out against the sentencing provisions for hate crimes - paedophiles or other perverted types might be able to claim some sort of legal standing under the umbrella of the undefined legal category 'sexual orientation.'

The fact that there was no legal definition for sexual orientation offered in the legislation was problematic for many opponents of the legislation. The testimony of lawyers and medical authorities who appeared at the committee hearing stage of *Bill C-41* were reiterated to the House to convince members of the uncertainty surrounding what exactly sexual orientation encompassed. One Reform MP was incredulous at the government's refusal to acknowledge their testimony and impose a definition to clarify the matter:

> Do they understand where these folks are coming from? If this government does not define sexual orientation then other people will in the courts. If the government has not the courage of its convictions, why is it leaving it to the courts?
>
> [The government] will leave it to the lawyers to do it at the cost of young kids in this country. (Randy White (Ref), *Hansard*, 13 June 1995, 13789)

A Liberal opponent gave examples of other jurisdictions world wide that provided definitions of sexual orientation in their statutes (Tom Wappel (Lib), *Hansard*, 13 June 1995, 13777-8) in joining the chorus of those demanding similar transparency on the matter. The fallout of leaving sexual orientation undefined was alleged to include paedophiles attempting to utilize protection on the ground of sexual orientation to excuse their illegal behavior (Randy White (Ref), *Hansard*, 13 June 1995, 13789). The hypothetical prospect of parents facing harsher punishments due to hate crimes cited on sexual orientation grounds after enacting some sort of revenge on a person who had molested their children was, to Liberal critic Tom Wappel, "ludicrous" (cited in *Globe and Mail*, 13 June 1995, A3). All of this conspicuous ambivalence over the government's unwillingness to define sexual orientation prompted the introduction of an amendment to impose a definition that encompassed homosexuality, heterosexuality and bisexuality.

The dominance of conservative ideology regarding having sexual orientation as part of section 718.2 was briefly interrupted when a gay/lesbian publication raised concern over the functioning of *Bill C-41*. It was suggested that the bill could prompt the use of the 'homosexual panic defense' to combat the possibility of sentencing based on aggravating circumstances in cases of gay bashing (*Xtra West*, 27 July 1995, p.15). However, the bulk of opposition and outward criticism of the legislation was found within

conservative discourses. In the wake of all this discontent, the supporters of a sexual orientation clause, undefined as it was, were forced to respond.

Those who defended the inclusion of sexual orientation alongside the other categories outlined in *Bill C-41*, did so from a liberal perspective - law was cited as possessing protective properties for gays and lesbians who might be subjected to crimes of hatred and, thus, the sexual orientation component of the criminal sentencing reforms would meaningfully assist in dealing with the problem through increased criminal sanction. Although most of the pro *Bill C-41* discourse concerning the coding of sexual orientation into law was a forced response to the various charges made by its opponents, there were some initial arguments not entirely raised from a defensive standpoint. One MP singled out for support the inclusion of sexual orientation in section 718.2:

> Crimes motivated by the sexual orientation of the victim must not be tolerated. As Canadians we cannot claim to support the protection and promotion of individual human rights if we do not oppose hate crimes motivated by sexual orientation.
>
> Sexual orientation is as much a matter of individuality as any other freedom we enjoy in Canada. As such it should be protected under Canadian law. (Colleen Beaumier (Lib), *Hansard*, 30 Sept. 1994, 6382)

Another insisted that:

> Homosexual Canadians should be able to walk on our streets without the fear of being attacked just because of their sexual orientation. Just as heterosexuals do not have to live with this fear neither should other Canadians who have a different sexual preference. (Jane Stewart (Lib), *Hansard*, 18 Oct. 1994, 6820)

The actual functioning of *Bill C-41* on this issue was alluded to by several voices, providing some detail as to what a sexual orientation clause would do for gays and lesbians. After outlining the findings of a study by the Québec Human Rights Commission

of incidents of gay bashing and other criminal acts motivated by hatred on the ground of sexual orientation, one MP insisted that providing "some deterrent, through bills such as this one," was the "only reasonable way" for changing the attitudes of those who perpetrate hate crimes based on a victim's sexual orientation (Réal Ménard (BQ), *Hansard*, 15 June 1995, 13950). A writer for a gay/lesbian publication also seemed to commend the message and effectiveness of the approach taken in the legislation: "We can't let insecure homophobes think that they can get away with beating on us. We have to bash back - C-41 ... could prove more effective than any baseball bat" (*Xtra West*, 29 June 1995, p.4). These types of arguments were similar to those made during debate over the role of section 718.2 in general for addressing the overall problem of hate crime.

Most of the rest of proponents' polemics were attuned to the issues raised by those opposed to the notion of having sexual orientation enshrined into law. The idea that sexual orientation accounted for both homosexuals and heterosexuals under the provision of section 718.2 was noted (Andrew Telegdi (Lib), *Hansard*, 13 June 1995, 13787) and, as the "bill deals with crimes in the Criminal Code, not with same sex issues," it would not "serve to promote a certain sexual orientation" (Stan Dromisky (Lib), *Hansard*, 15 June 1995, 13959) or grant "magical privileges to non-heterosexuals" (Stan Keyes (Lib), *Hansard*, 14 June 1995, 13818). Moreover, the justice minister tried to turn the 'special rights' argument around by offering:

> If we are speaking of special status perhaps we should remember that if gays and lesbians, for example, have a special status they have a special status to be targeted, to be beaten up. If there are members who care to share that special status I am sure it could be discussed. (Allan Rock (Lib), *Hansard*, 15 June 1995, 13924)

Proponents also had to refute claims that the rights of others would be eroded:

> I have also heard it said that the new bill will make it a crime to speak out publically against homosexuality. Again, let us be perfectly clear. It is the right of every Canadian to be able to speak his or her mind. A church sermon expressing a moral view is not a crime. Freedom of speech and religion are specifically protected under our Charter of Rights and Freedoms. (Sue Barnes (Lib), *Hansard*, 14 June 1995, 13831)

In a similar vein, the justice minister and others went to lengths to stress what *Bill C-41* specifically would *not* do - many of these assurances seemed a direct response to claims that the legislation in question was dealing in the area of gay rights. The House was told that *Bill C-41* was not a gay rights bill and had nothing to do with traditional family values, spousal benefits or adoption (Allan Rock (Lib), *Hansard*, 15 June 1995, 13924). Proponents affirmed that all they wanted to do was to put an end to violence (Réal Ménard (BQ), *Hansard*, 13 June 1995, 13780), to stop "gay people from getting systematically beaten and killed by bigots of all kind" (Patrick Gagnon (Lib), *Hansard*, 14 June 1995, 13828).

On the issue of not defining sexual orientation, the message put forth by the government and its supporters was that sexual orientation "has been in legislation in this country for a number of years" and there has "been absolutely no need to define it to avoid abuses" (Svend Robinson (NDP), *Hansard*, 18 Oct. 1994, 6826), including before the Supreme Court of Canada (Geoff Regan (Lib), *Hansard*, 13 June 1995, 13795). The parliamentary secretary to the justice minister further explained that the "worst that could happen by not defining sexual orientation is that someone may make a mistake about what sexual orientation is in the sentencing process"; this was a sentencing bill and as no rights

were being bestowed upon anyone, a precise definition was not necessary for sexual orientation or any other ground (Russell MacLellan (Lib), *Hansard*, 13 June 1995, 13779). The gay/lesbian legal lobby organization, EGALE, asserted that the discourse surrounding the desire to define sexual orientation resulted in and from the linkage of homosexuality with paedophilia based on "discredited myths and stereotypes" and that no jurisprudence exists to substantiate their claims (cited in 'EGALE Submissions to House of Commons Standing Committee on Justice and Legal Affairs: re: Bill C-41 - Hate Crimes'). The justice minister echoed these sentiments in alleging that it would be "offensive" to define the term sexual orientation for the purposes of the legislation (cited by Tom Wappel (Lib), *Hansard*, 13 June 1995, 13778). The connection of paedophilia with sexual orientation would also follow the debate into discussions and pronouncements over the general area of sexuality. There, the lives of gays and lesbians were discussed, as were ideas over the nature and meaning of sexual orientation that were certainly inspired by, but not directly connected with, a legal context.

*Sexuality and Sexual Orientation*

The words and ideas of proponents over the general subject of sexuality and sexual orientation exhibited many liberal ideology polemics, most notably directed at the 'nature' of (homo)sexuality and the pitiable lives of homosexuals due to homophobic threats and violence. Yet, there were also strains of counterhegemony that directly challenged *both* liberal and conservative beliefs and pronouncements, particularly focused on what were deemed unacceptable or hateful reactions to persons of non-heterosexual orientations.

From the outset, mention was made by those arguing for the bill's passage of the popular idea of sexual orientation as an innate, unchangeable characteristic. Thus, one member discussed how science is "now trying to determine whether homosexuality is not only innate but genetically determined" (Pierrette Venne (BQ), *Hansard*, 13 June 1995, 13772), while her gay Bloc Québécois colleague, Réal Ménard, made reference to a (presumably gay) "twin brother who has the exact genetic base as me" (Réal Ménard (BQ), *Hansard*, 13 June 1995, 13780). A Liberal MP, describing the impact of violent attacks on minorities, suggested such assaults "go to the nature of their humanity and the nature of their being" (Bill Graham (Lib), *Hansard*, 15 June 1995, 13936). Homosexuality was further reported to be "natural for that estimated 10 percent whose identity includes it" (*Globe and Mail*, 29 Sept. 1994, A30), and this number was indicated to be constant "in nearly all societies" (Réal Ménard (BQ), *Hansard*, 20 Sept. 1994, 5912). One supporter of the legislation also argued that "whatever the percentage, ... we cannot tolerate prejudice and hate-motivated crimes against any segment of our population" (Sue Barnes (Lib), *Hansard*, 14 June 1995, 13831). There was one other reference made to the prevalence of a sexual orientation - the opposition-termed 'sexual orientation of paedophilia' - when the same MP informed the House that heterosexuals were more often paedophiles than homosexuals (Sue Barnes (Lib), *Hansard*, 15 June 1995, 13972).

The experiences of gays and lesbians themselves were discussed with regard to prejudice and violence. Homosexual Canadians were described as "often suffering abuse" (Jane Stewart (Lib), *Hansard*, 18 October 1994, 6820), an indication that prejudice

"based on sexual orientation is ... one of the most common forms of discrimination we encounter today" (Sue Barnes (Lib), *Hansard*, 14 June 1995, 13831). These experiences were often brought up for discussion in the form of anecdotes or accounts of incidents of violence that have affected gays and lesbians in recent years in Canada. (e.g. *Hansard*, 20 Sept. 5912 / 13 June 1995, 13775-6 / 14 June 1995, 13828). MP Réal Ménard accused the opponents of the legislation of ignorance when it comes to understanding what it means to be homosexual in today's society:

> .... [I]f ... they are interested in expanding on their knowledge of the reality of the gay experience and the potential ill treatment to which gays are exposed, I am available to introduce them to spokespersons and leaders of these groups, because if their positions and statements are any indication, I venture to think that although members of the Reform Party are very knowledgeable in certain areas, they are somewhat less so in this particular area. (Réal Ménard (BQ), *Hansard*, 15 June 1995, 13947)

On another front, MPs characterized some of the more pointed attacks on homosexuality by Liberal Roseanne Skoke as "hateful" (Réal Ménard (BQ), *Hansard*, 22 Sept. 1994, 6032) and accused her of directing hatred at homosexuals (Svend Robinson (NDP), *Hansard*, 27 Sept. 1994, 6183) by slandering gay men and lesbians (Svend Robinson (NDP), *Hansard*, 13 June 1995, 13775). This attempt to cast the loudest and most obvious expressions of moral outrage at (homo)sexual immorality was taken a step further by a Liberal MP when suggesting that sentiments such as Skoke's label as "fair game" potential targets of homophobia aggression (Bill Graham (Lib), *Hansard*, 15 June 1995, 13936). The same Liberal Member spoke of extremism in citing a report that alleged a connection between the "homophobic outpouring from religious extremists" and "gay bashing and murder" (Bill Graham (Lib), *Hansard*, 15 June 1995, 13935-6), and also

linked racism, anti-Semitism and homophobia with the politics of the extreme Right. Additional attacks on those who propound homophobic beliefs came from MP Ménard when he suggested that "those who feel comfortable with their own sexuality do not feel the need to denigrate others with a different sexual orientation (Réal Ménard (BQ), *Hansard*, 13 June 1995, 13779). He wondered whether those who attack homosexuality "have a healthy and balanced life" and teased: "we could wonder about their fantasies, but we will refrain" (Réal Ménard (BQ), *Hansard*, 13 June 1995, 13780). This type of challenge sought to "question the well-being ... of some members of this House who show no tolerance toward the expression of that [sexual] difference" (Réal Ménard (BQ), Hansard, 15 June 1995, 13950).

A noteworthy incident was the reaction by MPs and media sources to the strong words of dissident MP Skoke. It was implied by some that homosexuals were not being treated as well as other minorities and that Skoke was getting off too easily for her comments:

> Will the parliamentary secretary undertake to raise the issue directly with the Prime Minister as to the appropriateness of this member continuing to sit as a member of the Liberal caucus, the Liberal Party of Canada, when she espouses views which, if they were spoken with respect to any other minority, perhaps a religious minority, a racial minority, any other minority, would be met with widespread outrage and anger by that member's colleagues?
> (Svend Robinson (NDP), *Hansard*, 20 Sept. 1994, 5916)

The rather muted response of the Prime Minister to Skoke's outburst was admonished by others as well:

> As reprehensible as her attack, though, was the response from Jean Chrétien. Instead of rebuking Ms. Skoke, Mr. Chrétien dissembled about freedom and democracy. Members have a right to express themselves, he said; a leader can't be responsible for every opinion of every member. Maybe so, but the Prime Minister should have dissociated himself from Ms. Skoke and declared her views out of place in his concept of Canada. Mr. Chrétien had an opportunity - nay, an obligation - to show leadership on a moral question. He showed none. (*Globe and Mail*, 29 Sept. 1994, A30)

> It is understandable that Central Nova Liberal MP Roseanne Skoke is opposed to the inclusion of protection from discrimination based on sexual orientation in any legislation. ... If lesbians and gay men enjoyed the same rights as heterosexual Canadians, her comments would earn her an immediate expulsion from Parliament. (*Globe and Mail*, 30 Sept. 1994, A22)

In the opinion of several observers, there were clearly different standards when it came to devising an appropriate response to the views of some when sexuality was what was being considered (as opposed to other minority characteristics).

Opponents of section 718.2 in *Bill C-41* primarily did not utilize the occasion of debating the bill's merit and drawbacks to launch a scathing attack on homosexuality. However, there were a number of claims forwarded reflecting a conservative ideological approach that served to denigrate gay and lesbian sexuality and some of the prevailing conventional wisdom regarding (homo)sexuality. In opening comments on the legislation, Liberal Roseanne Skoke's charges that homosexuality was "not natural" and "immoral" (Roseanne Skoke (Lib), *Hansard*, 20 Sept. 1994, 5910) were later supported by an (unnamed) Reformer who remarked "right on" when a proponent MP repeated her comments in an attempt to discredit them (*Hansard*, 20 Sept. 1994, 5916). One MP suggested that a "large number of people" find the (non-hetero)sexual orientations of others to be "repulsive" (John Williams (Ref), *Hansard*, 14 June 1995, 13829), while

another decried the "government sanction of unhealthy relationships" (Art Hanger (Ref), *Hansard*, 13 June 1995, 13783) and a third lauded "sexual fidelity" over legitimizing the "homosexual lifestyle" (Ken Epp (Ref), *Hansard*, 18 Oct. 1994, 6828).

This theme continued with the mention of AIDS as a Reformer recalled the death of a friend who had succumbed to AIDS and declared: "every thinking person in Canada knows that if he would have behaved sexually he would not have had that disease" (Ken Epp (Ref), *Hansard*, 18 Oct. 1994, 6828). Homosexuality, then, was deemed a practice (Roseanne Skoke (Lib), *Hansard*, 13 June 1995, 13773) or a lifestyle (Ken Epp (Ref), *Hansard*, 18 Oct. 1994, 6828); gay MP Svend Robinson was singled out as "the first politician in Canadian history to principally define himself by what he does in bed" (*Alberta Report*, 17 Oct. 1994, p.52), and a Liberal MP who spoke out against the bill still allowed that what the two openly gay House Members "do in the confines of their bedrooms is their business" (John Nunziata (Lib), *Hansard*, 13 June 1995, 13782). The words and reaction of other commentators further reflected this underlying tone to the opposition arguments. A Liberal Member opposing the legislation was reported to have 'chuckled' when describing gay MP Robinson's reaction - "Svend hit the roof" - to Skoke's initial inflammatory speech in early on in Parliamentary debate (cited in *Alberta Report*, 10 Oct. 1994, p.16). The same story in which that reference appeared was titled "Svend Robinson berates a grandmother," in which "militantly homosexual" Robinson's (re)action "seemed no way to treat a lady" (*Alberta Report*, 10 Oct. 1994, p.16). A homosexual orientation, it seemed, was not much more than acts and behaviors, thus

meriting a none-too-sympathetic response when those who are criticized for practicing it stand up and complain about prejudice.

Other discourses on the subject of sexuality included the claim that sexual orientation had not yet been proven to be immutable (Sharon Hayes (Ref), *Hansard*, 18 Oct. 1994, 6819). Further, homosexuals did not really suffer any sort of systemic discrimination as they had high income and education levels (*Alberta Report*, 12 Dec. 1994, p.8) and were not the "frequent targets of heterosexual rage" and hate crime as had been suggested by opponents (*Alberta Report*, 12 Dec. 1994, p.8-9). Violence that did happen to gays and lesbians was cited as mostly perpetuated by homosexuals themselves as a result of the "types of relationships they have" (*Alberta Report*, 12 Dec. 1994, p.8-9), with some research suggesting the "highest incidence of violence against homosexuals occurs between lesbians" (*Alberta Report*, 12 Dec. 1994, p.9). Finally, while most of the questions raised regarding paedophilia and sexual orientation were made in reference to legal standing, the overall message was that the notion of sexual orientation really encompassed a wide range of sexual behaviour, with one MP noting: "Canadians are aware there has been an active movement for paedophilia to be considered a legitimate sexual orientation" (Bill Gilmour (Ref), *Hansard*, 14 June 1995, 13827). The opposition convictions expressed over sexual morality, human sexuality and the ensuing notion of sexual orientation perhaps help clarify its unwillingness to support the government's legislation. Although these comments did not represent the bulk of what was actually raised by those who spoke out against the hate crimes section of *Bill C-41*, they are

nonetheless invaluable to understanding the foundation for much of the opponent discourse over the totality of the legislation.

**Examining the Discourse: Bill C-41**

The preceding review of the discourse and debate over *Bill C-41* with regard to coded rights and categories, coding sexual orientation into the law and ideas and pronouncements over sexual orientation in general, represents a basis from which a discussion of previous empirical and theoretical research concerning rights, sexuality, law and social change can emerge. In examining both sides of the debate over *Bill C-41*, three general themes emerge meriting further deliberation: (1) the dominance of liberal and conservative ideologies; (2) the realization that while gays and lesbians are struggling to attain minority rights, they are often not regarded as deserving a legitimate placement among other rights-seekers within the liberal rights paradigm; and (3) the presence and potential of counterhegemonic strategies. Each of these will be considered in an attempt to formulate an analysis of the discourses and implications as guided by previous empirical and theoretical work in this area.

*Liberal and Conservative Ideologies*

The debate over *Bill C-41* revealed an overall concurrence with many of the arguments established through previous analysis and criticism of the minority rights paradigm. Even as they confronted the subject of criminal sentencing, the claims by both proponents and opponents show a similarity to those forwarded within the context of

debate over anti-discrimination statues, such as a human rights code. Proponents outlined the problem - violence and hateful activity perpetrated against minorities - and suggested a solution - a resort to the criminal justice system encompassing what was essentially the possibility of harsher sentencing for the offenders in question. This problem/solution configuration resonates with the criticism of those who suggest that considering legal recourse in such a manner serves to confuse the problem and its underlying complexities as one which can be properly addressed through law. In perhaps the most vibrant example of this problem, one proponent purported that the changes in section 718.2 would *ensure* the safety of those targeted for hateful conduct. It was thus indicated that the message circumscribed by such a legislative initiative would itself have a impact on the problem of hate crime; the proponents thus called on the power and significance of law to confront a societal concern without clearly indicating how it would do so. Even an article in the publication *Xtra West* joined in the call for law to help gays and lesbians 'bash back' by using the measures in *Bill C-41* as a tool for confronting the criminally homophobic, as if it were an object to be wielded.

In order to manufacture the idea of the need for a criminal justice response, minorities had to be portrayed as perpetual victims of hatred and violence. While it should not be implied that hate-motivated crime is anything less than a serious reality, perhaps the stories and tragic accounts of those who had been victims of hate crime helped to produce similarly emotional responses that navigated towards invoking the heavy hand of the law as an ultimate solution. Furthermore, the result was often an absence of discussion over other matters that underlie the hatred, and their consequences. Issues such as the attitudes

and beliefs that sustain and give cause to violence were often overlooked, and those who reinforce them too readily left unscathed, in hailing an approach to target only those who act on their beliefs.

As some MPs turned to justifying the inclusion of sexual orientation within the sentencing bill, the restrictions of liberal law were further revealed. To insist upon inclusion in the enumerated categories, proponents not only had to flood the debate with narratives of violence directed at gays and lesbians, but they had to argue (in order to challenge the assertions of some opponents) that gays and lesbians are a discrete and immutable minority and not merely devotees of 'alternative' sexual practices. This tactic prevents a wide-ranging discussion of sexuality from surfacing, and does nothing to challenge the moral criticism of homosexuality which is doubtful to subside even if opponents accepted an immutability argument - which some did anyway.

Those opposed to the hate crime component of the sentencing bill - and especially the inclusion of sexual orientation among the list of enumerated grounds - argued against the legislation from primarily a basis of conservative ideology. The response to the government's 'list of victims' was to allege the granting of special rights or recognition that would favour certain victims of hate-motivated crime over others. Of course, it was not the cracking down on criminals that was necessarily wrong, only the selective manner in which it was proposed. Important to consider in the protests of the opponents was the derided idea that the government was searching for motivation behind acts of a criminal nature. While the acts were not excused, any thoughts and ideas that might provoke the offences that marginalize or oppress were deemed off limits. In this way, a conservative

response to the government's initiatives indicated an unwillingness to have homophobic thoughts or beliefs vilified through criminal sanction simply because they exist. This, in some ways, was similar to proponents' inaction over moving towards concrete measures to eradicate *sources* of social inequality; while proponents *did* signal that the motivation could duly bring a 'special' response under criminal law, it was an after-the-fact measure that has a seriously questionable capacity to effect any meaningful change in attitudes and beliefs. Both approaches neglected a somber look at the causes and perpetuation of hateful criminal activity.

The opponents went further in their criticism of the liberal minority rights paradigm when they suggested that the strategy for combating hatred typified by special recognition through coded legal categories not only could lead to battles (legal and otherwise) over competing rights interests, but singled out the strategy as *harmful* to society as a whole. This raised the prospect of an alternative to the present system where discrimination and prejudice would be combated without direction given on where specific problem areas might exist. In problematizing the discursive (and practical) limitations of minority rights, some critics seemingly have not sufficiently considered what an oppositional arrangement might encompass, and how the even minimal benefits of liberal rights (such as symbolism, publicity and a clearly established mode of legal recourse) could be adversely affected. Plus, to leave the finer points of any new strategy premised on the opponents' conceptualization of 'love' and 'understanding' or other such platitudes, given their statements made about gays and lesbians (and others) during the debate over *Bill C-41*, does not appear a risk worth taking.

The final area over which conservative ideology dominated opponents' arguments was discussions of gays and lesbians and of homosexuality. Not only were the predictable comments over immorality, unnaturalness, AIDS and a deviant sexual lifestyle present, some opponents alleged that gays and lesbians - homosexual Canadians - were in fact a very privileged social group with a high standard of living. It was further suggested that the violence was not as prevalent as it was made out to be, and that their relationships accounted for most of the violence they *did* experience. This rhetoric seems just as dangerous as general statements about morality, and should be challenged. While these types of arguments might seem to appear primarily in the script of the American religious Right, and are perhaps not normally associated with the mainstream media in Canada, they certainly have the potential to impact on public sentiments towards gays and lesbians.

As well, the opponents' attempts to introduce the prospect of paedophilia as inclusive with the phrase 'sexual orientation' created problems. While the government held firm and refused to explicitly define sexual orientation for the purposes of this specific legislation, the contentions nonetheless cast a shadow over the phrase that has been the descriptive term of choice for many gays and lesbians, especially on the stage of legal activism. For some lesbians, this might evidence a problem of association with gay men under the umbrella term 'sexual orientation.' Although not explicitly stated by any individual, an implicit message of this was that 'sexual orientation equaled homosexuality equaled (potentially) paedophilia.' Heterosexuality, it must be remembered, even when conceded as a sexual orientation alongside homosexuality or bisexuality by some opponents, does not *need* the protection or the recognition of the sexual orientation label

for legal or social purposes. A failure to include it in any piece of appropriate legislation, or to imbue society with its sense of meaning, harms gays and lesbians and not those who are part of the already accepted norm.

*Gays and Lesbians: Outside the Minority Rights Paradigm*

It became evident during the review of debate transcripts and media coverage of the debate over *Bill C-41* that, despite the victory, despite the inclusion of sexual orientation in this federal and other statutes, gays and lesbians appear to have been given a very tepid welcome into the realm of liberal rights and recognition. The words and characterizations employed by some who opposed having sexual orientation as part of section 718.2 were not entirely surprising, nor did the 'worst' of them constitute the majority of what opponents offered to the debate. However, the reaction of the Prime Minister to MP Skoke's outbursts indicated that gays and lesbians need not be publicly and steadfastly defended when their morality and the basic facets of existence are questioned. Clearly, it will be some time before such anti-gay polemics will not be so readily defended on the shaky platform of exercising one's right to free expression. A public condemnation would not have legally inhibited anyone's ability to speak freely on matters deemed appropriate to them, and the shaping of public consciousness over what is or is not appropriate to simply express, particularly with regard to gays and lesbians, probably requires a little more help now and then. As some did point out, had Skoke substituted 'Jew' or 'Aboriginal' in place of 'homosexual,' assuredly the reaction of the Prime Minister, among others, would have been different. The treatment of the Skoke

'incident' by conservative individuals or media outlets included mocking gay MP Svend Robinson's reaction to her comments and dismissing his outrage as unfounded or unimportant; this might well have been expected. However, the hegemony of the liberal rights paradigm - the minimal acknowledgment that certain 'groups' are disadvantaged in society and need 'help' in some capacity - seemed less secure when gays and lesbians were the people in question.

*Counterhegemony*

The third theme to be discussed is that of counterhegemony - what sort of evidence emerged during the debate over *Bill C-41* that might be regarded as contributing to or having the potential to contribute to a break from a dominant liberal/conservative schema? The idea that the legislative changes could be part of an educational effort at combating hatred has potential, although any such possibilities would surely depend on the content and scope of such programs, and none were specifically being proposed at the time. However, what is important to note in this instance is that there *were* some speakers who referenced the need to look outside the legal arena for answers, and thus did not fall into the alluring ideal that law, indeed criminal law, would solve all.

Beyond this matter, several proponents reacted to and confronted the anti-gay sentiments expressed by those speaking against the legislation. It is important that opponents were challenged on their understanding of gays and lesbians and of the impact of homophobia on peoples' lives. Furthermore, the attempt to cast the words of opponents like Skoke as hateful, coupled with the suggestion that they *contribute* to the

homophobic violence that the legislation in part was designed to address, moved beyond a liberal versus conservative ideological seesaw to connect certain thoughts and beliefs with the problem of violence. In effect, those who spoke out against homosexuality were being told that they must be accountable for their words, that they cannot justify pronouncements against violence while disparaging and maligning gays and lesbians at the same time. The connection made between the homophobic sermons of religious extremists and incidents of violence such as gay bashing and murder - along with the linkage of homophobia, anti-Semitism and racism with the religious Right - also served to implicate those who profess an inalienable mandate to endow society with a particular morality. These reprisals by proponents against the onslaught of the rhetoric of certain opponents of the legislation were counterhegemonic because they usurped some of the trappings of liberal ideology by confronting conservative ideology directly, instead of merely vilifying faceless individual 'thugs' and criminals.

On another front, gay MP Réal Ménard took it upon himself to question the personal well-being and 'balance' in the lives of those who spouted homophobic ideas during the debate over the sentencing legislation, even to where he jokingly mused aloud about latent fantasies of those who are uncomfortable with homosexuality. It is perhaps understandable during such an emotional debate that some thoughts expressed are not as effective as others yet, in this case, one wonders if tactics such as these might backfire if pursued to a greater extent. It seems that personal attacks premised on a brand of psychoanalytic 'insight' that neglect direct mention of the problem under consideration

would be less likely to form part of a successful counterhegemonic strategy to challenge the foundations of homophobic hatred.

*Conclusion*

The review of debates over *Bill C-41* and the three main analytic themes I have outlined suggest that, while much of the previous research and theorizing around the subject of discourse, law, rights and social transformation finds support in the results of this exercise, there has been somewhat insufficient attention paid to the particular context of a political debate under scrutiny and what resulting impact it may hold for both discursive tactics and future political maneuvering. Based on the information reviewed thus far, I believe that two further general ideas can be put forth regarding the debate over *Bill C-41*. First, the liberal and conservative ideologies that dominated much of the debate stemmed in part from the political context in which the debate took place. The hate crime sentencing provision represented a small portion of the legislation, and had the opposition not seized on it as overwhelmingly problematic, particularly its inclusion of sexual orientation, it seems likely that discourse over that section of the bill might have proceeded rather uneventfully, perhaps eliciting only some general comments from members reflecting mostly a liberal tone. However, the existence of a socially conservative political party, the Reform Party, attuned to the belief that the government was planning on introducing more specific legislation dealing in the area of gay rights, allowed for the debate over *Bill C-41* to *become* a debate over gay rights and minority rights in general.

As the opposition attack heated up, it was joined by an awakened religious Right in denouncing the government's approach taken in the legislation, and provoked concern on the government's own benches to where, at one point during the bill's presence before Parliament, it was suggested that up to half of caucus might have "qualms about the bill" (*Globe and Mail*, 28 Sept. 1994, A1). Opponents of *Bill C-41* and its coding of sexual orientation into law flooded Parliament with petitions; an estimate of the number of signatures received by third reading placed the total at 83, 000 (*Hansard*, 13 June 1995, 13773). Under such conditions, it is understandable that the government had to bear down and react to opposition claims about what the legislation was and was not, as much for its own party unity as to deflect opponents' attacks. In this situation, being on the defensive, proponents lapsed further into a reliance on liberal ideology; stories about hate motivated crime were increasingly introduced and the legal changes had to be more forcefully defended as accomplishing something meaningful, in light of charges that these changes did not facilitate anything except for a justification to proceed with further gay rights legislation. While media outlets such as *Alberta Report* and the organization Focus on the Family could and did profess and promote overwhelmingly conservative ideological discourses on the particulars of *Bill C-41*, there does not seem to have been much room for groups like EGALE or the gay/lesbian media (e.g. *Xtra West)* to turn a critical tongue on the government's initiative. Except for its warning about the potential conflict between the operation of and *Bill C-41* and the use of the homosexual panic defense, *Xtra West* primarily reported on the progress of the legislation through Parliament, often providing details of the brazen attacks by MPs and conservative voices regarding gays and lesbians,

but did not appear to offer up or develop much critical analysis of the dominant of liberal ideology used to defend *Bill C-41*. Even the intimation regarding the homosexual panic defense, or the *Herizons* writer's critique of that criminal law still operates within the context of a homophobic and heterosexist society, did not prompt either to suggest that the legislation should *not* be passed. Meanwhile, EGALE, perhaps looking down the road at potential further legislative changes (i.e. the *CHRA* amendment) in advancing gay and lesbian rights, likely had no choice but to contribute to the chorus of liberal discourse, else risk losing the support of the government for other reform initiatives.

The political dynamic at the time of *Bill C-41* also provided for the occasion of outspoken individuals like Liberal MP Roseanne Skoke to unapologetically pronounce controversial anti-gay views, while opponents less taken to such direct tactics introduced other arguments founded on similar conservative moral viewpoints. I believe that this vocal presence of religious and social conservatism in Parliament not only (further) entrenched a liberal ideology among supporters of the bill, but also capacitated a critical response from a segment of Parliament and society at large that perhaps would not have materialized several years previous. The existence of two openly gay MPs, one of whom came out during the heat of the debate, plus the willingness of others to take on the anti-gay crusaders, allowed for or, indeed, necessitated certain challenges to the ideological conservatism that moved beyond a resort to abstract liberal principles.

The second idea to emerge from this debate over hate crime sentencing is that the examination of legislative discourse in the area of minority rights or the coding of group categories into law not only allows for analyzing the discursive strategies at particular

given moments during the debate, but also provides insight into other areas of relevance to gay and lesbian liberation. A glimpse into possible policy changes was given, such as the ideas floated by the Reform Party regarding a different approach to minority rights. As well, the exercise revealed that an evaluation of the minority rights paradigm should be carried out with specific regard to gay and lesbian movements themselves. This allows for an understanding that, as I suggested earlier, gays and lesbians are somewhere in between acceptance into, and rejection from, the realm of legal minority rights. That reality can still provoke the response that the minority rights paradigm is problematic, but it should underscore that winning rights, benefits or other legal standings, while conceivably significant, is not automatically accompanied by an approving societal recognition. From this understanding further strategy and insight can develop.

I contend that the discourse surrounding sexual orientation, gays and lesbians, minority status and social change as evidenced in the debate over *Bill C-41* was not a mere product of a fundamental and insurmountable flaw within the paradigm of liberal rights. It took on forms and changes reflecting the role of the present political climate, the specific issues under consideration and the presence and input of individuals involved in the debate. With these propositions in mind, a study of the next attempt by the Liberal government to code sexual orientation into law can commence.

# CHAPTER FIVE:

# BILL C-33 (1996)

In early 1996, the Liberal Party was into the third year of its electoral mandate and still had not introduced the promised sexual orientation amendment to the *Canadian Human Rights Act.* The government finally acted at the end of April and introduced the legislation - *Bill C-33* - right on the heels of another controversy involving the Liberals' inaction over a commitment to replace the unpopular goods and services tax, which had led to Liberal MP John Nunziata voting to indicate non-confidence in the government, sealing his expulsion from caucus (*Globe and Mail*, 29 April 1996, A1). This furor over the GST was regarded by many as "producing the worst week for the Liberals" since their election in 1993 (Rayside, 1998:115). One Reform MP called the timing of the government's move to introduce the bill "a strategy to divert criticism" (Ken Epp (Ref), *Hansard*, 7 May 1996, 2445). The bill was to pass through the House of Commons in very short order; the government introduced *Bill C-33* on April 29 and a motion to limit the time for debate was brought forth during second reading of the legislation on April 30. After limited committee hearings that began on May 1, the bill was brought back to the House for three more days of debate on May 7 and passed third reading on May 9, 1996 - a sharp contrast with the approximate one year that *Bill C-41* took to move through Parliament.

*Bill C-33* was the second piece of legislation introduced by the Liberals that coded the phrase 'sexual orientation' into law - this time through the more direct yet still

uncertain vehicle of the *Canadian Human Rights Act*. Preceding the bill was the 1992 Ontario Court of Appeal *Haig* decision that, in ruling in favour of the gay litigants, 'read in' sexual orientation to the *CHRA* instead of striking down the act as unconstitutional (*Globe and Mail*, 6 June 1996, A19). As the Conservative government of the day did not appeal the ruling, it stood as legal precedent. A conflicting ruling taken by the Alberta Court of Appeal in the *Vriend* decision, after *Haig*, held that sexual orientation should not be read into human rights legislation, in this case that of the province of Alberta (cited in 'Working Against Discrimination'). However, the Supreme Court of Canada ruled in 1995 in *Egan* v. *Canada* that sexual orientation was an analogous ground to those laid out in the equality section of the *Charter*, to which all federal and provincial legislation must conform and, thus, the justice minister's claim that the amendment in *Bill C-33* was inevitable was strengthened (Rayside, 1998:131-2). These judicial developments did nothing to curtail opposition to the bill's introduction. While the *CHRA* offered protection against "any employer or provider of service that falls within federal jurisdiction to make unlawful distinctions" (cited in 'The Canadian Human Rights Act: A Guide') on a list of enumerated grounds, some ambivalence existed as to what the exact impact of including sexual orientation might be, particularly with respect to government policy over areas such as employment-related spousal benefits.

**The Debate: Bill C-33**

Despite the inevitable criticism by opposition Members and conservative media of the manner in which *Bill C-33* was hastily directed through Parliament, some of the most

noteworthy events surrounding this second attempt to code sexual orientation into law occurred outside the House of Commons debate forum. In a newspaper interview, Reform MP Bob Ringma hypothetically suggested that if a black or gay employee were disgruntling customers and causing a loss of business, he saw no trouble with terminating their employment or moving them to the "back of the shop" (cited in *Globe and Mail*, 1 May 1996, A7). As a result of these comments, Ringma apologized and resigned his post as party whip (*Globe and Mail*, 2 May 1996, A1). He was soon joined by another Reformer, David Chatters, who party leader Preston Manning suspended from caucus when comments he made in support of Ringma's beliefs came out in the media (*Globe and Mail*, 3 May 1996, A1). A third MP, Jan Brown, also joined the suspension list after complaining publicly about her discomfort with the views of some of her fellow Reform MPs, but her suspension coincided with a personal decision to "take time apart" from her own caucus (*Globe and Mail*, 8 May 1996, A1/A7). The turmoil embracing the Reform party, the most voracious political critic of 'gay rights' in the House, seemed to attract much attention both inside and outside of Parliament. The media covered the Reform Party's woes extensively, while the proponents of *Bill C-33* were able to utilize the situation to bolster their claims for the need for the legislation and score political points at the expense of the Reform Party at the same time. Although the political conditions surrounding *Bill C-33* unfolded very differently than they did over *Bill C-41*, the opponents and proponents of the new legislation split along lines similar to the previous debate. Reformers and a number of Liberals spoke out against the bill, joined by religious and social conservative organizations, while the rest of the Liberal caucus, supported by

the Bloc Québécois and the New Democrats, and a generally favourable mainstream media contingent (Rayside, 1998:123-5), contributed to the arguments of those supporting the legislation. As in the debate over *Bill C-41*, the subject areas of this debate can be organized as follows: (1) issues pertaining to legal categories overall; (2) issues pertaining to the legal category of 'sexual orientation' in particular; (3) and issues pertaining to notions of sexuality and sexual orientation in general. After these areas are outlined, an analysis of the discourse will follow and, finally, a discussion of the political context of *Bill C-33* will be provided.

*Legal Categories*

The discussion on both sides over the inclusion of sexual orientation in the *CHRA* touched upon the coding of groups of people into law for the purposes of legal rights. While this idea did not receive as much attention as it did during the discussions over *Bill C-41*, more details emerged, particularly with respect to the opposition view of this matter. On the proponents' side, it was again stressed that a list of grounds was needed in order to know exactly what kinds of discrimination were being targeted, therefore removing the list of grounds would make uncertain an understanding of "what forms of discrimination are prohibited and which are not" (Gordon Kirkby (Lib), *Hansard*, 9 May 1996, 2530). The list of categories was also believed to indicate people who have been "discriminated against by a dominant class" (Bill Graham (Lib), *Hansard*, 30 April 1996, 2129), and that opposition calls to remove the list entirely was "extremely disrespectful of the tragic historic realities that inspired the creation of human rights legislation

everywhere" (Sue Barnes (Lib), *Hansard*, 9 May 1996, 2579). One MP confronted the idea of removing the notion of enumerated grounds by suggestion the following to opponents:

> .... [L]et me challenge them to visit a seniors group and remind them they want to end protection based on age. Let them visit a synagogue, mosque or Christian church and tell the congregation they want to end protection based on religion. Let them visit women who have been fired or who lacked promotion because of the simple fact they are women. (Brenda Chamberlain (Lib), *Hansard*, 8 May 1996, 2488)

Reform's ideas were cast as a "sick excuse" to "cover the bigotry" displayed by its members over the course of debate over *Bill C-33* (Peter Milliken (Lib), *Hansard*, 7 May 1996, 2415). While proponents challenged what was perceived as ignorance and veiled prejudice on the part of *Bill C-33's* critics, their debate strategy in this area was again primarily of an ideologically liberal persuasion - holding up the categories of anti-discrimination law as a means to combat unfair treatment of minorities. However, Reform MPs and others opposed to the idea of 'special' rights or recognition persisted and provided more details as to what a different approach to combating discrimination might encompass.

Opponents made clear their opposition to "the tendency of the courts and Parliament to create or recognize different categories of persons for the purposes of defining or augmenting their rights under the Charter or the Canadian Human Rights Act" (Sharon Hayes (Ref), *Hansard*, 30 April 1996, 2111) for primarily the same reasons given during the debate over the sentencing bill in previous years: "It is the list that causes confusion. It is the list that causes hatred. It is the list that needs to be removed" (Jim

Silye (Ref), *Hansard*, 8 May 1996, 2495). Suggestions for replacing the current system of human rights tribunals and enumerated grounds in law were delineated. One Reform MP described in general terms a system whereby someone who felt unjustifiably discriminated against could appear before some sort of tribunal system where, if able to convince a mediator or judge that one indeed had a case to be made, the individual would be free to pursue the complaint in court where "community values" would become part of the process (Ian McClelland (Ref), *Hansard*, 30 April 1996, 2127). The current arrangement was seen not to work because of this absence of community standards or values when "the outcome of every single circumstance that we as citizens find ourselves in is determined because it has been codified and is written in law" (Ian McClelland (Ref), *Hansard*, 30 April 1996, 2127).

In addition to the notion of discrimination being dealt with under common law through the court system, Reform leader Preston Manning tried to expand upon what he regarded as a new system of equal opportunities rather than equal rights. Under an Equal Opportunity Act, which would utilize a tribunal system similar to present human rights tribunals:

> .... [P]eople who are actually subject to discrimination would have at least as much protection as, or more than, they do under the Canadian Human Rights Act. People who provide employment or accommodation or services would have ... no reason to be alarmed as long as their decision-making criteria can be demonstrated to be fair and reasonable. (cited in *Alberta Report*, 27 May 1996, p.2)

Critics of Manning's approach to rights lambasted his idea to let "political bureaucrats who account to nobody" remain a part of the tribunal decision making process (*Alberta Report*, 20 May 1996, p.2). Instead, an editor of the right-wing news magazine, *Alberta*

*Report*, argued that Reform adopt a 'rights policy' based on the following three principles: discrimination should not be suffered as a result of "unjustifiable harm for immutable characteristics"; for "behavior harmful to society", rights can be "proportionately curtailed"; and adjudication based on the principles of common law should take precedent over a tribunal system (*Alberta Report*, 20 May 1996, p.2). The alternative arrangements offered on the issue of human rights and discrimination were in response to the belief that the current *CHRA* was more than simply defending against prejudicial treatment in employment and the provision of goods and services. On one hand, the removal of the list of enumerated grounds for the creation of a new system based on *opportunity* instead of rights would perhaps be intended to ensure that the confusing notion of rights and the 'slippery slope' possibilities in the current system would be solved by a tribunal system that had a limited mandate and would listen to legitimate complaints from any citizen. Yet, others opposed even this recommendation, accusing Manning of "being dazzled by the liberal notion of a perfectly harmonious population supervised by a perfectly wise state" (*Alberta Report*, 27 May 1996, p.2). Being free from discrimination was a nonsensical falsity, according to one columnist, "because as long as we're alive we discriminate" (*Alberta Report*, 13 May 1996, p.52). Conservative ideology emerged, then, to form the basis of opposition attacks on the idea of minority rights; liberal law was cited as undemocratic and unfair, and alternatives to the present hegemony of the minority rights paradigm were offered.

*The Legal Category of Sexual Orientation*

> Let us treat for a moment that which this amendment is not. It does not deal with the conferral of benefits on any class or category of persons. It does not confer benefits on same sex couples. It does not confer benefits on homosexual individuals. The bill is silent on this point. (*Hansard*, 30 April 1996, 2106)
>
> - Allan Rock, Minister of Justice and Attorney General of Canada

Proponents of *Bill C-33*, in acknowledgment of the lessons gleaned from the opposition uproar over *Bill C-41*, were very clear to present arguments detailing what the sexual orientation amendment to the *CHRA* was *not*. The justice minister spent more than ten minutes in his opening speech at the beginning of the bill's second reading in the House trying to persuade his colleagues that issues such as marriage, spousal benefits and adoption were not implicated in the legislation, citing recent court rulings as evidence for his assurances (Allan Rock (Lib), *Hansard*, 30 April 1996, 2106-7). He also explained that the amendment would allow the government to 'catch up' to the provinces, the courts and even his own party's stated commitments regarding the protection of sexual orientation under the law (Allan Rock (Lib), *Hansard*, 30 April 1996, 2104). Finally, it was suggested that it was necessary to make the law "plain on its face and there for everyone to see" in light of both the *Haig* decision (Gordon Kirkby (Lib), *Hansard*, 9 May 1996, 2527) and the conflicting decision by the Alberta Court of Appeal. These arguments were supported by many proponent Members in the debate over *Bill C-33*. The bill was not about special rights or "changing people's sincerely held beliefs" (John Harvard (Lib), *Hansard*, 30 April 1996, 2116), nor was it a moral issue (Brent St. Denis

(Lib), *Hansard*, 7 May 1996, 2411). Furthermore, it was not possible, despite the "inflated views" of some MPs about themselves and the power of Parliament, to "destroy families" as families had survived through "wars, plagues, famines" and "all of history" (Paddy Torsney (Lib), *Hansard*, 9 May 1996, 2571).

The problem that the bill was intended to address was also outlined by Members, with one asserting:

> No one of us can deny that discrimination in the workplace for gay men and lesbians is very real. Many work in hostile and homophobic environments where gay jokes are an accepted norm. Lesbians and gay men must often conceal their identity in order to get hired or to keep their jobs. As a result they cannot talk openly about their personal lives or about their partners. (Karen Kraft Sloan (Lib), *Hansard*, 7 May 1996, 2451)

The "ample evidence of ... discrimination over the years" (Peter Milliken (Lib), *Hansard*, 1 May 1996, 2194) against gays and lesbians was greeted with calls for "fairness" and "tolerance" (John Harvard (Lib), *Hansard*, 30 April 1996, 2115) as the issue at hand was one of "dignity" and "equality" (John Maloney (Lib), *Hansard*, 8 May 1996, 2491). Most implied that the changes were expected to impact upon the workplace or the provision of goods and services for those citizens and situations as stated in the *CHRA*, yet it was not uncommon for general statements to be made expounding the effects of anti-discrimination measures in somewhat lofty terms. For instance, a Bloc Québécois Member indicated that Québec had long since amended its provincial rights statute with the following: "In the Québec National Assembly in 1977, then Premier Lévesque introduced a clause in the Québec charter of rights and freedoms which allowed male homosexuals and lesbians to live free from discrimination" (Gérard Asselin (BQ),

*Hansard*, 7 May 1996, 2452). The language used by Members occasionally suggested that the discrimination which was being targeted by the legislation was representative of all the discrimination that gays and lesbians faced, although many were careful to indicate the scope of the legislation so as to not allow others believe it too extensive.

A smaller part of the debate over *Bill C-33* included the recognition by proponents that the measures contained in the legislation in dealing with discrimination formed only part of the solution to a greater overall problem. One MP inferred that putting in place protective measures helped to facilitate the ability of homosexuals to be comfortable with their sexuality while admitting that "we are not yet there" (Réal Ménard (BQ), *Hansard*, 30 April 1996, 2121). Another Member conceded that while legislation "does not end discrimination ... it gives a legal recourse to people who are victims of those actions which we have determined are unacceptable in society" (Marlene Catterall (Lib), *Hansard*, 1 May 1996, 2200). There were also some members proclaiming that, after the passage of this bill, movement would begin toward other important issues:

> However, when the time comes to implement [future] legislation, if we accept non-discrimination based on sexual orientation, if we accept common law marriages, we will of course have to recognize one day or the other that two men or two women could live together, recognize each other as spouses and benefit from the advantages resulting from that. (Maurice Bernier (BQ), *Hansard*, 30 April 1996, 2109)

> Some members of the House have asked about the possibility that this might recognize gay and lesbian families. Let me say that when gay and lesbian people are involved in committed loving relationships, caring relationships which survive against incredible odds, we as communities, we as a country should be affirming and celebrating those relationships and not denying them. If this bill in any small measure helps to affirm and to recognize those relationships, then I say that is a good thing. (Svend Robinson (NDP), *Hansard*, 9 May 1996, 2544)

Alongside this acknowledgment that the bill was only a stepping stone for future policy decisions and societal recognitions was criticism of the latitude of the changes. One MP told the House: "This Parliament is making an important gesture today, even with the limited impact of this bill" (Maurice Bernier (BQ), *Hansard*, 30 April 1996, 2110), reminding members that when "talking about human rights, there cannot be any grey area. It is not a question of tolerance" (Maurice Bernier (BQ), *Hansard*, 30 April 1996, 2108).

In moving beyond looking at the mere prevention of discrimination in the areas outlined in *Bill C-33*, one Liberal Member recalled the debate over the hate crime sentencing provision:

> ...many MPs voted for Bill C-41. They stood up for people who were beaten up, but they somehow cannot support this bill. I believe that it is through intolerance in employment and other places that we communicate as a society that we accept violence against fellow citizens. (Paddy Torsney (Lib), *Hansard*, 9 May 1996, 2572)

This attempt to discuss the broader implications of, and connection between, hateful attitudes and discriminatory practices was taken up by MP Svend Robinson in reading from a letter from a Catholic priest concerning a young parishioner who took his life amidst rejection by his family of his homosexuality:

> 'Then I read that the MP for Central Nova [Roseanne Skoke] said people like Eddie defile humanity, destroy families and annihilate mankind. In this case the reverse happened. Eddie was annihilated by mankind, represented by good Christians like the member for Central Nova.' (cited by Svend Robinson (NDP), *Hansard*, 9 May 1996, 2545)

Here, some MPs tried to establish that hatred and discrimination cannot merely be attributed to unlawful actions, but are a part of attitudes, words and beliefs that can hold serious consequences. This attack on opponents of the bill continued with accusations that

Reform Members and those espousing similar views do not truly comprehend discrimination. One MP noted: "I do not think members of the third party understand the reality of people's lives because they come from a privileged majority" (Hedy Fry (Lib), *Hansard*, 1 May 1996, 2197) overwhelmingly consisting of Anglo-Saxon white men (Hedy Fry (Lib), *Hansard*, 7 May 1996, 2416). This ignorance was combined with a belief that those who speak out against the legislation, speak out against gays and lesbians and "would rather shut themselves off in their mean, cheap, narrow little worlds and try to make fun of us [homosexuals] because we are different" (Réal Ménard (BQ), *Hansard*, 7 May 1996, 2407). Opponents were depicted as indignant to the government's approach of using "words to enrich, to enlighten, to inform and to defend" - and instead used "words to tear down, to attack, to isolate, to denigrate (Barry Campbell (Lib), *Hansard*, 7 May 1996, 2413). One MP described how Reformers went into "trench warfare at the sound of the word 'homosexuality'" (Gérard Asselin (BQ), *Hansard*, 7 May 1996, 2452). The opponents of the legislation were therefore subject to more personal attack than was witnessed in the debate over *Bill C-41*, no doubt due in part to some Reform MPs controversial statements outside the House. These challenges to the prejudice reflected in conservative ideology, coupled with the acknowledgment of the limitations of adding sexual orientation to the *CHRA*, revealed that proponents did not always opt to fall-back on liberal arguments and ideology to make their case. Although many proponents *did* seem to over-emphasize the effectiveness of the anti-discrimination statute to directly challenge the causes and manifestations of homophobic prejudiced experienced by gays

and lesbians in daily life, others in the proponent camp rejected the trappings of legal liberalism when arguing on behalf of *Bill C-33*.

The opponents of *Bill C-33*, while more vulnerable to proponents' charges of intolerance and bigotry, still launched a full offensive over the proposal to code sexual orientation into the *CHRA*. The issue of 'sexual orientation rights' impacting on the rights of the traditional heterosexual family was cited, as were the perceived negative consequences of legitimizing a homosexual orientation, as part of an ideologically conservative challenge to the legislation. As during the sentencing bill debate, the prediction that this type of legislative change would promote a 'slippery slope' effect for the further advancement of unwanted 'gay rights' was the foundation for the bill's opposition. There were suggestions that gays and lesbians could eventually be the beneficiaries of affirmative action policies (Ian McClelland (Ref), *Hansard*, 30 April 1996, 2127) and that the amendment proposed in *Bill C-33* would be used by activists as justification to courts or tribunals for demanding their share of further rights and privileges beyond what most proponents were willing to concede for what the present bill provided (Tom Wappel (Lib), *Hansard*, 9 May 1996, 2550). Opponents reminded the House of previous statements and judgements made by various individuals suggesting that the *CHRA* amendment was potentially giving away more than they were being led to believe. The justice minister himself was reported in a gay/lesbian publication as equating the notion of non-discrimination with entitlement to spousal benefits (cited by Chuck Strahl (Ref), *Hansard*, 7 May 1996, 2423), while the chair of the Canadian Human Rights Commission was noted to have similarly described as discrimination the withholding of

benefits from homosexual couples that are given to heterosexual couples (cited by Paul Szabo (Lib), *Hansard*, 30 April 1996, 2150). Finally, a 1993 ruling in the *Mossop* case inferred that, had sexual orientation been part of the *CHRA*, the outcome of that case denying a benefit to a gay litigant (leave to attend the funeral of his partner's father) may have been different (Randy White (Ref), *Hansard*, 7 May 1996, 2412).

Due to the evidence pointing towards the probability of subsequent gains for gay rights activists, the negative consequences of such a development were outlined.
A Liberal MP alleged that it was not possible to continue 'positive' discrimination in favour of the traditional heterosexual family if the *CHRA* was amended to include sexual orientation (Paul Szabo (Lib), *Hansard*, 30 April 1996, 2149) as, according to another dissident Liberal colleague, a radical transformation of "the definition of family" understood by most Canadians would result from the passing of *Bill C-33* in its present form (Dan McTeague (Lib), *Hansard*, 7 May 1996, 2400). A Reform Member designated *Bill C-33* as one government policy among many others that did not indicate support for traditional families (Sharon Hayes (Ref), *Hansard*, 30 April 1996, 2114-5), while another described the likelihood of same sex benefits as unjustly impacting on the public purse strings: "If the state has no business in the bedrooms of the nation, surely the corollary is that homosexuals of the nation have no business in the wallets of taxpayers of this country" (Lee Morrison (Ref), *Hansard*, 7 May 1996, 2420). The preamble to *Bill C-33* affirming support for 'family' as the foundation for society in Canada was questioned for its lack of definition for the word 'family' (Paul Steckle (Lib), *Hansard*, 30 April 1996, 2151) and dismissed as irrelevant to the meaning of the legislation (Paul Szabo (Lib),

*Hansard*, 7 May 1996, 2404). Several Members spoke of the historic significance of the traditional family:

> Over several millennia, across many cultures and many nations we have had different cultures, people who decided in many ways through trial and error that the traditional family as we have come to know it in this country is the best possible family for the rearing of children. (Monte Solberg (Ref), *Hansard*, 30 April 1996, 2154)

> The institutions of marriage and family developed over millennia and they have served civilization well. They have served the essential purpose of procreation and the nurturing of children. Strong family units are the foundation blocks of society. When they are weakened by hedonism society as a whole suffers. Anyone capable of learning from history should look at ancient Athens or ancient Rome. (Lee Morrison (Ref), *Hansard*, 7 May 1996, 2420)

Besides the negative effect on the heterosexual family, *Bill C-33* presented a host of other concerns. A Reform MP drew on his medical training in debating against the bill:

> My specific problem with this bill is that it will produce and allow a promotion of an unhealthy lifestyle, a behavior that is unhealthy. I am speaking now as a physician with a physician's specific knowledge and experience. (Grant Hill (Ref), *Hansard*, 7 May 1996, 2405)

After detailing a list of health problems associated with the gay (male) community, he went on to say:

> There will be those who say I have stood in the House of Commons and have branded the homosexual community. I say simply that I wish to have my medical knowledge plainly displayed in the House of Commons. Doing otherwise is a great disservice to this country. (Grant Hill (Ref), *Hansard*, 7 May 1996, 2406)

In addition to health issues, and perhaps in association with them, one Member accused homosexuals of wanting more than protection from discrimination, including protection from "public scrutiny, from public criticism and ... public accountability" (Sharon Hayes (Ref), *Hansard*, 30 April 1996, 2113). The negative reaction and publicity over

opponent's assertions over health brought condemnation from them that the "facts can be put down and made untouchable" as a result of "the protection of the word discrimination" (Sharon Hayes (Ref), *Hansard*, 9 May 1996, 2539). This feeling was expressed by others who worried that legitimate criticism, in essence free speech, was being stifled by the tendency to adversely label those who dared "speak their minds" (Chuck Strahl (Ref), *Hansard*, 7 May 1996, 2424). As one Reform MP protested: "If you disagree with gay rights you are homophobic" (Randy White (Ref), *Hansard*, 7 May 1996, 2412).

A further argument offered by opponents of *Bill C-33* was to question the claim that discrimination was truly a problem for gays and lesbians, thereby undermining the stated *raison d'être* of the legislation. This suggestion was similar to that given during the debate over hate crimes, and was premised on the idea that protection and rights were not to be accrued for "sexual activity" (Chuck Strahl (Ref), *Hansard*, 30 April 1996, 2162). As explained in the newsletter on public policy of the religious conservative organization, Focus on the Family, "putting any sexual lifestyle alongside race, age and the other fundamental characteristics obscures the original intent of this legislation and diminished our response to legitimate human rights violations" (*Canadian Citizen*, 30 May 1996, p.1). Reflecting these views, a Reformer observed that he "had not been reading in the papers that discrimination is epidemic among the gay and lesbian community" (Elwin Hermanson (Ref), *Hansard*, 7 May 1996, 2415), and another challenged proponents to "show us where there is a problem with discrimination against homosexuals in Canada" (Mike Scott (Ref), *Hansard*, 8 May 1996, 2493). This subject would be re-visited as

Members and other observers offered thoughts on sexuality and gays and lesbians themselves during the course of the *Bill C-33* debate.

Finally, one Reform MP who voted against the legislation informed the House:

> If I felt that there was any evidence to support the notion that by amending the Canadian Human Rights Act to add those two words would somehow magically change the Canadian populace so that there would be no more discrimination against gays or anyone else, then I would vote for it in a minute. But it will not. All that will possibly change that is education and enlightenment. (Ian McClelland (Ref), *Hansard*, 30 April 1996, 2126)

Worse, the ineffective measures were deemed "sometimes actually more damaging than the wrongs themselves" (Monte Solberg (Ref), *Hansard*, 30 April 1996, 2153) - an idea that seemed to recall the opposition to *Bill C-41* on the grounds that it would provoke societal division and resentment. The opposition, then, was able to attack the government on allegations it was doing too much for gays and lesbians, and yet somehow not enough either. When it came to discussion of gays and lesbians themselves, however, the opponents' tone turned decidedly negative.

*Sexuality and Sexual Orientation*

Those opposed to 'protecting' gays and lesbians through the measures laid out in the *CHRA* pointed to evidence, as they did during the *Bill C-41* debate, that "the gay population in North America appears to have full access to a standard of living which is considerably above average" (Darrel Stinson (Ref), *Hansard*, 8 May 1996, 2490). Along these lines, one Reform MP argued that the homosexual community not only had a high standard of living, but also immense political clout as evidenced by the amount of

government funding for AIDS in comparison to other diseases like cancer which has much higher yearly mortality rates (Sharon Hayes (Ref), *Hansard*, 30 April 1996, 2113). This same Member repeated the same idea she introduced in the debate over *Bill C-41* - the lack of concurrence and conclusiveness within the scientific community that (homo)sexual orientation was an immutable characteristic (Sharon Hayes (Ref), *Hansard*. 30 April 1996, 2113). Moreover, she quoted Jerry Muller, an American academic, discussing the politics of homosexuality outside of academe versus current theorizing around the subject of sexuality:

> 'In political arguments toward the non-homosexual public, the homosexual movement has tended toward a deterministic portrait of homosexuality as grounded in irrevocable biological or social-psychological circumstance. Yet among homosexual theorists in the academy, the propensity is toward the defence of homosexuality as a voluntarily affirmed"self-fashioning."
>
> The confluence of feminism and homosexual ideology has now led to a new stage, in which the politics of stable but multicultural and multisexual identities is being challenged by those who regard all permanent and fixed identity as a coercive restriction of autonomy, which is thought to include self-definition and redefinition.' (cited by Sharon Hayes (Ref), *Hansard*, 30 April 1996, 2113)

The notion of sexuality as fluid is pointed out as reason not to offer the same legal or societal standing to those minorities who do "exhibit immutable or distinguishing characteristics" (Sharon Hayes (Ref), *Hansard*, 30 April 1996, 2113).

Other comments directed at the subject of sexual orientation in general by opponents of *Bill C-33* exhibited specifically negative connotations. Relating to concerns over adoption and recognition of same sex couples, a Liberal opponent suggested that "when all other factors are equal, [children] might better be raised by heterosexual parents than homosexual parents" (John Bryden (Lib), *Hansard*, 7 May 1996, 2397). A Reform

MP concurred: "All the studies I have seen indicate that children develop best when they live with their father and their mother" (Garry Breitkreuz (Ref), *Hansard*, 7 May 1996, 2409). This concern over children was reinforced by another Reformer when he brought the question over paedophilia back into the fold:

> The minister maintains this bill does not endanger children because paedophilia, even though technically a sexual orientation, is now a criminal act. I remind the minister that less than 30 years ago homosexual acts were illegal, and please observe where we are now. (Lee Morrison (Ref), *Hansard*, 7 May 1996, 2420)

The now predictable comments, in light of the *Bill C-41* debate, regarding an "immoral, unacceptable lifestyle" (Myron Thompson (Ref), *Hansard*, 7 May 1996, 2401) involving "repulsive and repugnant" (John Williams (Ref), *Hansard*, 7 May 1996, 2448) acts were aired in a few instances by some Members. As mentioned earlier, they were joined by the physician Reformer who described that "the specific problems promoting this lifestyle relate to HIV, gay bowel syndrome, increasing parasitic infections, lowered life expectancy and ... an increase in hepatitis in Canada" (Grant Hill (Ref), *Hansard*, 7 May 1996, 2405). One publication insisted that heterosexuals do not have the problems associated with gay sex practices, and while "promiscuous opposite-sex practices produce many of their own problems, ... even by the account of those involved, same-sex relationships are in a league of their own" (*Canadian Citizen*, 28 June 1996, p.8). A Reform MP attempted to expound the harms homosexuality had wrought on the world:

> If we want to look at what homosexuality and permissiveness have done to some countries let us look at Africa and the problems it has run into. There are guidelines laid down in this universe that we have to follow or we will pay the consequences. (Jake Hoeppner (Ref), *Hansard*, 7 May 1996, 2458)

Some final thoughts on human sexuality from the opposition benches came from one Member who made a distinction between different types of gay and lesbian people:

> I have many constituents, not a huge majority obviously, I want to make that clear, who are part of the homosexual community. These are not rampant people like in Gay Pride and in some of these strange parades promoting the homosexual lifestyle. These are regular citizens who contribute to the economy of our area. (Jim Gouk (Ref), *Hansard*, 7 May 1996, 2442)

While voting against the *CHRA* amendment, the member indicated that people in his community do not have a problem with the 'normal' types of gays and lesbians, the ones who are not flamboyant or advocating on behalf of their sexual orientation (Jim Gouk (Ref), *Hansard*, 7 May 1996, 2442). The notion of sexual orientation, then, was primarily cast in the terms of conservative ideology, as opponents drew upon familiar themes to discredit the placement of sexual minorities alongside 'legitimate' minorities, including describing a homosexual orientation as comprised of unseemly behaviour and warning of the dangers of the homosexual 'lifestyle.' It is noteworthy that part of the opponent arguments reflected some potential counterhegemonic insight, including a suggestion that sexual orientation is in fact socially constructed and, therefore, not a natural phenomenon. It must be noted, of course, that the context in which opponents presented these arguments could likely not be seen as contributing to the cause of (homo)sexual liberation.

Those arguing in favour of *Bill C-33* pulled out some of the same viewpoints found during debate over the hate crime sentencing legislation. Many MPs repeated the assertion that homosexuality was an innate characteristic, with one MP recalling the opinion of psychiatrists before the committee hearings on *Bill C-33* confirming "that a homosexual orientation was not learned or influenced behavior but set in the womb by the

mysteries of conception and fetal development" (John Maloney (Lib), *Hansard*, 8 May 1996, 2492). Gay MP Réal Ménard reiterated this to his colleagues in the House, admonishing: "do not think for an instant that it is a matter of choice" (Réal Ménard (BQ), *Hansard*, 9 May 1996, 2534) The notion of a homosexual orientation being natural to ten percent of the population (Ghislain Lebel (BQ), *Hansard*, 30 April 1996, 2118) was also repeated.

Besides these 'elementary' facts, information about the difficulties faced by gays and lesbians was offered. It was indicated that the routine discrimination facing gays and lesbians was not the whole story, or indeed most of it. MP Svend Robinson spoke of the "alienation" experienced by gay and lesbian youth, and how this is often compounded by an inability to seek help in their families or churches for fear of condemnation (Svend Robinson (NDP), *Hansard*, 9 May 1996, 2544). Gays and lesbians were also sympathetically described as the "outcasts" of our society (Geoff Regan (Lib), *Hansard*, 30 April 1996, 2128) and were compared with other groups of people, such as women and American blacks, who previously had struggled for their basic humanity to be acknowledged (Maurice Bernier (BQ), *Hansard*, 30 April 1996, 2108). One MP alluded to the mistreatment of homosexuals in the 1950s by the psychiatric and medical professions - including people being "given lobotomies ... on the basis that they could be cured of their sexual orientation" - and attributed the remarks of some *Bill C-33* opponents to this outdated psychiatric mentality (Bill Graham (Lib), *Hansard*, 30 April 1996, 2125).

The problem of suicide among gays and lesbians was also widely referenced in the debate over the *CHRA* amendment. A Liberal MP spoke of the accounts provided to the committee hearings on the legislation of the "wasteful suicides of the many" young people who did not gain societal and familial acceptance of their sexuality (John Maloney (Lib), *Hansard*, 8 May 1996, 2492). A justice department publication indicated as part of its evidence of discrimination on the basis of sexual orientation that over 75% of young people who attempt suicide do so as a result of conflict over their sexual orientation, and that *Bill C-33* represented a small step in combating the "negative environment" that produces this tragedy (cited in 'Working Against Discrimination'). Several MPs echoed these concerns, with one noting the "devastatingly high" levels of suicide for homosexual youth being second only to the rates for Aboriginal youth (Svend Robinson (NDP), *Hansard*, 9 May 1996, 2544).

On a slightly happier note, there was an attempt to place a positive human face on homosexual people and also praise for gays and lesbians and their communities by a few speakers. The justice minister told Members: "We deal here not with abstractions but with people, with humans. Gays and lesbians are not abstractions. They are very real, with very real entitlements to dignity and respect" (Allan Rock (Lib), *Hansard*, 30 April 1996, 2107). A Liberal MP asked his peers: "Who are homosexuals anyway? Who are they?" - and then answered that they are brothers, sisters, cousins, friends or relatives (Julian Reed (Lib), *Hansard*, 7 May 1996, 2409). On who they are *not*, Svend Robinson offered: "Gay and lesbian Canadians are not people from another planet" (Svend Robinson (NDP), *Hansard*, 9 May 1996, 2543). Back to the terrestrial world, a Liberal Member

expressed how "particularly fortunate" his Toronto riding was "to have within it a large section of the gay and lesbian community" (Bill Graham (Lib), *Hansard*, 30 April 1996, 2123). He went on to highlight that community as one

> .... of people who have established themselves, who have overcome discrimination, who have established healthy, productive lives in our communities, who work hard and who contribute to society, living stable lives, who contribute to the well-being of our city... . (Bill Graham (Lib), *Hansard*, 30 April 1996, 2124)

These positive images of gays and lesbians and their communities were the antithesis of the "longstanding attitudes and stereotypes in our society" (Sheila Finestone (Lib), *Hansard*, 7 May 1996, 2443).

On a concluding note, an interesting development involved the statements of two MPs who, in speaking out in support of *Bill C-33*, utilized the same arguments forwarded by the bill's opponents over two issues. One member taunted the opposition's stance on equality with the following:

> I do not hear the third party talking about equality in terms of 'then let us not let gays and lesbians pay taxes. Why should they be equal and pay taxes?' We know this group belongs to one of the highest income groups in the country and pays an extraordinary amount of taxes. (Hedy Fry (Lib), *Hansard*, 1 May 1996, 2197)

The other incident involved MP Réal Ménard when he claimed that "as much of an activist I may be, recognition of same sex partners will not lead me to say that two lesbians or two homosexuals constitute a family" (Réal Ménard (BQ), *Hansard*, 9 May 1996, 2533). The implications of such a covergence of ideas between proponents and opponents will be re-visited later in this chapter.

Overall, those who supported the *CHRA* sexual orientation amendment argued from largely a perspective of liberal ideology; tales of woe and unhappiness in the lives of

gays and lesbians necessitated this legislative change, and the immutability of sexual orientation facilitated placing gays and lesbians within the minority rights paradigm. Yet, there was also some attempt to portray those having a non-heterosexual orientation in a decidedly positive manner, thereby departing from the liberal reliance on accounts of homosexual gloom and despair. Further, some traditionally conservative ideas were forwarded in support of *Bill C-33*; thus, evidence of each of the liberal, conservative and counterhegemonic viewpoints was found in proponent discourses over sexuality and sexual orientation in arguing for the passage of the bill.

**Examining the Discourse: Bill C-33**

As the debate on *Bill C-33* unfolded, it became evident that many of the same arguments cited during the debate over *Bill C-41* were going to be brought forth again. There were some different points stressed during this debate over sexual orientation, yet the dominance of liberal ideology led the way in defending and eventually passing the *CHRA* amendment. As detailed in the preceding pages, proponents consistently and preemptively argued that *Bill C-33* was not about the extension of spousal, marital or familial benefits of any sort, but only dealt with protection against discrimination in the workplace for federally regulated employment and in the provision of goods and services by those industries such as banking that operate under federal jurisdiction. The need to protect gays and lesbians from discrimination in these areas was stressed, and the issue was determined to be one of basic human rights. While I will return to this approach

taken by proponents later, I wish to focus on two key areas in the debate over *Bill C-33* - the conservative arguments and the existence of counterhegemony.

*The Conservative Assault?*

Almost throughout the entire time that the bill to amend the *CHRA* was before Parliament, the Reform Party was under a veil of negative scrutiny because of the controversy surrounding MPs Bob Ringma and David Chatters. While Reformers were attempting to argue that they were one hundred percent against workplace and goods and service provision discrimination, here were two Reform MPs essentially discussing publicly the acceptability of doing just that. However, the opponents persisted, including a number of Liberal Members taking advantage of the free vote on the legislation, and raised questions as to where the legislative amendment might lead - warning of a situation where homosexuals would obtain too many benefits and privileges to the detriment of society.

Opponents spoke of the conflict between the rights of the traditional family and children and deemed these as irreconcilable with the rights of gays and lesbians. Yet, it again was the more specific comments about gays and lesbians themselves that signaled more contemptuous ideas about homosexuality. The homosexual lifestyle was dramatically 'medicalized' by Reform MP Grant Hill, a physician, who brought a medical text into the House for emphasis as he discussed what he believed were dangerous health risks associated with gay sex. Not only were homosexuals at high risk for disease, it was pointed out that their political clout allowed for AIDS funding to be disproportionately

high, and that their political activism was selfish and self-serving. The relative prosperity and political power of homosexuals were cited as reasons why a lifestyle should not stand alongside the other fundamental characteristics in being protected under the law. The comments of opponents on these issues, while presented in a somewhat different manner, were witnessed to some extent in the previous debate over *Bill C-41*. Interesting, however, was that two MPs on the proponents' side of the divide made arguments mirroring those exemplified by conservative ideology. Homosexuals, a Liberal MP concurred, *did* have higher than average standards of living, while Réal Ménard suggested that a gay or lesbian couple could never be considered a family. I find it somewhat dangerous to acquiesce to the language of the social and religious conservatives and, in instances such as these, the questionable claims and exclusionary arguments should indeed be challenged. If part of the gay and lesbian liberationist project is to contest the 'truths' put forth in conservative discourses, then surely those claims which are utilized in an attempt to argue against a progressive understanding of gays and lesbians must be called into question.

On the opposite end of the spectrum, a Reformer went to the trouble of indicating some of the current ideas in the academic world over the social construction of sexuality, to suggest that immutability is even being contested by homosexual supporters. While postmodern writers and others have explored the notion of sexuality as 'fluid' as a means to promote 'sexual emancipation' by deconstructing the usually assumed norm of heterosexuality, these ideas enter the sexuality discourse fostered by *Bill C-33* as ammunition for keeping sexual orientation outside the liberal rights paradigm. This

development suggests that at the moment it would be extremely difficult, not to mention strategically unwise, to try and introduce a transformative discourse on the subject of socially constructed sexuality directly into the world of liberal rights.

Another point on the topic of conservative ideology and its presence in the debate over *Bill C-33* centres on the charge by opponents that their voices were being muzzled in a capitulation to political correctness. Since the Ringma and Chatters incidents, those opposed to the *CHRA* amendment, especially in the Reform Party, found it difficult to express their views on the matters at hand openly without signaling themselves as homophobic. The physician MP was publicly rebuked by the Canadian Medical Association for his comments (*Alberta Report*, 3 June 1996, p.36), while others in the House had to face proponent benches with the fear of having phrases such as "Ringma around the collar" (*Hansard*, 7 May 1996, 2421) barked in their direction, lest they say something 'offensive.' The verbal expressions of conservative ideology toward gay rights or homosexuality became open targets as soon as the public relations disaster hit the Reform Party. It seems that, at least for the course of the debate over *Bill C-33*, opponents had to endure the experience of feeling their freedom to speak out against the legislation curtailed, as proponents connected the anti-gay standpoints with active discrimination against gays and lesbians and applied the political squeeze.

A final idea re-visited by opponents of *Bill C-33* dealt with the system of administrating human rights in Canada. Again, displeasure was expressed over the current system that was seen to promote special interests, often through undemocratic tribunal decisions that ignored the will of Parliament and did not respond to the interests of all

Canadians. Some Reform Members, including leader Preston Manning, tried to illustrate ways by which a fairer system could operate, including a new tribunal strategy based on the notion of equal opportunities rather than equal rights. A conservative media outlet - *Alberta Report* - ridiculed Manning's sketchy proposals, and suggested, among other things, that rights could be limited for harmful societal behavior and would only protect against discrimination for immutable characteristics. One might fairly infer that gays and lesbians would be afforded no legal protection under those two principles, and that the preferred rule for adjudicating claims - common law - would render any protection inconsistent. In the face of these types of proposals, it seems that gays and lesbians would certainly not have their cause for legal equality taken much farther. Again, while these might only be the musings of disenchanted conservatives, it is not inconceivable that a minority rights-hostile government might introduce changes to move towards the arrangements outlined by conservative politicians and analysts. The implications of this possibility should be considered by progressives who might too readily dismiss the present 'system' of adjudicated human rights complaints and, therefore, the opportunities this configuration provides for counterhegemonic resistance.

*Counterhegemony*

The substance of some of the debate offered by proponents of *Bill C-33* demonstrated a resilience to the pitfalls of minority rights hegemony. Many recognized that the *CHRA* was only a part of the process toward gay and lesbian equality, but considered it an important legal and political step. It was acceded by some that this bill

would not end prejudice, while others proclaimed that one day full equality would not only involve freedom from discrimination, but also societal recognition and affirmation of same sex relationships. In addition to refusing to profess a naive and unbridled optimism over what *Bill C-33* could accomplish, there were more attacks on the conservative ideology of opponents. The anti-gay sentiments of some were challenged, as they were during debate over *Bill C-41*, through direct assertions as to the dangers and consequences of opponents' beliefs and prejudices. These beliefs themselves were implicated in the propagation of homophobic discrimination and violence, thus providing a connection between the sacred and untouchable values of some Members and the harm they claimed to decry. The opponents were once more accused of being completely out of touch with the causes and experiences of discrimination, and their backgrounds as predominantly white (and implicitly straight) men were cited as a reason.

There was one Reformer who claimed that the inclusion of sexual orientation in the *CHRA* would amount to nothing whatsoever to help gays and lesbians in their quest to be free from prejudice and discrimination. While it is tempting to suggest that this argument forms a part of counterhegemony against the hollow promises of liberal law, the fact that the Member also indicated he was opposed to the extensions of benefits and wanted to see 'community values' come back into the adjudication process removes him from consideration as a radical critic of rights. Even though he called upon 'enlightenment' to help end prejudice and discrimination, an apparent commitment to conservative ideology in other areas reveals the tenuousness of such a plea.

*Conclusion*

As was the case over the hate crime sentencing provision, the discussion over the coding sexual orientation into law through *Bill C-33* was contoured by the political dynamics surrounding its time before Parliament, and what the government gleaned from its experience with *Bill C-41*. The *CHRA* amendment was planned by the government to represent a mere extension of anti-discrimination guarantees for gays and lesbians. The justice minister and countless Liberal MPs, in concert with speakers from other parties, went to great pains to suggest what would not happen as a result of the amendment. Despite these assurances, opponents of the bill geared up to challenge this second piece of legislation containing the words 'sexual orientation.' However, with a limit on debate imposed and support from Bloc Québécois Members virtually assured, it seemed that nothing would likely derail the planned change to bring in the amendment. Indeed, an information booklet published by the government came out on the day debate began in the House explaining the changes, which left a Reformer to label the booklet as signaling the government's take on *Bill C-33* as a "fait accompli" (Garry Breitkreuz (Ref), *Hansard*, 1 May 1996, 2195). How the approximate week and a half of debate would have unfolded had the Reform party not run into publicity troubles is uncertain. What is apparent is that the mainstream news media certainly had a lot more to write about than the specifics of *Bill C-33* during the time which it was under consideration.

David Rayside (1998:123) indicates that the news media demonstrated general agreement on the "appropriateness of change" in the *CHRA*, and served to expose "extremism among anti-gay forces, preventing their extraparliamentary and legislative

voices from claiming mainstream legitimacy." The *Globe and Mail* seemingly ran daily stories detailing the fallout of the Ringma/Chatters incident, while published letters to the editor and editorials uniformly denounced what the Reformers had said and their leader's reaction to it all: one columnist wrote that Preston Manning's "delay and half-heartedness just confirm the impression that elements of the party really are outside the mainstream" (*Globe and Mail*, 3 May 1996, A20). Reformers were left to complain that their right to speak openly had suffered and that the government was "working with the media to stir up controversy" (*Hansard*, 9 May 1996, 2535). It seemed that these complaints fell on deaf ears in the mainstream press, although *Alberta Report* articles and editorials maintained their conservative perspectives and trumpeted conservative discourses, and even admonished the Reform Party at times for backing away from ideological conservatism.

For its part, the government and its supporters were content to stick to a liberal rights anti-discrimination script made easier by the attention given to opponents of the legislation. During the time of the debate, EGALE did not issue public statements linking the *CHRA* amendment to specific benefits for gays and lesbians - seemingly content with allowing strategy to take precedent over its other concerns regarding gay and lesbian legal equality. Mainstream media support, coupled with opposition blunders, allowed supporters of the legislation to 'ride out' the time during which the legislation was before Parliament. After *Bill C-33* was passed in the House of Commons, MP Svend Robinson was quoted as saying: "I am confident that the amendments to this legislation will in fact assist in the recognition of gay and lesbian families and gay and lesbian relationships" (cited in *Xtra West*, 16 May 1996, p.13). Although he expressed support for such

relationships during debate over the act, he nonetheless waited until after its passage to publically contradict the assurances suggesting that *Bill C-33* was merely about protecting gays and lesbians from (primarily) workplace discrimination.

It should be reiterated that the way the government introduced and proceeded with the legislation, and the numerous delays in bringing the amendment before the House of Commons, are instructive. Concern over caucus dissent and public reaction readily can and did take precedence over the issue of gay and lesbian legal rights - and only an inclusion into a minority rights 'anti-discrimination' framework at that. But did this influence how the precise arguments of the debate unfolded? Perhaps or perhaps not. It seemed that the more outspoken of proponents were emboldened to continue a counterattack on the anti-gay sentiments delivered by the purveyors of conservative ideology. Despite the limiting of debate and the dominant strategic ploy of indicating that the bill would only bring the most basic of liberal protection, a good number of speakers still bypassed the hegemony of liberalism to assail conservatism directly.

Yet, gays and lesbians remained on the sidelines when it comes to claiming full membership in the family of minority legal rights. This time around, the Prime Minister saw fit to add to the criticism of outspoken Reformers Ringma and Chatters (unlike the situation in 1994 involving one of his own, Roseanne Skoke), however, he "never sent nearly as strong a message to his own caucus members" (Rayside, 1998:135) who expressed dissent over the *CHRA* amendment. The distinction can be made not only between Chrétien's reactions to the two situations, but also the reactions of many others. The two suspended Reform MPs advocated that discrimination in the workplace on the

basis of sexual orientation could be acceptable under certain circumstances, while others who evoked similar conservative values in discussing the immorality and unnaturalness of gays and lesbians themselves were not subject to disciplinary action. The proponents who recognized the relationship between belief and action condemned both equally and saw them for what they were - two components of the same problem that consistently reinforce one another.

Although *Bill C-33* successfully became law, the manner by which it did so leaves a lot to be disheartened over. According to David Rayside (1998:135), the

> .... decision to allow a free vote implied that gay/lesbian rights did not have the same standing as those for women, racial minorities, aboriginals, or the disabled. ... The long history of delays in presenting an amendment to the Commons, despite pressure from courts, sends the same message. So too did the Liberal government's constant reminders of the limited scope of its legislation.

As lesbian writer Cindy Filipenko concluded, her lack of jubilance at the passage of *Bill C-33* "could be explained by the fact that I really expected we'd be further ahead by now" (*Xtra West*, 16 May 1996, p.4). The political realities of sexual orientation at this moment in Canadian society are such that victories such as the *CHRA* amendment might best be celebrated for what may come down the road. The exercise of analyzing different debate discourses such as those surrounding the passage of *Bill C-33* helps to delineate where both promise and limitation exist right now, and what reactions differing policies and changes may produce in the future. Similar to *Bill C-41*, the *CHRA* amendment allows for a glimpse at the struggle for legal rights and recognition for gays and lesbians, revealing that the beliefs and pronouncements generated are not simply pre-determined, but seem to be in a period of evolution whereby the emergence of discourses rests upon a myriad of factors and circumstances both unique and similar across different situations.

# CONCLUSION

The main purpose of this project has been to investigate some of the ideas, claims and arguments made over pursuing a rights-based legal strategy as part of the activism of progressive gay and lesbian movements. I have endeavored to do this through an examination of discourse whereby two enactments of federal legislation were reviewed in the attempt to gain an understanding of how a legal and political context might shape and configure issues relevant to the move towards a better experience of societal equality for gays and lesbians. Based on the product of this undertaking, I can offer comment on several dimensions of the law/society relationship as it pertains to the progressive movements of gays and lesbians, beginning with the notions of ideology and counterhegemony. The basis for my investigation is the existence of ideological forms, the problems that accompany them and the potential for their transformation. The following section will assist in focusing on what the debates over *Bill C-41* and *Bill C-33* reveal about the modern legal struggles of gays and lesbians in Canada.

*Overview: The Politics of Ideology and Counterhegemony*

As suggested in previous research and theory, the liberal and conservative ideologies remain a forceful means through which information about gays and lesbians and their struggles for legal and social equality is communicated. The hegemony of legal liberalism was very much evident throughout the debate over the rights and recognition of sexual orientation concerning measures to impose a hate crimes sentencing directive and

to realize inclusion within an anti-discrimination statute. The arguments put forth by proponents of the changes often relied on the liberal predilection for championing a democracy committed to tolerance and fairness as rationale for supporting the legislative initiatives. This sometimes resulted in the tendency to exaggerate the ability of the changes to effect a meaningful impact on the lives of individuals for whom the legislation was designed to benefit. However, it also revealed that the idea of a singular ideologically liberal discursive and practical approach to minority rights was a simplistic one. In both words and actions, the government and others consistently demonstrated the various levels of inclusion supported by the liberal framework. Gays and lesbians, it seemed, were in some instances accorded a tenuous placement with the minority rights paradigm, even by those who supported the measures taken to code sexual orientation into law. This is important for signifying how mere formal or coded inclusion within the liberal rights paradigm might still leave a lot of territory uncharted. Indeed, if minority rights or recognition are in any way a step towards equality, in spite of their limitations, there may be *several* steps to take while inside the liberal framework in order to successfully move beyond its range for both legal and non-legal advances. It should also be noted that professing the convictions of the liberal paradigm can be a rhetorical device used for purposes of political or strategic maneuvering in order to ensure the success of various attempts at policy innovation or reform. While such an approach does fail to reveal an immediate transformation of hegemonic discourse and ideas, a successful change itself may have a role to play in assisting in the counterhegemonic project - in other words,

liberal discourse may grant opportunities for the introduction of ideas or actions that are more radical in nature.

The liberal treatment of sexuality and of gays and lesbians themselves remains problematic on several fronts. In the face of a heated opposition offensive, proponents of the bills in question were often pushed further into casting gays and lesbians as endless targets of hate, violence, discrimination and abuse, which, by way of an example, led to morbid depictions of a suicide epidemic among homosexual youth. While these discussions do insert information about some of the difficulties faced by some gay men and lesbians into the collective debate, the risk of portraying non-heterosexuals as perpetual victims enduring a wretched existence is amplified. This effect has the potential to distort the focus disproportionately towards realities which, while in many cases very worthy of attention, nonetheless omit and thereby excuse subtler forms of marginalization. The underlying causes of such prejudices and their incarnation as active discrimination are similarly forgotten, while the capacity of liberal law to directly address the problem is emphasized. Furthermore, differences in how discrimination affects gays and lesbians, or over other specific concerns that may exist in their daily lived experiences, are left unmentioned through the mere coding of sexual orientation into law as seen in the example of *Bill C-41* and *Bill C-33*. This weakness underlies some of the critical theorizing in the area of lesbian-specific recognition and jurisprudence (e.g. Robson, 1992; Majury, 1994). While the sexual orientation-encoded enactments may not actually function in their capacity to ignore, for instance, the specific problems faced by lesbians, the discursive evidence from this study suggests that the popular discourses, both

dominant and counterhegemonic, have a long way to go in gaining an appreciation of these and likely other subtleties that are surely important elements in the liberationist project.

Liberal discourse, as informed and constrained by legal tradition, also limits a capacity to broaden an understanding of, or introduce dialogue over, the social construction of sexuality. The liberal defense of sexual immutability was solidly entrenched in the words and arguments of the proponents of the legislative changes while, revealingly, a 'radical' discourse on sexuality was utilized by an opponent of the legal coding of sexual orientation in suggesting that gays and lesbians deserved no placement in the realm of liberal rights. Although 'discrete and insular' status is not a requirement for minority group inclusion in the equality section of the *Charter* or the *CHRA* and, therefore, legal arguments need not be made on this basis, it is apparent that the notion of immutability has become an entrenched part of the (legal) politics of sexual orientation recognition. It seems that, for the moment, ensuring an environment for sexual orientation recognition in law necessitates strategic support for a rather limited and problematic discussion over some aspects of human sexuality. It is possible that for this matter, extra-legal fora will provide the best opportunities for an extension of existing discourses around sexuality, and for the introduction of ideas that challenge the hegemonic forms that delineate impenetrable sexual identity boundaries. This ensures that possibilities remain for further recognition of lesbians and gay men on the legal stage while the maintenance of critical approaches to the topic of sexual identity continues on other fronts.

Meanwhile, the conservative ideological project that appeared during the sexual orientation debates focused primarily on the 'special rights' and 'slippery slope' lines of argumentation, reflecting a de-radicalization of past conservative pronouncements primarily reliant on unequivocal and sometimes graphic characterizations of homosexuality as deviant, sick and perverted. There certainly were instances during the debates over *Bill C-41* and *Bill C-33* where words such as 'revulsion' or 'unnatural' surfaced, but I would contend that a strategy of directly negative attacks on gays and lesbians did not emerge in any dominant manner. However, perhaps partly because of the presence of the Reform Party as a political base with roots firmly in religious and social conservatism, there was a stronger than expected personal assault on gays and lesbians - some of it based on arguments commonly found among the annals of the American religious Right. The warnings of an 'unhealthy lifestyle' and the disparagement of homosexuality as a societal scourge did materialize and, even amidst being put on the defensive as during the Ringma/Chatters incident with *Bill C-33*, criticism was not silenced. The physician Reform MP graphically attempted to turn a recognition of sexual orientation into medical warnings over dangerous sexual practices, while others complained that gays and lesbians were, in fact, a privileged faction, selfishly and politically sophisticated. I believe there is a need to directly confront these charges, to challenge their basis in reality and the context in which they are presented, beyond simply dismissing them as homophobic ramblings. While proponents did confront the conservative ideologues on issues of discrimination by linking obvious homophobic pronouncements and beliefs to the perpetuation of prejudicial treatment of gays and lesbians, they left too many assertions and claims unchallenged,

thereby forgoing an opportunity to correct the negative stereotypes and ideas witnessed in conservative discourses.

The contention that homosexuals are using 'the system' unjustly must surely support the calls on the right for moving away from the tribunal adjudication system and the 'whims' of an unelected 'activist' judiciary. While more 'accurate' information about gays and lesbians will alone likely not convince those on the far right that their criticism of how minority rights and justice are dispensed in this country is unfounded, for the purpose of protecting those gains already attained, we should not be encouraging a system akin to those in the ideas floated by the social conservative politicians and media outlets and organizations. The possibility of *losing* that already 'won' might not be a realistic threat at the moment, but there is certainly a segment of society that does not look favourably upon what it regards as the willingness of Canada's legal system to encroach upon the jurisdiction of elected representatives. There have been calls to 'amend' certain elements in the current legal system and tribunals of the various human rights commissions across the country; these tend to come on the heels of particularly controversial decisions that raise the ire of the public. At the risk of acceding too much momentum and stature to these voices, I simply suggest that we try to ensure those who claim that gays and lesbians are unduly 'benefitting' from the recognition of sexual orientation in law do not go unchallenged. The alternatives offered by opponents may allow for looking upon the current system of the liberal paradigm in a slightly different light.

The counterhegemonic ideas introduced during the debates over *C-41* and *C-33* served to directly challenge some of the realities that are obscured by liberal and

conservative ideologies. The arguments of many who supported the legislative changes revealed a cognizance which denoted liberal rights as having a limited capacity to directly impact on the problems under consideration; the legislation was lauded on symbolic grounds, or was recognized as only one part of what should encompass a variety of strategies to effect change. Further, there were elements of radical discourse in some proponents' approach to debate, such as those connecting the ideas and attitudes of conservative ideology directly to violence, hatred and discrimination. While there was weakness in the capacity of a legal context to promote discussion of the social basis of sexuality, MPs and some writers were able to transcend the tendency to resort to liberal platitudes and directly confront harm represented by conservatism. It appears that there is room for shifting the hegemonic order on this front, for openly discussing the right to be free from hatred and discrimination as inherently involving a curtailing of the rights of others to propagate and reproduce the conditions of inequality. Established legal rights discourse could not prevent the refusal to resort to pleas for tolerance; the message emerged that those who hide behind moral and ethical armoury will not be allowed to claim unchallenged that their rights allow them to unfettered leave to contribute to homophobia and its consequences. And, finally, several MPs broke with the impulse to focus solely on the victim status by speaking proudly and positively about gays and lesbians themselves. As indicated, more of this approach would be a welcome respite from the many descriptions of lives replete with misery and shame. A more positive discourse surrounding the lives of gays and lesbians could serve to balance the scales away

from tales of anguish and depression and, importantly, discourses of sickness and disease espoused by conservatives.

While this project has allowed for an overview of the ideas, thoughts and beliefs on a number of issues relevant to gay and lesbian movements as represented through the discursive data of debates over legal rights and recognition, the political element cannot be ignored. The discourses do not simply emerge on their own, no more than they are entirely predictable. During the House debates and outside of Parliament via the political machine, discourse is often used as a strategy for achieving a variety of political ends and often accounts for what gets expressed, when, by whom and in what manner. For instance, I believe that it was the harsh words of conservative critics on each bill - Skoke's moralizing during *Bill C-41* and Ringma's policy on discrimination during *Bill C-33* - that helped provoke a radical response from some proponents, effectively propelling a challenge to the hegemony of liberalism in attacking what was regarded as a dangerous anti-gay tirade. Further, the fact that two openly gay MPs were part of the debates, and perhaps that there is more willingness today than ten or fifteen years ago to stand up and denounce homophobia regardless of one's sexual orientation, must be considered as having an impact on how the debates unfolded. All of this indicates that discourse in the paradigm of liberal rights is not static or fundamentally constrained, nor is the dialogue itself the only means by which to critique and analyze.

*Re-visiting the Problematic*

At the outset of this thesis, I indicated that the outcome of my investigation could yield insight into the placement of gay and lesbian sexuality within the configuration of law and society. The task of uncovering this insight, grounded in an analysis of discourse, has revealed several key points for understanding the present circumstances pertaining to the role of rights-based legal strategies in the progressive struggle for the gay and lesbian liberationist project. First, successful shifts in the hegemony of liberal and conservative ideologies *are* possible, but counterhegemonic strategies and their resulting discourses have only been found to emerge in certain components of the hegemonic order. The introduction of radical insight to challenge more established 'ways of knowing' does occur, yet its scope suggests a danger in reifying the discursive - particularly what it can accomplish and transform - so that counterhegemonic strategies and discourses are believed presentable and injectable into any situation or forum. This contention does not suggest that the targeting of those discourses in opposition to gay and lesbian liberation, as witnessed in the debates over *Bill C-41* and *Bill C-33*, is not an important victory or a testament to rejecting deterministic analyses of law. Rather, it must be understood that a radical potential to rights-based strategies is constrained by the social and political contexts in which these strategies operate, including: coverage by the media; the desire to place tactics over naked principles by politicians, lobby groups and others, who may all have differing rationales for these 'desires'; and unique moments of interpersonal interaction and reaction that are highly unknowable or unpredictable at the outset of a particular rights campaign. While these constraints hinder the proliferation of specific

counterhegemonic discourses in certain situations, I believe that any attempt to become cognizant of the complexities and tendencies of hegemonic resistence to counterhegemony can only provide assistance and guidance to gay and lesbian liberation. Furthermore, I concur with the understanding that "we cannot expect lesbian and gay rights discourse to become more radical unless we are prepared to work at making it so" (Brodsky, 1994:535).

The second point of insight into the thesis problematic concerns the same social and political context described. I believe it is important to realize that despite the constraints and limitations of such a formation, what shapes and contours discourse on a variety of issues relevant to gay and lesbian liberation is not reducible to a monolithic entity called 'law.' The current hegemonic manifestations of discourse on law, sexuality and society involve a production of these by different actors and organizations; what is apparent from the review of *Bill C-41* and *Bill C-33* are the *opportunities* for resistence that a legal/political arena provides. Having a say in the present hegemonic formations of society means entering into these in the attempt to exercise influence upon them. The discourses on gays and lesbians that derived from the debates over sentencing for hate crime and amending an anti-discrimination statute are not singular products of the law or its power to shape and define, no more than the pronouncements of any one medical 'expert' or tradition are capable of discursively constructing gays and lesbians in a conclusively negative manner.

Over recent years, openly homosexual women and men have gained access to certain positions of prestige and influence within society - including in the fields of

medicine, law and politics - and from these positions have gained access to (discursive) mechanisms with the power to influence the process of knowledge creation. During the 'sexual orientation' debates over the two bills, the presence of an organization like EGALE and the contributions of openly gay MPs signal what I believe to be an important change in advancing the ideas of gay and lesbian liberation. The contributions of open and visible gays and lesbians and those who are willing to stand as their supporters, within a legal/political forum that can legitimize, educate and publicize issues and ideas, must be viewed as a step forward in the struggles of gay and lesbian movements.

A final point to be made in returning to the problematic is that rights-based legal reforms, such as those detailed in this thesis, should not be regarded as *primarily* holding the key to gay and lesbian liberation. The discursive emphasis of liberal and conservative ideology revealed in the debates over *Bill C-41* and *Bill C-33* readily support such a claim. As indicated earlier, there are important ideas and notions that need attention as part of the move toward gay and lesbian liberation (e.g. a better understanding of the social construction of sexuality). The discourses produced through the legal rights debates outlined here over recognizing the category of 'sexual orientation' as worthy of placement into law, fell short of providing the needed consideration for a number of important aspects pertaining to sexuality and the lives of gays and lesbians. However, there were liberal and conservative discourses propagated during the debate on which progressive voices and reactions were unnecessarily silent. These can and should be addressed in similar future fora on legal rights for gays and lesbians, while the areas that seem somewhat out of reach for the introduction of radical discourses may have to be, for the

moment, the project of counterhegemonic strategies outside of the realm of acquiring rights-status for gays and lesbians.

The debates over *Bill C-41* and *Bill C-33* were in many ways similar. Although they concerned different issues, they both produced some understanding over how the current social and political climate reacts to and challenges the concerns of the movements of gays and lesbians. What the study of these legislative initiatives - how they were discussed and implemented - allows for is an indication of where we are now, and where we might go from here. I also believe this study helps to solidify the understanding that the stage of legal struggle presents an ongoing challenge for gays and lesbians. I contend that there was counterhegemonic promise shown during the debates over the legislation and, as indicated, this emerged alongside an indication that a number of concerns still remain that need to be addressed. In the configuration of law and society in Canada, there remains the full recognition of gay and lesbian relationships (somewhere) on the horizon and, therefore, all of the complexities and problems of homophobia and heterosexism to be confronted. The complete acceptance of gay and lesbian sexuality and an end to prejudicial beliefs and discriminatory practices still remain an ultimate goal of gay and lesbian liberation. The victories of *Bill C-41* and *Bill C-33* appear rather minute when considered in the face of these challenges, yet the lessons and insights produced by the debate over these and other legislation can assist in signifying areas in need of attention. The impact of a discourse of rights and recognition extends far beyond any particular political debate, and for that reason the ideas about and arguments over the lives of gays and lesbians and their place in society demand such close scrutiny.

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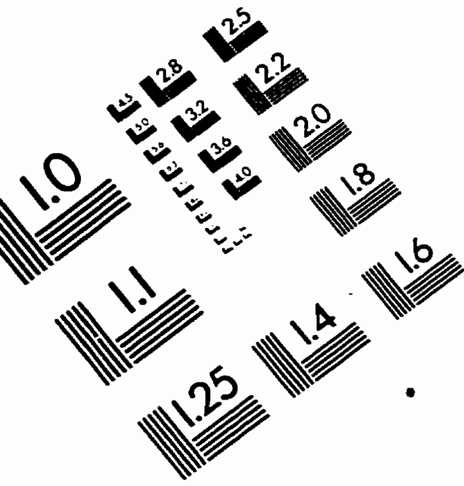


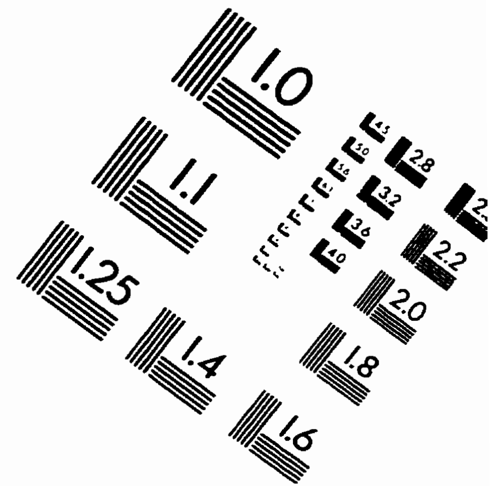


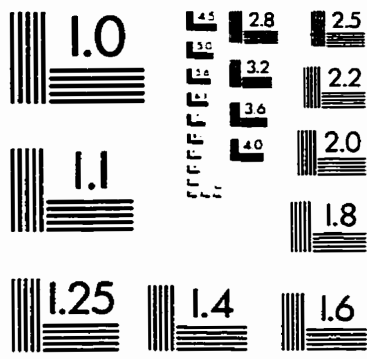


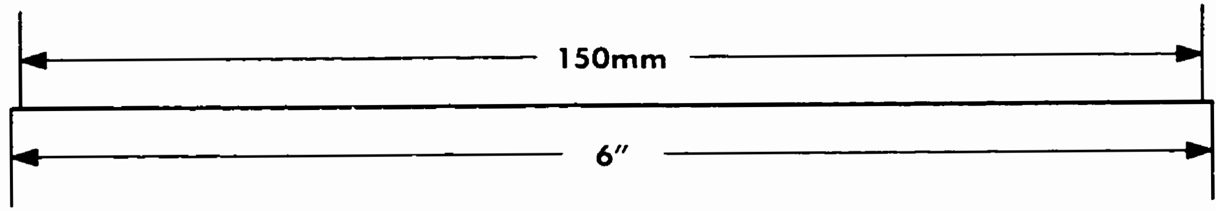


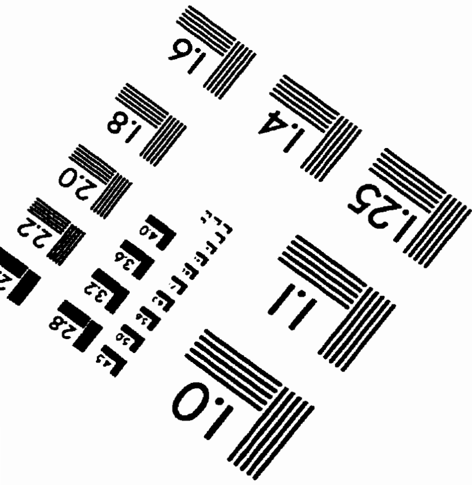

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