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Deconstructing Family: A Case Study of Legal Advocacy Scholarship

by

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Abstract

For activist legal academics, advocacy scholarship is a form of political action. In this view, the stories that the law tells help to shape the fabric of social life. Thus the ability to produce legal stories represents an important political resource, especially if these narratives are embraced by the law. This thesis explores the story of family offered by legal academics in legal periodical literature. The legal literature they produce is designed to employ the transformative power of law in the service of a reformist vision of society.

The advocacy scholarship examined in this thesis subjects family to a deconstructive analysis. Family is presented as an invention of dominant societal interests that seek to regulate (i.e., repress) sexuality. Family's exclusive links to heterosexuality, it is argued, alternatively marginalize and seek to normalize non-conforming sexualities. The solution is to radically transform family, either by including non-conforming sexualities within family or by abandoning the legal category of family altogether, along with the distinction between family and non-family.

Such deconstruction of family encounters substantial public resistance when it is expressed outside of the legal realm in the normal political process. Here legal academic writing proves to be useful to radical reformers of family. Such scholarship represents an opportunity to use the transformative power of law in a way that helps to constitute social life while remaining within the protective field of the law. For radical reformers of family, such strategic considerations demonstrate the value of legal advocacy scholarship as a form of political action.

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Introduction

It is generally accepted by legal scholars that the advent of the *Canadian Charter of Rights and Freedoms* has stimulated interest group use of the Court. Effective use of judicial resources in support of a social vision often requires the support of legal advocacy scholarship, and this type of scholarship is most often found in legal periodicals. This thesis undertakes a study of the Canadian legal advocacy scholarship written on the topic of family. The scholarship generally aims to deconstruct and transform family, with the particular aim of overcoming the traditional hierarchy between heterosexuality and homosexuality.

Advocacy scholarship in the legal realm represents a strategy of "influencing the influencers."[1] Legal academics producing advocacy scholarship amass theoretical support for a given position or cause, in the hope that it will then be used to influence the Court. And, in fact, interveners, often on behalf of activist social movements, routinely make available to the Court the scholarship of activist legal academics. F.L. Morton argues that the academic legal community's scholarship is invaluable to the various interest groups (interveners) which use *Charter* litigation to further the goals of social movements.[2] The relationship between activist intervener groups and the Court is central to explaining the importance of advocacy scholarship in the legal community. This relationship is at least

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[1] Sherene Razack, *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto: Second Story Press, 1991), p. 37. As cited in Ian Ross Brodie, *Interest Groups and Supreme Court of Canada* (Calgary: University of Calgary Doctoral Dissertation, 1997), p. 22.

[2] F. L. Morton, "The Charter Revolution and The Court Party," in Patrick Monahan and Marie Finkelstein, eds., *The Impact of the Charter on the Public Policy Process* (North York: York University Centre for Public Law and Public Policy, 1993), p. 194.

partly the result of the difficulties the Court has in interpreting the *Charter* without adequate 'social information'. These difficulties have led to increased access to the Court for interest groups that are 'well-informed' about social phenomenon. Because of increased access, however, groups that address the Court find themselves in need of academic materials with which to support their 'societal observations'. Conversely, the Court seems to be in search of academic support for groundbreaking decisions, and interveners are often the vehicle for this support. In addition, information regarding the possible social impact of judicial decisions and vision-projections is sought by interveners and the Court; hence the importance of advocacy scholarship.

Indeed, legal academics producing advocacy scholarship seem to have relatively close ties to the activist intervener groups that are heard by the Court.[3] Many advocacy scholars staff important positions within these interest groups. Their research is difficult to distinguish from political action, as their scholarship informs and "supports their politics, and their politics in turn feeds their research."[4] The significance of this kind of advocacy scholarship seems to have increased because *Charter*-driven law is increasingly engaging areas of social importance, and this law is often without precedent. Morton writes that "[w]hile legal commentary has always been an important influence on the development of

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[3] Morton, "Charter Revolution," p. 197.

[4] Morton, "Charter Revolution," p. 194. Writing from an American context, Mary Ann Glendon, in a discussion regarding the advocacy scholarship of law professors, notes that the distinction between advocacy and scholarship may be collapsing altogether, bringing with it the possibility that all legal scholarship will become a form of advocacy (Mary Ann Glendon, *A Nation of Lawyers: How the Crisis in the Legal Profession is Transforming American Society* (Cambridge: Harvard University Press, 1994), p. 209).

jurisprudence, it has taken on added significance in the case of the *Charter*." This is because the *Charter* created a "legal vacuum" that "was quickly filled by an avalanche of new *Charter* scholarship. The Supreme Court has liberally availed itself of this new literature, explicitly citing it in support of its own *Charter* decisions."[5] The reliance of the Court on advocacy scholarship, especially in areas of law that are in early development, seems to have encouraged the perception among many activist legal academics that their work forms the vanguard of 'progressive law'. In this light, the production of scholarly legal narratives[6] for the consideration of those within the legal community, including the Court, almost becomes a moral imperative. Indeed, advocacy scholars are the King's counsellors, the recognized storytellers of the Court. Supreme Court Justice Claire L'Heureux Dubé maintains that important judicial "decisions [are] buttressed by professors and their writings . . . ."[7]

"The simultaneous appearance of numerous articles all supporting the same position puts judges and legal scholars on notice that there is support for the position advanced."[8] Indeed, the deliberate "[f]looding of the law reviews"[9] is a commonly noted feature of

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[5] Morton, "Charter Revolution," p. 194.

[6] Legal narratives are usefully thought of as advocacy positions that are part of or cohere with a 'world view'. Their adoption aims for a societal wide impact, even if the immediate legal objective appears to be limited.

[7] Claire L'Heureux-Dubé, "Oral Remarks," (Lecture, University of Calgary, 23 October, 1996) [unpublished].

[8] Morton, "Charter Revolution," p. 196. The unity of thought presented by legal academics may also have the effect of shielding the Court from an adequate appreciation of contrary societal positions.

[9] Karen O'Conner, *Women's Organizations' Use of the Courts* (Lexington MA and Toronto: Lexington Books, 1980), p. 26. As cited in Brodie, *Interest Groups and Supreme Court of Canada*, p. 22.

advocacy scholarship. Activists in the feminist leaning *Legal Education and Action Fund* (LEAF), a well-known intervener in *Charter* cases, realized the power of this strategy more than a decade ago when they sought "*to build a theory of equality which is accepted by academics, lawyers and the judiciary*," partly by encouraging legal activists to "writ[e] in respected law journals . . . ." Indeed, advocacy scholarship is seen by activists as a "means of disseminating and legitimizing such theories of equality."[10] Morton, describing the relative success of their litigation activity with regard to the 'Equality Clause' (section 15) of the *Charter*, states, "When LEAF lawyers go into court, they can cite law review articles and books that support their arguments for theories of 'adverse impact' on 'historically disadvantaged groups'."[11]

This study is the front end of a case study in advocacy literature on how legally to define the family. A full-scale case study of this advocacy literature would have two parts. First, it would set out and analyze the self-understanding of the advocacy scholarship; that is, it would delineate their project of reform and the reasons for pursuing that project through court-oriented advocacy rather than through the normal political process. Second, it would examine the actual reception of this advocacy literature by the courts. Has the literature been

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[10] M. Atcheson, M. Eberts and B. Symes, "Equality Rights and Legal Action," in F.L. Morton ed., *Law, Politics and the Judicial Process in Canada* (Calgary: University of Calgary Press, 1992), p. 241. Emphasis in the original.

[11] F.L. Morton, "Introduction to Chapter Seven: Interest Groups and Litigation," in F.L. Morton, ed., *Law Politics and the Judicial Process in Canada* (Calgary: University of Calgary Press, 1992), p. 232.

employed by interest-group factums, and, if so, how have its arguments been received by the courts? The fact that advocacy scholars think their activity can substantially reshape society is one thing; whether it actually does so is another. No doubt, different streams of advocacy literature on various subjects will differ in their impact, with some being embraced by judges, and others rejected as too far-fetched or outlandish. The actual impact of any particular stream of advocacy literature, in other words, is an empirical question, the answer to which depends on close analysis of the actual behaviour of interest-group interveners and the courts.

In the case of the advocacy literature under examination in this thesis, the first part of this double barrelled task provides plenty of scope for analysis. A full case study, encompassing both parts, would require a much longer and more complicated study, one more suitable to a PhD dissertation. Although the analysis undertaken here has clear implications, and generates obvious hypotheses, for follow-up research on the empirical question of impact, it does not focus on that question. This study, in short, is mainly an exercise in theoretical clarification; its aim is to unfold the self-understanding, the internal logic, of a stream of advocacy scholarship on the family.

The family has obviously become a major area of legal contention. Its boundaries and functions are being challenged in the legal realm. This reflects (and has an impact on) the larger cultural debate regarding, among other things, the place of family in society, the responsibilities of individuals who live in family and the question of who gets to be in family. For example, exclusion of homosexuals from family is accompanied by the denial of spousal and family benefits, including bereavement leave, the coverage of a partner's

medical plan and pension benefits for one's partner that are otherwise available to heterosexuals. Homosexuals have litigated these issues in the cases of *Canada (Attorney-General) v. Mossop*, *Andrews v. Ontario (Minister of Health)* and *Egan v. Canada*, respectively.[12] In addition, the constitutionality of denying a cohabitating couple spousal status, and thus limiting certain benefits to married persons, has been questioned repeatedly in the courts, with a recent example being *Miron v. Trudel*.[13] The disproportional allocation of benefits between natural and adoptive parents has been challenged.[14] Another area of substantial litigation regarding the family arises out of the financial problems which occur after family breakup, such as support provisions and the variation thereof.[15] What all this underscores is the amount of legal activity that is surrounding the family at present. In short, family is being litigated.

Given the burgeoning importance of family-related litigation and given the general growth of advocacy literature, one would expect to find advocacy literature on this subject. To test this expectation, the Canadian legal periodical literature was searched for articles on perhaps the central issue in family litigation, namely, how to define family. The data

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[12] See: *Andrews v. Ontario (Minister of Health)*, [1988] 49 D.L.R. (4th) 548; *Canada (Attorney-General) v. Mossop*, [1993] 100 D.L.R. (4th) 658; *Egan v. Canada*, [1995] 2 S.C.R. 513.

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

[14] *Schachter v. Canada*, [1992] 2 S.C.R. 679.

[15] See especially: *G.(L.) v. B.(G.)*, [1995] 3 S.C.R. 370; *Moge v. Moge*, [1992] 3 S.C.R. 813; *Willick v. Willick*, [1994] 3 S.C.R. 670.

retrieval systems used included hardcover law review indexes (e.g., *The Canadian Abridgment: Index to Canadian Legal Literature*[16]) and the online databases *Legal Tract* and *QuickLaw*. In addition, an individual search of many Canadian law periodicals was undertaken. The search period was limited to post-*Charter* articles (1982 to present). The guiding search terms used included 'family', and 'family' combined with the terms 'traditional', 'functional', 'anti-essential', 'alternative' and 'homosexual' (also 'lesbian', 'gay' and 'same-sex'). A decision was made to focus on legal literature that dealt with the issue of familial definitions. Case commentaries were generally avoided in favour exploratory articles, law articles which often develop or expand upon advocacy positions. In addition, given the focus on legal definitions of the family, the numerous articles on such issues as the custody of children and (male) violence within the family were bypassed, unless they spoke directly to the issue of 'what family is'. These criteria yielded approximately twenty law review articles.[17]

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[16] *The Canadian Abridgment: Index to Canadian Legal Literature* (Scarborough, Ontario: Thomson Canada Limited).

[17] These articles include: Katherine Arnup, "'Mothers Just Like Others': Lesbians, Divorce, and Child Custody in Canada," *Canadian Journal of Women and the Law* 3.1 (1989), pp. 18-32; Nicholas Bala, "The Evolving Canadian Definition of the Family: Towards a Pluralistic and Functional Approach," *International Journal of Law and the Family* 8.3 (December, 1994), pp. 293-318; Susan B. Boyd, "Expanding the 'Family' in Family Law: Recent Ontario Proposals on Same Sex Relationships," *Canadian Journal of Women and the Law* 7.2 (1994), pp. 545-563; Brenda Cossman, "Family Inside/Out," *University of Toronto Law Journal* 44 (1994), pp. 1-39; Janice Drakich, "In Search of the Better Parent: The Social Construction of Ideologies of Fatherhood," *Canadian Journal of Women and the Law* 3.1 (1989), pp. 69-87; Mary Eaton, "Patently Confused: Complex Inequality and *Canada v. Mossop*," *Review of Constitutional Studies* 1.2 (1994), pp. 203-245; Jody Freeman, "Defining Family in *Mossop v. DSS*: The Challenge of Anti-Essentialism and Interactive Discrimination for Human Rights Litigation," *University of Toronto Law Journal* 44 (1994), pp. 41-96; Shelley A.M. Gavigan, "Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian, and Gay Engagement to Law," *Osgoode Hall Law Journal* 31.3 (Fall, 1993), pp. 589-624; Didi Herman, "Are We Family?: Lesbian Rights and Women's Liberation," *Osgoode Hall Law Journal* 28.4 (Winter, 1990), pp. 789-815; Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity," *Queen's Law*

If advocacy scholarship is about 'flooding the law reviews' with a unified advocacy position, these twenty articles certainly have the markings of advocacy scholarship. To be sure, twenty articles may not be considered a 'flood', but the crucial issue here is not sheer numbers, but consistency of approach. If 'flooding' means significantly outnumbering the opposition, this stream of advocacy scholarship has definitely achieved that objective. Certainly those who write in law review articles about the manner in which the law should define family form a distinct and homogeneous group of activist scholars, with a remarkably consistent point of view. Although there is a lively debate about the family in the wider literature,[18] virtually no dissenting voices can be found in legal periodicals. The narrative

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Journal 19.1 (Fall, 1993), pp. 179-207; Margaret Leopold and Wendy King, "Compulsory Heterosexuality, Lesbians, and the Law: The Case for Constitutional Protection," *Canadian Journal of Women and the Law* 1.1 (1985), pp. 163-186; Debra M. McAllister, "*Egan*: A Crucible for Human Rights," *National Journal of Constitutional Law* 5.1 (November, 1994), pp. 95-108; Peter Rusk, "Same-Sex Spousal Benefits and the Evolving Conception of Family," *University of Toronto Faculty of Law Review* 52 (Fall, 1993), pp. 170-205; Bruce Ryder, "Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege," *Canadian Journal of Family Law* 9.1 (Fall, 1990), pp. 39-97; Bruce Ryder, "Straight Talk: Male Heterosexual Privilege," *Queen's Law Journal* 16.2 (Summer, 1991), pp. 287-312; Douglas Sanders, "Constructing Lesbian and Gay Rights," *Canadian Journal of Law and Society* 9.2 (Fall, 1994), pp. 99-143; Carl F. Stychin, "Essential Rights and Contested Identities: Sexual Orientation and Equality Rights Jurisprudence in Canada," *Canadian Journal of Law and Jurisprudence* 8.3 (January, 1995), pp. 49-66; Bertha Wilson, "Women, the Family, and the Constitutional Protection of Privacy," *Queen's Law Journal* 17.1 (Spring, 1992), pp. 5-30; Robert Wintemute, "Sexual Orientation Discrimination as Sex Discrimination: Same-Sex Couples and the *Charter* in *Mossop*, *Egan* and *Layland*," *McGill Law Journal* 39.2 (June, 1994), pp. 429-478; Alice Woolley, "Excluded By Definition: Same-Sex Couples and the Right to Marry," *University of Toronto Law Journal* 45.4 (Fall, 1995), pp. 471-524.

[18] See especially: Michèle Barrett and Mary McIntosh, *The Anti-social Family* (Thetford, Northfork: Thetford Press Ltd., 1982); Brigitte Berger and Peter L. Berger, *The War Over the Family: Capturing the Middle Ground* (Garden City, New York: Anchor Press, 1983); David Blankenhorn, et al., eds., *Rebuilding the Nest: A New Commitment to The American Family* (Milwaukee: Family Service America, 1990); Bryce J. Christensen, *The Retreat From Marriage: Cause and Consequences* (Lantham, Maryland: University Press of America, Inc., 1990); Bryce J. Christensen, *Utopia Against the Family: The Problems and Politics of the American Family* (San Francisco: Ignatius Press, 1990); Margrit Eichler, *Families in Canada Today: Recent Changes and Their Policy Consequences* (2nd ed) (Toronto: Gage Educational Publishing Company, 1988); William D. Gairdner, *The War Against the Family: A Parent Speaks Out* (Toronto: Stoddart, 1992); Christopher Lasch, *Haven in a Heartless World: The Family Besieged* (New York: Basic Books, Inc., 1977).

of family and sexuality forwarded by these advocacy scholars is uniformly critical of 'familial ideology'. Special criticism is reserved for the 'traditional family', or, in their words, 'the dominant discourse of oppressive familial ideology'.

Interestingly, the narratives these scholars produce focus almost entirely on what might be called the politics of homosexual identity, especially as it relates to institutions of public recognition (e.g., marriage, the family). That is, virtually all of this advocacy literature is concerned with the question of gay and lesbian rights. The central question regarding the family, in other words, is how to abolish the traditional hierarchy in which the heterosexual family is officially preferred to homosexual relationships. This question accordingly becomes the focus of this thesis. The advocacy literature promotes either a partial deconstruction of the traditional heterosexual family—in order to allow homosexuals to form official families—or in a more radical deconstruction that aims to abolish any meaningful distinction between family and non-family. This thesis tries to clarify this project of deconstruction.

Chapter one sets out the view of law on which advocacy scholarship appears as a powerful form of political action. What is it that makes advocacy scholars think that law reform, especially through Supreme Court decisions, will transform social relations? In brief, advocacy scholars embrace the view that law is much more than a mechanistic, instrumental device. They see law as a powerful pedagogic force, one that shapes psychic identities and self-understandings. Deconstructing traditional legal categories, such as the category of 'family', can, in this view, be a force for deconstructing (and then reconstituting) society itself.

Chapters two and three then analyse the two deconstructive projects found in the advocacy literature. Chapter two examines the more limited project of including homosexual relationships in an otherwise unchallenged ideal of family. This projects accepts most of the traditional functions of family and challenges mainly the idea that only heterosexual unions can fulfill those functions. This 'functionalist' approach seeks to make homosexuals eligible to marry, raise children (acquired either through adoption or artificial insemination), and receive all of the spousal/parental benefits and privileges available to heterosexual families.

Although the functionalist approach is present in the advocacy scholarship, it is not really the preferred policy orientation of this literature. As chapter three shows, the functionalist approach is, in principle, too limited for advocacy scholars. Although it makes the legal category of 'family' available to homosexuals, the functionalist approach leaves in place an invidious distinction between family and non-family. Homosexuals, like heterosexuals, might be able to marry and form families, but they are still held to the traditional ideals of long-term, monogamous relationships. The idea of better (family) and worse (non-family) sexual and social relations is retained by the functionalist approach. The advocacy scholars almost uniformly prefer a more radical deconstruction of family, one that involves the denial that there are *any* essential functions that define family, and that accord it a higher status in a hierarchy of social relations. To the extent that the advocacy scholars advance the functionalist position, they do so mainly as a strategic step to the ultimate anti-essentialist end. They do so with a certain caution and hesitancy, however, because they fear that functionalism could easily coopt or derail the forces of deconstruction, so that the apparent 'stepping stone' becomes a dead end.

Chapter four shows that the anti-essentialist project at the core of the advocacy literature constitutes such a far-reaching departure from traditional expectations about the family that it is likely to seem far too outlandish to be accepted by the general public. This fact underlies the necessity of pursuing such a radical project through a comparatively undemocratic arena, such as the courts, rather than through the normal democratic process, where it would make no headway. In fact, however, the anti-essentialist project is likely to seem too outlandish even for the judges. This fact, demonstrates the necessity of functionalism as a strategic (albeit dangerous) stepping stone. In other words, one might hypothesize that the second stage of a full-scale case study—the examination of the actual use and reception of this advocacy literature—would find interest-group factums emphasizing, and judges accepting, mainly the functionalist components of the advocacy literature. Although a systematic testing of this hypothesis falls outside the scope of this study, early impressionistic evidence certainly suggests that it is functionalism, not full-scale anti-essentialism, that is succeeding in the courtroom. No doubt this will be seen as a mixed blessing by the advocacy scholars.

Chapter 1

The Transformative Power of Legal Narrative

If one wants to transform society, why not man the political barricades rather than write in law journals? Why go to the courts to transform society? Obviously, legal activists perceive the law to be a significant transformational force, one that can reconstruct basic social structures, and perhaps one that offers less resistance than traditional political activism. Now, law can obviously transform social relations in the immediate instrumental sense of prohibiting or requiring certain behaviours. But legal advocacy scholarship rests on a much broader view of legal agency, namely that law has an educative or pedagogic function, that it shapes society by forming consciousness and thus identity.

In this view, law presents narrative visions of reality to society. The purpose of these legal narratives is to help make sense of or give meaning to our experience of the social world and thereby affect how we act in the world.[1] In Mary Ann Glendon's formulation, the law "tells us stories about the culture that helped shape it and which it in turn helps to shape."[2] Similarly, James Boyd White writes that we should regard "the law as a sort of social literature, as a way of talking about people and their relationships."[3] Like Glendon,

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[1] Legal stories are not necessarily 'fictitious', rather they can be thought of as attempts to produce persuasive speech. They are rhetorical vehicles for larger social visions. Stories are easily identified with and understood. Indeed, one's commitment to a set of principles usually occurs within and is supported by a larger narrative vision. Producing a rational and objective legal appraisal of reality may or may not be possible, but it is unlikely to persuade if it lacks the context that a story can provide. The context provided by stories helps to organize meaning into a coherent interpretation of reality, which can then be used to evaluate competing conceptions of reality.

[2] Mary Ann Glendon, *Abortion and Divorce in Western Law* (Cambridge: Harvard University Press, 1987), p. 8. Clifford Geertz argues that law "is this complex of characterizations and imaginings, stories about events cast in imagery about principles . . ." (Clifford Geertz, *Local Knowledge* (New York: Basic Books, Inc., 1983), p. 215).

[3] James Boyd White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (Boston: Little, Brown and Company, 1973), p. 243. The stories told by the law develop or encourage certain categories of moral and social significance that can adequately explain social events and experiences. These categories

White thinks that in talking about social life, the 'literature' of the law does not merely describe it but 'in turn helps to shape' it. In defining, organizing and interpreting the experiences of those engaged in social life, the law constructs imaginative visions of reality (stories) which may or may not cohere with current societal sensibilities but are certain to have an impact upon them. The way law describes our lives, White insists, influences "the constitution of the social world."[4] Similarly, Glendon contends that law is not merely "interpretive" but, more importantly, "constitutive."[5] Its 'constitutive' impact, she writes, is evident when the law "affect[s] ordinary language" thereby "influenc[ing] the manner in which we perceive reality"[6] and thus act toward it. In Clifford Geertz's terms, law is one of the most powerful ways in which we 'imagine the real';[7] and reality is partly constituted by how we imagine it. Advocacy scholarship represents an attempt to influence how the law imagines reality and thus the stories that the law will tell us. It thus has the eventual goal of influencing societal perceptions of reality.

As an example of the constitutive impact of law, consider the issues of domestic violence or drinking and driving. The law's hardening stance on these crimes can be seen

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will, in turn, go on to influence such things as the role-expectations within family, the argument goes.

[4] James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (Chicago: The University of Chicago Press, 1984), p. xi. Law composes stories that help us "to imagine principled lives [we] can practicably lead" (Geertz, *Local Knowledge*, p. 234).

[5] Glendon, *Abortion and Divorce*, p. 142. Geertz writes, "Law, even so technocratized a variety as our own, is, in a word, constructive; in another constitutive; in a third, formational." Law "is constructive of social life not reflective, or anyway not just reflective . . . ." It projects "visions of community, not echoes of it" (Geertz, *Local Knowledge*, p. 218). See also: Geertz, *Local Knowledge*, p. 232.

[6] Glendon, *Abortion and Divorce*, p. 9.

[7] Geertz, *Local Knowledge*, p. 184.

as influencing societal attitudes. While social activists concerned with these issues campaign to have the law address these areas more effectively, the law has done more than simply respond to the public will. It has listened to the arguments for a new approach to these problems and has produced legal narratives that go beyond enforcement to have an educative and even constitutive impact. So it is that activists speak of a heightened awareness of domestic violence or drinking and driving. The law has been part of a strategy to attach greater stigma to these offenses. Using authoritative legal stories in this way represents an attempt to act in the world in a way that affects our understanding of it. Thus the motive to produce narratives that are sanctioned by the law can be understood as arising from a desire to use law to influence our perceptions of social reality, to create and shape meanings, indeed to 'constitute' social identity. This *use* of law is especially of consequence if both law and society are 'communities' dependent on language and thus open to narrative (re)visions of the real.

For both Glendon and White, legal stories 'constitute' reality mainly by establishing the categories or labels into which we fit social experience, and through which we make sense of that experience. To categorize something is to 'name' it, and for Glendon "the way we name things is very important for the way we analyze them, feel about them and act towards them."[8] For example, to call someone 'mother' is important to how that person will be perceived. Societal expectations lead to the categorization of a mother as a nurturing person, as one who is intimately involved in child rearing. 'Mother', moreover, is a label that goes with 'father', another category of significance. When the law told the story of 'mother and father', it invoked and confirmed a host of expectations about appropriate sex-roles in family life. As the law replaces the gender-specific categories of 'mother' and

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[8] Mary Ann Glendon, "Changes in the Relative Importance of Family Support, Market Work and Social Welfare in Providing Economic Security," in M.T. Meulders-Klein and J. Eekelaar, eds., *Family, State and Individual Economic Security: Volume 1—Family* (Bruxelles: E. Story—Scientia, 1988), p. 4.

'father' with the single gender-neutral category of 'parent', it subtly tells a different story, one that is less rooted in sex-role differentiation. At the extreme, for example, the category of 'parent' can be made available to homosexual couples in a way that the labels 'mother' and 'father' cannot. Similarly, to evoke the story of 'husband' is to set up a category of significance and perception that helps us to distinguish between husbands and non-husbands. As in the case of mother/father, 'husband' exists because of the binary of husband/wife. A legal narrative using these categories tends to reproduce such traditional roles as husband/father, so that, for example, non-husbands are not readily associated as fathers; that is, fatherhood, in its 'proper' expression, is linked exclusively to the category of husband.

Categories of perception (names or labels) influence reality in part by setting up hierarchies of relationships. For example, legally recognizing the category of 'husband' elevates this identity above non-husband. The category of husband/father becomes the norm (the expected role for adult males) and non-husband a somewhat marginalized social identity. Likewise, the story of family brings with it the binary of family/non-family, and this binary leads to a hierarchy of family over non-family. The boundaries created by the story of family tend to set up certain role-expectations and 'marginalize' as non-family those who are unable or unwilling to fulfill these role-requirements. Family becomes the norm. The identities, norms and experiences fostered by the story of family are in a sense 'given' to us by the narrative. That is, by telling this story of family, law takes part in the formation of consciousness and identity.[9]

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[9] Alan Cairns makes a similar claim when he writes about the identity forming effects of constitutional law. For Cairns, constitutional law is about "big-picture narratives" (Alan C. Cairns, "Author's Introduction: Whose Side Is the Past On?," in Douglas E. Williams, ed., *Reconfigurations: Canadian Citizenship and Constitutional Change* (Toronto: McClelland and Stewart, Inc., 1995), p. 29) that produce "powerful symbolic statement[s] of inclusion or exclusion" (Alan C. Cairns, "The Fragmentation of Canadian Citizenship," in Douglas E. Williams, ed., *Reconfigurations: Canadian Citizenship and Constitutional Change* (Toronto: McClelland and Stewart, Inc., 1995), p. 179). The categories of recognition found within the constitution allow for "constitutional naming," and these descriptions or labels help to develop identity (Alan C. Cairns, "Constitutional Minoritarianism in Canada" in Douglas E. Williams, ed., *Reconfigurations: Canadian Citizenship and Constitutional Change* (Toronto: McClelland and Stewart, Inc., 1995), p. 126). Indeed,

To the extent that legal labels or categories constitute reality, one can change reality (at least gradually) by changing the labels or 'names'. Thus one way to undermine and transform the social expectations and identities entailed by the story of husband/father-wife/mother is to replace that story in law with the story of spouse/parent. To be sure, a shift in legal categories is likely to be resisted by those who were formed by, and remain attached to, the old categories. But even if one resists, one will nevertheless be engaged in a social world that has accepted or at least acknowledged the reconstituted narrative. The official entrenchment of new conceptions of reality cannot be ignored; only their impact can be resisted. For example, if the Court were to authoritatively rename the family to include homosexual unions, the shift in meaning could not be ignored nor could the existence of homosexual marriages be overlooked. Immediately, the process of educating the public to accept the Court's story of family would begin. At this point, the new distribution of meaning could be resisted and argued against, but the consequences of the story's symbolic and material impact would engage all in society; none could ignore it. White doubts that such resistance is forever possible if one finds oneself in a hostile culture speaking an alternative language and appealing to alternative stories. He writes, "One cannot maintain forever one's language and judgment and feelings against the pressures of a world that works in different ways, for one is in some measure the product of that world."[10]

Indeed, some argue that the transformative impact of new legal categories is likely to be much greater today than at any time in the past. In the past, the law had powerful competitors as a source of 'official' stories (e.g., religion, history, literature). What is special about modern legal discourse is that it seems to authoritatively name concepts in a way that

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minority rights activists equate constitutional non-recognition with possessing a non-identity (Cairns, "Constitutional Minoritarianism," pp. 129-130).

[10] White, *When Words Lose Their Meaning*, p. 4.

now private centres of power (e.g., the Church) no longer can. In Glendon's words, "it has become quite difficult to convincingly articulate common values by reference to shared history, religion, or cultural tradition." This, she maintains, is "both cause and consequence of our increasing tendency to look to law as an expression and carrier of" social values.[11] As other sources of norms decline, in other words, "law has a tendency to move into [the] vacuum." It "has assumed an increasingly prominent position in relation to other social norms." Moreover, because many increasingly take their "*moral* bearings to some extent from the law" any change in the law will carry "a moral charge," and will affect the understandings and actions of citizens.[12]

Glendon is a moderate social conservative on such issues as the family, and she thus worries about the increased constitutive power of law. Because law is constitutive, she writes, "we need to be especially careful"[13] in how we employ and deploy it, lest we damage important institutions of civil society such as the family. Given law's power, in other words, "it is incumbent on us to be attentive, intelligent, reasonable, and responsible in the 'stories we tell', the 'symbols we deploy', and the 'visions we project'."[14]

The same understanding of law that is a source of concern and caution for Glendon is a cause for celebration for social activists who wish to transform reality by altering the way in which the law induces us to 'imagine the real'. It is a radical version of this view of

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[11] Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991), p.3.

[12] Glendon, *Rights Talk*, p.102. This description of law seems to support the idea that those who produce legal narratives may have a disproportionate influence over our societal stories. See also: Glendon, *A Nation of Lawyers*, p. 284.

[13] Glendon, *Rights Talk*, p.102.

[14] Glendon, *Abortion and Divorce*, p. 142.

law that makes legal advocacy scholarship an attractive form of political action. Certainly, it is the view of law that underpins the advocacy scholarship on the family that is the subject of this thesis. For example, Jody Freeman, a contributor to that scholarship, writes, "The symbolic power of law is potentially too enormous, and its influence on culture too profound, to abandon it as a site of dialogue, confrontation, and resistance."[15] And while she does not believe "that a single legal decision, even from the Supreme Court, would change social attitudes and lead to the acceptance of non-conforming families,"[16] Freeman does write that "who is family and who is not is a product of legal among other, discourses; it is not a product of nature."[17] Because the family, in Freeman's account, is socially constructed (by 'discourses') and not based on biological considerations (e.g., begetting children), it follows that it can be radically deconstructed and reshaped by new legal discourses. The rest of this thesis analyses this project of deconstructing the family.

Conclusion

Advocacy scholarship, in its attempt to affect the story of family, represents an

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[15] Freeman, "Defining Family," p. 88. Indeed, many *Charter* cases regarding family are almost entirely about symbolism. For example, litigation regarding the extension of spousal benefits to same-sex couples often hinges on the perception that such exclusion causes economic disadvantages for gays and lesbians. Yet the law's treatment of homosexual couples as relatively autonomous individuals often leads to neutral or even positive economic consequences. In two gay-rights equality cases, *Andrews* and *Knodel*, the financial impact of the denial of benefits was negligible. With *Knodel*, the negative financial impact resulted in the loss of forty-two dollars per year in potential benefits. In the case of James Egan and John Nesbit, the denial of spousal benefits under the *Old Age Security Act* apparently resulted in a "positive financial impact"—yet they chose to pursue remedy (Wintemute, "Sexual Orientation Discrimination as Sex Discrimination," p. 448). See cases: *Andrews v. Ontario (Minister of Health)*, [1988] 49 D.L.R. (4th) 548; *Egan v. Canada*, [1993] 103 D.L.R. (4th) 336; *Knodel v. British Columbia (Medical Services Commission)*, [1991] 58 B.C.L.R. (2nd) 356. The remedy sought here is symbolic in nature. It is about social legitimation for gay and lesbian relationships and about challenging the legal and social categories (e.g., marriage, family) that presently exclude homosexuals.

[16] Freeman, "Defining Family," p. 91.

[17] Freeman, "Defining Family," p. 81

attempt to constitute an alternative vision of family.[18] The presumption is that law can transform basic social structures (e.g., family) through storytelling. This position seems dependent on the idea that *current* ways of describing family in law are best thought of as 'stories'. The argument is then made that present stories are inadequate given the needs of modern families. Advocacy scholars propose to develop and then present alternative stories of family to society via the law. These stories are meant to foster particular social meanings and identities, and accordingly influence the way one describes and experiences family. Central to this reorganization of the story of family is the removal of the distinction between heterosexual (family) relations and homosexual (non-family) relations.

The law (i.e., the Court) considers the merits of differing accounts of what the proper definition of family should be. It thus encourages the production of narrative descriptions of family (i.e., advocacy scholarship on the family). Law is, or should be, open to such arguments and agreeable to change if a particular narrative is persuasive. White argues that this process "makes our choice of language conscious rather than habitual and creates a moment at which controlled change of language and culture becomes possible."[19] Because of its openness to arguments regarding what narrative of family the law should embrace, "[l]egal argument is an organized and systematic process of conversation by which our words get and change their meaning."[20] It is a way that the present meaning of family can be solidified or altered. During this process of claiming meaning the legal storyteller creates

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[18] Advocacy scholarship represents an attempt to imagine the social fabric (e.g., family) in a certain way, so that the law might embrace these imaginings. Geertz maintains that, in turn, the law "propounds the world in which its descriptions make sense" (Geertz, *Local Knowledge*, p. 173).

[19] White, *When Words Lose Their Meaning*, p. 273.

[20] White, *When Words Lose Their Meaning*, p. 268.

a narrative about the family.[21] This narrative, in turn, aims to influence the "creation of social identity and meaning"[22] by using the transformative power of a law that tells stories.

This is what Clifford Geertz means when he writes that law "is part of a distinctive manner of imagining the real."[23] In the process of explaining the social world, we in society, and those in the legal community in particular, must choose how to contextualize incident.[24] For example, how do we choose to describe single-motherhood, the marriage bond, or what we expect the roles of family members to be? Signifying or giving meaning to that which we observe in society requires an account of reality, yet a narrative cannot be a pure reflection of reality in the social world. This is in part because there are competing conceptions of social reality from which to choose, each interpretation coming with its own way of imagining itself and its environment. Choosing one conception involves imagining

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[21] For example, one who sees the family as a place of oppression and dominance may use the supposed phrase of endearment 'The Ties That Bind' in a way that suggests that the ties of family do not so much bind people together in mutual and loving commitment as bind women to the regulation of men. The family (especially the nuclear family) as a 'Haven in a Heartless World' is rhetorically transformed into a haven for men to privatize violence and reproduce patriarchal relations. This all occurs within a world that in many ways remains deeply misogynistic. Family, as the focal point of oppression, is not a healthy place for women, so the story goes.

[22] White, *When Words Lose Their Meaning*, p. 239. Robert Vipond maintains that law, especially constitutional law, is part of "an ongoing process of cultural self-definition" (Robert Vipond, *Liberty & Community: Canadian Federalism and the Failure of the Constitution* (Albany: State University of New York Press, 1991), p. 9).

[23] Geertz, *Local Knowledge*, p. 184. Glendon maintains that "[l]ike a nation's art, literature, science, production relations, or history, its law is 'part of a distinctive manner of imagining the real'" (Glendon, "Changes," p. 4). Glendon quotes Clifford Geertz in the passage. Glendon also writes that the "law, like other aspects of culture such as religion, art, literature, science, history, and production relations, is an active part of a given society, contributing to making that society what it is and what it will become" (Glendon, *Abortion and Divorce*, p. 58). Geertz writes, "law is rejoined to the other great cultural formations of human life—morals, art, technology, science, religion, the division of labor, history (categories themselves no more unitary, or definite, or universal than law is)—without either disappearing into them or becoming a kind of servant adjunct of their constructive power" (Geertz, *Local Knowledge*, p. 219).

[24] Geertz, *Local Knowledge*, p. 181.

reality to be a certain way and accepting the story's distinct organization of meaning. Moreover, the law will often present an idealized representation of reality. In the past the traditional family was idealized in law. The law did not confine itself to stating what the family was, it presented a vision to which people should aspire. More recently, the legal community has adopted a more fluid (and many argue a more representative) concept of family, free from 'oppressive' family ties, as the ideal version of family. And, the argument goes, such constitutive narratives participate in the formation of consciousness and thus identity.

To be sure, the legal understanding of the social world is not formed without reference to the current actualization of social reality. This does not mean, however, that the law is necessarily captured by the reality it seeks to represent. Instead, the law can be seen as both a conforming and reforming force in society, alternatively describing social phenomena in ways that reinforce or alter that which is described. This occurs because in representing social reality in a certain way, the narrative of the law invariably supports or even adopts one version of reality, and in so doing, commits itself to normalizing alternative accounts of the social world. Judging by the amount of advocacy scholarship on the family, for those involved in producing narratives for the Court's consideration the promise of working in alliance with such a normalizing force as the law is an irresistible one.

Chapter 2

The 'Family as Functions' Critique of Traditional Family

The advocacy scholarship under consideration in this thesis seeks to dismantle the traditional hierarchy between heterosexual and homosexual relationships. This involves either reforming the legal definition of family or deconstructing it altogether. The more limited, reformist approach, which is the subject of this chapter, leaves intact many of the well-known 'functions' of the traditional family, but strives to liberate these functions from their historical ties to heterosexuality. Its aim is to adjust the story of family just enough to permit homosexuals to marry and 'have' children (through adoption or artificial insemination), forming families that, except for the sexual orientation of the 'spouses' and 'parents', look very much like traditional families. Although this approach dismantles the hierarchy between heterosexual and homosexual families, it leaves untouched the hierarchy between family and non-family.

The functionalist approach[1] tries to coopt much of the traditional story of family. According to functionalists, family is the bedrock unit in society. It is the primary socializing body of humanity, based on a caring relationship between its adult members and a nurturing environment for the rearing of children. Traditionalists would recognize much of their perspective in Supreme Court Justice Claire L'Heureux-Dubé's functional account of family. According to her, family involves each member caring for the other by providing

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[1] The functional approach to defining family posits that if a grouping satisfies certain legally conceived of 'functions of family' then it is a family. It involves the inclusion of currently marginalized 'family forms' into the definition of family. Few law review articles forward this perspective. Instead, advocacy scholars mention that 'others' in the legal community believe this to be a valuable approach to defining family. As chapter three will show, to the extent that there is support for this approach among activist legal academics, it is often predicated on the functional approach eventually leading to an anti-essential definition of family. However, the functional approach is currently the most viable alternative to the conventional role-defined family before the Court and thus deserves close examination, despite the ambiguous treatment it receives among activist legal academics.

for the emotional and economic well-being of family members. Family is a place of stability and character (identity) formation, a place to raise children and enable the transmission of core values between generations.[2]

Although L'Heureux-Dubé's perspective would be congenial to traditionalists in many respects, it does not fully capture the traditional view of family.[3] L'Heureux-Dubé's formulation contains not a word that would limit marriages to heterosexuals, not a word about husbands and wives, mothers and fathers—and that is precisely the point of the functional approach. For traditionalists, marriage is necessarily a heterosexual institution because the families constituted by marriage are fundamentally procreative or generative institutions. Thus marriage is a bond that transforms man and woman into husband and wife, and potentially into mother and father. Marriage is a social institution,[4] the primary purpose of which is the founding and maintaining of child-centred family. For functionalist

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[2] This vision of family is especially clear in L'Heureux-Dubé's minority opinions in *Moge v. Moge*, [1992] 99 D.L.R. (4th) 456 at 478 and *Canada (Attorney-General) v. Mossop*, [1993] 100 D.L.R (4th) 658 at 704-715. In her view, family need not be related, need not live together, need not contain children, but does need to embrace "commitment," "attachment," and "future obligation," and these obligations may include the 'socialization' of children (*Canada (Attorney-General) v. Mossop*, [1993] 100 D.L.R (4th) 658 at 705).

[3] For traditionalists, family is primarily an intergenerational social institution, not a personal association. That a couple shares an intimate life is not necessarily sufficient to make them family. Moreover, family is not just any union of man and woman that has a potential of producing children. To ensure a stable context for child rearing, traditionalists want family to be based on formal marriage (i.e., on a solemn commitment, witnessed by the state—if not also by God), and marriage requires a long-term monogamous relationship. The family in this view is also based on gendered roles: husband/wife, not just spouse; father/mother, not just parent. Here all kinds of relationships, including homosexual relationships, are excluded from family by definition. Since 'family' is a legally sanctioned (i.e., officially preferred) relationship, one that entails a series of benefits and responsibilities not available to other kinds of relationships, the traditional definition of family amounts to, among other things, an official, state-sanctioned preference of heterosexuality to homosexuality.

[4] Traditionalists posit that marriage and family exist objectively as essential institutions of society because they have social functions (e.g., procreation, socialization, the development of sexual identity and the nurturing of natural affections) that are essential to the health of any society. Because of its position in the production and upkeep of social norms, the 'problem' of family may attract the academic attention of social reformers who wish to alter societal values.

reformers, who wish to open the category of family to homosexuals, the functional roles inherent in the traditional family must be abstracted from this traditional heterosexual context. Thus 'spouse' should replace 'husband' and 'wife' in legal discourse, just as 'father' and 'mother' should become 'parent'. Moreover, the old heterosexual assumptions must be expunged from the definitions of both spouse and parent; what are gender neutral terms in theory must become so in fact.[5] The emphasis must be placed on familial roles such as nurturing and caregiving, not on the sexual identities or orientations of those who perform these roles. In essence, this functional approach "first identifies the [non-gendered] values underlying marriage or family, and then uses those values to identify the characteristics which distinguish a marital or family relationship from others."[6] It is just this kind of non-gendered definition of family functions that reformers of the family find so attractive in Justice L'Heureux-Dubé's discussion, and why they so often quote her.[7]

Although the functional approach to family abandons heterosexuality as the basis of family, it does not necessarily abandon sexuality itself. Functionalist reformers want homosexuals to be able to marry and form families; they do not claim that non-sexually involved roomates or siblings who share living quarters should qualify as family. Sexual

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[5] Justice Epstein, in a trial decision upheld by the Court of Appeal for Ontario, mandated "a declaration that the words 'a man and a woman' be severed from the definition of 'spouse'," and "the words 'two persons' be read into the definition of 'spouse' in section 29" of the *Family Law Act* of Ontario (As cited on page four of the Appellant's factum in *M v. H*) [unreported].

[6] Woolley, "Excluded By Definition," p. 477. This approach seems to be gaining popularity with the Court.

[7] Woolley, "Excluded By Definition," p. 477. See also: Bala, "The Evolving Canadian Definition of The Family," p. 312; Eaton, "Patently Confused," pp. 242-243; Wintemute, "Sexual Orientation Discrimination as Sexual Discrimination," p. 435. The functional approach to defining family recognizes also as family those who are in a long-term committed relationship, which is self-identified 'as a marriage' and is seen by others as such. Such family involves sexual intimacy, along with mutual care and support (Woolley, "Excluded By Definition," p. 477). Interestingly, this definition of family does not necessarily require the presence of children to make a grouping 'family'.

intimacy remains at the core of marriage. This does not mean that family *requires* a sexually intimate couple—a single parent with children would qualify as family—only that non-sexual adult co-habitation does not qualify as marriage.

Whereas sexual intimacy remains an important part of the definition of marriage, the social roles that flow from that intimacy in the traditional heterosexual family (e.g., mother and father) do not. Indeed, the functionalist family is more a psycho-sexual entity than an entity dependent on formal role-requirements. Essentially, family forms deemed acceptable are those that are *psychologically similar* to a normative concept of family built around stability (e.g., monogamy), child-rearing, nurturing or interdependence. Those who 'live as family' and 'care' for each other can undertake these obligations and thus attain family status.[8] The functional approach does recognize some roles (e.g., caregiver, socializer), but they have more flexible definitions and applications than those provided by the story of traditional family (e.g., father, mother). Therefore, despite the lingering influence of traditional family, legally recognizing caregivers and socializers will allow for more inclusive family. Yet there is no assertion made that more traditional familial categories must be abandoned. Nor is there an attempt to abolish the officially sanctioned, benefit-providing status of family. Rather, 'family' must expand to accept other groupings that perform the 'functions' of family. Specifically, advocates of the functional approach want to redefine the legal category of family so that homosexual relationships can qualify for its status and benefits.

The reformers rest their case for a more abstract, non-gendered definition of family on three interconnected propositions. First, they claim that procreation or procreative capacity is no longer (and never really was) a defining function of family; it follows that

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[8] Wintemute, "Sexual Orientation Discrimination as Sexual Discrimination," pp. 435-436. Here Wintemute cites the views of Supreme Court Justice L'Heureux-Dubé.

procreation (essentially a heterosexual phenomenon) must be separated from the story of family. In other words, although nurturing and socializing remain important family functions whenever children are present, the actual generation of children is no longer a core purpose of family.

Second, if procreation is no longer a basic function of family, the dominant ideal of traditional family is unable to represent adequately the diversity of family forms now present in Canadian society; it follows that the real essence of family must be defined as something else, something more hospitable to the homosexual family. Legal activists claim a redefinition of family is needed to bring the law into line with evolving reality. The crucial functions of family, they argue, are increasingly being fulfilled by a diverse range of associations that are nonetheless denied the status and benefits of family.

Third, functionalist reformers emphasize that sexuality is an immutable characteristic; that is, sexual orientation is biologically determined. If family does not require heterosexual procreation, and if homosexuals can fulfill all the other functions of family, why should they be denied the status of family because of a characteristic beyond their control, the arguments goes. Homosexuality is portrayed as an innate and immutable characteristic, thus making it fundamentally unfair to exclude homosexuals from a familial arrangement whose essential functions they can manifestly fulfill. Let us consider each of these three propositions at greater length.

Severing the Connection Between Family and Procreation

Procreation is central to the development of traditional role-expectations within family. Thus the project of problematizing the traditional family involves dismissing conceptions of the family based primarily on procreation or procreative capacity.[9] This

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[9] See: Bala, "The Evolving Canadian Definition of The Family," p. 309; Leopold and King, "Compulsory Heterosexuality," pp. 168-169; McAllister, "*Egan*: A Crucible for Human Rights," pp. 101-103, 106; Rusk, "Same-Sex Spousal Benefits," pp. 193-194; Ryder, "Equality Rights," pp. 84-88; Sanders, "Constructing Lesbian and Gay Rights," pp. 127-129; Wintemute, "Sexual Orientation Discrimination as Sexual

project is related to the goal of including non-procreating couples (e.g., homosexuals) within the definition of family. The functional approach criticizes the procreative criterion of family status because it is used to exclude homosexuals. It is the one function of family that homosexuals cannot readily satisfy. The functional narrative eliminates this requirement of family in part by creating the 'psychological parent' or, better yet, the all-encompassing 'caregiver'. Here the necessity or even the superiority of a biological link between parent and child is abandoned as a central story of family. More than this, however, functionalists question the very legitimacy and consistency of procreation as an important function of family. They seek to 'liberate' family from its heterosexual moorings.

According to functionalists, the predominant and even sacred situation of reproduction within the heterosexual marriage is challenged by such things as childless marriages. In arguing "that there might be an alternative vision of the family which is rooted in something other than the potential to procreate," activists first point to childless heterosexual marriages, either the result of incapacity or unwillingness to procreate, so that they might highlight the existence of a 'subversive' family form (i.e., non-procreative 'family') within the heart of heterosexual life. If procreative capacity is the heart of heterosexual familial ideology, it is a weak heart indeed, the story goes. Moreover, if the definition of marriage hinges on procreation, if this is what differentiates non-marriage from marriage, then the definition rests on an unevenly applied criterion. Unmarried people can, and do, choose to have children while "*many* people marry who are either unable to procreate or who have no intention of doing so." Because of the legal sanction of intentionally childless marriages, there is no "necessary link between encouraging procreation and the limiting of marriage to opposite-sex couples;" therefore, a "lack of procreative capacity cannot in and of itself justify the court's refusal to recognize same-sex couples' claim to be

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Discrimination," pp. 452-453, 473; Woolley, "Excluded By Definition," pp. 480, 517.

entitled to marry."[10] Moreover, if procreation is an overriding function of family and thus a reason to legally recognize marriages, then couples who do not intend to have children should not be allowed to marry. Only then might one be able to justify excluding homosexuals from family and preventing their marriages because of an incapacity to procreate, activist scholars argue.

Reformers of the family argue that "an ability to procreate has never been a precondition to capacity to marry." That is, a marriage is not preventable, or once enacted, voidable simply because of an incapacity to procreate. "[P]roof of fertility or of an intention to procreate has not been demanded of prospective marital partners, nor have post-menopausal women been denied the right to marry." Bruce Ryder continues, "The state has tolerated the severance of the link between sexuality and procreation so long as heterosexual dominance has not been threatened." Indeed, "[i]t is only when the courts have been confronted with the possibility of same-sex marriage that the ability to procreate has been elevated to an essential condition of the marital relationship."[11] Similarly, Debra McAllister writes, "Focusing on procreation as the defining characteristic of the family not only denies *the* reality of modern-day families; it leaves us with a limited and narrow vision of life and community which is worthy of state recognition."[12] Family, McAllister argues,

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[10] Woolley, "Excluded By Definition," p. 480. Emphasis added. Woolley uses the term *many* liberally. See also: Leopold and King, "Compulsory Heterosexuality," p. 168; Sanders, "Constructing Lesbian and Gay Rights," p. 128; Wintemute, "Sexual Orientation Discrimination as Sexual Discrimination," p. 473.

[11] Ryder, "Equality Rights," pp. 85-88. In his discussion of post-menopausal marriage, Ryder ignores the social benefit of rebuilding families that have lost a grandfather through death.

[12] McAllister, "Egan: A Crucible for Human Rights," p. 103. Emphasis added. Apparently the 'modern' family does have a single reality to which we should be true. What has happened to the pluralist vision of family? Additionally, is McAllister suggesting that *the* reality of modern families is childlessness?

is more "than the potential to procreate."[13]

The story told here by legal activists questions a 'stereotype' (homosexual couples do not procreate) and a consequence of accepting the stereotype as natural (homosexuals should not be allowed to marry) not so much by attacking the stereotype—for example, by pointing to artificial insemination[14]—but by demonstrating that *many* heterosexuals possess the same characteristic which presumably differentiates homosexual couples from heterosexual couples: childlessness, either by design or circumstance. This strategy is most important, for it means that gays and lesbians do not have to procreate to be family. They need not to fit into a traditional family norm that is unable to compel many heterosexuals to adhere to its ideal. Yes, the story goes, homosexuals are non-procreative. At the very least their patterns of procreation differ from those of the traditional family. But so does the reproductive behaviour of many heterosexuals. And since procreation cannot explain the reality of many heterosexual families, it cannot be the essence of family. With this approach to the 'problem' of procreation, marginalized family forms are protected more comprehensively than they would otherwise be if the dominance of procreation in familial ideology were left unchallenged. Instead, because procreation is severed from family by functionalists, homosexuals who will never have children are given a claim to family.

Still, it is important to note that although procreation and children are no longer essential components of family, children continue to play a role in many families, including homosexual families. While homosexual couples do not actually procreate as a couple, a lesbian may conceive through 'alternative insemination'. Adoption is also a possible way

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[13] McAllister, "Egan: A Crucible for Human Rights," p. 99.

[14] Referred to as 'alternative insemination' by lesbian activists. Some choose to attack the stereotype directly. For example, Freeman asserts the belief "that gay men and lesbians do not reproduce" is the result of a "reliance on blatantly inaccurate and negative stereotypes" (Freeman, "Defining Family," p. 62).

to de-emphasize traditional patterns of procreation while allowing for child-centred homosexual family. In both cases, one's sexual activity is no longer the only means to *have* children. It is also worth noting that reforming adoption laws to allow homosexuals to adopt their lover's child[ren] is seen as a *de facto* way to recognize marriages between same-sex couples. What happens to the relationship between the child[ren] and the heterosexual parent—including unknown sperm donors—is presumably not problematic for radical reformers of family. Advocates of reforming the family hope that these legal redescriptions of familial roles and identities will alter what society expects of family. That is, this alteration of the story of family is meant to change what it means to be family, not only for those who are 'marginalized' by present definitions of family but also for those currently living within family.

In sum, if the real essence of family lies not in procreation, then the exclusionary ideal of traditional family seems to lose much of its normative force. Functionalists argue that the basic values of family come from non-gendered psychological functions such as caring, support and nurturing. Mutual caring and support in a long-term committed relationship indicates family, regardless of sexual orientation. In addition, family often involves the nurture of children but is not necessarily child-centred. That is , although the functions of family can include the care of children, they are not limited to childcare. Thus a childless but mutually caring and nurturing homosexual couple can be family in precisely the same sense as a childless heterosexual couple. It is also argued that although the generation of children is necessarily a function of heterosexuality (even when it takes place through artificial/alternative insemination), the nurture of children is not. For all these reasons, it is argued, homosexuals can fulfill the 'essential' functions of family.

The Unrepresentativeness of 'Traditional Family'

In addition to separating family from procreation, reformers argue that the so-called traditional family is in fact highly unrepresentative of social reality. To this end Nicholas

Bala writes, "A more pluralistic and functional legal definition of the family is gradually evolving."[15] Traditional family no longer represents many of our living arrangements, we are told; it constitutes a narrow (even impoverished) vision of the functions of family.[16] For example, the "dominant image of family—a white, middle-class, heterosexual, nuclear family, comprising a wage-earning husband, an economically dependent wife, and their biological children"[17]—while supposedly being central to the social understanding of family, has "never accurately described the way in which the vast majority of people live . . . ."[18] Indeed, functionalists point to unmarried cohabitation, divorces, "'serial monogamy', and the growing formation of step-families" to call into question the idea that family is (or should be) based on the permanence of the traditional marriage bond. They argue that there is increasingly less support in society for the legal enforcement of "a single, religiously based conception of the family" and "much more willingness to tolerate a range of family forms,"

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[15] Bala, "The Evolving Canadian Definition of The Family," p. 293.

[16] Woolley, "Excluded By Definition," p. 472.

[17] Cossman, "Family Inside/Out," p. 28. See also: Boyd, "Expanding the 'Family'," p. 548; Cossman, "Family Inside/Out," p. 5 (ft. 6); Eaton, "Patently Confused," p. 240; Gavigan, "Paradise Lost, Paradox Revisited," p. 597.

[18] Cossman, "Family Inside/Out," p. 28. By way of criticism, only a few traditionalists might be expected to defend the supremacy of this ideal of the traditional family. Given its narrow definition, it is true that this family form is not dominant, nor, presumably, would most traditionalists want it to be, for this would make them racists, classists, sexists and bigots. Additionally, it is far from clear whether those who defend a concept of family based primarily on biological relationships and normative roles (i.e., father, mother and child[ren]) are necessarily supportive of an overly static interpretation of these roles. For example, there is no prescription in the concept of the nuclear family against a dual-income household (although there is no ideological commitment in favour of both parents working). In this case, it appears that some legal reformers of the family are willing to present a narrow and almost universally offensive definition of the traditional family in order to raise doubts about the representativeness of such family and the concept of a hierarchy of family forms. See Also: Rusk, "Same-Sex Spousal Benefits," p. 171 (ft. 1).

especially the step-family.[19] The result is that "there is clearly less legal emphasis being placed upon the pre-eminence of the traditional family unit."[20] Put simply, "a large number of Canadians do not live within such families,"[21] and "consideration and recognition should be given to the realities of familial relationships, rather than some idealized moral vision of 'the family'."[22] Moreover, such consideration and recognition should extend beyond, for example, the reality of step-families to homosexual unions. Advocates of the functional approach thus question not only the representative nature of the moral vision of traditional family but that of heterosexual family in general. Such legal activists argue that the exclusion of homosexuals from marriage and family is unfair and outdated because traditional views regarding marriage and family including, they maintain, a definition based on solely on heterosexuality, fail to take into account the present diversity of family forms.[23]

Yet much of the 'diversity' functionalists point to is occurring under the rubric of the heterosexual family. How does the diversity of heterosexual family forms (and the growing tolerance of them) support the homosexual claim to family? Because such diversity has led to the questioning of formalized and conventional requirements for inclusion into family, homosexuals can claim that 'we are like you' in all relevant areas, except our (immutable) sexuality. If a single-mother and her child[ren] are considered family why are two lesbians

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[19] Bala, "The Evolving Canadian Definition of The Family," p. 294.

[20] Bala, "The Evolving Canadian Definition of The Family," p. 302.

[21] Bala, "The Evolving Canadian Definition of The Family," p. 310.

[22] Bala, "The Evolving Canadian Definition of The Family," p. 312.

[23] Freeman, "Defining Family," pp. 61, 88, 95.

with children from previous marriages not family? Both satisfy the psychological criteria of family. The only difference is the 'irrelevant' issue of sexual orientation.[24] For the purposes of being family, traditional and heterosexual moral visions of the proper family are irrelevant as long as homosexuals accept the basic values underlying family. It is thus maintained that there are a plurality of ways to live as family while satisfying its functions, including living within a homosexual family.

As the diversity of heterosexual family forms increases so too does the diversity of ways in which to fulfill the functions of family. For example, because of a desire not to deny family status to cohabitating couples (a decision largely based on a presumption of dependency within heterosexual relationships), sexual intimacy within a 'committed relationship' is said to be a function of family; that is, something society should encourage and support. This relaxation of the criteria of inclusion into family has allowed homosexual couples in 'committed relationships' to claim family status. Thus the idea that there is no social justification for excluding homosexuals from marriage and family is tied both to the weakening of the traditional family ideal (which allows for a plurality of family forms) and the position that homosexuals can fulfill the increasingly flexible functions of family that result from the recognition of these family forms. Current familial ideology is 'unrepresentative' because it represents only the dominant image of traditional heterosexual family. It does not recognize that alternative (e.g., homosexual) family forms can satisfy the functional criteria for inclusion into family. It is claimed that the dominant vision of traditional family does not represent well the existence of alternative family forms nor the reality of their execution of the functions of family. In contrast, focusing on the psychological functions of family will allow for greater inclusivity and pluralism within

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[24] If procreation or procreative capacity is not required to be family, heterosexual family, in all of its diverse forms, only differs from homosexual family because of sexual orientation, and this difference is of minimal importance, we are told.

family, supporters argue. In this way, the functional approach seems to be allied with attempts to foster a more egalitarian family structure, a family form that is more 'responsive' to the needs of modern families. This is demonstrated by the emphasis on 'non-hierarchical' and psychological (as opposed to 'natural' or biologically given) family roles and functions.

The overall message is that the essential functions of family are increasingly being carried out by many kinds of relationships not captured by the traditional definition of family. Society is right to encourage families, because the essential functions of family are indeed socially important; but this official recognition (and the benefits that go along with it) should extend to all of the forms of relationships, including homosexual relationships, that provide the essential functions of family.

The Immutable Nature of Sexuality

Those who perceive family to be any grouping that can perform its functions tend to present sexual orientation as an immutable characteristic. They argue that the family has undergone substantial changes recently, to the point that homosexuals are now able to execute the basic functions of family. Changes to what are considered vital family functions have made family more accessible to homosexuals. For example, 'caring' and 'mutual support' are important categories of significance in the functional story of family. The implication is that role-requirements should be directed to the execution of these functions. Considering this, the argument is made that homosexual family is similarly situated to many heterosexual family forms. 'We are able, like you, to be family', the argument goes, 'except that we are excluded because of our sexual orientation', and sexual orientation is beyond everyone's control.

(Homo)sexuality is presented as a biological given because heterosexuality traditionally has been a central role-requirement for inclusion into family. The assumption was that a homosexual could only marry a heterosexual to become family. But if homosexuality is naturally generated (as heterosexuality is assumed to be), then such family

would strike out against a person's basic identity. The heterosexuality requirement is thus presented as unjust because it excludes from family otherwise 'qualified' homosexuals for an orientation over which they have *no control*; it leaves homosexuals with the unacceptable option of denying their natures if they want to be family. If a group can undertake the functions of family, why should an irrelevant but permanent characteristic exclude it from family status, they ask. Reformers argue that excluding someone from family because of a sexual orientation he or she cannot control is like denying someone the right to marry and form family because of his or her race. If the separation of procreation from family and the inclusive nature of family are accepted as truth, then it follows that homosexuals can fulfill the truly essential functions of family just as well as heterosexuals; and given the immutable nature of sexuality, they are excluded from the benefit-providing status of family only by an uncontrollable accident of birth, one perfectly analogous to such 'accidents' as skin colour or sex.[25]

Conclusion

The ideological dominance of traditional family is viewed by activist legal academics as the result of its existence in a particular time in history. This time is no longer here, we are told. Yet, although the traditional family is a said to be product of history, the functions of family are not. It is thus not legitimate to exclude from family those who execute its basic and unchanging functions. Moreover, procreation, traditional role-requirements and heterosexuality should not be included as *basic* functions of family. The message is that those who live 'as family' are best able to define it. Thus exclusive legal support for normative accounts of family based on traditional role-requirements should be discontinued. Legal recognition should be extended to all who function as family. Essentially, family is

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[25] For a discussion regarding the proposition that sexuality is immutable see: Herman, "Are We Family?," pp. 810-815; Leopold and King, "Compulsory Heterosexuality," pp. 182-184; Sanders, "Constructing Lesbian and Gay Rights," pp. 108-111; Stychin, "Essential Rights," pp. 54-65.

more pluralistic than it has been in the past, and the law should reflect this development.

This approach to the definition of family seeks inclusion and an end to stereotyping, not radical transformation. While the story retells our social experience in a way meant to encourage inclusion, it does so from within a fairly conventional view of family (e.g., it still has basic 'functions'). An attempt is made to highlight the existence of a marginalized (but sympathetic) group while "individual stories reveal the substantial social costs of the exclusionary policy, and also put a human face on the policy's victims."[26] Stories that "identify connections between the victim's experience and the audience's experience are the most effective at changing attitudes based on inaccurate stereotypes."[27] What is most important, though, is that this narrative works to transform society by "'marketing' gay people as 'the same' as straight people in relevant respects . . . ."[28] All marginalized experience which does not conform to the audience's (i.e., society's) experience, or is hostile to it, is hidden from view. Here functionalist reformers engage in 'community' censorship by presenting the homosexual claim to family within a minority rights discourse, such that it is not threatening to the prevailing social discourse. Because of this, more radical constructions of homosexuality, and the discourses that support such constructions (e.g., 'Queer Theory'), are deliberately muted.

While the functionalist approach attempts to eradicate the hierarchy between

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[26] William N. Eskridge, Jr., "Gaylegal Narratives," *Stanford Law Review* 46.3 (February, 1994), p. 614.

[27] Eskridge, "Gaylegal Narratives," p. 615. An example comes from *Egan v. Canada*, [1995] 2 S.C.R. 513. Here James Egan wished to have his partner of 45 years, John Nesbit, defined as a 'spouse' in order that Mr. Nesbit might receive benefits under the *Old Age Security Act* that are otherwise available to heterosexual couples. The story of Egan and Nesbit, by presenting their homosexuality in a 'heterosexually friendly' manner (e.g., highlighting their monogamous and long-term relationship) is calculated to elicit the sympathy and support of the dominant heterosexual culture.

[28] Eskridge, "Gaylegal Narratives," p. 620.

heterosexuality and homosexuality within the definition of family, it retains much else from the traditional structure of family. This approach leaves in place the basic distinction between family and non-family, with family still defined in terms of long-term stable sexual relationships. Legally, a functional definition of family leads to demands for the recognition of same-sex marriages and the inclusion of same-sex 'spouses' and 'parents' in whatever benefit schemes are available to their heterosexual counterparts. But advocacy of the functional approach seems to be driven by more than a desire for a particular policy outcome. The desired *symbolic* impact of this approach includes a reorientation of the ideals of family life and the social legitimation of homosexuality. Still, this reorientation is meant to foster greater acceptance of the plurality of family forms that perform the functions of family; it is not designed to lead to the elimination of the legal and social category of family.

Chapter 3

The Anti-Essentialist Critique of Family

While functionalism does not eliminate the legal and social category of family, that is precisely the aim (or at least the implication) of the anti-essentialist critique of family. Although functionalism denies that the family is 'naturally' heterosexual, it does not directly challenge the notion that the family has something like a natural or 'essential' form, a series of essential functions that distinguish family from non-family. In other words, while functionalism might portray the traditional family as a construction of social and legal forces, the largely psychological functions it ascribes to family remain lodged in nature. The functionalist narrative is one of inclusion, and is not deliberately transformational.[1] For anti-essentialists, by contrast, to maintain the distinction between family and non-family is to maintain an oppressive hierarchy, one that marginalizes many, if not most, homosexual relationships. Moreover, to call this distinction 'natural' by asserting that family has essential functions is pure myth-making.[2]

What is remarkable about the advocacy scholarship examined in this thesis is that it

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[1] In criticizing the functionalist approach, and a proposal to recognize Registered Domestic Partnerships (RDPs), Susan Boyd expresses the concern that "incorporating lesbian and gay partnerships into those laws, by whatever mechanism, does not appear to go far in the direction of social transformation" (Boyd, "Expanding the 'Family'," p. 555).

[2] For anti-essentialists, 'the family' is socially and legally constructed, not natural. Its constructed identity is historically and culturally specific. See especially: Cossman, "Family Inside/Out," pp. 9-10; Freeman, "Defining Family," pp. 48 (ft. 14), 81; Leopold and King, "Compulsory Heterosexuality," p. 163; Gavigan, "Paradise Lost, Paradox Revisited," p. 597; Ryder, "Straight Talk," p. 289. See generally: Herman, "Are We Family?," pp. 789-815; Rusk, "Same-Sex Spousal Benefits," pp. 196-200; Stychin, "Essential Rights," pp. 49-65.

is dominated by anti-essentialism, not functionalism. Although the functionalist approach set out in the previous chapter certainly appears in the literature, it is often presented as the less-than-adequate position of 'others'. At best, as we shall see later in this chapter, some advocacy scholars advocate functionalism as a dangerous, though perhaps necessary, intermediate stepping stone to the ultimate, and more radical, anti-essentialist goal.

Anti-essentialists argue that because the functional approach requires newcomers to the family to perform the same 'functions' that current families do, it requires conformity to a normalizing narrative of family. In other words, the functional story of family forces homosexuals to "behave in ways that make their relationships recognizable to heterosexuals."[3] For example, the goal of inclusion demands that arguments be presented in such a way as to demonstrate the similarities between homosexual and heterosexual relationships. In practice, the argument for inclusion is a rights-based one; that is, 'We should not be excluded from family because we are able, like heterosexuals, to satisfy its functional criteria'. Once these criteria are satisfied, any other reason for excluding homosexuals from family or marriage is presented as unnecessarily and unjustly discriminatory. Yet by arguing that homosexual unions are families of equal value, such couples are being compared to the standard of heterosexual marriage and family.[4]

In effect, to retain the 'essential' functions of the heterosexual family—even though

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[3] Freeman, "Defining Family," p.71.

[4] Freeman argues that homosexuals should not have to mimic heterosexual relationships to 'get into family' (Freeman, "Defining Family," p. 70).

these functions are detached from heterosexual procreation—is to continue to impose a heterosexual ideal on the homosexual community. True, homosexuals may no longer be asked to deny their sexual orientation—to 'choose' to become heterosexual—in order to marry and form families, but only those homosexuals who are willing to become 'heterosexualized' in every other respect will become 'respectable'; all others will continued to be marginalized. Thus the functionalist redefinition of the family is really a way of maintaining most of the traditional hierarchy between heterosexuality and homosexuality; it is a new but covert version of the old attempt to 'assimilate' homosexuals into heterosexual norms. Anti-essentialists, in short, are also anti-assimilationists; they argue that the price of social legitimation through inclusion is a loss of distinctiveness and a chance to create meaningful pluralism and diversity in sexual and familial matters.[5]

Susan Boyd, for example, argues "that recognizing (some) same-sex relationships as spousal would reinforce the dominant model of the family and create a hierarchy of relationships among lesbians and gays, some of which would be recognized and others not."[6] Boyd continues, "The positive symbolic benefits of legitimating (some) lesbian and gay

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[5] While the "[l]egal recognition of same sex couples" would undoubtedly "have an important symbolic value for this long victimized group" (Bala, "The Evolving Canadian Definition of Family," p. 312), and such legal recognition would "represent significant material, psychological, and symbolic benefits" for homosexuals (Freeman, "Defining Family," p. 73), there remains the concern that "the symbolism of marriage" (Sanders, "Constructing Gay and Lesbian Rights," p. 131) will bring with it the 'baggage' of restrictive emotional and sexual role-expectations. To be sure, denying the benefits of marriage and family 'sends hurtful messages to homosexuals' (Wintemute, "Sexual Orientation Discrimination as Sex Discrimination," p. 454). Yet, as a solution to problems of symbolism, inclusion "threatens to subsume the reality and uniqueness of same-sex families" (Rusk, "Same-Sex Spousal Benefits," p. 173).

[6] Boyd, "Expanding the 'Family'," p. 551.

relationships by calling them 'family' also must be balanced against the stigmatizing effects of those lesbian and gay individuals who are not in 'conjugal' relationships."[7] To include 'good' homosexuals within familial ideology might further marginalize gays whose relationships fall outside the norm. On the one hand, if 'good' homosexuals (e.g., committed lesbians with children) are recognized publicly as being married (even though they may be few in number), the symbolic victory would likely undermine certain stereotypes; on the other hand, an unintended result could be that those homosexuals who 'choose' to remain apart from the norm (and thus within the stereotype) would be subject to increased hostility. They might have to deny the truth about their unconventional relationships. Why split the homosexual community in the face of such opposition if all that is to be gained is public affirmation of the heterosexualized lives of a few gays and lesbians?[8]

In a similar vein, Alice Woolley maintains that the functional approach "has the problem of being contingent because [it is] dependent on the values of the given society or historical period being observed." Thus, under the functional approach, the common

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[7] Boyd, "Expanding the 'Family'," p. 555.

[8] The ultimate goal of anti-essentialists seems to be the destruction of all familial ideology, whether in its private or public form. This is partly because "[l]esbians and gay men who are not sexually monogamous, lesbians and gay men who are not in relationships, will be further marginalized" if family, in whatever its form, remains at the top of a life-style hierarchy (Cossman, "Family Inside/Out," p. 9). This is especially important because if the sexual pluralists are correct, "[g]ay and lesbian relationships are not functionally equivalent to heterosexual relationships—they are not necessarily based on sexual monogamy or emotional exclusivity" (Cossman, "Family Inside/Out," p. 8). In addition, Boyd expresses the concern that inclusion might bring more state control over recognized homosexual unions (Boyd, "Expanding the 'Family'," p. 561). And, as was mentioned above, homosexuals who choose to remain outside of marriage and family, especially for ideological reasons or as a consequence of a commitment to a sexually pluralistic lifestyle, might be open to increased legal stigmatization.

financial interdependency between a husband and wife with children could provide the reason for excluding many or all homosexuals from family benefits (and status). In other words, if the purpose of such benefits is to mitigate the consequences of financial interdependency, family benefits would not be available to homosexuals, at least not to those 'bad' homosexuals who do not exhibit similar patterns of financial interdependency. For Woolley, "whether the functional model actually allows for an expanded understanding of who falls within marriage will remain contingent on the views and observations of the judge or court applying it."[9] Clearly, given Woolley's discussion of the functional approach's inherent limitations, the current generation of judges should not be expected to undermine 'heterosexual privilege' by radically transforming family. Indeed, the functionalist approach can be seen as a way of maintaining heterosexual privilege, and continuing the attempt to assimilate 'good' homosexuals to heterosexual norms while excluding 'bad' homosexuals from family.

The anti-essentialist attack on the family consists of several interlocking claims or arguments. First, as already suggested (and as its names implies), anti-essentialism rejects all attempts to identify 'essential' functions of the family, and thus hierarchy between family and non-family. While functionalists deny that procreation is an essential function of family, anti-essentialists deny that there are *any* essential functions of family. Indeed, anti-essentialism rejects not only the categorization of relationships into family and non-family but the whole enterprise of categorization.

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[9] Woolley, "Excluded By Definition," pp. 481-482.

Second, as part of its attack on the 'naturalness' or 'essential' character of any categories, anti-essentialism rejects the naturalness of sexual orientation itself. Unlike the functionalists, who contend that homosexuality is as natural and immutable as heterosexuality, anti-essentialists insist that heterosexuality itself is socially constructed. The family, which (even in its abstracted functionalist form) represents 'heterosexual privilege', is sustained by the apparent 'naturalness' of heterosexuality, and can be deconstructed by exposing this 'naturalness' as myth.

Third, if the predominance of heterosexuality is socially constructed, not natural, it is possible to conceive a utopia in which heterosexuality and homosexuality would be matters of choice, and would in fact be chosen in more equal proportions. Sexual choice becomes the goal to strive for, and the standard to guide political action. The political action required is a politics of deconstruction, including especially the deconstruction of the family as the bastion of heterosexual privilege.

The Attack on Categorization

The anti-essentialist (and anti-assimilationist) narrative of legal academics represents a wholesale rebellion against categorization and categorical meanings. While functionalists challenge the fact that the category of family has historically been limited to heterosexuals, anti-essentialists see all categorization, including any essentialist definition of family, as inherently oppressive. Even the equality-based arguments underpinning the 'family as functions' narrative represent oppressive categorical thinking. Equality-based arguments identify marginal groups for the purpose of inclusion without questioning the ultimate legitimacy of the background category that has 'created' the deviancy which now seeks

social legitimation. To be sure, liberal human rights often allow the deviancy in question to exist unassailed, but usually present such "deviation[s] from the static norm" as *unfortunate* and *rare*.[10] Because of this, the norm "remains in place, permanently fixed, immutable, and 'undeconstructed'."[11] It "is neither questioned nor interrogated, nor is it perceived itself as an historically contingent category."[12] Thus it remains invisible and unassailed. Indeed, it comes to be seen as natural.

Indeed, allegedly 'natural' categories are the most dangerous of all. Family and sexuality remain 'natural' in the popular mind set when, in fact, they are malleable; that is, contingent on prevailing (and alterable) conceptions of reality. The danger of this 'essentializing' or 'naturalizing' of categories is that it "prevents the emergence of a vision of radical change in the relationship of norm and deviation (and the transcendence of that binary)."[13] For example, such 'mystification' tends to "den[y] the possibility of individual agency in determining sexual orientation and practice. Homosexuality becomes defined as

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[10] Stychin, "Essential Rights," p. 56.

[11] Stychin, "Essential Rights," p. 52.

[12] Stychin, "Essential Rights," p. 56. In 'reality', anti-essentialists argue, "the relationship between normality and deviance (family and not family) is hierarchical and *socially constructed*" (Freeman, "Defining Family," p. 81). Emphasis added. Indeed, constructions of normality and deviance such as family/non-family are "historical," not naturally-given (Gavigan, "Paradise Lost, Paradox Revisited," p. 597).

[13] Stychin, "Essential Rights," p. 59.

an innate inability to realize the heterosexual norm."[14] This is problematic for anti-essentialists, because they generally wish to celebrate the contingent and fluid character of sexuality and family. This requires them to deny that either sexuality or family has any essential or 'natural' functions. From this perspective, the functionalist approach, with its appeal to the 'natural', is a 'normalizing' account of family. Certainly, it is not a 'safe bet' for marginalized homosexual unions.

What is the solution according to anti-essentialists? It is certainly not to appeal to the discourse of minority rights. For within this narrative "there is little room to articulate a more radical claim about the *ideological* basis of the categories and process of categorization," especially the "*ideology* of compulsory heterosexuality."[15] In fact, Carl Stychin argues, "human rights law [e.g, the inclusionary narrative of the functional approach] is in part a strategy to normalize sexual orientation," normalization that "amounts to a 'desexualization' of a gay sexual orientation," because it requires "the 'we are *essentially* the same as you' approach."[16] This approach denies the distinctive and subversive quality of gay lives, he and others maintain. Indeed, inclusion arguments, by their very nature, affirm the

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[14] Stychin, "Essential Rights," p. 57. For social constructionists, such examples confirm their belief that "to be the categorizer or comparison-maker, is to occupy a position of power," for one categorizes (e.g., constructs meaning) "on the basis of *your* choice of characteristics . . ." (Iyer, "Categorical Denials," p. 185).

[15] Stychin, "Essential Rights," pp. 57-58.

[16] Stychin, "Essential Rights," p. 64.

value of 'the norm'. A much more radically "deconstructive"[17] enterprise is required. One must explode altogether the idea of essential or natural categories.

Socially Constructed Heterosexuality

The anti-essentialist attack on 'natural' categories even extends to such binaries as homosexual/heterosexual. While functionalists accept that heterosexuality is natural, insisting only that homosexuality is equally natural, anti-essentialists maintain that all such apparently natural binaries are social constructions.[18] Indeed, any unalterable core meaning or attribute that determines a thing or concept must be resisted if we are to allow for fluidity and, more importantly, the transformation of oppressive structures of dominance, because such structures very often avoid criticism by claiming a natural and unchangeable status. Witness the traditional family's claim to be the 'natural society'.

The notion that heterosexuality is itself a social construction is surely the most radical claim of the anti-essentialists. But it is crucial to the anti-essentialist project. Remember that

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[17] Freeman, "Defining Family," p. 92. This enterprise would undoubtedly include the contestation of "those definitional boundaries which have excluded us from family" (Cossman, "Family Inside/Out," p. 25). But notice that inclusion is not the goal of a 'deconstructive' analysis, for it leaves "intact the dominant, normative model of family based on marriage and heterosexuality" (Boyd, "Expanding the 'Family'," p. 556). Instead, the solution to the 'problem' of categories that exclude on the basis of what is 'natural' is to deconstruct such boundaries, such that no one is included or excluded.

[18] For example, anti-essentialist legal academics generally resist the dichotomized alternatives represented in the present conceptions of gender and sexuality. Such 'essential' or natural binary opposites as male/female or homosexual/heterosexual are 'myths', one is told (Freeman, "Defining Family," p. 48). See also: Stychin, "Essential Rights," p. 54. This seems to be a popular position among anti-essentialists. Ryder writes against the "binary system of heterosexuality" (Ryder, "Straight Talk," p. 289), as well as other dichotomized structures (Ryder, "Equality Rights," p. 43). Rusk writes against "dichotomous characterizations" (Rusk, "Same-Sex Spousal Benefits," p. 172), and Gavigan against 'bifurcated dyads' (Gavigan, "Paradise Lost, Paradox Revisited," p. 613). Finally, Cossman encourages resisting all "binary pairs," including that of family and non-family (Cossman, "Family Inside/Out," pp. 11-13).

the non-gendered 'functional' family is, from this perspective, just a more subtle way of maintaining heterosexual privilege and assimilating homosexuals to the heterosexual norm. The traditional family, in other words, is the "ideological centrepiece of heterosexual supremacy,"[19] a centrepiece that is maintained, not disloged, by the narrative of functional family.[20] That is, both the traditional family and its non-gendered functional version are ultimately grounded in the alleged naturalness of heterosexuality. The natural and unquestioned privilege of heterosexuality is justified "by reference to biology, nature, or some other source of apparent transcendent truth, like the Bible or the Oxford English Dictionary."[21] Armed with this belief, "heterosexually-identified people can avoid confronting their privilege by viewing heterosexuality as a norm dictated by biology or nature."[22] In fact, however, heterosexual privilege is not given by nature, but is the result of "heterosexual indoctrination."[23] In this view, the "essentialist based arguments" of (even

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[19] Ryder, "Equality Rights," p. 94.

[20] In Mary Eaton's view, the functional approach does nothing to problematize heterosexual privilege nor does it offer permanent "redress for those whose family forms are marginalized" by this oppressive force (Eaton, "Patently Confused," p. 244). This is at least partly because the functional approach attempts to normatively define the family (albeit in a vague and ambiguous way) thus avoiding, and even denying, that family and (hetero)sexuality are social constructions. And if family is not constructed, then the traditional family cannot be deconstructed. This is not a story that deconstructing anti-essentialists want to see the law embrace.

[21] Ryder, "Straight Talk," p. 294.

[22] Ryder, "Equality Rights," p. 44.

[23] Ryder, "Equality Rights," p. 81.

gay-rights) functionalists "fail to acknowledge the breadth and diversity of sexuality," because they do "not consider the mutability of heterosexuality, which remains the entrenched norm."[24] Such arguments, and the assumptions they rely upon, are central to the continuing marginalization of gay and lesbian sexuality, in addition to various 'non-traditional' manifestations of heterosexuality.

The claim that heterosexuality is socially constructed rather than natural is particularly clear in the thought of Bruce Ryder. "Heterosexuality," Ryder maintains, "is a problem." This sexuality dominates and colonializes all others because of "heterosexual privilege," which creates an "oppressor class" and is "sustained and rationalized in legal discourse."[25] "'Heterosexual privilege' refers to the range of perks and incentives with which heterosexually identified persons are rewarded for *conforming* to the dominant sexuality."[26] These rewards include the social affirmation of heterosexuality and the legal "construction of heterosexual privilege by conferring a vast range of rights, powers, privileges, benefits,

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[24] Stychin, "Essential Rights," p. 63.

[25] Ryder, "Straight Talk," p. 287. Herman writes: "Heterosexuality is problematic. As a set of dominant ideologies and enforced practices, heterosexuality is central to women's oppression" (Herman, "Are We Family?," p. 813).

[26] Ryder, "Straight Talk," p. 290. Emphasis added. More than this, Ryder maintains that heterosexual men "cannot avoid embodying and benefitting from heterosexual privilege if [their] primary sexual relationships are with women" (Ryder, "Straight Talk," p. 297). He continues, "it is not possible [for heterosexuals] to celebrate and honour [their] love for each other without further entrenching heterosexuality and heterosexual privilege." This is because one's marriage, family, even one's sexual behaviour as a heterosexual is privileged and thus excludes and represses other sexualities. Indeed, all expressions of heterosexuality, at least "in a heterosexist society that compromises sexual choice," are "politically problematic" (Ryder, "Straight Talk," p. 302).

and obligations exclusively on 'spouses', a legal category open only to married persons or cohabiting heterosexuals."[27] The suggestion is that without these socially constructed and legally enforced 'perks and incentives' the hierarchy between heterosexuality and other sexualities would lose its force.

Obviously the idea that heterosexuality is natural is abandoned here, for Ryder implies that if the social and legal supports which heterosexuals enjoy were to be removed, heterosexuality, as a dominating social force, would be dismantled.[28] Indeed, the 'naturalness' of the 'private heterosexual family form' is "largely shaped and defined by law." Ryder supports this claim by pointing to "[t]he amount of legal architecture that has gone into building the ideal family and supporting heterosexuality," which he believes is convincing evidence that heterosexuality, and heterosexual family, is legally constructed.[29] It follows that "if heterosexual privilege is socially and legally constructed, it can be socially

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[27] Ryder, "Straight Talk," p. 293.

[28] Ryder, "Straight Talk," p. 305. The dismantling of heterosexuality would presumably occur if legal support for any and all sexualities were to be discontinued. Citing an alternative strategy, Ryder posits that heterosexuality is "vulnerable to the conferral of social and legal support to other sexualities" (Ryder, "Equality Rights," p. 44). This latter position is quite similar to 'strategic functionalism', which is discussed below.

[29] Ryder, "Equality Rights," p. 47. Eaton maintains that the family does not have status, legal or otherwise, without legal intervention to support it (Eaton, "Patently Confused," p. 238). Leopold and King write that judges created "the legal fiction known as 'marriage', and defined it in a way that excluded same-sex couples" (Leopold and King, "Compulsory Heterosexuality," p. 168). Cossman argues that the "ideology of family is reproduced and reinforced in law" (Cossman, "Family Inside/Out," p. 10). And, Freeman maintains that "both legislation and judge-made law contribute to the social pressure to conform to a mythologized traditional family" (Freeman, "Defining Family," p. 45). Family, she argues, is largely the result of legal and cultural discourses—it is not natural (Freeman, "Defining Family," pp. 48 (ft. 14), 58-59, 81).

and legally dismantled."[30]

The claim that heterosexuality is socially constructed also makes an appearance in lesbian extensions of traditional feminism. Feminism takes the view that the "dominant model of family" which "has been reproduced and reinforced through law," "is heterosexual and nuclear in form, patriarchal in content."[31] Such "family is an oppressive and exclusionary institution,"[32] the "primary site of women's economic and ideological oppression."[33] For feminists, too, the heterosexual family is socially constructed, but the aim

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[30] Ryder, "Equality Rights," p. 44. By way of criticism, all this is rather like saying that legally recognizing and idealizing the parent-child bond proves that such bonds are not natural because they 'need' legal support. Saying one thing supports another is not the same as saying it creates it. Furthermore, legally recognizing and exalting the parent-child bond may be more about discouraging other natural tendencies (e.g., individualism, avoidance of parental responsibility) than legally constructing parenthood. Likewise, it seems entirely plausible that legally supporting family and marriage is meant to discourage other natural behaviours such as sexual permissiveness leading to fatherless families, rather than constructing heterosexuality. The vast majority of laws regarding family are altogether unconcerned with marginalizing or stigmatizing homosexuality. They are concerned with familial stability, largely because children are involved. To support one natural tendency (family) over another (non-family) is not necessarily to admit that family is constructed. It is to admit that family needs and deserves more respect and support than non-family. To the extent that homosexuals find themselves excluded from family, it may be because of their perceived association with non-familial behaviour.

[31] Gavigan, "Paradise Lost, Paradox Revisited," p. 597. The term 'patriarchal' is used by many feminists to describe traditional family and the role-expectations therein. It is meant to highlight the oppressive role-expectations that, some say, continue to exist in traditional family. The idea that men disproportionately benefit through membership in marriage or family constitutes the background of much of the relevant law review scholarship. The ambiguous spectre of patriarchy seems to inform much of the desire to reform the family. Yet the specific evidence of patriarchal relations in the family is most often lacking, with footnotes simply citing the research of other authors.

[32] Cossman, "Family Inside/Out," p. 1. This realization has lead former Supreme Court Justice Bertha Wilson to question whether society should continue to "regard the preservation of the family as an unqualified good" (Wilson, "Women," p. 29).

[33] Herman, "Are We Family?," p. 795. The roles fostered within the traditional family are particularly oppressive of women and children (Freeman, "Describing Family," p. 87). Indeed, most heterosexual relationships produce and are supported by "exploitation and oppression" (Ryder, "Straight Talk," p. 291). This oppression is all the more insidious because the traditional family ideal, much of which survives in the 'family as functions' narrative, has successfully integrated its mythologized role-expectations into the very

of reconstructing it is to overcome the hierarchy between men and women, not between heterosexuals and homosexuals. Thus while a discussion of 'patriarchy' poses the 'problem' of family as that of men (husbands) oppressing women (wives), it ignores marginalized groups such as homosexuals. For the purposes of constructing hierarchies of oppression and victimization, 'heterosexual privilege' is a more useful story to legal academics because it posits that heterosexual women benefit from their affirmed roles as heterosexuals (i.e., they are not marginalized lesbians), even as they are oppressed by heterosexual males. In effect, even as they are objectified and subordinated by male patriarchy, heterosexual women are rewarded by 'heterosexual privilege' for resisting their 'natural lesbianism'.[34] In other words, seeing the plight of those lower in the sexual hierarchy (i.e., gays and lesbians), heterosexual women believe they have no other choice but to accept the compulsory practice of heterosexuality.[35] Eventually, their consciousness is controlled to the point where they accept the naturalness of their heterosexual behaviour.[36] The message of anti-essentialists

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identities of its members. This ideological oppression manifests itself in violent domination. Gavigan sees family as a violent place for women and children, and a place to subordinate women. She links familial ideology to "wife assault and child abuse" (Gavigan, "Paradise Lost, Paradox Revisited," p. 614). Freeman maintains that the ideological dominance of the traditional family "helps maintain the invisibility of child and spousal abuse . . ." (Freeman, "Describing Family," p. 61).

[34] Leopold and King, "Compulsory Heterosexuality," p. 164.

[35] Ryder, "Straight Talk," pp. 288-289; Leopold and King, "Compulsory Heterosexuality," pp. 164-165.

[36] Leopold and King, "Compulsory Heterosexuality," p. 165. Yet it seems that some (i.e., lesbians) still find the agency to resist. Ryder finds as "valuable" the analysis that because of their rebellion against heterosexual norms "lesbians are punished for resisting heterosexuality, and . . . gay men are punished for not participating fully in its daily maintenance of women's subordination" (Ryder, "Straight Talk," p. 289). The value of the discourse of 'heterosexual privilege' in the production of victim/resister narratives for homosexual polemics is readily apparent here.

clearly is that heterosexuality and homosexuality are equally choiceworthy, and that they (perhaps along with other currently less common sexualities) would be chosen more frequently in the absence of legal and social pressure/stigma. Didi Herman writes:

> While it may be true that a heterosexual's sexual identity is not easily changed, this is not due to an inherent sexuality, but to the context of enforced and privileged heterosexuality that denies people choice. Notions of immutability set the homosexual *and* the heterosexual in a mould that is politically reactionary in that it denies to heterosexuals the agency to break out.[37]

Sexual orientation, in other words, is a matter of choice, not nature.

From this perspective, the functionalist appeal to the rhetoric of rights, especially equality rights, is inherently anti-choice. As we have seen, this functionalist rhetoric uses 'sameness' arguments to secure the protection and benefit of universal liberal rights. The message is 'We are like you and deserve to be treated equally'. One of the ways 'we are like you', moreover, is that 'our sexual orientation is just as fixed or immutable (i.e., beyond our control) as is yours'. "The position advanced is that we should not punish or tolerate discrimination against people who have no control over a *personal characteristic*."[38] Anti-essentialist homosexual activists decry the loss of control over their bodies that this position

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[37] Herman, "Are We Family?," pp. 813-814. It is interesting that the 'ideology' of immutability only prevents heterosexuals from exercising agency and 'breaking out'. Presumably homosexuals, by virtue of their *choice*, have already demonstrated their agency. Here the 'construction' of heterosexuality is not presented as a choice on par with the construction of homosexuality but as the result of oppressive layers of mystification, totally unrelated to biological considerations.

[38] Herman, "Are We Family?," p. 811.

entails. Here "[s]exuality becomes an area beyond human agency."[39] Many such activists see their sexual orientation not as an imposed biological fact but as a capacity or even a merit. This is especially true of "lesbianism [which] can be expressed politically as well as personally."[40] Moreover, homosexuals who are social constructionists necessarily have difficulty with sexuality not being a matter of choice. For if (homo)sexuality is immutable, then 'oppressive' heterosexual relationships might successfully be described as immutable.

On the other hand, if sexuality is a choice, then heterosexuality can be described as "a set of dominant ideologies and enforced practices,"[41] all of which are engaged in the oppression of women and children by heterosexual men. Presumably, recognizing and legitimizing the constructed or chosen disposition of homosexual relations can help to deconstruct the 'naturalness' of heterosexual relationships. Heterosexuals (mostly women) will be introduced by example to the postmodern world of 'agency through subjectivity', the argument implies. For this reason, the story of immutability (an objective discourse) remains problematic to anti-essentialists.

The Politics of Deconstruction: Towards the Utopia of Choice

Anti-essentialists maintain that one should be able to create or choose any number of family forms outside the influence of predetermined functional criteria, be they traditional

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[39] Herman, "Are We Family?," p. 813.

[40] Herman, "Are We Family?," p. 813.

[41] Herman, "Are We Family?," p. 813.

or progressive. No normative concept of family should be allowed to legally stigmatize those who choose an alternative (e.g., anti-essentialist) family form. Yet for this to be possible, essentialist familial ideology (e.g., the hegemonic traditional family) must be deconstructed; only when its anti-choice ethos is discredited can the utopia against objective family norms succeed. If left unassailed, its powerful influence will continue to prevent the exercise of free choice and radicalized agency within the realm of family. In order to accomplish this deconstruction of essentialist ideology, reformers of the family must convince society (or perhaps the legal profession in the interim) that there is no natural family form, despite the force of history, biology and the lived experiences of the majority of Canadians.[42] The underlying assumption is that presently "[f]amily is less a fact than it is a product of legal and social regulation and ideology."[43] Indeed, the law is central to the health of heterosexual familial ideology. The hope is to "expose the contingent status of dominant [familial] ideologies and suggest, implicitly, that resistance to them is possible."[44] To this end, Didi Herman argues "that law reform is a part of an ideological battle, and fighting over the meanings of marriage and family constitutes resistance to heterosexual hegemony."[45]

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[42] *Canada Yearbook 1994* (Ottawa: Minister of Industry, Science and Technology, 1993), p. 104.

[43] Freeman, "Defining Family," p. 59.

[44] Freeman, "Defining Family," p. 81.

[45] Herman, "Are We Family?," p. 803.

Resistance occurs when the boundaries of normality are challenged and demystified. For example, by undermining the idea of an immutable sexual nature, the possibility of a diversity of sexual identities is revealed. Society is forced to consider the mutability of heterosexuality and to justify why it should remain the entrenched norm.[46] Activists hope that the marriage/family "ideological centrepiece of heterosexual supremacy," as a way of categorizing human behaviour and potential, will itself be diminished by this argument, thus "fostering a plurality of sexual and familial arrangements."[47]

The anti-essentialist project is clearly transformational and deconstructionist. By challenging categorical thinking, by focusing "on fluidity, mutability, contingency and the relational character of all identities," it is meant to create a "disruptive influence."[48] Douglas Sanders asserts that this strategy can be seen "as part of a larger framework of the recognition of sexual diversity within the society."[49] Activists hope, it seems, that such recognition will lead to the abandonment of categories of natural sexual and familial behaviour and that the abandonment of such natural categories will allow for even more sexual diversity. For, "there will be neither freedom nor equality of sexual identity until the walls of heterosexual privilege are dismantled, and lesbians and gay men no longer suffer the assaults of

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[46] Stychin, "Essential Rights," p. 63.

[47] Ryder, "Equality Rights," p. 94.

[48] Stychin, "Essential Rights," pp. 64-65.

[49] Sanders, "Constructing Lesbian and Gay Rights," p. 99.

heterosexuality's natural pretensions."[50]

This "fundamental challenge to heterosexuality" involves anti-essentialists as the *de*categorizers of our society. It requires "the contestation of boundaries and categories, not only of sexual identity, but more widely to include the boundaries of normalcy itself." All sexual and social (e.g., familial) categories, practices and identities are to be made purposefully ambiguous and contingent in the narrative of the law. Their coherency and stability are to be constantly questioned in the stories produced by the law. The goal is "to highlight the failure of the categories fully to 'erect' boundaries around the subjects within their sphere; to challenge categorization, as a means of creating 'alternative social and political possibilities'." This will undermine, activists hope, the "enforced and privileged heterosexuality that denies people choice." The result: the way we live in family and the way we live out our sexuality becomes "tied to an emancipatory politics where group definition is understood not as essence, but as an ongoing process."[51]

Unlike the identities formed in the present context of oppressive hierarchies, the familial and sexual identities formed in the egalitarian utopia envisioned by the anti-essentialists would be freely chosen and self-constructed. Understanding themselves as contingent constructions, none would attempt to place themselves in a dominant position, falsely pretending to be natural, real or permanent. If the anti-essentialist story were to become the dominant story in law, in other words, the family that each of us 'created' (e.g.,

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[50] Ryder, "Equality Rights," p. 97.

[51] Stychin, "Essential Rights," pp. 61-65.

traditional, lesbian-centred, etc.) would not be supported by the law as a natural or permanent community. Presumably, the law would recognize all choices of family but hold us to none. Or, perhaps, the law would simply turn a blind eye to family altogether. In either case, family would be a truly 'nonbinding commitment'.

In effect, a logical outcome of the anti-essentialist position is the abandonment of family as a legal category. If there is no clear way to decide what family is, then what differentiates it from non-family? And why give legal privileges and benefits to family if it differs not from non-family? The hierarchy between the two is no longer meaningful. At this point some anti-essentialists openly wonder why the legal category of family should continue to be the basis for the distribution of material and symbolic benefits.[52] Remember, anti-essentialists deplore the existence of essential categories. One way of deconstructing a category is to let everybody into it, thus removing its normative force. Here the 'currency' of family is lost as it is expanded beyond an 'essential' existence. Some anti-essentialists seem to support this strategy. However, in this instance, the suggestion is to simply and immediately remove the category of family from the law. Its existence will become totally privatized.[53]

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[52] Indeed, many anti-essentialists maintain that "legislation should not distinguish between 'family' and 'not family' for the purpose of allocating benefits and burdens" (Freeman, "Defining Family," p. 86).

[53] There may be important reasons that anti-essentialists do not wish for the family to be abandoned as a legal category, even as they advocate removing its normative force. Freeman raises concerns that abandoning "family as an organizational category" might lead to the family's "reprivatization, a daunting prospect to the women and children who are often abused within it." Family, as a category, will grow stronger in the private realm (Freeman, "Defining Family," pp. 86-87). In addition, the elimination of the state's regulation of the family, because it will lead to the family's reprivatization, will make it much more difficult to socially engineer family in order to make it less oppressive and free people from the heterosexual categories (e.g., wife/mother) that thrive within it.

The *Mossop*[54] case illustrates this strategy. Jody Freeman, a legal scholar involved in the process of constructing the *Equality for Gays and Lesbians Everywhere* (EGALE) factum for *Mossop*, describes the shift in strategy away from 'sameness' arguments (aimed at social legitimation and deployed at the lower level courts) to an argument centred around directly demythologizing the ideal of the traditional family and insisting that law legitimize the plurality of family forms which *already* exist in Canada. However, the activist intervener coalition in *Mossop* went much farther than this position when it asked the Court "to eliminate the family relationship qualification for granting bereavement leave" and thus "define family in an open-ended way," the end result being the elimination of benefits being tied to family status.[55] Here a core (albeit functional) definition of family is abandoned in favour of an anti-essentialist meaning of family—"its meaning is subjective and shifting."[56]

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[54] *Canada (Attorney-General) v. Mossop* [1993] 100 D.L.R. (4th) 658. Brian Mossop was denied bereavement leave to attend the funeral of his lover's father. He claimed that this was unjust because his attachments to his family form were as strong as the average heterosexual couple's sentiments. Yet the main purpose of paid leave for a spouse upon the death of a partner's close relative is not necessarily to allow the spouse time to mourn. It might be associated also with the need to have one's spouse take on the task of caring for the child[ren] in the family as the more affected spouse deals with his or her immediate grief. Homosexual unions do not produce children.

[55] Freeman, "Defining Family," p. 55.

[56] Freeman, "Defining Family," p. 67. Freeman maintains that an anti-essentialist definition of the family will not only subvert objective accounts of the family but it will actually be *more* representative of social reality. She writes, "subverting dominant meanings and contesting representations of reality are a necessary part of any strategy aimed at infusing law with social reality, and ending subordination" (Freeman, "Defining Family," p. 92, (ft. 111)). This position is confusing until one realizes that a postmodern feminist such as Freeman believes that all reality is constructed. Therefore, 'infusing law with social reality' simply means having law recognize the homosexual construction of reality over more traditional 'representations of reality.' Neither account of reality is more representative of the 'truth' in the postmodern perspective.

While the individual litigants may have simply wanted an extension of family benefits to their household (i.e., they may have had no desire to 'subvert family'), Freeman asserts that simply including "gay couples as families only reinforces the already idealized conception of family without challenging it . . . ."[57] Inclusion may or may not lead to subversion. Thus she seems to favour the extension of material and symbolic benefits based on chosen attachments rather than family status (although some might choose to call such attachments family), even if the law begins to recognize homosexual unions as family. While recognition would represent a victory for some homosexuals it might leave the essentialist family intact. True dismantling of the 'oppressive' traditional heterosexual family and its functionalist equivalent may require the deliberate and speedy abandonment of 'family' as a legal category.

'Strategic Functionalism': Inclusion Leads to Transformation

As noted, while anti-essentialism directly influences most of the legal advocacy scholarship on the family, some activist scholars recognize that functionalist-based 'inclusion' arguments are more likely to meet with success in a court of law, and in the court of public opinion, than are the arguments of anti-essentialists. These legal scholars understand that it is unrealistic to expect judges to abandon the traditional family ideal in favour of a radicalized anti-essentialist vision of family. And yet, judges have already shown themselves to be fairly open to functionalist arguments. Because of this, there is a reluctant willingness on the part of some anti-essentialists to consider the idea that inclusion may in

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[57] Freeman, "Defining Family," p. 72.

the long run be quite subversive of family.[58] This position is fairly remarkable given the general view that the functional approach is dangerously assimilationist. Even while recognizing this danger, some anti-essentialists explore whether a recognized legal narrative of functional family might provide some possibilities for a gradualist subversion of family. To be sure, this position is not widely favoured, but some anti-essentialists think it to be necessary given the strength of present societal and legal myths regarding family.

These 'moderate' anti-essentialist legal activists suggest that the assimilation of homosexual unions into the heterosexual strongholds of marriage and family injects a subversive element into already weakened social units. These 'strategic functionalists' maintain that the goals of anti-essentialism are not at odds with inclusion if the ultimate end of inclusion is the transformation of family into a pluralistic and anti-definitional entity. The expansion of the functions of family so as to include homosexuals is thus seen by some anti-essentialists as pivotal to deconstructing the traditional heterosexual family. In this instance, the goals of gay liberation (a radical alteration of the basic mores and structures of society) are hidden within the language of inclusion, equality and choice that form the basis of the gay-rights movement. The implication is that the call for legal extension of marital and familial benefits to homosexual unions involves not so much the goal of inclusion but that of subverting the family.[59] Indeed, it is important to recognize that strategic functionalists

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[58] Herman, "Are We Family?," p. 801.

[59] What *is not* offered to society by legal academics is a legal narrative advocating inclusion that has the purpose of changing stereotypical attitudes in order to facilitate the legal and social acceptance of previously marginalized family forms. To conclude that activist legal scholars forward a model of family that is centred around the goal of 'inclusion' would be incorrect. This is demonstrated by the debate surrounding the

use the 'family as functions' narrative with the intent of developing a viable legal narrative of anti-essential family. Strategic functionalists focus on the expanding family as a place to attack the psychological and legal hierarchy that they argue constructs and maintains the social dominance of heterosexuality and heterosexual family. Their narrative advocates "inclusion and attempts to alter the category of family at the same time."[60]

Using a functional narrative to transform family along anti-essentialist lines involves legal redefinitions of the roles allowed within family. It is maintained that expanding the family forms sanctioned by law, in unison with attempts to 'democratize' family relations, will lead to more fluid role-requirements. Instead of using the law to openly alter the definition of family in order to cohere with an anti-essentialist/deconstuctionist narrative, this approach relies on family (and family members) to gradually abandon essentialist roles as alternative family forms and roles become available and legitimized in law.[61] For, "[i]n the face of this diversity, the notion of a 'core' definition of family becomes increasingly

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usefulness of the functional approach to the ends sought by anti-essentialists. For those studying the family through the lens of an activated and radicalized identity, inclusion strikes out against authenticity. Indeed, inclusion is only considered as a strategy to the extent that it will allow for the radical transformation of family.

[60] Freeman, "Defining Family," p. 74.

[61] The availability of alternative family forms will lead to the reduction of the private power and privilege centred in the traditional heterosexual family. Then heterosexual women will be able to exercise more choice in the construction of a familial form. For example, they will have a chance to become political if not personal lesbians. Moreover, Herman writes, "It may not be necessary to have intimate sexual relations with a woman in order to be a lesbian (self-definition plus the rejection of heterosexual privilege might suffice)" (Herman, "Are We Family?," p. 813).

unworkable."[62] For example, absent the exclusive support of law, it will be increasingly difficult for the traditional family to claim that it is the natural or essential family. Without this claim, presumably, free choice will be possible and a diversity of families and sexualities will spontaneously emerge.

In other words, there is a tactical consideration on the part of some activist legal academics to advance "'inclusion' arguments [as being] necessary to affect an initial shift in the status quo conception of family," before arguing for the total dismantling of the concept of family.[63] Here "rights litigation can be a useful *tool* in the pursuit of social change, as part of a broader strategy."[64] Strategic functionalists point out that inclusion will require the privileges and benefits presently available only to married and cohabitating heterosexuals to be extended to any who execute the ever expanding functions of family. Yet as the functions of family expand, so too do the myriad of family forms that are able to execute these functions. The vague and open ended criteria for inclusion into 'functional family' that are suggested by such legal activists, if actualized, would essentially give the family a contingent (anti-essential) identity.[65] In time, they argue, benefits and social recognition may not be based on 'family status' at all, for family will be seen (at least

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[62] Freeman, "Defining Family," p. 57.

[63] Rusk, "Same-Sex Spousal Benefits," p. 170.

[64] Freeman, "Defining Family," p. 95. Emphasis added.

[65] Rusk, "Same-Sex Spousal Benefits," p. 199.

legally) as an outdated category. Subversion, therefore, lies in the expansion of the meaning accorded to family and marriage. Indeed, strategic functionalists maintain that "recognizing marriage between gay men or lesbians would revolutionize its meaning."[66] Moreover, if gays and lesbians can be accepted into family without "negat[ing] the ways in which our relationships are different and subversive,"[67] then the dismantling of heterosexual familial ideology (i.e., traditional and functionalist accounts of family) is possible without the assimilation of the 'subversive homosexual' into an essential family form. Here "the strategy for inclusion is important and subversive . . . ."[68] Indeed, homosexual "demands to be let inside the family are fundamentally subversive." For example, one of the goals of radical reform of the family is to subvert "the traditional gender roles within the institution" of family.[69] This should occur because the shift in the meaning of marriage and family resulting

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[66] Freeman, "Defining Family," p. 73.

[67] Cossman, "Family Inside/Out," p. 1. In creating the identity of the 'subversive homosexual', activist legal academics ignore homosexuals who do not wish to undermine 'oppressive family' or heterosexuality. Such activists derisively call such people 'good' homosexuals, as if by seeking *only* inclusion they are denying their subversive nature or deconstructive *telos*. Advocacy scholars seem to assume that a "politicized ontology" (Jean Bethke Elshtain, *Democracy on Trial* (Concord, Ontario: House of Anansi Press Limited, 1993), p. 52) is operating within all homosexuals. The identity they envision for homosexuals is thorough-going—there are no vacations in the land of traditional values for the subversive homosexual. This is because one's private identity informs, even dominates, one's political activism (Elshtain, *Democracy on Trail*, p. 57). This is a life that politicizes some of our most basic and private attributes. It matters to social constructionists that homosexuals resist and deconstruct 'heterosexual privilege', not simply lead private lives. This radicalized legal narrative can be seen as a displacement of private interests into the public realm *en masse* in the name of 'authenticity' and 'identity'.

[68] Cossman, "Family Inside/Out," p. 3.

[69] Cossman, "Family Inside/Out," p. 7.

from the inclusion of formerly marginalized family forms will destabilize the hegemonic rule of patriarchy within the traditional family. Without exclusive legal recognition, heterosexual couples will no longer be the privileged sons and daughters (mostly privileged sons) of the state. Women will be able to freely choose their family form, if they choose to live in family at all. The deinstitutionalization of the traditional family will have a profound impact on gender roles, activists imply.

Strategic functionalists deny that inclusion of homosexuals under the rubric of marriage and family would both legitimize the oppressive concept of essentialist family (especially the traditional family) and lead to the loss of the distinctiveness of homosexual unions. On the contrary, Peter Rusk writes: "As a result of fighting stereotypes and seeking inclusion, advocates of lesbian and gay rights will fundamentally transform the social and legal conception of what constitutes an appropriate family unit. As it becomes more pluralistic and inclusive, 'the family' will become a less oppressive institution."[70] To be sure, Rusk's position is not strictly anti-essentialist. On the surface he advocates a more pluralistic and egalitarian family, not anti-essential family. However, Rusk confidently asserts that 'stereotypes' regarding the inability of homosexuals to bear children and the inappropriateness of polygamy in marriage may well be abandoned because of the validation of same-sex couples.[71] The 'distinctive' choices of some homosexuals will be protected even as they define themselves as family, because family is to be transformed into a less

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[70] Rusk, "Same-Sex Spousal Benefits," p. 173.

[71] Rusk, "Same-Sex Spousal Benefits," p. 172.

oppressive social entity, partly by accepting such things as polygamy in marriage. Although Rusk writes of 'inclusion' and 'pluralism', his view of a fundamentally transformed family seems well on its way to an anti-essential definition.

In sum, what is being sought by strategic functionalists is nothing less than social legitimation, a goal most easily accomplished by demanding the "sanctioning of same-sex relationships by the state [which] would imply a high degree of social legitimation of these relationships."[72] Nevertheless, such activists generally warn that they must not seek recognition if this means assimilation. It is feared that a hierarchy of 'good homosexual families' and 'bad homosexual non-families' will be set up.[73] In order to avoid this, the family must undergo radical transformation. It must be transformed into a social unit without normative force. Indeed, "recognizing the full diversity of lesbian and gay relationships" *requires* a "fundamental degree of social transformation and a reordering of laws and social policies,"[74] especially as these laws and policies relate to family. Presumably, this process of transformation will occur in two stages. First, an equality-based rights argument will be used by advocates to push for inclusion within family. Once this goal has been accomplished, a 'freedom of choice' argument will be brought before the Court in an attempt to persuade the law-makers to expand what is allowed for in marriage

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[72] Rusk, "Same-Sex Spousal Benefits," p. 203.

[73] Freeman, "Defining Family," p. 71.

[74] Boyd, "Expanding the 'Family'," p. 556.

and family. This is the strategy of those who believe inclusion might well lead to transformation. Then distinctive 'gay life-style' choices, such as polygamy, will be accepted within the family setting.[75] And once such things are accepted for one minority group, those in the 'larger community' (e.g., heterosexuals) will be able to claim similar 'rights'. Any essential definition of family will not be able to survive such internal pressures. Hypocritical and oppressive heterosexual familial and sexual norms will most assuredly be abandoned.

Conclusion

According to anti-essentialists, family should be a community of individuals free from legally and socially imposed visions of its basic functions and values. Family should be opened to all those who define themselves as such (e.g., two sisters, a grouping of friends or a lesbian separatist commune). This requires more than simply having the law treat all family forms equally. It is necessary to attack the 'naturalness' of heterosexual privilege, which allows heterosexual ideology to categorize what family is and is not. For it will not be possible to allow for free choice in the areas of family and sexuality until the myth that heterosexual family is the 'natural' family form is abandoned. Indeed, the idea that there is any 'natural' family form or sexuality is disregarded by anti-essentialists. In fact, they maintain that the legal hierarchy represented in the family/non-family binary opposite should be abolished altogether. This position has led some anti-essentialists to further posit that family status may no longer be a useful way to discriminate between who should or should not receive the legal and governmental privileges and benefits traditionally associated with

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[75] Rusk, "Same-Sex Spousal Benefits," p. 198.

supporting family over non-family. They maintain that the privileges and benefits associated with family status should be eliminated. It is a short distance between the position that there should be no essential definition of family and advocating the outright elimination of the legal category of family.

The critical bite of the anti-essentialist story of family extends well beyond the claim that the traditional family can no longer adequately represent the reality of all family forms. More than this, it seeks to transform many of the basic assumptions we have about and the meanings we ascribe to family. Here a deconstructive analysis is required, one that offers a critical or transformational edge with which to assail heterosexism and heterosexual privilege. The naturalness of 'essential' family, its role-expectations and functions, in addition to the ('oppressive') legal and social narratives that sustain such family must be exposed as custom and convention, and then dismantled. Family is to be a social entity without defined roles, functions or customs. Families will construct themselves—any construction of family is family, for family has no essential definition or function. Besides, why would marginalized groups (e.g., gays and lesbians) want to submit to a universal conception of the family when familial ideology has traditionally been used to oppress women and repress (homo)sexuality?

This is why anti-essentialists argue against the inclusion of homosexual unions into family even if they execute the functions of family. To do otherwise would be to commit to the story that family has essential functions, functions that distinguish family from non-family and to which family members must be true. Adherence to such a story might allow for the entrenchment of oppressive role-expectations. Moreover, if homosexual unions are

recognized as family, gays and lesbians could become subject to these role-requirements.

Some argue, however, that the strategy of *using* 'inclusion' arguments to legitimize homosexual unions and thus radically reform the family and the strategy of abandoning any notion of family status in favour of constructed relationships that fall outside of the family/not family dichotomized hierarchy have important objectives in common. Both seek to deconstruct and demythologize the myth of the essential family. There is some disagreement regarding how this can best be accomplished; however, this disagreement does not seem thorough-going. For example, 'inclusion' arguments can be used to advocate the extension of benefits to homosexual unions in the interim, and once the concept of family includes a variety of alternative family forms the extension of benefits based on family status may no longer make sense. Thus the inclusion strategy may well lead to the effective dismantling of distinctions in law based on family status. The 'sameness' or 'inclusion' perspective does, nevertheless, conflict to a degree with the idea that one can choose one's family form. This is because 'sameness' arguments generally accept that sexuality is immutable. Some advocates of radical reform to the family maintain that appeals to the Court based on the immutability of homosexuality might actually support the claim that heterosexuality (and by implication the heterosexual family) also has an immutable nature. If this claim is accepted generally, the ability to construct alternative family forms free from the dominating influence of heterosexual familial ideology may well be lost. Given the desire of such activists to have law reflect and legitimize a 'social reality' that is informed by a plurality of constructed families from which we choose a family form (if we choose to live in 'family' at all), the idea that any form of family is immutable or essential must be

avoided.

Do the proposals offered by anti-essentialists 'studying' the family constitute a narrative? A story is being told. Role-defined family is problematic, especially because it restricts the freedom to construct family and sexual identity free from traditionally oppressive categories such as wife/mother and husband/father. One is told that such freedom is of great value, and no 'side-effects' are mentioned. Family is presented as a choice, not a community. And freedom of choice requires that no one choice (e.g., to construct family) limit future choices (e.g., to leave family or construct another). Here 'diversity of choice' is a self-evident good; sexual diversity is presumably no more problematic than culinary diversity, unless one 'chooses' an oppressive familial or sexual form. Then again, such a life-style (e.g., legally and socially enforced heterosexuality) is not the result of a true choice; it is the result of mystification. One must then adopt the project of demystifying and deconstructing.

Chapter 4

The Advocacy Scholars vs. the Public

Legal academics 'studying' the family have 'flooded the law reviews' with advocacy scholarship informed by anti-essentialist ideology.[1] Their scholarship aims to demystify the allegedly 'natural' traditional family, thus clearing the way for an imagined utopia of sexual and relational freedom of choice. This involves somehow overcoming the 'false consciousness' of those (i.e., the vast majority) who have been mystified by the dominant ideology. Since the falsely conscious majority dominates the normal democratic process, the social transformation desired by the activist academics is unlikely to be achieved through that process. Indeed, the radicalized vision of family offered by anti-essentialists would undoubtedly encounter fatal resistance if it were to be forwarded in a venue controlled by those suffering under the very mystification to be overcome. This is why anti-essentialists hope to achieve their aims through the judiciary, an institution designed precisely *not* to be responsive to public opinion.[2] But judges, too, have been formed by traditional society and are thus likely to resist a full-scale anti-essentialism. This explains why, for all its cooptive

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[1] That some anti-essentialists *strategically* support the functional approach does not negate their largely unified opposition to any essential definition or form of family.

[2] Indeed, the Court is often presented as being a sobering influence on society, one that is not persuaded by public passions and thus is a bulwark against the excesses of majority rule. An alternative interpretation to the 'guardians of society' view of the Court portrays the judiciary as part of a "vanguard elite" that is involved in the realization of "the egalitarian project." Here the Court does not simply protect against majoritarian excesses, it actively seeks to shape society. In this view, the judiciary must remain somewhat aloof from the social environment it is attempting to transform. This is why social activists often favour "the undemocratic elitism of judicial review" (Rainer Knopff and F.L. Morton, *Charter Politics* (Scarborough, Ontario: Nelson Canada, 1992), pp. 247-248.

and assimilationists dangers, functionalism is more likely to succeed in the courtroom, and may have to be embraced by anti-essentialists as an intermediate step in a gradualist strategy.

There is, in other words, as anti-essentialists themselves would assert, a huge gulf between the anti-essentialist vision and the lived experience and aspirations of the majority of people. While anti-essentialists would argue that the experiences and aspirations of the majority reflect an unjust and oppressive false consciousness, the majority is likely to respond that the anti-essentialist project represents the imposition by an elite of an unrealistic and ultimately destructive utopia. The previous chapters have articulated the views of the activist scholars. To fully reveal the extent of the gulf between the core position of these scholars (anti-essentialism) and more widespread and traditional perspectives, this chapter looks across the gulf from the other side; it examines the anti-essentialist project from the perspective of those whose consciousness that project wants to transform. From this perspective, what is remarkable about the anti-essentialist vision is what it ignores or leaves out. So significant are the omissions, in fact, that a traditionalist might well suggest that it is the anti-essentialists who suffer false consciousness as a result of their own self-mystification. By showing just how unbridgeable the gulf between the two visions is, this exercise reinforces the conclusion that the anti-essentialist vision could not be achieved through ordinary democratic politics, and thus underlines the importance to the anti-essentialist project of courtroom politics, and of strategic functionalism as a cornerstone of that politics.

The Gulf Between Traditionalism and Anti-Essentialism

For anti-essentialists, the abandonment of role-defined family is unproblematic. The

connectedness and rootedness long associated with the intergenerational nature of traditional family is reduced and distorted by a discussion of family that focuses almost entirely on oppression, domination and violence. Gone is a consideration of marriage and family as the place to teach self-restraint and self-control, presumably because these are forces allied against the 'free' exercise of human agency. Also ignored is the model of family as a place to learn how to live in community; for example, as a place to prepare for non-familial relationships such as teacher/student or employer/employee.[3] Instead, the central focus of anti-essentialists is on family as a political entity. Family is seen as a place to cultivate radicalized public identities and to resist 'private' forms of oppression. Activists argue that traditional family's mythologised existence is central to the cultural condemnation of homosexuality and the marginalization of homosexual family forms. Thus its dominant place in society must be deconstructed. That most Canadians believe in the value of traditional, two-parent family is taken as further evidence of the power of the 'natural family myth,' and the need to demystify and deconstruct what is for many the central meaning in their lives. No attempt is made to account for the popularity of traditional family beyond attributing it to mystification, patriarchy, and heterosexual privilege.

Anti-essentialist familial ideology speaks out against the public affirmation of the traditional family, for such public recognition implies a hierarchy of family forms and family relations which has, activists argue, led to marginalization and allowed for oppression. The naturally-generated heterosexual family, and our experience of it, must then be undermined

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[3] It is worth noting that the functionalist approach attempts to foster these functions of family.

and subverted, given the political goals of radical reformers of the family. The suggestion is that the present story of marriage and family no longer represents us adequately to ourselves. In order to justify such a position, however, family is given no life of its own. That is, no intention other than exclusion, subjugation and oppression is afforded to the dominant conception of family.[4] That such family might be directed towards the emotional, spiritual and economic *security* of its members is ignored altogether or taken as evidence of the systematic ordering of familial relations in the service of the ideology of *dependency*. Moreover, those involved in traditional family are treated as moral imbeciles, for although choice is praised, *their* choice is regarded as the result of mystification. What this says about legal academics' respect for the moral agency of the average Canadian is troubling. Indeed, their advocacy scholarship fails to address "the role of stable familial structures in the process of human creation and moralization, the place of stable sexual identity in the preservation of marriage, and the place of reaching out to the sexual 'other' in the order of creation."[5]

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[4] Indeed, the 'oppression/liberation' interpretive filter pervades much of the anti-essentialist analysis of family. Their want to liberate the mystified allows activist legal academics to offer us a description of our lives, the purpose of which is to normalize the majority view to cohere with a marginalized legal and social narrative. We are offered a transformative story of family by a small but radicalized and vocal legal elite. Their anti-essentialist narrative, by ignoring the wants and needs of family members to have their 'natural affection' (myth or not) recognized and supported by the law, seems to talk not about people and their familial relationships but around them. Because of this, no serious account of the complexity of attachments within marriage and family is offered. Ironically, a counter-claim is made that heterosexual culture has failed to comprehend the complexity and depth of homosexual relationships.

[5] Jerry Z. Muller, "Coming Out Ahead: The Homosexual Moment in the Academy," *First Things* 35 (Aug.-Sept., 1993), p. 23. Given their orientation towards the familial choices of average Canadians, it is no wonder that anti-essentialists feel uneasy about the prospects of traditional political activism.

What we are offered instead is a sterile, anti-social vision of intimate community. The stability of our social, familial and sexual identities is placed at the mercy of the project of constructing contingent and fluid identities. The social dimension of personhood is to be left unprotected and neglected as the law sanctions and embraces an overly atomistic view of human life. Our lives are presented to us in the language of rights and liberation, not responsibility and community; and the latter seems better suited for describing the reality of family life. Indeed, anti-essentialists imagine a family to which few would, or even could, commit. And this is precisely the point, for commitment, at least as it is traditionally understood, presumes bonds and attachments that radical reformers of the family find oppressive. Motherhood, fatherhood, interdependence and children are four such bonds that are ignored or inadequately presented in the anti-essentialist vision.

Motherhood

The topic of motherhood is neglected by the advocacy scholarship on the family. Very little of what mothers do and are is represented in the story of family developed by activist legal academics. The story of mothers is lost within the oppression/liberation interpretive framework offered by legal academics studying the family. Mothers, along with their children, are typed-cast as the objects of male violence and (ideological) domination. In addition, the concept of 'mother' is generally separated from that of 'wife'. By contrast, there is a fairly extensive discussion of the merits of lesbian motherhood.[6] Indeed, we are

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[6] See especially: Arnup, "'Mothers Just Like Others'," pp. 18-32; Leopold and King, "Compulsory Heterosexuality," pp. 163-186.

told that lesbian mothers are feared and hated because they have demonstrated their agency by breaking away from oppressive heterosexual family norms.

The 'ideology of motherhood' is said to socialize women into supportive (and submissive) roles within family. For some, heterosexual family captures a woman's reproductive labour and robs her of what should be a woman-centred experience.[7] For many others, the 'ideology of motherhood' seems to aid in the support of the oppressive traditional family ideal. It must then be deconstructed, as must all identity categories that appeal to the 'natural'.

Fatherhood

Fathers have no place in the narrative vision of legal academics studying the family. They are rarely mentioned. The word 'husband' is avoided as one avoids racial humour. There is mention of the problem of 'male domination', but nowhere does a discussion of the complex identities of husband or father arise. Paternal authority is immediately associated with negative aspects of family life. Surprisingly, legal academics studying the family offer no comment or solution to the 'problem' of male flight from the family. In fact, legal activists pass up the opportunity to castigate men for abdicating their familial responsibilities, perhaps in order to avoid admitting that society recognizes that family members *do* have mutual obligations toward one another. Certainly, the silences regarding fatherhood seem to imply that the absent father is the norm, or at least that unattached fathers represent an unproblematic phenomenon.

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[7] Leopold and King, "Compulsory Heterosexuality," pp. 164-165.

Although mention of fatherhood is rare, there is a critical appraisal of 'the ideology of fatherhood'. Janice Drakich argues that before the recent "image" of the involved father, "[t]he role of fatherhood did not encompass parenting." Drakich maintains that the present "image" of fathers as "legitimate care-givers and socializers of children" demonstrates "the discrepancies between reality and myth," for the image of the participant father is a myth, although it is presented as reality. She contends that "for the majority of mothers, the image of the nurturing father is a myth."[8] Indeed, the argument goes, fatherhood is constructed by ideological and social forces. It is dependent on the health of these constructions for its survival.[9] Drakich worries that this ideology of fatherhood encourages the belief "that if a child has an active father, he or she really does not need a mother."[10] She is alarmed, moreover, that current academic research on fathers indicates (with bias) that "fathers are replacing mothers as the better parent."[11] For Drakich "fathering rhetoric," including "[t]he image of men as caring fathers," is dangerous and must be resisted because it further "entrenches the current ideology of fatherhood."[12] And this ideology "is a smokescreen for

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[8] Drakich, "In Search of the Better Parent," pp. 69-70.

[9] Drakich, "In Search of the Better Parent," p. 72.

[10] Drakich, "In Search of the Better Parent," p. 75.

[11] Drakich, "In Search of the Better Parent," p. 79. Drakich provides no footnotes for these assertions.

[12] Drakich, "In Search of the Better Parent," p. 82.

men's entrenched privileges and rights to their children."[13] It represents yet another strategy that men can use to ideologically dominate those within family. Notice here the sharp division between the interests of mothers and fathers. Indeed, fatherhood is presented as a threat to mothers. Certainly there is no hint of a mutually beneficial interdependence between husband and wife in the activity of child rearing.

The Interdependence of Husband and Wife

For many activist legal academics, the relationship between husband and wife is characterized by dependency, not interdependency. That is, the traditional family is a place where women lose their autonomy and become dependent on men. What is ignored by the advocacy scholarship on the family are the benefits that come from a marriage in which husband and wife are *inter*dependent. This interdependence is vital to the functioning of a healthy family, especially child-centred family. Indeed, the anti-essentialist treatment of family goes so far as to deny that the functional criterion of 'mutual support', even as it is separated from traditional role-expectations, is basic to the family.

Children

Children constitute perhaps the greatest gap in the anti-essentialist vision. Children are rarely mentioned in the story of family offered by legal academics. Little is written of the main purpose of family, which seems to be the socialization and character formation of

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[13] Drakich, "In Search of the Better Parent," p. 86. See also: Susan B. Boyd, "Child Custody, Ideologies, and Employment," *Canadian Journal of Women and the Law* 3.1 (1989), pp. 111-133.

children and, ideally, civically minded parents.[14] To the extent that legal academics voice concern about how families socialize children, they strike out against the 'forced heterosexualization' of the young.[15]

One of the reasons activist scholars can avoid dealing with what actually occurs within Canadian families and concerns them is that these scholars present what are often temporary heterosexual family forms such as childless families and single-parent families as the standard by which traditional family should be judged. 'Don't you realize', they argue, 'that your vision of two-parent heterosexual family has failed to describe the lives of all people at all times'? This banal truth informs the totality of the treatment to which the family is subjected by legal experts. And yet, even while legal activists present this narrative, ordinary family life continues to give meaning to the lives of family members. In a nation where children are immediately associated with marriage and family, is it proper for activist scholars to use what many perceive to be non-family (e.g., childless families) and unfortunate breakdowns in family (e.g., lone-parent families) as a standard with which to call into question the idealism of more traditional forms of family?[16]

More than this, non-traditional families are put forth by activist scholars as examples

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[14] Some have suggested that intergenerational family is essential to the nurturing of a civic identity within its members (Elshtain, *Democracy on Trial*, pp. 6-7). Activist legal academics fail, however, to consider whether family has a role as an important socializing institution of civil society.

[15] The message we send to our children is that a woman is "incomplete without a man, and any man who seeks a relationship with another man degrades himself by 'acting like a woman' . . ." (Wintemute, "Sexual Orientation Discrimination as Sex Discrimination," p. 466).

[16] See also: Mary Ann Glendon, *A Nation of Lawyers*, p. 276.

of deliberate ideological resistance to the dominant family form, rather than a result of an often temporary departure from child-centred two-parent family. Such an argument, be it implied or explicit, seems deliberately specious and manipulative. Implying that the increasing numbers of single-parents demonstrates some sort of deliberate ideological challenge to traditional family is akin to saying that a more mobile society is ideologically committed to rootlessness. Most 'alternative family forms' mentioned by activist legal scholars are not examples of a radicalized agency at play in the realm of the family. Instead, they are often the result of temporary dissolution of two-parent family. The constructed and ideologically radicalized homosexual family/commune model just does not transfer well into the heterosexual narrative of family. The most important reason for this seems to be the substantial and ongoing needs of children, and children are generated by heterosexual unions.[17] That is, heterosexual families are too busy raising children to 'try out' different identities within family in order to demonstrate their agency.

The assumption of anti-essentialists seems to be that children are a "stand-alone constituency,"[18] able to flourish as individuals in a family that is without legal (and perhaps social) boundaries. This position ignores the unique (e.g., vulnerable, dependent) place of

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[17] Some activist scholars maintain that it is prejudicial to assume that homosexuals are incapable of producing children. Yet as Leon R. Kass writes: "[E]ach of us owes our living existence to exactly one man and one woman—no more, no less, no other—and, thus, to one act of heterosexual union. This is no social construction, it is a natural fact, a fact older even than the human race" (Leon R. Kass, "Man and Woman: An Old Story," *First Things* 17 (November, 1991), p. 14).

[18] David Blankenhorn and Barbara Dafoe Whitehead, "What the Bishops Don't Know About Families," *First Things* 23 (May, 1992), p. 20.

children in family and the position of parents as the primary caretakers of their children. The implicit position of activist legal academics, given their extraordinary silence on the needs of children, is that the project of 'radicalizing human agency' within family will have no negative consequences on children. This anti-essentialist vision of reality ignores the neediness and dependency of children that makes stable and 'naturally-connected' family so important in a child's life. This neediness, and the radical attack on it, are poignantly described by Bruce C. Hafen:

> A friend shared this experience with me: his daughter came home from elementary school one day, crying and upset. "Is it true that I don't really *belong* to you Mom?", she asked her mother. Knowing this was her natural child, the startled mother asked what her daughter meant. The girl explained that her teacher had told her class that everyone is free to control his or her own life, and no one *belongs* to anyone else. Children don't belong to parents; husbands don't belong to wives; nobody belongs to anybody. The girl looked up at her mother and asked, "I *am* yours, aren't I, Mom?" The mother took the child in her arms and said, "Of course you're mine—and I'm yours, too." As the two embraced, they both felt the love and the security of really belonging to each other.[19]

Any alteration of family structure is bound to affect children. Thus a *transformational* narrative of family that fails to adequately address the place of children within their story of family is irresponsible. How can anti-essentialist ideology speak to the reality of the human condition given the demonstrated desire for human connectedness, at least within heterosexual family? This is why the (functionalist and anti-essentialist based) criticism of procreation as being a reason to favour one family form over another does not

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[19] Bruce C. Hafen, "Individualism and Autonomy in Family Law: The Waning of Belonging," *Brigham Young University Law Review* 1 (1991), p. 31.

speak to the truth of traditional family. Such criticism misses the point. Procreation-centred family definitions cannot be separated from the proper and stable socialization of children that occurs within naturally-connected family. The heterosexual family continues to have a dominant hold over both the creation and raising of children. Is it so strange then that marriage would be *primarily* encouraged as a way to produce a generally stable environment for the bearing and rearing of children? And perhaps children can make a marriage, and the couple that constitutes the marriage, more ethical and altruistic. Parents are often described as 'thinking sacrificially' when it comes to their children. In turn, the socially and legally committed (i.e., married) mother and father, because they are naturally-connected to their children, pass on the benefits of naturally-driven altruistic behaviour to their children (i.e., they role-model family to their children). Can an ideologically constructed family offer the same security to children under its care and stewardship?[20] More to the point, what are people who believe in constructing famil*ies* and sexualit*ies* telling their (and our) children? Where is the place of a child in such a family?

Conclusion

Anti-essentialists confront a strongly entrenched view of family in which a central place is given for the experiences of motherhood, fatherhood, childhood and the marriage bond. From the perspective of this view, it is the anti-essentialist utopia that appears as unrealistic and oppressive. Anti-essentialists themselves recognize that the gulf between

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[20] Indeed, some lesbians have expressed concern for the well-being of their male children because they belong to a community that has tended to look down on the practice of raising boys as children. Lesbian separatists have been known to abort unborn male children (often conceived through artificial insemination) in order to construct the desired *ideological* vision of woman-centred family.

their views and those of their opponents cannot be bridged by rational discussion. In their own perspective, the traditional views they want to replace are defended by a weblike "interconnectivity of human institutions and opinions,"[21] which support "people's conceptions of themselves and of the good society," making these conceptions "very hard to change through rational argument."[22] Anti-essentialists explicitly see theirs as an 'outsider' narrative that will be strongly resisted by 'insiders'. Since insiders constitute the majority, the outsider narrative is highly unlikely to win the battles of ordinary democratic politics. This helps to account for the emphasis on winning courtroom battles, with the help of a 'flood' of advocacy scholarship. It also suggests that strategic functionalism, not unadulterated anti-essentialism, is likely to be the interim, and most successful strategy in those courtroom battles.

Thus it is reasonable to expect that follow-up research (i.e., the second stage of a full-scale case study) regarding the efficacy of advocacy scholarship would find many interest-group factums and at least some judicial decisions reflecting the influence of the functionalist components of the advocacy literature. To be sure, activist legal scholarship on the family is still emerging, and it is probably too early to come to conclusions about its impact, but early observations indicate that functionalism, not pure anti-essentialism, has indeed enjoyed some success in the courtroom. This observation is especially clear in the reasoning embraced by some minority opinions in *Canada (Attorney-General) v. Mossop* and *Egan v.*

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[21] Eskridge, "Gaylegal Narratives," p. 634.

[22] Eskridge, "Gaylegal Narratives," p. 635.

Canada.[23] Here the idea that family is best characterized as a series of psycho-sexual functions that can be executed by both heterosexuals and homosexuals has influenced some members of the Court. For example, Supreme Court Justice L'Heureux-Dubé's minority opinion in *Canada (Attorney-General) v. Mossop* (with Justices Cory and McLachlin concurring with L'Heureux-Dubé's definition of 'family status' to include same-sex couples) is based on a functional definition of family. She writes, argumentatively, "Could it not be said that 'family status' is an attribute of those who live as if they were a family, in a family relationship, caring for each other?"[24]

Although a definitive victory still eludes supporters of the functionalist approach, it is likely that functionalist arguments will enjoy greater success before the Court than anti-essentialist arguments will, although the impact of legal advocacy scholarship (which is heavily influenced by anti-essentialist ideology) on legal decisions regarding family has yet to be measured adequately.

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[23] See: *Canada (Attorney-General) v. Mossop*, [1993] 100 D.L.R. (4th) 658 and *Egan v. Canada*, [1995] 2 S.C.R. 513. At the Federal Court of Appeal, Justice Linden's dissent was based on a functional account of family (*Egan v. Canada*, [1993] 103 D.L.R. (4th) 336).

[24] *Canada (Attorney-General) v. Mossop*, [1993] 100 D.L.R. (4th) 704. For L'Heureux-Dubé's full opinion see: *Canada (Attorney-General) v. Mossop*, [1993] 100 D.L.R. (4th) 677-722. For Justices Cory and McLachlin's concurring opinions see: *Canada (Attorney-General) v. Mossop*, [1993] 100 D.L.R. (4th) 722-723. It is worth noting that in developing her account of functional family, L'Heureux-Dubé relies heavily on academic definitions of family.

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[6] Morton, "Charter Revolution," p. 198. Such people seem to realize that t
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because the law is a place where the adequacy of our descriptions of the social world are challenged, and subsequently supported or disregarded. It is a place where we tell our stories and allow others to scrutinize them. The law then tests "one way of telling a story and thinking about it against another," and then chooses between the narratives.[7] This is a process of the law recognizing a legal narrative as being 'true' to reality. It is an inherently public act, with public consequences, the most important of which is the public recognition of social identities (e.g., familial, sexual) found within the narrative of the law. Moreover, the law's power of authoritative recognition has traditionally led to the production of norms and accompanying categories of deviance. By contrast, anti-essentialists propose either to use the law to recognize all as family—the result being that none are marginalized—or they propose to use the law's *non*-recognition of family as a legal category to send the message that family is not more deserving than non-family—the result here (at least in law) being the deconstruction of the norm (family) and the accompanying deviation (non-family).

Arguably, the debate about family is largely happening in the legal realm. This makes the legal stories we tell about family very important. Mary Ann Glendon writes, "The war over the family is, to a great extent, a war of words, and is about words."[8] Those involved in the struggle to define family (or to free it from definitions) maintain that the way it is imagined in language (especially in legal narratives) is critical to how we conceive of

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[7] James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990), p. 24.

[8] Glendon, *Rights Talk*, p. 121.

its role in society. For example, each narrative vision of family comes with a supporting and 'colonizing' language. The traditional story of family comes with ways of describing the world (including role-expectations) that many reformers of family find rigid and exclusive. If talking about family in law necessitates using the discourse of formal roles, then advocates of 'inclusive' family will have difficulty presenting their vision of family in law and to society. Likewise, a functional definition of family forwards the 'psychological functions' of family as the norm. Those interested in roles beyond providing for the 'socialization' of children would find legal discourse dominated by the functional view of family to be a hostile environment for the articulation of more traditional family narratives. Thus when the law sanctions one version of family it is accepting the parameters of discourse that the supporting language will impose on subsequent considerations of alternative images of family. The narrative chosen is all the more important because which vision of family the law chooses to embrace is important to the manner in which society conceives of and categorizes social happenings; legal categories, in part, inform the moral, social and identity categories that give order and meaning to our lives.

What are the visions of family offered by legal academics? The traditional story presents family as a fundamental and universal human experience. Its most basic functions are procreation and the socialization of children, and this process of socialization includes role-modelling traditional familial identities to children. Indeed, one of the most important things to be role-modelled by the traditional family is a stable marriage. However, the traditional family represents the norm that the advocacy scholarship on the family in law periodicals is striking out against. It is a vision of family that is attacked, not offered, by

legal academics.

With the functional approach to the definition of family, the predominance of procreation and marriage in the formation of a familial identity is questioned. The story of family here offered focuses instead on psychological and emotional role-expectations. It proposes to describe all family using this story. Thus although people will undoubtedly continue to adhere to traditional roles and identities, these roles and identities will only be recognized as *one* way of fulfilling the functions of family. The functional approach does more than simply recognize currently marginalized family forms. It purposefully reorganizes the functions of family and thereby effectively seeks to remove traditional ways of describing family from the law. Here all identities, including those of traditional family, merge into the role-requirements and identities supported by this story of family. For example, the traditional identity (binary) of mother/father may continue to exist in society, but its expression in law will occur within the psychological identity of 'parent'. This legal classification categorizes the intergenerational family in a way that ignores the gendered aspect of parenthood and the centrality of the marriage bond and natural affection to effective parenting. Still, it reorganizes family but does not attempt to radically transform it, and for this reason it is not the preferred narrative of activist legal academics; at best it is seen as a strategic weapon, a transitional phase on the way to a more radical narrative.

The story of family found in the advocacy scholarship of Canadian legal periodicals is almost exclusively informed by anti-essentialist ideology. This advocacy scholarship centres around the story that there is no essential family form or function; thus, family is what we say it is. The anti-essentialist vision of family presents family as a community of

individuals whose association is constructed not natural. Legal advocates of this position argue that freedom to choose one's family form (or to remain outside of 'family') should be the fundamental consideration when discussing the legal and social status of family. They argue, moreover, that such freedom is unlikely as long as the ideal of traditional heterosexual family remains unchallenged and undeconstructed. Indeed, the idea that there are any functions of family, either biological or psychological in origin, must be abandoned. The solution they offer is the purposeful dismantling of this dominant image of family. For this process to meet with success, the 'natural' superiority of heterosexuality and heterosexual role-expectations (e.g., wife/mother) must be challenged and abandoned.

Indeed, the anti-essentialist treatment of family posits that gay and lesbian activists cannot "change mainstream attitudes without causing serious social rifts."[9] As a narrative it is purposefully disruptive and deconstructive. This is because the social constructions that are reportedly being used *against* homosexuals at present are perceived as being strongly defended by the weblike "interconnectivity of human institutions and opinions,"[10] which support "people's conceptions of themselves and of the good society, and thus are very hard to change through rational argument."[11] In response, 'outsider' narratives are advocated, legal narratives informed by alternative 'truth creations' that will question the most basic and

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[9] Eskridge, "Gaylegal Narratives," p. 631.

[10] Eskridge, "Gaylegal Narratives," p. 634.

[11] Eskridge, "Gaylegal Narratives," p. 635.

essential assumptions which underpin family, sexuality and identity.[12]

This project of deconstruction is directly related to the goal of fostering greater sexual and familial choice. And yet, if it were actualized it would surely encounter substantial resistance. This is because many of society's central identities, such as mother/father and husband/wife, and the commitments that they represent, might be threatened by a realized anti-essentialist legal approach to family. For this reason, it is likely that strategic functionalism will be the vehicle for the anti-essentialism found in the advocacy literature on the family. Indeed, for many activist legal academics, the possibility of disrupting and even deconstructing the social construction of heterosexuality makes the strategic use of functional narratives likely. And it is no coincidence that much of the activist scholarship regarding the reformation and transformation of family has a strong legal edge. The law presents reformers of the family with a unique opportunity of influencing the structure of family while remaining outside of the larger societal debate. Legal advocacy scholarship represents an attempt to take advantage of this opportunity.

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[12] To be sure, most anti-essentialists do not suggest that identity, socially constructed or otherwise, is easily changed. They argue that, in a very real sense, the social constructions that we help to create, sustain, and occasionally resist make up who we are as individuals and as a culture. Moreover, it may be especially difficult for individuals to transform their identity separate from community. This level of difficulty may be why such activists advocate a cultural transformation that will allow for a diversity of identities. For if identity is socially constructed as the anti-essentialists would have one believe, altering our social, cultural and legal stories would be a way to alter the types of identities which could be constructed.

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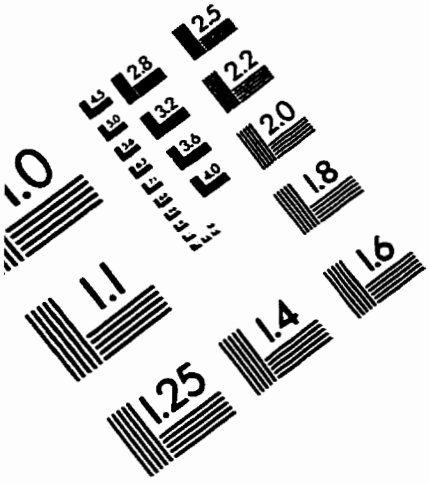

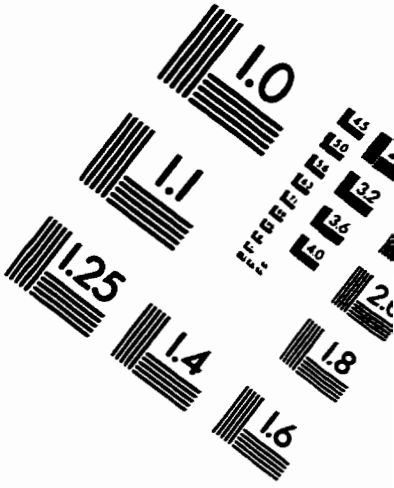

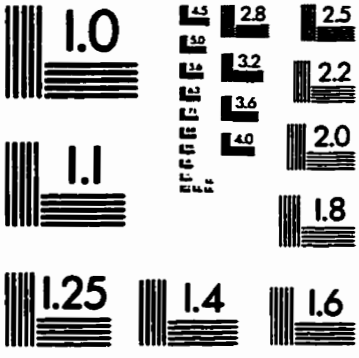

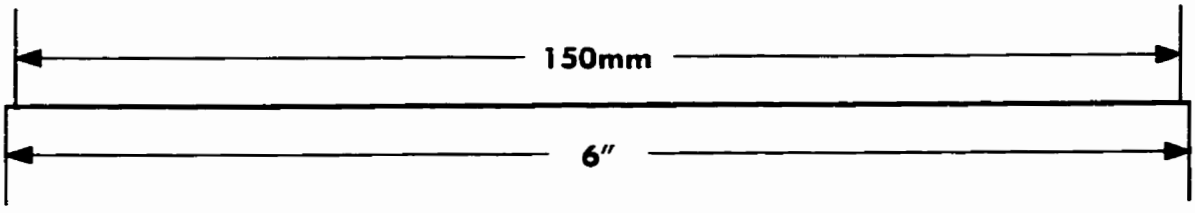

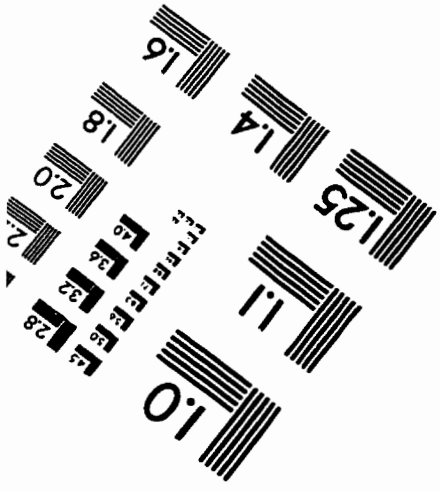

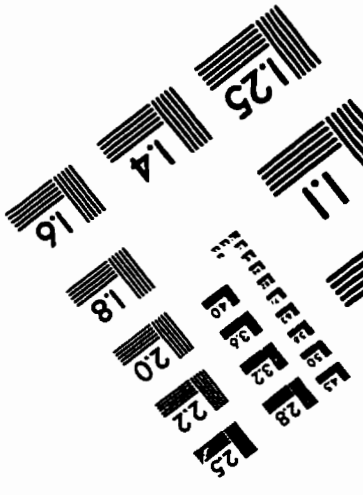

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