CIVIL LIBERTIES, SEXUALITY AND THE LAW

Donald G. Casswell, Lesbians, Gay Men, and Canadian Law. TORONTO: EMOND MONTGOMERY PUBLISHERS LTD., 1996. PP. 675. $110.00 (CLOTH/PRACTITIONERS); $78.00 (STUDENTS).

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I.

In 1997, William B. Rubenstein published a second edition of his well-regarded treatise, *Cases and Materials on Sexual Orientation and the Law.* In the same year, William N. Eskridge, Jr. and Nan D. Hunter released their casebook, *Sexuality, Gender, and the Law.*[1] Both books have been heralded as pathbreaking in their efforts to define an emerging subject of contemporary relevance and thereby to frame the current debate.[2] With the publication of Professor Donald G. Casswell's monumental work *Lesbians, Gay Men, and Canadian Law* in November, 1996, the Canadian discussion of the legal rights of lesbians and gay men has reached a level of sophistication commensurate with its importance.

Casswell's is the first comprehensive text on the subject of law and sexual orientation in Canada. To state that this text is thoroughly researched would be an understatement.[3] Indeed, Casswell's work is an encyclopedia in fifteen chapters, affording the reader a detailed analysis of important legislation and jurisprudence, as well as an exceedingly thoughtful review of the social and political context of the issues relevant to this topic.[4] Throughout the book, the author combines his passion and eloquence as an advocate for equality with careful attention to detail as a scholar. The result is a truly awesome scholarly product which will serve as a valuable and indeed essential resource not only for legal practitioners and students, but also for business and governmental leaders who, in the future, will have to consider the rights and concerns of lesbians and gay men when designing or planning for their workplaces and communities. Lesbians and

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1. *See* Katherine M. Franke, *Homosexuals, Torts and Dangerous Things*, 106 Yale L.J. 2661 (1997) (reviewing WILLIAM B. RUBENSTEIN, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW (2d ed. 1997) and WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER AND THE LAW (1997)).

2. *Id.* at 2681, 2683.

3. Casswell's coverage is broad, ranging from human rights legislation (ch. 3), to marriage and children (chs. 7-8), to immigrants and refugees (ch. 13). *See generally* DONALD G. CASSWELL, LESBIANS, GAY MEN AND CANADIAN LAW (1996) (considering areas of Canadian law different on lesbians and gay men than on heterosexuals).

4. *See, e.g.*, CASSWELL, *supra* note 3, at 1-6 (distinguishing between discrimination covered by the Charter of Rights and Freedoms in the Canadian Constitution [hereinafter the Charter] and discrimination covered by statutory enactment).

gay men, deprived of socio-legal rights conferred by heterocentric laws and processes in Canada, will also find this book of interest and even a source of hope. Casswell's book details levels of exclusion for a growing segment of Canadian society. It presents a framework for principled legal decision-making which, if implemented, will lay the foundation for new policies of fairness and inclusion.[5]

Casswell's central argument is that so long as Canadian law discriminates against lesbians and gay men, both the law and the socio-political structures in which it operates legitimize and thus perpetuate heterosexism and homophobia.[6] Instead of preserving the *status quo* in this area, law can help eradicate heterosexism and homophobia by ensuring that all Canadians, regardless of sexual orientation, receive equal treatment.[7]

Professor Casswell has, with the publication of *Lesbians, Gay Men, and Canadian Law*, established himself as the foremost authority in this vital area of human rights law in Canada. Joining William Eskridge, Nan Hunter and Will Rubenstein in the United States, he has embarked upon a "dangerous venture;"[8] a venture whose purpose is not only to commence a dialogue on the development of a distinct gay and lesbian culture, but to sensitize all citizens of the transnational community to the need for social, political, legislative and judicial accommodation of fundamental rights of association and privacy for all members of society. It remains to be seen whether this venture can create access to the "traditional" type of marriage for same-sex couples that Casswell considers the "inner sanctum of heterosexual privilege."[9] Indeed, casting aside what Justice Burger called "millennia of moral teaching"[10] will not be an easy task. Even if full acknowledgment of equal rights for lesbians and gay men cannot be achieved, however, gay rights activists may hope for the adoption of legislative approaches, such as those undertaken in Hawaii, where homosexual partners qualify for the same health-care benefits available to married

5. Together with various human rights enactments by provincial and territorial legislatures, the Charter serves as the major legal vehicle for advancing claims made by lesbians and gays. While the Charter applies only to governmental action, the human rights legislation applies to both public governmental actions and non-governmental, private action. *See* CASSWELL, *supra* note 3, at 2, 23-91 (presenting legal arguments for interpreting human rights instruments as prohibiting discrimination based on sexual orientation). *See generally* ROBERT WINTEMUTE, SEXUAL ORIENTATION AND HUMAN RIGHTS: THE UNITED STATES CONSTITUTION, THE EUROPEAN CONVENTION, AND THE CANADIAN CHARTER (1995) (presenting legal arguments for interpreting human rights instruments as prohibiting discrimination based on sexual orientation).

6. CASSWELL, *supra* note 3, at 643-49.

7. *Id.* at 648.

8. Raymond C. O'Brien, Book Review, 9 J. CONTEMP. HEALTH L. & POL'Y 605, 621 (1993) (reviewing FRANK BROWNING, THE CULTURE OF DESIRE (1993)).

9. CASSWELL, *supra* note 3, at 647.

10. Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring in a decision upholding a Georgia anti-sodomy statute under which criminal penalties were imposed upon a man who had engaged in consensual sex with another man in his own home).

couples.[11] Acceptance of this approach would truly be a giant step toward achieving sexual equality for lesbians and gay men.

Professor Casswell recognizes the fragility of the advances achieved by lesbians and gays in recent decades in Canada;[12] his tone is thus one of cautious optimism.[13] Casswell expresses the hope that his book will serve as an instrument for charting a level of social and legal progress which, in turn, will allow Canadian Law to "not only... protect lesbians and gay men against discrimination but also to positively recognize lesbians and gay men as equally worthy along with heterosexuals."[14] But Casswell will not be satisfied with half measures:

> In the absence of complete acceptance of lesbians and gay men as equals, Canadian society and law would merely replace repression of and discrimination against lesbians and gay men with a form of alienation. The objective of all Canadians and of Canadian law should instead be liberation of lesbians and gay men. Lesbian and gay rights are the vehicle to achieve equality for lesbians and gay men, which will in turn lead to freedom for lesbians and gay men.[15]

II.

Casswell's goal is both noble and visionary. It is one that should be shared by all Americans. Viewed practically, however, I have serious doubts that the social and legal changes advocated by Professor Casswell will be effected within a generation. When the time does come for comprehensive action, however, Casswell's treatise will serve as a vital blueprint for the dismantling of laws that discriminate on the basis of sexual orientation in North America.

In order to achieve that goal, gay rights activists will have to overcome the skeptical attitudes concerning gay rights that are so pervasive in mainstream legal culture.[16] More specifically, in *Bowers v. Hardwick*, the

11. With the enactment by its legislature of Act 383 in July, 1997, Hawaii became the first state to recognize a new relational status of "reciprocal beneficiaries." The Act extends to individuals who are legally prohibited from marrying under state law and who otherwise qualify for the status, rights and benefits, including family health insurance, of reciprocal beneficiaries. Haw. Rev. Stat. § 572C-1 (1997). *See* CASSWELL, *supra* note 3, at 241-42, 317-448 (discussing litigation in which same-sex couples challenged Hawaii's marriage license law and, more generally, the difficulties same-sex couples face in claiming spousal, family or similar benefits).

12. Caswell, *supra* note 3, at 648.

13. *Id.* at 649.

14. *Id.* at 648.

15. *Id.*

16. *See, e.g.*, ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 112-14 (1996) (denouncing proleptically the possibility of a Hawaiian statute creating a right to same-sex marriage on the grounds that "a large majority of Hawaiians. . .oppose homosexual marriage" and criticizing *Romer v. Evans* as without

United States Supreme Court held that the Federal Constitution does not protect an individual's right to engage in homosexual sodomy, even in the privacy of the home.[17] Homosexual sodomy was acknowledged neither as a practice recognized within national history or tradition nor as a part of rights that must be protected as "implicit in the concept of ordered liberty."[18] Chief Justice Burger took a more decidedly homophobic position, pointing to the history of Western regulation of homosexual conduct and asserting that "condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards."[19] Justice Burger thus concluded that "to hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."[20]

Burger's words now sound as if they come to us from a different era. Havelock Ellis observed in 1942 that homosexuality has long been considered "a social question."[21] Ellis remarked that while, within limits, "the gratification of the normal sexual impulse, even outside marriage, arouses no general or profound indignation; and is regarded as a private matter; rightly or wrongly, the gratification of the homosexual impulse is regarded as a public matter. This attitude is more or less exactly reflected in the law."[22] Casswell's work indicates that the law may soon begin to adjust to a public that provides new responses to the "social question" posed by homosexuality.

Pointing out that conduct defines personhood, some American legal scholars have argued that state action criminalizing homosexual conduct violates basic rights of privacy.[23] This argument suggests that homosexual conduct should be acknowledged as within the scope of fundamental personhood[24] because sexual conduct defines who a person is. A state should

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logical or constitutional foundation). *But see* Romer v. Evans, 517 U.S. 620 (1996) (holding that an amendment to the Colorado Constitution prohibiting all legislative, executive or judicial actions designed to protect homosexuals from discrimination violated the Equal Protection Clause). *See* also Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994) (arguing for a cautious and incremental judicial approach to the expansion of constitutional protections against discrimination to the realm of sexual orientation).

17. 478 U.S. at 190-91, 194-96 (1986).

18. *Id.* at 194.

19. *Id.* at 196 (Burger, C.J., concurring).

20. *Id.* at 197; JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.30 (5th ed.1995). Historians have recently pointed out numerous grounds to question Justice Burger's rendering of the history of Western—and even Judeo-Christian—attitudes towards homosexuality. *See generally* JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE (1994) (reconstructing the history of same-sex unions from the Greco-Roman world through medieval Europe).

21. 1 HAVELOCK ELLIS, STUDIES IN THE PSYCHOLOGY OF SEX 343 (1942).

22. *Id.*; CASSWELL, *supra* note 3, at 481-553 .

23. *See* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 801-802 (1989); O'Brien, *supra* note 8, at 617.

24. O'Brien, *supra* note 8, at 617.

not criminalize forms of conduct which speak to personhood. Life-defining patterns of conduct should be protected under the right to privacy.[25]

According to this line of reasoning, a government that criminalizes private, consensual acts of homosexual sodomy among adults, the very conduct through which a gay man constitutes his personhood within the context of sexuality, is a government that discriminates invidiously against homosexuals and denies them "fundamental freedom."[26] Although heterosexual sodomy is illegal in some states, those laws are not enforced when the acts of sodomy are carried out in private.[27] The fact that all sodomy is illegal but that enforcement targets only homosexual sodomy is startling evidence of invidious discrimination.[28] Being in a monogamous relationship or entering into a domestic partnership is, for both homosexuals and heterosexuals, "an index of belonging," a part of the life cycle and an inherent component of their concept of personhood.[29]

If homosexuality is accepted as a genetic orientation rather than a social choice,[30] surely those who have this orientation should be entitled to pursue life, liberty and happiness within the same constitutionally protected context as those who are heterosexuals and do not have this predisposition at birth.[31] If the courts adopt this enlightened theory of personhood, which necessitates a new interpretative gloss on the principle

25. *Id.*; Rubenfeld, *supra* note 23, at 799-803.

26. O'Brien, *supra* note 8, at 617-18; Larry Cata Backer, *Constructing a "Homosexual" for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 TUL. L. REV. 529 (1996). According to the Lambda Legal Defense and Education Fund, as recently as the 1960s, all 50 U.S. states had criminal laws outlawing consensual sodomy. Today, 19 states still criminalize sodomy, and six (Arkansas, Kansas, Maryland, Missouri, Oklahoma, and Texas) prohibit consensual sodomy only between same-sex partners. Lambda Legal Defense and Education Fund, *State-by State Sodomy Law Update* (last modified Jul. 15, 1998) <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record'275>.

27. *See, e.g.*, Schochet v. State, 580 A.2d 176 (Md. 1990) (holding that a statute criminalizing fellatio as unnatural or perverted sexual practice did not encompass consensual, noncommercial, heterosexual activity between adults in privacy of home).

28. *See* Gordon v. State, 360 S.E.2d 253 (Ga. 1987) (preventing defendant, who was convicted of sodomy, from claiming that he was denied equal protection because officials enforced a sodomy law only against homosexuals and not against others who violate sodomy law).

29. Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163, 219-20 (1995) [hereinafter O'Brien, *Domestic Partnership*].

30. *See* Robert Pool, *Evidence for Homosexuality Gene*, 261 SCIENCE 291 (1993) (reporting on research involving 40 pairs of homosexual brothers and suggesting that a region on the x-chromosome appears to hold a gene or genes for homosexuality); J. Michael Bailey & Richard C. Pillard, *A Genetic Study of Male Sexual Orientation*, 48 ARCHIVES GEN. PSYCHIATRY 1089, 1093 (1991) (suggesting that genetic factors are important in determining individual differences in sexual orientation); *Therapists Not Needed*, AUGUSTA CHRON., Aug. 16, 1997, at A2 (reporting on the determination by the American Psychological Association that homosexual orientation is not a mental disorder and should not be subject to reparative therapy).

31. O'Brien, *Domestic* Partnership, *supra* note 29, at 189-93.

of fundamental liberties, they will remain in the vanguard of rights protection, as they were in the realms of contraception and abortion law. The new interpretation of fundamental liberties would recognize that consensual homosexual sex is protected from regulatory intrusion under the right to privacy. Ideally, legislative protection would then follow.[32]

These changes in judicial and legislative perspectives will undoubtedly be accompanied by general cultural changes, changes that must begin with cooperative efforts, in which it is reasonable to expect the gay and lesbian communities to take the lead, aimed at combating heterosexist prejudices, advancing and developing a culture of mutual acceptance, and educating heterosexuals as to the non-threatening nature of homosexual culture. The culture of diversity will be advanced and accepted through a national dialogue involving the legal community and the media.[33] This dialogue must include, without doubt, a frank discussion of the AIDS epidemic and the increased homophobia that accompanied it, but also such issues as domestic partnerships, employment and insurance benefits, artificial reproduction for gays and lesbians, and adoption and custodial rights upon legal separation of either mixed heterosexual couples or same-sex couples.[34] The commencement of this dialogue is admittedly "a dangerous venture,"[35] because it forces citizens to confront long-held prejudices tied inextricably to any consideration of these issues. Such a dialogue is, however, the only avenue for understanding and for founding a society based on equality before the law for all.

32. O'Brien, *supra* note 8, at 618.

33. Jane S. Schacter, *Skepticism, Culture and The Gay Civil Rights Debate in a Post-Civil- Rights Era*, 110 HARV. L. REV. 684, 723 (1997) (reviewing ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY (1995) and URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION (1995)).

34. O'Brien, *supra* note 8, at 621. *See* CASSWELL, *supra* note 3, at 225, 247, 449 (suggesting as a starting point for such a dialogue the dynamics of gay and lesbian relationships—such as the desire to form long-term attachments, to have children, and, sometimes to separate— that are similar to heterosexual relationships).

35. O'Brien, *supra* note 8, at 621.