

Kymlicka's Cultural Theory of Group-Differentiated Rights: Ramifications for
the Rights Claims of Gays and Lesbians

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The issue of group rights has proved to be contentious among liberal theorists, with a number of scholars having tested the bounds of liberal principles and their ability to accommodate claims for group-differentiated rights. This is particularly true of the work of Will Kymlicka. Kymlicka endorses a model of equal citizenship that incorporates differentiated rights for minority social groups, and endeavours to articulate a normative basis on which to ground their claims. Rejecting appeals to universal citizenship that are predicated on formal equality, Kymlicka contends that group-specific measures realize, rather than contradict, liberal equality.

In constructing his liberal defence of group-specific rights, Kymlicka begins by exploring the relationship between cultural group membership and personal autonomy. He argues that our cultural community provides us with a range of options about how to lead our lives, as well as the means to evaluate the relative worth of those options. In this respect, our cultural community

is indispensable to individual autonomy. For Kymlicka, it is on this account that liberals must concern themselves with the well-being of cultural communities.

In addition to providing a normative justification for the provision of group rights, Kymlicka offers a general framework for assessing the rights claims of various cultural collectives by setting limits on the purposes for which group rights may be claimed and distinguishing among different types of cultural groups. Making his work of even greater interest is his 'gay ethnicity' model of the rights of gays and lesbians. Likening lesbians and gays to ethnocultural groups, Kymlicka argues that the normative basis of the former's rights is cultural in nature. On this view, this sexual minority constituency deserves group-differentiated rights because it constitutes a culture-bearing collective that provides its members with a shared culture and identity.

The purpose of this essay is to critically assess Kymlicka's efforts to extend his cultural theory of group rights to lesbians and gays, including the place he assigns them in his group rights hierarchy. Not all minority social groups are entitled to the same types of rights. Aboriginal peoples and Québécois deserve the most extensive scheme of rights because they constitute "societal cultures," providing their members with a full range of life options across both public and private spheres. Multicultural minorities and gays and lesbians are entitled to a less significant scheme of rights. These minority social groups are eligible to receive group-specific measures that protect them from discrimination, while helping them integrate into mainstream society.

But three significant difficulties challenge the coherence of Kymlicka's rights framework and question its utility to gays and lesbians. First, several of the principles that Kymlicka employs to justify his group rights hierarchy seem to undermine, rather than support, its structure. The connection he draws between group membership and personal identity, in particular, seems to subvert his attempt to distinguish Aboriginal peoples and Québécois from lesbians and gays for the purposes of his theory. Second, the liberal identity politics in which Kymlicka engages seriously constrains the political and legal agendas of lesbians and gays by ignoring their efforts to challenge the heterosexual norms of the dominant society. His integrationist perspective does not address the relations of power that gays and lesbians contest, examine the institutionalized norms against which sexual minorities are measured, or acknowledge their desire to reform the institutions, practices, and cultural codes of the dominant society. Third, and as recent Canadian case law illustrates, the form of identity politics that Kymlicka embraces, informed, as it is, by the principle of immutability, reifies the boundaries of group membership and contributes to the marginalization of non-conforming group members. As a form of legal method, liberal identity politics not only pays scant attention to the ways in which gay and lesbian differences are constructed by the dominant, heterosexual community but fails to attend to intragroup differences. Instead, gays and lesbians are presented as a homogeneous sexual minority, bound together by a fixed, shared, and essential personal characteristic. Accordingly, rather than focussing on how the construction of intragroup difference results in discrimination, legal analyses lapse into efforts to specify the substantive content of the group's shared identity, vesting social group insiders with the classificatory authority to exclude non-conforming Others.

In assessing the origins of these weaknesses, two common problems emerge. The first concerns Kymlicka's failure to consider group differences in relational, comparative terms, that

is, to focus on the cultural specificity of the norms of the dominant society from which Others are deemed to be different. The second is Kymlicka's adherence to liberal standards of immutability to justify the rights of gays and lesbians. Though his theory of gay rights emphasizes the group's shared culture and identity, he also characterizes lesbians and gays as sharing a medical condition or biological disposition. Their non-conformist behaviour, on this view, is not a matter of choice, but of natural endowment or circumstance. In both these cases, what is absent from Kymlicka's analysis is consideration of the social construction of individual identity. Yet, given Kymlicka's own theory of identity formation, which embraces both social construction and self-determination, this omission is quite puzzling, and it remains to be seen whether his theory of identity and his theory of gay and lesbian rights are reconcilable.

Liberal Theory and the Value of Cultural Membership

Among Will Kymlicka's principal goals is the reconciliation of group-differentiated rights with the liberal commitment to equality. Kymlicka contends that while liberal theory's principal concern is that individuals have the freedom and resources necessary to form, implement, and revise their life plans and conceptions of value, more attention must be paid to the role played by cultural communities in making these kinds of determinations. In this respect, the critical question that most liberals fail to ask is where do "our beliefs about value that are said to give meaning and purpose to our lives . . . come from" (Kymlicka, 1989: 164)? It is in answering this question that the value of cultural group membership to liberal theory becomes clear.

In the first place, the range of options from which we choose in formulating our life plans is culturally given. Though we are free to choose amongst any number of options in deciding how to live our lives, we do not choose the options themselves (Kymlicka, 1989: 164). Second, our cultural heritage is critical to our ability to judge the value of those options. Our capacity to assess the options before us and to "intelligently examine their value" only can take place within a cultural context that helps us assign value and significance to particular activities and life plans (Kymlicka, 1989: 165). In this respect, the context of choice provided by our cultural community is indispensable to the exercise of personal liberty and individual autonomy; it is a critical component of our capacity for reflective judgement. And it is on this account that liberals must concern themselves with the status and viability of cultural communities (Kymlicka, 1989: 166).

However, the value Kymlicka assigns to the cultural community is not unconditional; preserving the integrity of its traditions and practices is not more important than respecting the rights of its members (1989: 168). The reason for this is clear: liberalism demands respect for the human capacity for deliberative judgement and self-determination. Individuals must be free to follow their beliefs, to "question these beliefs, and to adopt other beliefs . . . without being penalized or discriminated against by society" (Kymlicka, 1989: 164). Thus, rather than professing the need to protect the authenticity and integrity of cultures, Kymlicka attempts to affirm the importance of cultural communities, without restricting the freedom of individuals to critically assess, modify, or even reject the "norms, values and . . . attendant institutions" of their society (1989: 166). As a result, rights that function to protect the "cultural character" of a community by immunizing its traditional way of life from challenge are insupportable because they unduly restrict our freedom to form our own conceptions of value and choose our own ends (Kymlicka, 1989: 166-167).

But if protection is not to be afforded the substantive values and practices that characterize a culture, what sort of group-specific rights can be offered to protect minority cultural communities? In Kymlicka's view, the overriding value of a cultural community is its "cultural structure," the existence of a context of choice that provides community members with meaningful options and helps them to judge the value of various life choices. Here, culture is synonymous with "the existence of a viable community of individuals" who share a common heritage and self-identification with the group (Kymlicka, 1989: 168). On this view, "the cultural community continues to exist even when its members are free to modify the character of the culture, should they find its traditional ways of life no longer worth while" (Kymlicka, 1989: 167). Affording protection to a culture's structure, rather than its character, significantly alters the nature of the rights that a cultural community can claim over its members. Because the rights of the community are limited to those required to maintain the existence of the community itself, rather than its particular character, the autonomy of group members is safeguarded. Individuals are free to challenge and revise the norms and values of their community.

Cultural Membership and Individual Identity

However, the importance assigned by Kymlicka to the existence of a secure cultural structure that provides individuals with a context of choice does not, by itself, explain why citizens have a right to the protection of their *own* cultural structure. Indeed, given Kymlicka's rejection of arguments in favour of protecting the cultural character of communities, it would not seem unreasonable to require members of minority cultural groups to rely on the meanings and options provided by the cultural structure of the dominant community to guide their choices. Kymlicka's response to this challenge is to appeal to the importance of individual identity and its connection to culture. While it is true that our cultural community equips us with a context of choice that helps us to make deliberative choices about our life plans, our cultural heritage is critical to our personal agency in another way. Culture is constitutive of individual identity. Our cultural heritage, endows us with a "sense of belonging" and provides us with "emotional security," "personal strength," and a "sense of agency," and so failing to show due respect for the cultural membership of others constitutes a harm (Kymlicka, 1989: 175).

According to Kymlicka, then, it is the role played by culture in constituting individual identity that is critical to the claim that minority cultures deserve protection. For in the absence of the constitutive nature of cultural membership, there is no reason to favour the protection of particular cultural structures, rather than ensuring the existence of *a* secure cultural structure to facilitate citizens in exercising their moral powers and individual autonomy. Indeed, this aspect of Kymlicka's theory has prompted Rainer Forst to contend that "it is not culture as a 'context of choice' . . . but culture as a 'context of identity'" that truly drives Kymlicka's thesis (1997: 66). And though Kymlicka is resolute in insisting that his framework of minority group rights is more autonomy driven than identity driven,¹ the importance of identity to his project cannot be dismissed. Individuals may possess an "autonomy-interest" in the context of choice provided by their culture, but the interest minority cultural groups have in their own particular cultural structures, and the corresponding rights that can be claimed for their protection, are grounded in the constitutive role that culture plays in the formation of individual identity (Kymlicka, 2001: 55, n. 7).

As Kymlicka concludes, because our cultural heritage is an integral component of

individual freedom, autonomy, agency, moral development, and identity, having access to a secure cultural context of choice must be regarded as a necessary resource, or a primary good, to use Rawls's terminology (Kymlicka, 1989: 177-178). Accordingly, where the cultural structure of a minority group is insecure, group members lack their fair share of a resource that is critical to their autonomy. Thus, in culturally plural societies such as Canada, "vulnerability of the context of choice will always be a ground to which minorities can appeal in claiming rights (Kymlicka, 1989: 200).

Three Conceptual Distinctions to Guide the Provision of Group Rights

Having established the normative grounds for justifying group-specific rights, Kymlicka is left with the task of providing concrete principles to determine which cultural minorities should be afforded rights, and for what purposes. Three distinctions are offered to guide the adjudication of rights claims: cultural character versus cultural structure, internal restrictions versus external protections, and choice versus circumstance.

The first distinction offered by Kymlicka, and discussed above, is the cultural character/cultural structure distinction. Aimed at setting limits on the content of group-specific rights, this principle affirms laws and policies that seek to preserve the continued existence of minority cultural structures, without insulating cultural values and practices from challenge. The promise of this principle is its potential for guiding the liberalization of minority cultures, while protecting the existence of the communities themselves and the contexts of choice that they provide (Kymlicka, 1989: 169-170).

Of course, there are limits on the lengths to which groups may go to secure their cultural structures. To the greatest degree possible, the measures taken to protect a vulnerable cultural community must respect the civil and political rights of its members (Kymlicka, 1998a: 70). This requirement gives rise to the second distinction offered to help determine the kinds of rights and powers that a group can claim. The distinction drawn here is between internal restrictions and external protections. Internal restrictions, the right of a group to restrict the activities of its own members, to insulate the group against the effects of internal dissent, for example, are not permissible. These kinds of restrictions are insupportable because they conflict with liberal-democratic principles by allowing groups to oppress their members (Kymlicka, 1998a: 62). A very different case can be made for the provision of group-specific rights sought to protect the viability of a cultural community from the disintegrating effects of the decisions of the dominant society. Rights that function as external protections are permissible because they "do not raise problems of individual oppression. Here the aim is to protect a group's distinct identity not by restricting the freedom of individual members, but by limiting the group's vulnerability to the political decisions and economic power of the larger society" (Kymlicka, 1998a: 62-63).

While the first two distinctions are concerned principally with the permissible purposes for which group-specific rights may be sought, Kymlicka's third distinction, that of choice versus circumstance, serves two functions. It adds a further limitation on when group rights may be claimed and offers guidance in determining which groups should be the recipients of rights. Having heard a claim for group-specific rights to protect an insecure cultural structure, determining whether rights and resources should be granted will depend on the purpose to be served by the special measures. The critical question here is are rights being sought to remedy unequal circumstances or unfortunate choices? In short, while rights can be granted to remove inequalities that are the product of circumstance, individuals must assume the costs of their own

choices (Kymlicka, 1989: 186).

Kymlicka's Hierarchy of Group Rights

The effect of the choice/circumstance principle is to deny the provision of group-specific rights to rectify inequalities that are the result of people's choices. However, the distinction also is employed by Kymlicka to create a hierarchical scheme of minority group rights. It is important to understand that Kymlicka does not confer an equal status or equal rights on all cultural groups. First, Kymlicka divides ethnocultural groups into two general categories: national minorities and immigrant groups. A national minority is "a historical society, with its own language and institutions, whose territory has been incorporated (often involuntarily, as in the case with Quebec) into a larger country" (Kymlicka, 1998a: 2). In Canada, Québécois and First Nations constitute national minorities because they are territorially concentrated, institutionally complex, and linguistically distinct. More importantly, these communities provide their members with a "societal culture," a complete context of choice that offers a range of meaningful options "across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres" (Kymlicka: 1995: 76). In Kymlicka's view, national minorities deserve an extensive scheme of rights to allow Québécois and First Nations to protect their societal cultures from the "disintegrating effects" of the choices of the dominant cultural community (Kymlicka, 1989: 198). Ideally, these external protections will not entail restrictions on the rights of individual community members. However, Kymlicka argues that national minorities should be able to limit their members' behaviour where failing to place "restrictions on the internal activities of minority members . . . would literally threaten the existence of the community" (1989: 199).

Immigrant groups are very differently situated when it comes to the issue of group-specific rights. The rights to be conferred on these ethnocultural minorities are far less extensive than those owed to Canada's 'nations within', a position justified by the choice/circumstance principle. For Kymlicka, the distinguishing feature of immigrant groups, relative to national minorities, is the voluntary nature of the former's membership in the Canadian state. Their history of immigration fundamentally alters the nature of the rights that they can claim. Unlike Aboriginal peoples and Québécois, immigrant groups are not entitled to the protection of their original cultural structures, but are expected to adopt the context of choice provided by their new community. That being said, immigrant groups should be able to expect "some accommodation of their ethnocultural distinctiveness" to help them "integrate into the larger society and to be accepted as full members of it" (Kymlicka, 1998a: 7-8; 1995: 10-11). Here, Kymlicka cites Canada's official policy of multiculturalism and exemptions from Sunday closing laws as the appropriate type of rights that immigrant groups may claim (1995: 97).

New social movements are the third type of group addressed by Kymlicka. Though ethnocultural minorities are properly included in this category, his interest lies more with the "non-ethnic identity groups" that form contemporary social movements and the similarities between their rights claims and the claims of national minorities and immigrant groups (1998a: 9). Together, non-ethnic movements, which Kymlicka identifies as including women, lesbians and gays, religious minorities, and people with disabilities, constitute "a broader movement towards a 'politics of identity', in which a wide range of previously disadvantaged groups seek public recognition of their distinctive identities and needs" (1998a: 90). The formation of these collectives has both social and political importance. Their organization as movements not only

provides members with ways “to define their sense of self and to shape a new way of life and identity” but to advance their distinct political agendas (Kymlicka, 1998a: 92).

Where Kymlicka’s discussion of new social movements takes an unusual and controversial turn is with his attempt to extend his cultural analysis to non-ethnic social groups. Kymlicka contends that the rights of gays and lesbians also can be justified in cultural terms because like ethnocultural groups, gays and lesbians create culture-bearing communities that provide their members with a context of choice and group identity. As explained by Kymlicka, gays and lesbians not only share a “medical condition or biological disposition,” but are bound by a shared “‘identity’, ‘history’, and ‘way of life’” (1998a: 91). Like their ethnocultural counterparts, gays and lesbians seek “recognition for their community and cultural identity,” as well as their “cultural differences” (Kymlicka, 1998a: 91). These similarities are reflected in the tendency of lesbians and gays to employ “quasi-‘ethnic’,” and “cultural” conceptions in defining themselves and defending their rights claims (Kymlicka, 1998a: 91).

Applying his cultural analogy to lesbians and gays, Kymlicka points to the existence of gayⁱⁱ enclaves in major cities, whose territorial concentration has facilitated the creation of separate institutions and a gay culture. The appearance of this genuine subculture, with its “sense of history,” “residential concentration, institutional complexity, and cultural distinctiveness,” serves a similar function to the cultural structures of ethnocultural groups, providing a context of choice, range of options, and sense of agency that are formative in the lives and identities of group members (Kymlicka, 1998a: 95). On this basis, Kymlicka concludes that non-ethnic social movements “that have developed a common culture” and, therefore, provide group members “with valuable cultural practices and group identities” can make claims for public recognition in the form of group-specific rights (1998a: 97). As for the purpose, range, and substance of these rights, Kymlicka places non-ethnic social movements on a par with immigrant groups. They have no claim to the rights and powers owed to national minorities or to the protection of their cultural structures. Nor are they entitled to regulate the activities of their own group members. Like multicultural minorities, the group-specific provisions to which lesbians and gays are entitled are those that serve to fight discrimination and fully integrate group members into mainstream society (Kymlicka, 1998a: 100-103).

Institutional Completeness and the Social Group Hierarchy

Thus, Kymlicka’s scheme of group-differentiated rights places national minorities on a different footing than ethnocultural groups and non-ethnic social movements, and much scholarly attention has been paid to his social group hierarchy and the priority assigned to national minorities relative to multicultural minorities.ⁱⁱⁱ Similar questions arise respecting the position assigned to gays and lesbians. If social groups, like lesbians and gays, create cultures that are important to the identities of their members and provide them with a context of choice in determining how to lead their lives, why should they not be assigned rights similar to national minorities? Moreover, if the sexual identity of lesbians and gays is a matter of circumstance rather than choice - a “medical condition or biological disposition” - as Kymlicka puts it, why should their rights claims be placed on a par with voluntary immigrants (1998a: 91)?

While Kymlicka does not explicitly address the implications of the choice/circumstance distinction as it applies to gays and lesbians, he does explain why they are not entitled to the same kind of rights as national minorities. In Kymlicka’s view, membership in a national minority culture is more fundamental than membership in gay culture. This claim rests on the

meaning and significance of belonging to the type of “societal culture” that national minorities provide. In the first place, individuals are inextricably linked to the culture and society in which they were raised, creating an allegiance that “secondary socialization” into the gay community is unlikely to displace (Kymlicka, 1998a: 98).. As Kymlicka explains,

Francophone gays in Quebec, for example, are born and raised to think of themselves as Québécois, and to think of their life-chances as tied up with participation in Quebec societal institutions. Entering the gay community in later life is unlikely to change this deeply rooted sense of national identity, or the desire to continue to live and work in one’s original national language and culture. (1998a: 98)

In the second place, gay communities play a less formative role in the lives of their members because, unlike the societal cultures of national minorities, gay communities simply cannot provide individuals with a complete context of choice to guide their life choices across both public and private spheres. This becomes evident upon comparing the institutional completeness of gay communities relative to that of the Québécois national community. As Kymlicka notes, “there are no gay universities or governments, and gays lack the territorial concentration to create such institutions. Gays who want to become doctors, lawyers, police officers, teachers or politicians, can do so only by entering mainstream schools and institutions. . . . In this respect, the institutional completeness of the gay community is much less than that of the Québécois” (1998a: 99).

The Relative Value of Societal Cultures

Yet, despite the lack of institutional completeness that characterizes gay and lesbian communities, Kymlicka may be too quick to assume that societal cultures have a pre-eminent value to their members. Here, we see the first difficulty that arises with Kymlicka’s theory; the coherence of his group rights hierarchy and the importance he assigns to the cultures of national minorities is not entirely convincing. If Québécois hold their national culture in such high esteem, what are we to make of the creation of alternative gay communities and culture? In Kymlicka’s view, the emergence of these secondary communities should not be understood as a rejection of their national community. Rather, it signals the desire of lesbians and gays to gain social inclusion in the Québécois national culture by politicizing sexual difference (Kymlicka, 1998a: 98). What most gays and lesbians really want, according to Kymlicka, is integration into the dominant community, seeking “only fair accommodations within mainstream institutions for their distinctive needs and identities” (1998a: 880).

The problem is that Kymlicka does not seriously question whether the discrimination that gays and lesbians face in their national culture diminishes its value to them. In fact, Kymlicka does not pay a great deal of attention to the oppressive potential of national cultures at all. National cultures can offer affirmation and recognition, but they also can signal disregard and disdain. They can marginalize individuals with the range of options they offer, as well as the social meanings assigned to those options. Kymlicka might reply to this criticism by reminding us that the cultural character of a national culture is open to revision. He might argue that the creation of alternative communities provides lesbians and gays with a means of challenging the character of their societal culture - and I would not disagree. But the fact that Kymlicka’s theory reserves protection for the structure of cultures in no way divests a culture’s character of its power, and, in this respect, Kymlicka is too quick to pronounce the greater value of national

cultures for all individuals.

The creation of alternative communities seriously questions the adequacy and inclusiveness of the context of choice provided by national cultures, whose paramount value to individual identity Kymlicka seems to take for granted. If, as Kymlicka suggests, *particular* cultures and communities deserve protection because of their importance to the identity of community members, then the national culture in which a person was raised may not have the greater value. Indeed, institutional completeness may not always be determinative of a community's value, especially where discussions turn to the construction of identity. As Shane Phelan explains, in creating alternative lesbian communities "the priority is on the creation of a community and a history that will offer the lesbian a sense of belonging rather than exclusion, positive identity through membership in a group that has a culture of its own - a culture, in fact, superior to that denied them" (1989: 166).

Cultural Integration versus Cultural Reformation

Given his failure to question the relative value of societal cultures, the fact that Kymlicka equates the creation of alternative communities by gays and lesbians with their desire for integration into existing political, social, and economic structures should not come as a great surprise. However, his integrationist perspective signals the second serious weakness with his theory. By asserting that the political programmes of gays and lesbians are aimed primarily at inclusion and integration, Kymlicka does not adequately consider whether some movements are more interested in social and political reformation, than in integration. As a result, his idea of meeting the demands of social group activists is limited to making "some modification of the institutions of the dominant culture" to further integration (1995: 96). For lesbians and gays, Kymlicka cites the recognition of same-sex marriage and the positive portrayal of lesbians and gays in educational resources as the sort of public accommodation that should be expected (1998a: 100). With these rights comes the hope that individuals will be integrated successfully into their societal culture, that is, that these group-specific measures will allow gays and lesbians to "express their cultural particularity with pride without it hampering their success in the economic and political institutions of the dominant society" (Kymlicka, 1995: 31).

What is less clear, is the extent to which Kymlicka envisions these groups contributing to, or reforming, the dominant culture. On the one hand, his theory clearly supports the efforts of citizens to change the character of their societies, and certain references are made to minority group members contributing to the range of options available in the dominant cultural community (Kymlicka, 1995: 78-79). Yet, Kymlicka's emphasis on integration seems to belie this possibility. There is a real tension between social integration and social reformation, a tension that is not adequately explored by Kymlicka. It is one thing to encourage inclusion and respect for diversity in existing mainstream institutions and quite another to challenge the dominant cultural codes in an effort to transform those institutions and the relations of power that sustain them. Yet, more and more, the claims of collective movements demand just this: the right of all citizens to participate in cultural reproduction - to contribute to the norms, meanings, values, and practices of the dominant culture.

In significant ways, these difficulties are exacerbated by Kymlicka's theoretical approach to difference and his failure to conceptualize difference in comparative, relational terms. The value of a relational approach to difference is the way that it challenges constructions of difference that equate variation from prevailing cultural norms with inferiority. Rather than

seeking to protect individuals who deviate from institutionalized standards from discrimination, a relational conception of difference asks that we test and challenge the logic and neutrality of the standard to which Others are compared. When this approach to difference takes concrete form in rights analyses, it becomes evident how different it is from Kymlicka's approach.

Consider legally recognized same-sex marriage, which Kymlicka provides as an example of an appropriate group-specific right. From an integrationist perspective, the policy offers both public affirmation of gay and lesbian identities, as well as protection against discrimination on the basis of sexual orientation. Here, the efforts of gays and lesbians to gain recognition as 'married', as 'spouses', and as 'families', and, in turn, to become eligible for various employment and government benefit programmes, proceed by attempting to prove the similarities between same-sex couples and "the paradigmatic heterosexual couple" (Herman, 1990: 794). The critical point here, however, is that the heterosexual norm to which gays and lesbians are compared escapes scrutiny.

A very different strategy and result ensue from a framework that approaches difference as a two-sided relationship. Rather than accepting the given scheme of distribution, critically assessing the construction of difference requires that we "question the fundamental premise that benefits should necessarily or logically be disseminated through sexual relationships" (Majury, 1994: 313). If the substantive purpose of spousal and family benefits is to address issues of "dependence, need, and obligation," why is it that sexual relationships, rather than these criteria, serve as the basis for the distributive paradigm (Majury, 1994: 313; Herman, 1990: 797-799)? Instead of simply asking that those who deviate from the institutionalized norm not be discriminated against on account of an arbitrary difference, the legitimacy of the norm itself is called into question.

Immutability and the Choice/Circumstance Distinction

In failing to examine the background norms against which Others are judged, Kymlicka's theory proves ill-equipped to attend to the challenges posed by lesbians and gays to the cultural codes of the dominant society. It also fares little better in terms of its ability to offer a meaningful rights strategy to sexual minorities. Indeed, the third weakness with Kymlicka's theory involves its practical application in the legal realm. When employed as legal method, Kymlicka's rights framework, with its reliance on the immutability of sexual identity, reifies group boundaries. It promotes homogeneous and essentialist depictions of group members, ignoring the construction of intergroup and intragroup differences and the relations of power that support them.

Understanding the limitations of Kymlicka's rights framework requires a further examination of both the choice/circumstance distinction on which Kymlicka relies and the tenet of immutability on which the distinction is premised. As noted above, Kymlicka adheres to the liberal distinction between choice and circumstance to ground the rights of minority social groups. Relying on the work of John Rawls, Kymlicka tells us that group rights only may be conferred where the special measures requested are to remedy unequal circumstances - those disadvantages that arise from the social environment or from an individual's natural endowment (1989: 186). Accordingly, while Kymlicka may emphasize the value that gay culture possesses for its members, maintaining his characterization of lesbians and gays as sharing "a medical condition or biological disposition" is critically important if his theory is to fit the liberal rights paradigm (Kymlicka, 1998a: 91). Indeed, liberal models of gay and lesbian rights find their basis

in the claim that homosexuals constitute an identifiable and fixed minority constituency, defined either by biology, early childhood socialization, or the experience of same-sex desire (Duggan, 1992: 13-16). Often couched in the language of ‘immutability’, the idea that sexual orientation is given, rather than chosen, gays and lesbians are deserving of tolerance and understanding by the majority heterosexual community because sexual preference, “occurring without any conscious agency on the part of the individual, should not, liberal argument goes, be a basis for discrimination” (Herman, 1994: 38). As Didi Herman explains, even when “liberals acknowledge that biology may not be the sole determinant of sexuality, they tend to draw an analogy between sexual orientation and religious orientation - as a deep-seated, fundamental aspect of identity that can be changed only at great cost, if at all” (Herman, 1994: 38).

Rights Claiming and Immutability

Defining homosexuality as an immutable trait has proved invaluable to the rights claiming agendas of gays and lesbians because of the significant role immutability has played in equality rights jurisprudence. In the first place, Canadian courts have invoked immutability standards to determine which non-enumerated groups should be afforded protection under the equality provisions of the *Charter of Rights and Freedoms* set out in section 15.^{iv} For example, in *Andrews v. Law Society of British Columbia*, La Forest J., in a concurring majority opinion, lent support to the doctrine of immutability. In accepting the category of citizenship as an analogous ground of discrimination for the purposes of s. 15, La Forest J. explained that “the characteristic of citizenship is one typically not within the control of the individual and, in this sense, is immutable. Citizenship is, at least temporarily, a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs” (Supreme Court of Canada, *Andrews v. Law Society of British Columbia*, 1989: 195).

In the second place, immutability has been explicitly relied on to establish sexual orientation as an analogous ground of discrimination. In *Veysey*, the Trial Division of Canada’s Federal Court upheld the claim of a gay inmate to receive family visits from his same-sex partner, invoking the principle of immutability. Finding that sexual orientation constitutes an analogous ground of discrimination, the Court stated that “most of the grounds enumerated in s.15 of the Charter as prohibited grounds of discrimination connote the attribute of immutability, such as race, national or ethnic origin, colour, age. One’s religion may be changed but with some difficulty; sex and mental or physical disability, with even greater difficulty. Presumably, sexual orientation would fit within one of these levels of immutability” (Federal Court Trial Division, *Veysey v. Correctional Services of Canada*, 1989: 370-371). Similarly, in 1998, the Supreme Court of Canada affirmed the connection between immutability and the equality rights of lesbians and gays in finding Alberta’s human rights code to be unconstitutionally underinclusive because it did not contain a prohibition against discrimination based on sexual orientation. Discussing the objectives of s. 15, the Court noted that the principal aim of the provision’s prohibited grounds is to eliminate discrimination relating to immutable personal traits (*Vriend v. Alberta*, 1998, at para. 72).

However, like Kymlicka’s choice/circumstance distinction, the legal discourse of immutability constrains the types of claims that lesbians and gays can make and leaves little room for claimants to contest the meanings assigned to social differences. As Nitya Iyer explains, in order to succeed, an aggrieved party must “present him or herself as possessing an ‘unfortunate’ social attribute” over which the individual has little control (1993: 190). As an

immutable trait, sexuality is placed beyond human agency; it is a matter of biology or psychology whose significance is the way that it impedes the ability of lesbians and gays to conform to societal norms (Herman, 1990: 812). Accordingly, the Court's focus goes to the "fixed group of 'others' who need and deserve protection," rather than on the hierarchy of sexual identities (Herman, 1994: 43).

Liberal Identity Politics and Intragroup Difference

While immutability standards tend to preclude analyses that critically assess the background norms of the dominant society, they are even less helpful when it comes to recognizing intragroup differences. This problem is only exacerbated by the emphasis on identity that characterizes Kymlicka's work. Despite his efforts to safeguard the ability of group members to reject and reform the cultural character of their community, his assertion that cultures provide a readily identifiable group identity leads back, willingly or not, to the problem of authenticity and the oppression of non-conforming group members. For example, in discussing 'gay' politics, little time is spent examining the gender differences that place lesbians in a substantially different position than gay men. While Kymlicka acknowledges this omission, attributing it to a less extensive literature on lesbian communities, criticisms of the gay liberation movement by lesbians abound (Kymlicka, 1998a: 197, n. 3). Numerous scholars have characterized the gay liberation movement, its goals, and the efforts and strategies taken by the movement's leadership as institutionalizing the norm of the white, gay male, at the expense of recognizing important intragroup differences.^v Indeed, a significant danger with asserting the notion of a shared group identity is the oppression of non-conforming group members. As the group's culture and identity come to be defined and asserted, standards of authenticity are erected as groups endeavour to set the boundaries that determine what it means to be a 'real' member of the community. In turn, those who deviate from the group's stated norms find themselves marginalized or excluded. It is in this respect that legal standards predicated on a shared group identity are so problematic, especially in the context of immutability standards. Too often the focus becomes defining the substantive content of the group's shared identity, rather than the way that the group's membership is legally, socially, and politically constructed.

Group Membership and Authenticity

Recent Canadian case law makes clear that the exclusion of non-conforming group members is not a problem that is confined to the realm of political and legal theory. One area where the discourse of identity has been given considerable judicial attention is in the jurisprudence on the constitutional rights of Canada's Métis peoples, who are specifically included in the definition of the "aboriginal peoples of Canada" in s. 35 of the *Constitution Act, 1982*. The Aboriginal rights of the Métis was the subject addressed in *R. v. Powley*, a 2003 decision of the Supreme Court of Canada. In *Powley*, the Court was asked to determine who qualified as Métis. According to the Court, "the term 'Métis' in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears" (*R. v. Powley*, 2003, at para. 10). While recognizing that a comprehensive definition of who is Métis would require further development, the Court did specify "important components of a future definition" for the purposes of s. 35 (*R. v. Powley*, 2003, at para. 30). Specifically, an individual claimant must self-identify as a Métis community member. Second, the claimant must demonstrate an ancestral

connection to a historic Métis community. Finally, a claimant must present evidence that she or he is accepted by the modern rights-bearing Métis community. As explained by the Court, “the core of community acceptance is past and ongoing participation in a shared culture . . . That is what the community membership criterion is all about. Other indicia of community acceptance might include evidence of participation in community activities and testimony from other members about the claimant’s connection to the community and its culture” (*R. v. Powley*, 2003, at para. 33).

The Supreme Court’s decision is interesting on two counts. First, like Kymlicka’s depiction of ethnic groups as sharing both a common “ethnic descent” and cultural community, determining who is Métis is not simply a matter of biology or ancestry (Kymlicka, 1998a: 95). The Court is clear that the group also is constituted by its members’ shared identity and culture. Second, and of particular significance for the purposes of this discussion, the Court’s community acceptance standard vests the authority to classify the boundaries of a group’s community and shared identity with the group’s established, most powerful members. The ramifications of this approach for intragroup oppression would soon become clear in an entirely different context.

Kimberly Nixon, a male to female, post-operative transsexual was both medically and legally a woman, her birth certificate having been amended to reflect her gender as female. In 1992 and 1993, Nixon had suffered physical and emotional abuse from a male partner following her sex reassignment surgery and had gone to battered women support services to receive counselling as a female victim of violence. In 1995, when she saw an advertisement calling for peer rape counsellors, she decided that she wanted to ‘give back’ by volunteering as a counsellor herself. Nixon proceeded to train as a volunteer rape counsellor for the Vancouver Rape Relief Society, a feminist, non-profit organization operated by a woman-only collective, providing services to female victims of violence by men. While attending a training session, Nixon was identified as an individual who had not always been a woman, and was asked to leave the group. She was told that to be a rape counsellor, an individual had to have been a woman since birth, that is, she must have been oppressed as a woman all of her life (British Columbia Human Rights Tribunal, *Kimberly Nixon v. Vancouver Rape Relief Society*, 2002 at para. 31). Nixon lodged a complaint with British Columbia’s Human Rights Tribunal, claiming that the Rape Relief Society had discriminated against her on the basis of sex.

The Rape Relief Society asked the Tribunal to consider the interests of rape victims. The argument offered in favour of Nixon’s exclusion was based on psychiatric testimony that female victims of sexual assault often possess a profound distrust of men, whose presence signals a lack of safety and elicits feelings of physical vulnerability (British Columbia Human Rights Tribunal, *Kimberly Nixon v. Vancouver Rape Relief Society*, 2002 at paras.153-155). Accordingly, male counsellors, or a counsellor with male characteristics, would be disturbing to victims of sexual assault. The Society further argued that peer counselling requires commonality of experience. In short, because Nixon had not lived through the “milestones” of being a woman, including “childhood, adolescence, menstrual periods, first sexual experience and taking her place as a woman in the world,” she was not a peer with a “life context” similar to those women seeking counselling (British Columbia Human Rights Tribunal, *Kimberly Nixon v. Vancouver Rape Relief Society*, 2002 at paras.159-160).

Counsel for Nixon countered by reminding the Tribunal that Nixon not only had suffered physical and emotional abuse from a male partner as a woman but had suffered gender

oppression as a transgendered and transsexual individual. Nixon shared many of the experiences with the women in counselling, and, as far as she was concerned, had been a woman from birth (British Columbia Human Rights Tribunal, *Kimberly Nixon v. Vancouver Rape Relief Society*, 2002 at para. 42). Evidence also was presented to the Tribunal establishing that after her rejection from the Rape Relief Society Nixon had gone on to participate in other women-only organizations, working both with battered women and as a live-in support worker in a transition house for female victims of sexual assault (British Columbia Human Rights Tribunal, *Kimberly Nixon v. Vancouver Rape Relief Society*, 2002 at para. 205). The Tribunal found in Nixon's favour, awarding her \$7,500 and ordering Rape Relief to stop excluding transsexuals. In doing so, the Tribunal rejected the biological essentialism relied on by the Rape Relief Society in purporting to define who is a woman. As stated by the Tribunal,

Rape Relief drew a formal distinction between Ms. Nixon and other women based on a personal characteristic. They applied their stereotypical view, that, despite her self-identification as a woman, and her legal status as one, she was not a woman so far as they were concerned. Rape Relief made an assumption about Ms. Nixon that was not based on any assessment of her individual capabilities or her life experience. They reached conclusions about her because she was a members of a defined group - transsexual women. (*Kimberly Nixon v. Vancouver Rape Relief Society*, 2002, at para. 146)

The Rape Relief Society then moved to quash the Tribunal's decision. Finding in the Society's favour, the Supreme Court of British Columbia determined that Nixon's expulsion from the small, private group did not constitute discrimination in the legal sense because her exclusion did not constitute an affront to human dignity. The Court relied on the Supreme Court of Canada's decision in *Powley* in rendering its decision. Citing *Powley's* three-part test, Nixon had to establish self-identification with the group, an ancestral connection to the group, and acceptance by the relevant community (British Columbia Supreme Court, *Vancouver Rape Relief Society v. Kimberley Nixon and British Columbia Human Rights Tribunal*, 2003, at para. 94). Though Nixon's self-identification as a woman was clear, the Court was less sure about her ability to meet the "ancestral connection" component of the test, noting that while genetics were not the only criteria for meeting the legal standard, if "genetic characteristics are a legitimate criterion which must be objectively proved, it would seem that absence of pre transsexual surgery male characteristics is at least arguably an objective basis for determining membership in an 'identifiable group' of women" (British Columbia Supreme Court, *Vancouver Rape Relief Society v. Kimberley Nixon and British Columbia Human Rights Tribunal*, 2003, at para. 99). However, whether Nixon could meet the second component of the test was something of a moot point; Rape Relief's refusal to recognize Nixon as a woman ensured her inability to pass the community acceptance component of the *Powley* test. As noted by the Court, "if the Rape Relief collective is analogous to a community, quite clearly Ms. Nixon does not meet Rape Relief's community membership criterion" (*Vancouver Rape Relief Society v. Kimberley Nixon and British Columbia Human Rights Tribunal*, 2003, at para. 103). Ultimately, the Court concluded that "exclusion from a small self-defined 'identifiable group' like the Sault Ste. Marie Métis community in *Powley* or Rape Relief in this case, cannot, on the basis of objective scrutiny, impact negatively on the dignity of any person excluded"

(*Vancouver Rape Relief Society v. Kimberley Nixon and British Columbia Human Rights Tribunal*, 2003, para 146). In the Court's view, Nixon's expulsion from the private group, did not constitute a public indignity.

The liberal identity politics played out in the *Nixon* case amply illustrate how the concepts of immutability and identity lead to the exclusion of non-conforming group members, usually in the name of authenticity. Nixon's medical, legal, and personal status as a woman succumbed to the logic of biological essentialism that informs liberal immutability standards. Despite the fact that Nixon had experienced male violence as a woman, this experience, which she shared with other female victims of abuse, could not overcome the fact that she had experienced some part of her life as an anatomical male. According to Rape Relief, authentic women are those who have been "unambiguously female from birth," a community standard in whose formulation Nixon was excluded from participating (British Columbia Supreme Court, *Vancouver Rape Relief Society v. Kimberley Nixon and British Columbia Human Rights Tribunal*, 2003, at para. 36). In this respect, the *Nixon* case exemplifies a critical truth: that "liberal identity politics can serve as a pervasive method of social control, which is far more effective than the juridical use of power" (Stychin, 2005: 98).

Liberal Identity Politics and Theories of Identity Formation

Without question, liberalism's rights paradigm limits the kinds of claims that sexual minorities can make. Challenging the cultural codes of the dominant society and the hegemony of heterosexuality are all but precluded. At the same time, by focussing on the boundaries of group membership, this form of identity politics and rights claiming tends to reify identities and oppress non-conforming group members. For these reasons, among others, the immutability of sexual identity has come under increasing scrutiny in the scholarly work of gays and lesbians. The discourse that has preoccupied these discussions concerns the debate between essentialist and constructionist theories of sexual identity. Essentialist theories treat sexual identity as the expression of the individual's core being (Kitzinger and Wilkinson, 1995: 95). Whether determined prenatally or through experiences in early childhood, essentialist theories take gay and lesbian sexuality to reflect "cognitive realizations of genuine, underlying differences" from heterosexuals (Epstein, 1987: 11). Constructionist theories, on the other hand, reject the fixity of sexual identity that essentialism assumes. Rather than focussing on the causes of homosexuality, constructionists shift their examinations to the way that "societies construct 'the homosexual' and to the meanings and definitions attached to that concept" (Wilkinson and Kitzinger, 1994: 307). On this view, "sexuality, and sexual identities, are social constructions, and belong to the world of culture and meaning, not biology" (Epstein, 1987: 11).

Despite the strength of constructionist arguments, the notion that sexual identities are socially constructed sits uneasily with many gay and lesbians for two reasons. First, the gay liberation movement often has presented its political project in essentialist terms in order to fit liberalism's legal rights framework. Second, constructionist theories suggesting that sexual identities are mere social constructs fail to explain the self-understandings of many gays and lesbians who experience their sexual identities as fixed, rather than voluntary (Epstein, 1987: 23).

Much like the long-standing debate between liberal and communitarian thinkers regarding the nature of the self,^{vi} some scholars have sought to resolve the tension between essentialism and constructionism in the formation of gay identity by embracing a hybrid position

between choice and constraint. The work of Steven Epstein is notable in this regard, particularly because Kymlicka's gay ethnicity model of group rights is drawn from Epstein's work (Kymlicka, 1998a: 98). Like Kymlicka, Epstein offers a theory of identity that recognizes the importance of socialization into a particular social system, as well as the agency of individuals to gain independence from and reject aspects of their socialization (1987: 29). This enables Epstein's account of gay and lesbian identity to respect and accommodate those who experience their sexual identity as involuntary, while allowing for a critical evaluation of the ways in which the dominant society constructs same-sex sexual identity. However, in doing so, Epstein rejects the choice/constraint distinction that structures the essentialist/constructionist debate, as well as the choice/circumstance distinction invoked by liberals such as Kymlicka. Epstein's own words are instructive here:

If the question is, Are sexual identities the outcome of choice or constraint?, then the whole thrust of the preceding argument is to suggest that the only possible answer is "neither and both." Choice and constraint constitute a false opposition.

Once we abandon the strict essentialist notion of identity as forever fixed within the psyche, as well as the strict constructionist conception of identity as an arbitrary acquisition, we can recognize that a gay or lesbian identity might have a clear resonance for individuals without necessarily binding them to any specific definition of what that identity "means." An intermediate position between the poles of intrapsychic and acquired identity allows us to recognize that these sexual identities are *both inescapable and transformable*, and thus are capable of giving rise to a variety of political expressions. (1987: 33-34)

In Epstein's theory, which he refers to as a "modified constructionist position," sexual identity is likened to ethnicity and given a decidedly constructionist spin (Epstein, 1987: 13). Citing Donald Horowitz's work on ethnic identity, Epstein accepts that ethnicity is not a voluntary affiliation, yet maintains that ethnic identity operates on a continuum. Though it is an ascriptive characteristic, its boundaries are not absolute. Rather, ethnicity is a "putative ascription" whose borders can change. This can occur through the shifting national boundaries of war and annexation,^{vii} changing levels of self-identification among group members, as well as "panethnicity" - the conscious organization of previously distinct ethnic or national identities within a unified racial or ethnic category, as in the case of "Asian Americans" and "Latinos" (Omi, 1997: 15-17). For Epstein, a modified constructionist perspective that recognizes ethnicity as a putative ascriptive characteristic provides a better basis for a gay ethnic analogy. As he puts it: "If ethnicity does not necessarily begin at birth, and if ethnicity involves some combination of external ascription and chosen affiliation, then a gay identity . . . seems not wholly unlike an ethnic identity" (1987: 36).

On this view, sexual identity is likened to race or gender, as a category whose meaning is socially-constructed, but "whose membership is, for the most part, biologically determined" (Ortiz, 1993: 1843). As a result, gay identity can be defined either around same-sex desire or around assigned social roles, depending on the purpose for which the description is being employed. As Daniel Ortiz explains, "to a researcher testing determinist theories of the causes of sexual orientation, for example, the essentialist description will probably prove more helpful. . . .

To a cultural anthropologist exploring the meaning of and reasons for the ban on military service by gay citizens, however, the thicker, constructivist description will prove the better tool” (1993: 1846). Similarly, while recourse to identity in the legal realm will always run the risk of diverting attention to the specific content of the group’s shared identity, it is the social, political, and legal construction of difference that is the critical factor. There simply is no meaningful way to assess intergroup or intragroup discrimination without attending to the ways in which the differences of Others are constructed as inferiority against the unexamined background norms of the dominant society, or the imposed standards of a social group’s most powerful members.

Conclusion

Kymlicka’s attempt to reconcile the provision of group-specific rights to gays and lesbians with the tenets of liberal theory raises a number of difficulties. Though his gay ethnicity model likens lesbians and gays to multicultural groups in order to distinguish the former from national minorities, the coherence of this grouping is subject to challenge. While Kymlicka relies on the voluntary nature of immigration to accord multicultural minorities with fewer rights than national minorities, on Kymlicka’s account of sexual identity, the insecure cultural structure of gays and lesbians is a matter of circumstance, rather than choice. Kymlicka’s other argument to distinguish gays and lesbians from national minorities for the purposes of his rights framework also begs important questions. His claim here is that the societal cultures of national minorities have greater value to lesbians and gays than do gay and lesbian cultures because of the primary socialization and institutional completeness offered by national minority communities. However, Kymlicka’s insistence that societal cultures are of greater value to gays and lesbians is not entirely convincing. Given his failure to address the potential of societal cultures to devalue and disrespect the identities of sexual minorities, the lesser value assigned to gay and lesbian culture and community is open to challenge. Moreover, if cultural contexts are worthy of protection because of their connection to individual identity, that is, because of their ability to provide individuals with a sense of belonging, emotional security, and personal strength, then gay and lesbian cultural contexts may have greater value than first believed.

A more significant failing of Kymlicka’s theory is the way that it conceptualizes - or fails to conceptualize - difference. His analysis does not examine the institutionalized norms against which gays and lesbians are measured or acknowledge the importance of critically assessing the meanings assigned to same-sex sexual identity in the dominant society. Ironically, though Kymlicka resolutely asserts that liberal autonomy demands that individuals be free to challenge the norms and values of their societal culture, his emphasis on integrating gays and lesbians into the dominant society and its institutions provides little room for cultural contestation. Like his evaluation of the value of societal cultures, consideration of the oppressive potential of heterosexual values is notably absent from his discussion of the political agendas of gays and lesbians. Furthermore, and as evidenced by recent Canadian jurisprudence, the liberal identity politics that Kymlicka embraces, with its emphasis on immutability, is ill-equipped to attend to intragroup differences. Instead, rights claiming around shared group identities too often lapses into the exercise of specifying the content of a group’s shared and authentic identity, marginalizing non-conforming group members in turn. The negative impact that results where attention is diverted to defining identity categories should not be underestimated. Discrimination does not flow from the fact that personal characteristics inhere in individuals, but from how

differences, be they biological or social, are constructed by society. Legal analyses that neglect this fact are bound to overlook the sources of discriminatory treatment.

Given Kymlicka's desire to appeal to the liberal rights paradigm, perhaps his characterization of sexual identity as immutable should not be surprising. But what is surprising about this characterization is the way that it conflicts with his own theory of identity. The question that remains for Kymlicka is how can his conception of identity, which embraces both choice and constraint, be reconciled with the binary choice/circumstance distinction and the principle of immutability that are so central to his rights framework? If, as Kymlicka suggests, important aspects of individual identity are culturally informed, then it is imperative that the social meanings assigned to identities be critically assessed. Failing to do so denies the social construction of individuals, unnecessarily restricts our understandings of sexual identity, and neglects the principles of liberal autonomy which demand respect for the right of individuals to reject the norms and values of their society. Ultimately, therefore, while Kymlicka's characterization of gay identity as medical or biological in nature fits neatly into the liberal rights paradigm, it belies the constructionist aspects of his own theory of identity.

Notes

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- i. Kymlicka responds to Forst's contention as follows: "Considerations of identity provide a way of concretizing our autonomy-based interest in culture. In principle, either the minority's own culture or the dominant culture could satisfy people's autonomy-interest in culture, but considerations of identity provide powerful reasons for tying people's autonomy-interest to their own culture. Identity does not displace autonomy as a defence of cultural rights, but rather provides a basis for specifying which culture will provide the context for autonomy" (2001: 55, n. 7).
 - ii. While Kymlicka's discussion generally focusses on gay male communities, he does suggest that "many of the historical trends and current issues affecting gays also apply to lesbians, although lesbian communities tend to be smaller in size" (1998a: 197, n. 3).
 - iii. For a critical discussion of Kymlicka's distinction between national minorities and voluntary immigrants see Young, 1997; Parekh, 1997; and Carens, 1997.
 - iv. For a discussion of the judicial treatment of sexual identity as an immutable trait in Canadian case law see Iyer, 1993: 188-191; Herman, 1990: 810-815; and Stychin, 1995: 54-64.
 - v. This argument is noted by Kymlicka (1998a: 199-200, n. 39). For a discussion of how gender differences divide the interests of lesbians and gay men see Taylor and Whittier, 1992: 116; Epstein, 1987: 22; Stein, 1992: 49-50; and Majury, 1994.
 - vi. For a discussion of the communitarian/liberal debate see Kymlicka, 1998b.
 - vii. Consider the case of French children in the province of Lorraine who suddenly became German upon the province's wartime annexation (Scales-Trent, 1995: 128-129).

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