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# *Rearranging the Furniture: Toward the Articulation of a Queer Legal Theory. A Review of Carl F. Stychin, Law's Desire: Sexuality and the Limits of Justice*

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Carl F. Stychin, *Law's Desire: Sexuality and the Limits of Justice*. New York: Routledge, 1995. Pp. ix, 185 [Cloth \$59.95 (U.S.); paper \$16.95 (U.S.)].

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**Reviewed by Jo-anne Pickel\***

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*[O]ur sexualities and the categories through which we understand them — for instance, “lesbian”, “gay”, “bisexual”, or “straight” — are not part of the furniture of the universe but rather are themselves produced by systems of regulation including the law.<sup>1</sup>*

## Introduction

It is difficult to ignore the increased visibility of gay men, lesbians and even bisexuals in recent years, whether it be in the media, political fora, the academy, or in different legal contexts. The recent growth in legal scholarship on law, sexuality and sexual orientation is noteworthy as are the sustained efforts by lesbians and gay men to seek redress for social inequalities through litigation strategies.<sup>2</sup> The complex array of political and legal interventions undertaken by gay men and lesbians over recent years has been aimed not only at seeking redress for perceived injustices, but also at

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© McGill Law Journal 1997

Revue de droit de McGill

To be cited as: (1997) 42 McGill L.J. 483

Mode de référence : (1997) 42 R.D. McGill 483

<sup>1</sup> L. Greene, “Introduction” (1995) 8 Can. J. Law & Jur. 3. Greene is describing a constructivist or postmodern perspective on sexuality. He remarks that this perspective is now the controlling voice in scholarship in this area.

<sup>2</sup> For recent analyses of law and sexual orientation in Canada, see e.g. D.G. Casswell, *Lesbians, Gay Men and Canadian Law* (Toronto: Emond Montgomery, 1996); D. Herman, *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* (Toronto: University of Toronto Press, 1994) [hereinafter *Rights of Passage*]; R. Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (New York: Clarendon Press, 1995); J.A. Yogis, R.R. Duplak & J.R. Trainor, *Sexual Orientation and Canadian Law: An Assessment of the Law Affecting Lesbian and Gay Persons* (Toronto: Emond Montgomery, 1996).

asserting lesbian and gay identities, and at disrupting dominant discourses and practices relating to issues of sexuality and sexual orientation.

In tandem with this broadening and deepening of analyses that focus on sexuality and the law, there has been an increased questioning of law itself and of the complex ways in which law operates both in the regulation and constitution of subjects. Scholarship in feminist legal theory, critical race theory, critical legal studies and legal pluralism is well known for its attempts to lay bare the workings of the legal process. In addition, in recent years, a number of theorists have sought to examine law and legality through the lens of postmodernism.<sup>3</sup> Given their concern with the discursive dimension of social life, postmodern theorists have attempted to deconstruct universal ideals in order to reveal their particular and contingent nature. Applied to the study of law, postmodern theory suggests that presumed legal truths and realities are instead constructed through the operation of discursive frameworks and practices.

Carl Stychin's *Law's Desire: Sexuality and the Limits of Justice*<sup>4</sup> is a welcome addition to ongoing efforts to break down rigid and reductionist thinking about identity and to scrutinize law's complex and at times contradictory relationship to sexual practices, identities, and representations. It is an audacious attempt to weave together an analysis that crosses both national and disciplinary boundaries.

Significantly, *Law's Desire* is not a systematic overview of legal responses to sexual orientation in different countries. Instead, Stychin seeks to highlight recurring themes in the legal treatment of sexuality, particularly gay male sexuality, through the consideration of case studies drawn from Canada, Britain and the United States. Heavily influenced by postmodernism and poststructuralism, Stychin generally eschews an approach which would seek to make universal claims about life and law. Through his case studies, he probes the ways in which law both constrains sexual expression and constitutes sexual identities in particular contexts. Ultimately, he seeks to explore the gaps and inconsistencies in this process, for it is these gaps, Stychin suggests, which create space for discursive resistance to legal and sexual hegemonies.

Most of the chapters in *Law's Desire* appeared as articles in various law journals between 1992 and 1994. As a collection of previously published articles, there inevitably is some repetition; however, the consolidation of these articles into book form allows Stychin to sketch some of the similarities and differences between the three countries (and legal contexts) from which he has chosen his case studies. In addition, the publication of *Law's Desire* makes Stychin's work available to a broader audience, one that extends beyond those (relatively few) of us who have regular access to law journals and legal databases.

Stychin's work is persuasive, insightful and challenging. His analysis is most compelling when it is carefully circumscribed by one of his case studies. At times,

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<sup>3</sup> See e.g. B. De Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York: Routledge, 1995); C. Douzinas & R. Warrington, *Postmodern Jurisprudence: The Law of Text in the Texts of Law* (New York: Routledge, 1991); M.J. Frug, *Postmodern Legal Feminism* (New York: Routledge, 1992).

<sup>4</sup> (New York: Routledge, 1995) [hereinafter *Law's Desire*].

Stychin's discursive investigation lingers too long on the gaps and inconsistencies in legal discourse without examining how actors take advantage of these gaps to effect social/sexual change. Given his interest in discursive struggle and resistance, Stychin's analysis would benefit from additional grounding in the specific experiences of situated political actors. I will elaborate on this critique after canvassing some of the key themes raised in Stychin's work.

## I. Toward a Queer Legal Theory: Key Themes in *Law's Desire*

Several interrelated themes recur in Stychin's case studies. Since I cannot hope to map out all of these exhaustively, I will highlight a few that I found significant and that are woven through several chapters.

The first theme is Stychin's central claim: law desires "the 'homosexual' against whom a coherent heterosexuality can be promoted through law."<sup>5</sup> He argues that "legal discourse is an important site for the constitution, consolidation and regulation of sexuality and, in particular, the hetero-homo sexual division."<sup>6</sup> Stychin affirms a social constructionist view of identity. That is, sexuality and sexual identities, as all other identities, are socially constructed – they are neither "natural" nor do they precede their own articulation through a web of discourses including legal discourses.<sup>7</sup> This view ties into poststructuralist attempts to show how the rational subject of the Enlightenment requires the creation of a devalued other against whom the former can be constructed. Poststructuralist theorists argue that all structured dualities are constructs and that they can and should be deconstructed in order to reveal their fragile and contingent nature. Deconstruction helps us notice the way in which dichotomous thinking constitutes a powerful strategy for controlling the world by stabilizing contingent hierarchies and promoting them as natural and inevitable.<sup>8</sup> Applying a post-structuralist analysis to the legal treatment of sexuality, Stychin argues that the construction of a "normal" sexuality through legal discourse requires an excluded "other" against whom the former can be consolidated. Homosexuality provides this oppositional "other" against which heterosexuality is normalized.

Stychin provides several examples of how this construction of homosexuality functions as "other" in order to reinforce the "naturalness" of heterosexuality. In particular, he discusses attempts in both Britain and the United States to legislate against the "promotion" of homosexuality. For example, he discusses the adoption of section

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<sup>5</sup> *Ibid* at 1.

<sup>6</sup> *Ibid* at 7.

<sup>7</sup> Stychin draws considerably from the work of Judith Butler and Eve Kosofsky Sedgwick to put forward a view of both gender and sexual identities as "performative". That is, rather than being essentially determined, identities come to be naturalized through the repetition of actions and discourses (see *ibid.* at 140-51; J. Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990); E. Kosofsky Sedgwick, "Queer Performativity: Henry James' *The Art of the Novel*" (1993) 1 G.L.Q.: J. Lesbian & Gay Stud. 1).

<sup>8</sup> For a discussion of the merits of a deconstructionist approach for feminist theory, see E. Frazer & N. Lacey, *The Politics of Community: A Feminist Critique of the Liberal-Communitarian Debate* (Toronto: University of Toronto Press, 1993).

28 of the *Local Government Act*<sup>9</sup> in Britain which prevents local authorities from promoting homosexuality and teaching in school the acceptability of homosexuality as a “pretended” family relationship. Referring to the debates on the legislation in the British House of Commons and House of Lords, Stychin argues that the proponents of section 28 put forward a view of gay and lesbian sexual identities as extremely dangerous yet also dangerously seductive.<sup>10</sup> According to this view, any positive portrayal of gay and lesbian sexuality risks the proliferation of gay and lesbian identities in society.

Stychin observes that the proponents of section 28 implicitly view heterosexuality as a fragile and tenuous identity which is under constant threat from its “other” — homosexuality — which has the power to cross the border and corrupt the former’s “natural” unity. Ironically, then, section 28 supporters implicitly accept a view of sexuality as provisional and dependent on historical and social circumstances.<sup>11</sup> This understanding of sexuality accords with the belief commonly held by contemporary cultural and postmodern theorists that our subjectivities, rather than being stable and unitary, are positioned or “sutured” at the intersection of a web of discourses which circulate within societies at given points in time.<sup>12</sup> Meanwhile, opponents of section 28 — who include, but are not limited to, gay men and lesbians — tend to respond to fears over the “luring” of children into a homosexual “lifestyle” by advocating a view of sexuality as innate, immutable, and not susceptible to promotion. In contrast, Stychin suggests that opponents of section 28 should put forward a more fluid view of sexuality and sexual identities, one that recognizes that these identities definitely can be promoted (heterosexuality being the prime example in mainstream culture) and, moreover, that homosexuality *should* be promoted as an alternative sexual identity.<sup>13</sup> He suggests that rather than resorting to the language of immutability, opponents of section 28 could instead assert a right to articulate a plurality of sexual identities within public discourse.<sup>14</sup>

Despite governments’ attempts to use legal mechanisms to prohibit the promotion of homosexuality, Stychin maintains that the legal constitution of identities never achieves complete closure. Legal regulation frequently and inadvertently creates discursive spaces for the articulation of identity(ies) through the agency of the excluded “other”. First, because a prohibition must acknowledge the existence of the prohibited, it thereby brings prohibited practices and identities into the realm of public discourse. Second, the enactment of laws may be marked by considerable protest which may in turn provide a point of unity and solidarity among targeted groups. Thus, ac-

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<sup>9</sup> (U.K.), 1988, c. 9.

<sup>10</sup> See *Law’s Desire*, *supra* note 4 at 43.

<sup>11</sup> *Ibid.*

<sup>12</sup> See e.g. S. Hall, “Old and New Identities: Old and New Ethnicities” in A.D. King, ed., *Culture, Globalization and the World System* (London: MacMillan, 1991) 41.

<sup>13</sup> See *Law’s Desire*, *supra* note 4 at 43, 48–49. Stychin, however, notes that “homosexuality” should not simply be promoted as a matter of sexual desire but, rather, as a legitimate, desirable and fulfilling identity. He suggests that this promotion would provide the basis for a more “integrated sense of self and community” among gay men and lesbians.

<sup>14</sup> See *ibid.* at 49.

ording to Stychin, while attempts to constitute and regulate identities through legal means may be partially successful, they may also serve to facilitate discursive interventions and the articulation of alternative sexual identities.<sup>15</sup>

A second recurring theme in *Laws' Desire* concerns the pitfalls inherent in the legal regulation of artistic and pornographic representations. Drawing upon poststructuralism, postmodernism, and critical film and literary theory, Stychin argues that attempts to regulate representations are often based on a misconception of the role of cultural production and the diverse meanings of cultural texts.<sup>16</sup> Further, he suggests that the uncontrollable nature of representations, in terms of the meanings that they convey, can form the basis upon which marginalized groups may forge new and potentially subversive political identities.<sup>17</sup>

Stychin examines the possible problems with attempting to regulate pornographic representations in his analysis of the work of anti-pornography feminists.<sup>18</sup> He argues that the view held by feminists such as Catharine MacKinnon and Andrea Dworkin, and advocated in Canada by the Women's Legal Education and Action Fund (L.E.A.F.) in *R. v. Butler*,<sup>19</sup> is flawed in its application to gay male pornography.<sup>20</sup> The feminist anti-pornography position, Stychin argues, fails to take into account the way representations are invested with different meanings depending on the audience. Stychin suggests that the meaning of an image cannot be discerned outside the context of its spectatorship. Thus, the dominance and submission depicted in most pornography may assume different meanings when these materials are viewed outside a straight male context.<sup>21</sup> As a result, according to Stychin, the radical anti-pornography approach fails to capture the ways in which gay male pornography, rather than reinforcing images of masculinity, may in fact subvert dominant understandings of masculinity and male power. He suggests a new model for the regulation of pornography, one that conceives of pornography as political speech and which focuses on the right of marginalized groups to articulate their identities in the public sphere.<sup>22</sup>

A third theme taken up by Stychin is directly linked to the postmodern problematization of identity. If identities are partial, contingent, and open to reconfiguration,

<sup>15</sup> See *ibid.* at 48-53.

<sup>16</sup> See *ibid.* at 63-64.

<sup>17</sup> See *ibid.* at 12.

<sup>18</sup> See *ibid.* at 55-90.

<sup>19</sup> [1992] 1 S.C.R. 452, 89 D.L.R. (4th) 449.

<sup>20</sup> For an elaboration of this anti-pornography feminist position, see C. MacKinnon, *Only Words* (Cambridge, Mass.: Harvard University Press, 1993). This position has been the subject of heated debates both within and outside feminist circles (see e.g. B. Cossman *et al.*, *Bad Attitude(s) on Trial: Pornography, Feminism and the Butler Decision* (Toronto: University of Toronto Press, 1996) at 99; A.C. Hutchinson, "In Other Words: Putting Sex and Pornography in Context" (1995) 8 Can. J. Law & Jur. 107).

<sup>21</sup> *Law's Desire*, *supra* note 4 at 64.

<sup>22</sup> According to Stychin, this would be a liberationist conception of rights. The subject of the rights is not the universal bearer of liberal rights, but a subject with a specific political experience and history of marginalization within dominant culture. For his discussion of this model of rights, see especially *ibid.* at 55-75.

how can they also serve as the basis for assertions of collective identities by particular groups within society? On what basis do identity-based social movements assert the coherent identity-categories arguably needed for political and legal reform? Stychin argues that this tension between deconstruction and assertion of identity is irresolvable and best understood as a continuing contestation.<sup>23</sup> It arises most clearly in attempts to articulate a queer theory and practice. According to Stychin,

[c]entral to a queer identity ... is the problematisation of categories of sexual identity and boundaries of sexual propriety, as they have been historically constituted. Queerness in part suggests an unwillingness to fix difference in any ultimate literality. Rather, queers favour a strategically articulated commonality forged from differently located subject positions.<sup>24</sup>

In highlighting the provisional nature of identities, then, queerness as a concept challenges prevalent modes of thought both in dominant culture and within gay and lesbian communities, as the latter often have been no less exclusionary and essentialist in their thinking about identity.<sup>25</sup>

A tension arises between the view of identity as unstable and open to reconfiguration and the desirability of asserting coherent identity-categories for purposes of political mobilization; for, as Stychin notes, essentialist arguments continue to have resonance and to be persuasive within most social and political contexts. This may be especially so in legal contexts, given that legal discourse proceeds on the basis of categories in order to characterize and analyze legal problems. Indeed, by relying upon essentialist claims, gay men and lesbians in countries such as Canada have achieved significant legal advances. These claims have been especially common, perhaps necessary, but also somewhat problematic, in the area of equality rights or anti-discrimination law. Attempts on the part of gay men and lesbians to assert equality rights under section 15 of the *Canadian Charter of Rights and Freedoms*<sup>26</sup> provide one example. Stychin notes that the language of immutability that has been used by the courts to add analogous grounds of discrimination under section 15 clashes with the postmodern view of identities as fluid and contingent.<sup>27</sup>

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<sup>23</sup> See *ibid.* at 140-56.

<sup>24</sup> *Ibid.* at 141.

<sup>25</sup> Many social movements, including the feminist and gay and lesbian movements, have been called upon to recognize and respond to the diversity within their memberships. By viewing individual and collective identities as shifting and open to reconfiguration, a postmodern approach to identity adds an extra wrinkle for these movements. Not only are they called upon to recognize diversity along racial, (dis)ability, gender or class lines, they are also challenged to recognize the dynamic nature of their members' self-identification.

<sup>26</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>27</sup> In deciding on the recognition of analogous grounds of discrimination under s. 15 of the *Charter, ibid.*, Canadian courts have used the language of "immutability" and "discrete and insular minorities" (see e.g. *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143 at 152 & 195, 56 D.L.R. (4th) 1 [hereinafter *Andrews*]). However, since the Supreme Court of Canada's judgment in *Egan v. Canada*, [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609 [hereinafter *Egan* cited to S.C.R.], the courts' approach to the recognition of analogous grounds has shifted somewhat. Although Laforest J. in his judgment

Didi Herman has commented on the way in which, despite its possible benefits, an approach which represents lesbians and gay men as a discrete and immutable minority may restrict rather than broaden social understandings of sexuality. Within the minority-rights paradigm of equality, according to Herman,

[L]esbians and gay men are granted legitimacy, not on the basis that there might be something problematic with gender roles and sexual hierarchies, but on the basis that they constitute a fixed group of "others" who need and deserve protection. Arguably, then, human rights frameworks thus regulate new identities in ways that contain their challenge to dominant social relations.<sup>28</sup>

The current test for the addition of analogous grounds of discrimination under section 15, then, may fail to question the naturalness and implied neutrality of the background norm against which these grounds are constituted.<sup>29</sup>

Stychin notes, however, that while identity categories may be constraining and exclusionary, they may also be necessary politically and personally liberating.<sup>30</sup> Moreover, the transgression of identity-categories alone will not transform the meaning assigned to social categories in dominant culture. Therefore, in Stychin's view, collectivities will have to negotiate strategically the tension between construction and deconstruction of identity-categories by "assert[ing] categories as meaningful and strategically important, while avoiding a closure of their definition."<sup>31</sup>

## II. The Possibilities and Pitfalls of Postmodern Analysis

While Stychin's analysis offers considerable possibilities for probing the relationship between law and sexuality, it also presents certain pitfalls by failing adequately to recognize and validate the impact of political agents in the legal sphere.

On the positive side, Stychin's discursive approach is a useful tool for unpacking current and highly-charged debates about the social construction of identities and of concepts such as "marriage" and "family". For example, it is significant that, in the context of section 28 of the *Local Government Act*<sup>32</sup> in Britain, not only are gay men and lesbians positioned as "other", but same sex relationships and families are viewed

(Lamer C.J.C., Gonthier, Major JJ. concurring) refers to "groups defined by an innate or unchangeable characteristic" (*ibid.* at 528-529), Cory J. (Iacobucci, Sopinka, McLachlin JJ. concurring) focuses on whether the basis of the impugned distinction serves to deny the essential human dignity of the Charter claimant (*ibid.* at 598). Rather than focusing on immutability, he looks at whether the group in question has suffered discrimination arising from stereotyping, historical disadvantage or vulnerability to political and social prejudice (*ibid.* at 598-603). Having occurred since the writing of *Law's Desire*, these shifts in the analysis under s. 15 will no doubt be incorporated into Stychin's future work on this issue.

<sup>28</sup> *Rights of Passage*, *supra* note 2 at 44.

<sup>29</sup> See N. Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 *Queen's L.J.* 179. See also L'Heureux-Dubé J.'s judgment in *Egan*, *supra* note 27 at 540; J. Nedelsky, "Embodied Diversity and the Challenges to Law" (1997) 42 *McGill L.J.* 91 at 98-99.

<sup>30</sup> See *Law's Desire*, *supra* note 4 at 154.

<sup>31</sup> *Ibid.* at 155.

<sup>32</sup> *Supra* note 9.

as “pretended” rather than real.<sup>33</sup> Stychin’s analysis, then, easily extends to section 28’s view of same-sex families as posing a constant threat to the “traditional” (and traditionally-idealized) heterosexual family unit.

Moreover, it seems that this type of analysis is becoming ever more applicable given recent controversies over the meaning of marriage in both the United States and Canada.<sup>34</sup> The debates over same-sex marriage in Hawaii and the rush by state legislatures in the United States to pass legislation defining marriage as the union of one man and one woman in the wake of the *Baehr*<sup>35</sup> case is remarkable, as is the recent federal *Defense of Marriage Act*<sup>36</sup> passed by the United States Congress last January. Applying Stychin’s poststructuralist analysis, this flurry of opposition to same-sex marriages and families suggests the possibility that dominant notions of family and marriage have been significantly disrupted by attempts on the part of gay men and lesbians to have their unions officially recognized. The excluded “other”, in this case the spectre of same-sex couples (and even worse, same-sex couples raising children), is presenting a profound challenge to the socially constructed categories of marriage and family.

A similar analysis could be used to interpret the spirited defense of the heterosexual family in *Egan v. Canada*,<sup>37</sup> decided in 1995 by the Supreme Court of Canada. According to Laforest J., writing for a plurality of the members of the court (Lamer C.J.C., Gonthier and Major JJ. concurring), the ultimate *raison d’être* of marriage is

firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage.<sup>38</sup>

The concept of marriage, then, according to Laforest J., is naturally fixed; it is grounded in biological and social realities which in his view are unchangeable.<sup>39</sup> Same-sex unions are thereby pushed outside the biological and natural frame of analysis but, significantly, are always seeking to intrude back into it. Such an analysis of the legal construction of the concepts of “marriage” and “family” suggests that Stychin’s approach to the legal regulation of sexual identities might provide a frame-

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<sup>33</sup> See *ibid.*, s. 28.

<sup>34</sup> For an analysis of the ideological construction of the notion of family and the possible implications of claiming recognition for same-sex families, see D. Herman, “Aren’t We Family? Lesbian Rights and Women’s Liberation” (1990) 28 *Osgoode Hall L.J.* 789.

<sup>35</sup> *Baehr v. Miike*, 1996 WL 694235 (Haw. Circ. Ct.) (on appeal).

<sup>36</sup> Pub. L. No. 104-199, 110 Stat. 2419 (1996).

<sup>37</sup> *Supra* note 27.

<sup>38</sup> *Ibid.* at 536.

<sup>39</sup> The judgments in *Egan*, *ibid.*, reflect deep divisions within the Supreme Court on the interpretation of equality rights under the *Charter*, *supra* note 26. While Laforest J.’s judgment does not reflect the majority view on the interpretation of s. 15, it did attract as much support from the Court as any other judgment in the case (see *supra* note 27 for description of the two principal opinions).



work for understanding how other categories and concepts that affect gay men and lesbians are invested with meaning through legal processes.

Indeed, the greatest strength of Stychin's work lies in his analysis of cultural and legal texts. His work is most persuasive when he engages in carefully delineated case studies rather than making more general claims. For example, his study of an American case concerning gay men and lesbians in the military<sup>40</sup> provides compelling insights into the unarticulated assumptions embedded in the court's reasoning on this issue.<sup>41</sup>

In contrast, his chapter entitled "Equality Rights, Identity Politics, and the Canadian National Imagination"<sup>42</sup> tends to be rather utopian and highly general in both its approach and conclusions. In this chapter, Stychin suggests that Canada could be seen as the first postmodern state.<sup>43</sup> In his view, this is because the Canadian national identity is signified by an absence of essential definition, which effectively creates space for the articulation of group identities using the language of nationalism. Thus, according to Stychin, "'Canadian' becomes an identity open to resignification and intersection through an ever-increasing variety of perspectives engaged in a dialogue guaranteed by the *Canadian Charter of Rights and Freedoms*."<sup>44</sup> Later, he argues that

[t]he general approach adopted by the courts and its specific application to discrimination on the basis of sexual orientation suggests a willingness to recognize emergent identities within constitutional discourse and to *protect* those who so identify themselves through the equality guarantees of the *Charter*.<sup>45</sup>

Stychin's analysis of the *Charter* in this chapter seems idealistic at best and dangerously naive at worst. First, if the Canadian national identity is as open to resignification as Stychin suggests, I am not sure why members of marginalized groups need the courts to *protect* them. That is, if Canadian nationalism were truly open to the articulation of diverse counter-narratives which ultimately inspire a reconceptualization of Canadian citizenship, recourse to the courts for the protection of emergent identities would not be necessary. While Stychin's effort to reconceptualize equality rights as the contestation of identities is compelling, a greater elaboration of the role of state political and legal institutions in this process would assist in clarifying and grounding his analysis.

Second, there is a difference between articulating identity claims and having them widely recognized and respected. It took ten years for the Supreme Court to recognize sexual orientation as a prohibited ground of discrimination under the *Charter*.<sup>46</sup> Par-

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<sup>40</sup> *Steffan v. Cheney*, 780 F. Supp. 1 (D.C. Cir. 1991). The case dealt with a challenge to armed-forces regulations that attempt to prevent gay men and lesbians from serving in the military.

<sup>41</sup> See *Law's Desire*, *supra* note 4, c. 5.

<sup>42</sup> See *ibid.* at 102-116.

<sup>43</sup> See *ibid.* at 104.

<sup>44</sup> *Ibid.* at 103.

<sup>45</sup> *Ibid.* at 109 [emphasis added].

<sup>46</sup> In *Egan*, *supra* note 27, the Supreme Court held unanimously that sexual orientation is an analogous ground of discrimination under s. 15(1) of the *Charter* (see *ibid.* at 528, 566, 572 and 603). However, the legislation denying benefits to same-sex couples was upheld by the majority of the

liament resisted including sexual orientation as a prohibited ground of discrimination in the *Canadian Human Rights Act*<sup>47</sup> for many years as well. These facts speak volumes about the *closure* of social, political and legal institutions to providing even minimal protections for gay men and lesbians in Canada. Thus, while Stychin's analysis may point to a more open Canada of the future, his optimism must be applied with caution to current social and legal realities.

Overall, Stychin's analysis would benefit from a stronger grounding in the concrete and situated experiences of political agents. Despite frequent references to the need for agency and resistance, Stychin is more successful at highlighting the inconsistencies in legal discourse than at articulating how particular subjects take advantage of these inconsistencies in their struggle to effect change. His analysis at times spirals off into abstract claims — about the openness of cultural and legal texts to discursive resistance — without attending to the concrete experiences of political agents undertaking this resistance. While Stychin does offer the examples of gay camp and the production of gay pornography,<sup>48</sup> a greater range of efforts at political resistance could be explored through the case studies that Stychin presents.

For example, in the chapter on Canadian equality rights and identity politics discussed above, Stychin advances the claim that "Canada may be particularly well situated to further the postmodern political agenda of facilitating democratic dialogue over an ever-expanding range of identities."<sup>49</sup> In particular, Stychin argues that the *Charter* and its equality provision "ensures" the protection and development of newly emerging identities.<sup>50</sup> In his view, it is significant that the wording of section 15 allows for the extension of the grounds upon which individual members of groups may claim rights to equality before and under the law and to equal protection and benefit of the law.<sup>51</sup> He notes that the Supreme Court of Canada has undertaken an open-ended approach to equality rights and that it has held that the grounds listed in section 15 are not exhaustive.<sup>52</sup> Stychin concludes that the political conditions of postmodernity provide the "political and cultural explanation for why Canadian equality rights are interpreted in an open-ended fashion" as well as "the basis for a broader understanding of equality in terms of the contestation of identities."<sup>53</sup>

Stychin seems to be suggesting first, that the political and social conditions of postmodernity explain why the Supreme Court of Canada has adopted an open-ended

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court, with Lamer C.J.C., LaForest, Gonthier and Major JJ. finding no infringement of s. 15(1) (see *ibid.* at 539) and Sopinka J. finding that there was infringement, but that it was justified under s. 1 of the *Charter* (see *ibid.* at 572-77). The dissenting judges held that the legislation infringed s. 15(1) and that the infringement was not justifiable under s. 1 (Cory and Iacobucci JJ. at 608, McLachlin J. concurring; L'Heureux-Dubé J. at 568).

<sup>47</sup> R.S.C. 1985, c. H-6.

<sup>48</sup> See *Law's Desire*, *supra* note 4 at 33-35 and 61-66.

<sup>49</sup> *Ibid.* at 103.

<sup>50</sup> See *ibid.* at 102.

<sup>51</sup> See *ibid.* at 108.

<sup>52</sup> See *ibid.*, referring to *Andrews*, *supra* note 27.

<sup>53</sup> *Law's Desire*, *ibid.* at 107.

approach to section 15 and, second, that the text of the equality guarantee “has facilitated”<sup>54</sup> this flexible interpretation. Nowhere does Stychin mention the massive lobbying efforts of equality-seeking groups — especially women’s groups — aimed at expanding the wording of section 15 in order to avoid the narrow formalistic interpretation given to the equality provision in the Canadian Bill of Rights.<sup>55</sup> To say that the wording of section 15 “ensures” the protection of newly emerging identities obscures the key role played by equality-seeking groups in this process. Stychin fails to acknowledge the political struggles which took place over the meaning of equality — that is, the *discourse* of equality — in Canada and over the appropriate scope of constitutional equality guarantees. Significantly, these political struggles had both discursive and broader political dimensions. Specifically, they managed to mobilize people not only to pressure legislators to expand the wording in section 15 but to press for a more substantive approach to equality rights within Canada’s legal and political systems.<sup>56</sup>

My reading of the shaping of equality rights in Canada represents an alternative reading or “truth” to Stychin’s. It seems, however, that an analysis of the struggles for social/sexual change and of the potential for resistance and agency in bringing about a newly-envisioned set of societal possibilities should recognize these instances of resistance and agency when they occur. Instead, Stychin speaks of the “relative openness” of the Canadian government and courts to the recognition of emergent identities and of their willingness to “protect” these identities. Where are the political agents in this scenario? In the end, one is left with the impression that this “openness” arises on its own rather than as a result of the particular struggles of a multiplicity of political actors and social movements.

## Conclusion

Despite the critiques outlined above, Stychin’s book represents a significant contribution to current literature on law and sexuality. *Law’s Desire* is ambitious in scope and breaks new ground in understanding the law’s complex relationship to sexual identities and their expression in a variety of contexts. Even if readers may not necessarily agree with Stychin’s approach or conclusions, they will have difficulty ignoring his challenges to commonly held understandings of law, sexuality and sexual orientation.

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<sup>54</sup> *Ibid.* at 108.

<sup>55</sup> R.S.C. 1970, App. III. See e.g. L. Gotell, *The Canadian Women’s Movement, Equality Rights and the Charter* (Ottawa: Canadian Research Institute for the Advancement of Women, 1990).

<sup>56</sup> See e.g. *Andrews*, *supra* note 27.