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Book Review: *Not The Marrying Kind: A Feminist Critique of Same-Sex Marriage* by Nicola Barker

Gillian Calder

BOOK REVIEW

Nicola Barker, *Not The Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Basingstoke, UK: Palgrave MacMillan, 2013)

Gillian Calder[1]

> *With all that we have learned, we should be helping our heterosexual brothers and sisters out of their state-defined prisons, not volunteering to join them there.*
>
> *Jane Rule*[2]

> *The word "marriage" has a meaning. If it wasn't so important, we wouldn't be here today.*
>
> *Jeffrey (8 the Play)*[3]

> *Most significantly, in terms of the feminist critiques of marriage, it is not possible to simultaneously seek recognition through marriage and argue that family is not an appropriate mechanism through which to distribute social resources.*
>
> *Nicola Barker*[4]

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1 Associate Professor, Faculty of Law, University of Victoria. Thanks to Sharon Cowan for criticism and comments, to the anonymous reviewer for the careful read, and to the cast, crew and audience of UVic Law's production of "8" for inspiration.

2 Jane Rule, *The Heterosexual Cage of Coupledom* (2001), online: ABC Book World <http://www.abcbookworld.com>.

3 Dustin Lance Black, "8" at 7. Copy on file with the author.

LIGHTS COME UP ON THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, A LARGE COURTROOM[5]

In the spring of 2013, as part of their course requirements for "Sexual Orientation and the Law," a group of UVic law students staged a reading of Dustin Lance Black's play "8".[6] Using the trial transcripts of *Perry v Schwarzenegger*[7] as the primary source, the play is a courtroom drama, designed to be read aloud and to bring people into the formal equality arguments at the heart of these American cases.[8] The course was designed to engage students on critical questions about the relationship between law and sexuality looking both at how sexuality and law are constructed in the world around us, and at

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4 Nicola Barker, *Not the Marrying Kind: A Feminist Critique of Same-sex Marriage* (Basingstoke, UK: Palgrave MacMillan, 2013) at 197.

5 Stage direction. Black *supra* note 3 at 2.

6 "'8' The Play: Presented by University of Victoria Faculty of Law" (2013), online: American Foundation for Equal Rights <http://www.8theplay.com>. The cast members included 16 students, the 11 year-old son of one of the students, three guest professors from the law school, and one visiting professor who also worked with the students all semester.

7 Decision of Justice Vaughn Walker, United States District Court for the Northern District of California, in *Perry v Schwarzenegger*, 704 F Supp (2d) 921 at 1004 (ND Cal 2010).

8 See "About 8", online: American Foundation for Equal Rights <http://www.8theplay.com> for details about "8" the Play. See also Kevin Jagernauth, "Watch: Reading of Dustin Lance Black's Prop '8' Play Featuring George Clooney, Brad Pitt, John C Reilly, Kevin Bacon & More" (5 March 2012), online: Indiewire <http://www.indiewire.com>. For press on the UVic reading, see Amy Smart, "UVic law school sponsors reading of same-sex marriage play" (12 March 2013), online: Times Colonist <http://www.timescolonist.com>.

how law and its tools shape and place limits on queer movements. Primarily, it was designed for the students to use as many differing methodologies as the semester would allow in order to explore the relationships between the lived reality of law and social movements, broadly cast. Embodiment was a central theme, and ultimately producing and performing the play was the primary medium for thinking about queer legal theory[9] in action.

The students were given primary responsibility for all the elements of production, from casting through publicity, to facilitating the talkback, as well as bringing to life each of the characters in Black's play.[10] As their instructor, I took responsibility for ensuring that they had the best chance at success, liaising for over a year with the New York producers, staging a closed reading of the play with an earlier group of students in the spring of 2012, and bringing in a theatre professional to help the students with the "acting" component of their task.[11] I also laid the groundwork for the play-reading through my own previous experience and scholarship on the

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9 I approach "queer legal theory" not as a standalone theoretical model, but one informed by feminist legal theories, one that centres questions of the power of heteronormativity, and works both to transgress and transform through methodologies that challenge binaries and are often performative in nature.

10 In order to stage "8" permission must be sought from the producers through the American Foundation for Equal Rights and Broadway Impact. Once permission is granted, resources are made available to the group staging the play including templates for programs and posters, a guide for holding a talkback, and video clips for projection, amongst other material. See "Stage a Reading", *American Foundation for Equal Rights*, online: <http://www.8theplay.com>.

11 Special thanks to Lina de Guevara, founding Artistic Director of Victoria's Puente Theatre for her work with the actors to prepare them for a staged reading.

theoretical elements of using a play-reading to teach law,[12] as well as introducing these students to various legal theories tied to sexual identity.[13] Through the course readings and the various exercises we undertook together throughout the semester,[14] the students built the skills so that by the night of the play, they were prepared to bring queer legal theory in action to UVic Law.

My role, the night of the play, was to work the lights. As Director, it enabled me to keep the play moving while being part of the production, as I stood behind the actors on the stage. The room in which we performed the play-reading is the largest that the law school has[15] but it was not designed for performance, and as such the transitions between scenes were more a basic turning the lights on and off than the original script envisions. What my position enabled me to do, however, was to watch the audience as the play was performed from behind the actors' arc of chairs. Amongst the many surprises

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12 See Gillian Calder, "*Guantanamo*: Using a Play-Reading to Teach Law" (2010) 142 *Canadian Theatre Review* 44-49.

13 Some of the authors that the students read this term included: Sharon Cowan, Judith Butler, Janet Halley, Elaine Craig, Jack Judith Halberstam, Paisley Currah, Francisco Valdes, Andrea Smith, Suzanne Lenon, Val Napoleon, and Dean Spade.

14 Some of the exercises that the students did this term to prepare included: mapping; mural making; image theatre; queer dressing; and storytelling as well as rehearsing and staging the play. For a student's perspective on this course please see: Jasreet Badyal, "Perry v Schwarzenegger: An Opportunity to 'Do' Law Differently" (2014) *Appeal* 3-20

15 Two students had responsibility for finding a venue on campus where we could perform the play to a potentially large audience. They ultimately chose the largest room at the law school (it can accommodate 304 people), but also so that the play could be a transformative experience within a building that can be, for many students, an oppressive space.

of the night, the one that caught me unawares was when, at page 26 of a play that I have read many, many times and watched performed by students for whom I care deeply, I thought to myself, "I don't really like this play". I will return to that visceral response in a moment.

The actual evening of our performance was fantastic. The students were amazing in their reading, with each actor rising to a level of performance that I had not seen in any rehearsal. And the audience responded. The laughed, they grew still, and when the performance was over, they stayed and participated in a lively, challenging, and epiphanal talkback. The questions allowed the actors to step out of their characters and talk about what it had meant to them, as part of learning law, to be in this play. In response the students demonstrated how their reading and learning through the semester had prepared them to perform a polemical play, geared to persuade an audience that same-sex marriage is the culmination of equality for gays and lesbians, through a queer theory lens. They talked about their discomfort with the play and its message. Even when confronted by a homophobic audience member, arguing through the lens of religion for a heteronormative rearticulation of the institution of marriage, the students responded with honesty, compassion, and startling insight. It was a night in my legal teaching career that will always stand out.

And yet, I was left with unease around the play itself. Despite my conviction that embodied methodologies bring something to the learning of law that is painfully missing from most classrooms,[16] I was still worried that in some shape or form I had made a mistake in asking these students to perform

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[16] See for example, Suzanne Bouclin, Gillian Calder & Sharon Cowan, "Playing Games with Law" in Zenon Bańkowski, Maksymilian Del Mar & Paul Maharg, eds, *The Arts and the Legal Academy: Beyond Text in Legal Education* (Farnham, UK: Ashgate, 2013) 69-85 at 69.

this play. And then I read Nicola Barker's exceptional text, *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage*[17].

This text is essential reading for anyone engaged in questioning how law regulates a Western notion of the family. In particular, as we watch the inevitable redefinition of marriage in many countries throughout the world to be inclusive of gays and lesbians, it enables the critical reader to stay engaged with the underlying questions of why we continue to centre marriage in our understanding of what constitutes a legal family. Dr. Barker's text is both a compelling and a careful telling of the story of marriage in the Western world[18], and a powerful feminist critique of the march to inclusion. She argues with painstaking thoroughness that the same critical lens that second-wave feminists have brought to the institution of heterosexual marriage should also be brought to bear on same-sex marriage, while paying due attention to the voices of queer legal theorists who assert the transformative and transgressive potential that rethinking the family could entail.

In this review, I will walk through how Barker structures her argument, offering my own view that the creative lens that she brings to bear on the issue of the legalization of same-sex marriage is a necessary point of view for all those interested in questions of family and family law. I will then offer some critiques of the text and its argument, particularly with respect to how, on its central questions, it works to marry feminist legal theory and queer theory. I will then conclude by returning to "8", with some final reflections on the peace that Barker's text brought to me about having asked my students

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17 *Supra* note 4.

18 The countries that figure most prominently in her analysis are Canada, the United States, the United Kingdom, France, and South Africa.

(and colleagues) to bare their souls on the edifice of marriage equality.

WILL SAME-SEX MARRIAGE TRANSFORM MARRIAGE?

Structure and Argument

This book is a *tour de force*. It is a model for how to structure and answer a legal question, and as such should be read not just by those interested in questions of feminist and queer legal theories, practitioners and students of family law, or members of the LGBTTIQ communities, but by all legal scholars working to bring a complicated question of law to life. The argument at the heart of this manuscript is very simple. Barker asserts that the key question of the same-sex marriage debate is not whether same-sex couples should be legally permitted to marry; it is instead whether the institution of marriage itself can evolve to overcome the problems that have made marriage an oppressive site for female-identified persons and a consistent target of second-wave feminist critique.[19] That is, while most of the focus has been on the "same-sex" part of the issue, the more complicated and problematic questions arise when we look more carefully at the institution of marriage itself. Not to spoil the ending of this fabulous text, but after a painstaking laying of the foundation, Barker answers her own question: marriage remains a gendered and imbalanced institution, and despite egalitarian shifts, the heteronormative marriage model looms large. But the joy of the book is that reaching this conclusion is far from simple. While clearly arguing that accessing the institution itself should be approached cautiously, she leaves us with optimism drawn from queer legal theory, both for the transformative and transgressive potential of same-sex marriage, but also for the ways in which feminist legal theory can benefit from queer perspectives.

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19 Barker, *supra* note 4 at 198.

The structure of the argument is beautiful. Barker starts her analysis by carefully framing the institution at the heart of her text: the institution of marriage. In this approach, Barker does two unique things. First, she challenges the *Hyde v Hyde*[20] definition itself, the common law articulation of marriage that has been front and centre in many of the legal challenges, particularly in Canada. Drawing primarily on Rebecca Probert, she argues that the "idea of marriage as set out in *Hyde* was more important than its accuracy"[21]. Marriage is an ideal, not an essential, universal, and natural institution.[22] This enables her, secondly, to set up the clear focus of her critique, which is not in fact marriage, but what she terms the "marriage model". Instead of delineating legal marriage from other marriage-like relationships, she keeps the aim of her critique and analysis firmly planted on state-sanctioned relationships characterized by commitment, conjugality, monogamy, and interdependence.[23] Working with the marriage model, she sets the groundwork to demonstrate how much of the analysis to date on same-sex marriage has been about access to the institution, rather than a careful consideration of what it means to be married, legally socially, and ideologically.[24]

She also tells us up front that she will approach her research questions using twin theoretical lenses: second wave feminist legal theories and queer legal theories. Working with the question, posed here and by others, of why there are notable silences from feminist legal theorists on the questions of same-

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20 *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130

21 *Supra* note 4 citing Probert at 20.

22 *Ibid* at 21.

23 *Ibid* at 39, 65.

24 *Ibid* at 12.

sex marriage[25], she weaves a unique template for analysis: how to bring together divergent approaches to equality to offer a forward-looking and biting critique of an institution that has not been a safe haven for female-identified persons.[26] Although there is more overlap and integration between feminist and queer theories than Barker acknowledges, bumping these two theoretical traditions against each other offers a lively tension for the text, and simultaneously ensures that the question of who remains excluded from marriage, even as it expands to include same-sex unions, does not go missing from the analysis.[27]

With the normative model of relationship in hand, Barker then moves, in Chapter 2, to look at the different institutions that have arisen over the last twenty years or so, to address questions of relationship recognition primarily for gays and lesbians. In each model that she examines – domestic partnership, reciprocal beneficiary, civil union, registered partnership, civil partnership, civil solidarity pact and *de facto* relationships – she shows two things. First, she demonstrates how each of the models adheres to the marriage model, and secondly, where the divergences exist between these models in structure, legal consequences, and ideology. She argues that alternative models of relationship recognition map onto and affirm the centrality of the marriage model, ironically reifying

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25 See for example, Rosemary Auchmuty, "Out of the Shadows: Feminist Silence and Liberal Law" in Vanessa E Munro & Carl F Stychin, eds, *Sexuality and the Law: Feminist Engagements* (Abingdon, UK: Routledge-Cavendish, 2007); and Claire Young & Susan Boyd, "Losing the Feminist Voice? Debates on the Legal Recognition of Same-Sex Partnerships in Canada" (2006) 14 *Fem Legal Stud* 213.

26 Barker sets out her theory in the introduction, *supra* note 4 at 7-12, returning to it with more intention in chapters 5 and 6.

27 *Ibid* at 12.

the marriage model through their existence. At the same time, the gaps and spaces and the way these models offer a different performance of relationship, are the building blocks for Barker. Her examination of what second-wave feminist theorizing and queer legal theory does with these spaces is one of the unique contributions of this volume.

Having looked at the normative marriage model, and then presented numerous ways in which relationship recognition has been sought in differing jurisdictions, Barker then turns to same-sex marriage litigation, highlighting the legal arguments necessary to secure access to the institution of marriage for those excluded on the basis of their gender and the degree to which they have been accepted by courts and legislatures. In her third chapter, she moves through the evolutions and revolutions[28] of the legal challenges brought in various jurisdictions throughout Europe, North America, and the southern African continent, looking at the broad themes that arise, how the arguments in those cases are framed, and how the question of procreation as part of marriage emerges. Barker demonstrates, notwithstanding different legal cultures and constitutional histories, that there are some powerful similarities in using courts to achieve this kind of social change. As she moves from jurisdiction to jurisdiction, we see sameness and formal equality and the symbolism of marriage to excluded communities, all situated in a context in which there is a heightened backlash against the expansion of marriage.

With this foundation, the second part of the book moves into the key arguments for and against same-sex marriage. Chapter 4 is an unsettling chapter that looks, optimistically, at the legal quest for marriage equality through a feminist lens. With substantive equality at the heart of her analysis, Barker leaves behind the formal equality and

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28 *Ibid* at 67.

symbolic recognition arguments that she identified in Chapter 3, to positively engage with arguments that focus on difference rather than sameness.[29] Barker is rigorous in this chapter, working to engage with the various scholars, theorists, and zealots, who come at the question of why same-sex marriage is important from so many different angles. She lays bare the argument that to continue a politics of exclusion is to reinforce, in the most hateful of ways, that lesbians and gay men are outsiders to the very idea of family.[30] Even for those of us who remain emphatically critical of marriage as an institution, she manages to create in us a form of longing – the very feeling I got, for example, when I saw the image of Ernie and Bert on the front page of the New Yorker magazine watching the US Supreme Court on television.[31] She concludes her chapter with due attention to the arguments for same-sex marriage as a way to challenge oppression on the one hand, and as transgressive and subversive on the other. Alongside the kind of hope that strategies of resistance can evoke, Barker continues to remind the reader, however, that the forms of oppression experienced by gay men and lesbians who are excluded from marriage remain different from the forms of oppression experienced by heterosexual women within it.[32]

The book then moves to its crux, asking: is there a singular feminist perspective on same-sex marriage? And what

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29 *Ibid* at 113.

30 *Ibid* at 115.

31 Causing a stir in social media, the New Yorker's June 28, 2013 cover was a moving image of Sesame Street puppets and "room-mates" embracing while watching the US Supreme Court render their decision on the constitutionality of the *Defence of Marriage Act* and California's *Proposition 8*. For example, see Francoise Mouly and Mina Kaneko, "Cover Story: Bert and Ernie's "Moment of Joy"" (28 June 2013), online: The New Yorker <http://www.newyorker.com>.

32 Barker, *supra* note 4 at 126.

potential do second-wave theories bring to third-wave families? Having taken apart formal equality approaches to marriage, Barker now moves to argue why fighting for inclusion is in fact a dangerous strategy. Revisiting primarily second-wave radical and social feminist theories of marriage, she argues convincingly that those critiques still hold. She asserts that the model of marriage in the 21st century is deeply neoliberal, begging for deconstruction not inclusion. Using primarily a social reproduction lens, Barker argues that the changes outside the home are not matched within it[33], with changes that have occurred taking place more at the individual than at the structural level, leaving the gendered division of labour intact.[34] Drawing on some of the most powerful academic voices in family law in Canada, the United States, and the UK, Barker concludes that legal recognition of same-sex marriage supports the privatization of care with the "form that the family takes…less significant to the neoliberal state than the functions it performs on behalf of capitalism".[35] Somewhere, Martha Fineman is tipping her hat.

Having made the economic argument, Barker moves to her penultimate chapter, "Outlaws and In-Laws: The 'Ambivalent Gift' of Legal Legitimation".[36] While this chapter stands alone as a queer engagement with the idea of marriage, it works as the final substantive chapter in the volume. Indeed, the power of this chapter is that most refuting arguments have been addressed in the pages that precede it. Having addressed both the argument that same-sex marriage might bring change from within to the institution of marriage, and the dangers of capitulation and assimilation, she now turns her energy to the

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33 *Ibid* at 148.

34 *Ibid* at 158.

35 *Ibid* citing Shelley Gavigan at 162.

36 *Ibid* at 164-197.

final argument that the inclusion of same-sex folk in marriage may lead to a destabilization of the institution's existing parameters. And, as with each of the previous chapters, Barker moves painstakingly through each element of the argument, from Carol Smart's warnings about using law in this way,[37] through a more distinctively queer model of citizenship.[38] Barker ends up showing her true socialist feminist roots, however, in confessing her inability to see in the near future at least, that any change to the inclusivity of marriage can in turn lead to what she claims is the essential element for substantive equality, *transformative redistribution*.[39] For now, marriage remains a means of distribution of social resources that is both partial and fundamentally unjust.

Barker concludes, as she had done throughout, by reminding the reader of the path that we have travelled together, with gracious acknowledgement of the many shoulders she is standing on to make her argument. In her view, feminist critiques of marriage are relevant to same-sex marriage, although she remains open to the potential of transgressive change. And then she leaves us by pointing to the questions that she has not answered: who remains excluded and othered by the various strategies that have been pursued by people seeking marriage equality? Is the truly feminist answer not sitting somewhere else? Is there not a way to move entirely beyond the marriage model itself?

Critique

This is a powerful book. It is well-written, offers an intriguing theoretical framework, and pays due homage to the authors upon whom it relies. It is a reminder of how important it is to

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37 *Ibid* at 165.

38 *Ibid* at 175.

39 *Ibid* at 196.

stop and think carefully about the roads we have travelled and reflect on what has been lost and gained when we argue for social change. But there are also some weaknesses in the book. Without diminishing the power of what Barker has achieved, or indeed without offering the critique that this book did not leave every legal or theoretical stone unturned, let me briefly raise the following.

First, the text seems to rest upon a premise that marriage is universal. There is a tinge of irony here given Dr. Barker's clear intention to do the opposite.[40] The text is effective in its constant comparison of jurisdiction on each and every element of her argument. However, the model of marriage that Barker creates does not pay attention to marriage as it may be practiced outside of "the West", or perhaps even within other countries of the global North. The text does not consider arranged marriage, for example, within the ideal of marriage that grounds this volume. The jurisdictional reach of this text is strong, but I would have liked to see how the argument applied in a more global sense.

Relatedly, I would also have liked to see Dr. Barker do more with the issue of whiteness. She brings attention to questions of privilege, race, and class – particularly in her introductory chapters. But as is often the case when working to unsettle something as enormous as the structures that support the institution of marriage, some questions of how we live our diversities beyond gender disappear.[41] As we move to the text's conclusion, as a reader, I wanted to know more about other more transgressive possibilities for family formation,

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40 In my view, Barker uses marriage as experienced in North American and northern Europe as "marriage" while arguing that the institution itself is not universal. See for example, Barker, *supra* note 4 at 5.

41 See for example, Suzanne J Lenon, "Marrying Citizens! Raced Subjects? Rethinking the Terrain of Equal Marriage Discourse" (2005) 17 CJWL 405-421.

including more understandings of the fears of the sexual other. In particular, I wanted her to use her insightful voice to interrogate work like Suzanne Lenon's, which has queried the power of whiteness in this context.[42] In my view, given her introduction, more work could have been done to weave more integrally into the text questions of race, ability, Indigeneity, and belief.

Second, the queer legal theory is thin. As the title to the text indicates, this is a feminist critique of same-sex marriage, and as I note at the end of my analysis, perhaps even a socialist feminist critique at its heart. At the outset, Barker offers that the text will be informed by two large and often contradictory bodies of theory, one termed second-wave feminist legal theory and the other, queer legal theory. Indeed, the text offers the possibility that it will show us how these theories are in fact more compatible than derisive of each other.[43] Yet, as the analysis unfolds, queer legal theory is really seen as other to feminist legal theories and takes a back seat, emerging more often than not as a counterargument to the dominant thread being sewn. The text as a whole could not be what it is without the marriage of these two theoretical bodies, but it is, I would assert, more of a thick, feminist reading of marriage than a radically transformative queer reading.

Third, other family models remain outside the parameters of the text. As a single parent of an Indigenous child with deep roots in an extended notion of family, I kept looking for myself in the text. What does the inevitable march towards formal equality for gays and lesbians say to those of us who stand with feet in many communities, but ultimately are not part of a conjugal family? Again, as with the Western idea of marriage, and with queer legal theory, Barker pays attention

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42 *Ibid* at 409.

43 Barker, *supra* note 4 at 12.

to those that her analysis cannot fully embrace. But for me, it wasn't quite enough. At page 111 of the text, I noted in the margin that I was so excited to see where the text would go. But a mere fourteen pages later, my margin notes queried how this all applied to single people, to single parents, or to polyamorists. And when I closed the text, I knew that some of the questions of family that I care about the most were mentioned as the path for future study. Moving beyond the marriage model is, as far as this text is concerned, a starting point for future research.[44]

AND THAT'S WHAT WE DID. WE PUT FEAR AND PREJUDICE ON TRIAL[45]

I am aware that grounding this review in a story drawn from my own teaching may be viewed as distracting. But let me go back to my experience with my seminar students in the spring of 2013 to offer some final thoughts on why this book is such an important resource and text. And indeed, let me return to the moment when, turning the lights on and off at page 26, I looked into the audience and wished that the play was over. I offer an analysis here of some of what I thought in that moment, and how those students and this text give me assurances and optimism both in terms of the pedagogy but also for the direction that law is likely to lead us in terms of substantive equality for all of those whose diversities leave them excluded from this basic human right: access to a family.

First, this play seems unidimensional![46] Although the staged reading of "8" was an intentional engagement with

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44 *Ibid* at 204. Academics always criticize other academics for the book that they wish they had written. Here, I am saying that I wish that the same careful and nuanced attention that Barker brings to the marriage model could also have been brought to the contemplation of non-marital family models, cast broad.

45 *Supra* note 3 at 47.

same-sex marriage, asking the students to embody the American pursuit of formal equality was not without risk.[47] What they did in the moment was, however, truly remarkable. They played each character with intention and with integrity, enabling the words that those characters spoke in the context of a trial to be given their full due. And given the honesty of their reading, they put into motion and made possible a variety of critiques to be leveled against the very arguments their characters spoke. They paid due attention to all the arguments, and acted with courage, as Barker does here as well. This book gives the feminist argument *against* same-sex marriage the best opportunity to be heard. It grounds the argument in history, supporting it with scholarly rigour, but then lays it bare, letting the words float out in the universe to be critiqued by the audience. It embraces dissent, and sees that through critical engagement the most positive change will emerge.

Second, this play doesn't give "the other side"! The play is written from trial transcripts, and as such is based on actual words spoken, although it is also written by an award-winning playwright to be both entertaining and polemical. As such, it walks a careful line of political theatre, while also being designed with an audience talkback in mind. That is, the play gives life to arguments that most people would never get to hear or see, and then allows for the actors to step out of their characters and talk to the audience honestly and from the heart. The actors' preparations throughout the semester were not just the practicalities of staging a play; they were laying the groundwork to truly understand the use of law for social change from a theoretical perspective. In this way, in their

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46 Because everything that ran through my head at that moment was exclamatory I have put an exclamation mark at the end of each of the starting sentences!

47 Students are rarely asked to put their bodies into the learning of law in such a public way.

portrayals and in their responses to the questions posed, they complicated what the playwright has given them to say. Barker's text models this very practice. She anticipates from as many perspectives as she can the questions that will be placed at her feet as she walks the feminist critique of heteronormativity into the world of same-sex marriage equality. And she does it with grace, with optimism, but mostly by paying due respect to the waves of feminist theorists she has read and cited.

Third, this play embraces marriage as an enviable goal for all people to attain! The play, while theatre, is still a clear and powerful argument that the exclusion of same-sex folk from the institution of marriage is discrimination of the worst kind. And perhaps this is the argument that troubled me most; that what I had asked my students to do was to throw themselves onto the pyre of marriage equality. But again, their careful portrayals and then their earnest answers showed their attention to diversity, not just on this issue, but on issues that are integral to sexuality: faith, racism, classism, transphobia, mental health and care-giving. They were able to present a clear and cogent argument for why excluding people from marriage on the basis of who they love was problematic, while offering that perhaps marriage itself was not the answer. In my view, this too is the gift of the Barker text. She is able to demonstrate with care and integrity why the pursuit of same-sex marriage is an important legal and social goal, while still arguing that until marriage itself shifts fundamentally as an institution, the equality achieved through attaining that goal will only be partial.

Fourth, this play embraces formal law, courts, and judges as the best way to achieve your legal goals! The courtroom drama, while important and often compelling, is just one venue for change. And what these students did was show that the courtroom is also a stage. In shifting that stage so that the audience becomes part of the play, they were modeling

anti-oppression in action.[48] Here too, Barker's text is an anthology of how to rethink a legal question, mostly by turning it on its head. To really critique an issue you have to know it inside and out; you have to acknowledge your weaknesses and recognize where power sits. As a guide for thinking about complicated legal questions and the best venue for solving those problems, Barker points in many directions. She shows that formal law, equality jurisprudence in particular, is only one tool, albeit an important tool, in the advocate's legal toolbox.

Finally, this play is not diverse! While my students were diverse on race, gender identity, faith, political perspectives, and national origin, amongst other dimensions, the characters of the play were not. In fact, some of the views that the characters expressed in the trial were indeed oppressive.[49] The students embraced this play and confronted its lack of diversity in two key ways. First, they cast themselves and in that casting did not worry about the gender or race or age of the character they chose. For example, the white male teenage twins were portrayed by a 20-ish South Asian female-identified student and a 40-ish Scottish female-identified visiting professor. Second, they brought a queer

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48 Part of their coursework included introduction to some techniques drawn from the work of Augusto Boal and Paolo Freire, particularly image theatre. For a discussion of theatre of the oppressed in the law school classroom please see: Gillian Calder, "Performance, Pedagogy and Law: Theatre of the Oppressed in the Law School Classroom" in Zenon Bańkowski and Maksymilian Del Mar, eds, *The Moral Imagination and the Legal Life: Beyond Text in Legal Education* (London: Ashgate, 2013) at 215-254.

49 For example, the character of "Ryan", who is a young man testifying about being sent to a program aimed at transforming gay youth into straight youth, uses the words "mentally retarded" when talking about people who live with mental health issues. Although taken from the transcripts, and out of context in places, some of the testimony offered was jarring for the students to present.

legal theory lens to the performance of the play, in preparation, on the night, and in their debrief in the following weeks. Here is where I wish I had Barker's book in hand when I "panicked" at page 26. Barker works to bring a queer legal theory lens to the question of same-sex marriage. And while, in my view, she ultimately embraces the lessons of socialist feminist theory as determinative, her text still weaves a queer perspective into the mix. It reminds me that queering the legal family is as much about positive sexual expression as it is an exercise of boundary transgression. The more that we can que(e)ry why law centres some forms of families over others, and support those who find themselves painfully excluded, the better all of our lived experiences will be. The play taught me that. And Nicola Barker's beautiful text reinforced that message in abundance.

DISCRIMINATIONS OF AN UNUSUAL CHARACTER[50]

As I was writing this article the US Supreme Court released its two decisions on same-sex marriage, *United States v Windsor* ("DOMA")[51] and *Hollingworth v Perry* ("Prop8").[52] Read by many commentators as a victory for same-sex equality in the United States,[53] both decided in 5-4 splits of the Court, the *Defence of Marriage Act* was found unconstitutional in DOMA and the plaintiffs were found not to have standing in Prop8. In neither judgment did any judge address the substantive question of the constitutionality of the heterosexual definition of marriage; rather, in DOMA they ensured that where same-

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50 Justice Kennedy, *United States v Windsor* 570 US 12 (2013) at para 19, 133 S Ct 2675

51 *Ibid*.

52 *Hollingsworth v Perry*, 570 US __ (2013), 133 S Ct 2652

53 See for example Paul Thornton, "DOMA and Prop 8 decisions: We've come a long way, say readers", *LA Times* (26 June 2013) online: Los Angeles Times <http://www.latimes.com>.

sex marriage is legal, those who are married would have access to all federal benefits, as do heterosexual married folk in those same states. In California, the Court essentially restored the judgment of the lovely Justice Vaughn Walker, the judge who presided in "8" meaning that in the state of California, same-sex marriage is (again) legal. Surprising results – yes – given the current make-up of the Court, but ultimately a just and fair result. However it must be reinforced that alongside these "winning" judgments, the Court also rendered two judgments with devastating consequences for racialized and Indigenous Americans,[54] leaving the issue of whiteness in the same-sex marriage story festering.

Overall, nothing really shifts; formal equality as a path to inclusion remains the primary tool in same-sex marriage equality. I do have to confess, though, to getting caught up in the frenzy, sitting on www.scotusblog.com on one device while on Twitter with the other, madly tweeting at each revelation of what the Court was going to do. And as a final coda to the story of "8" the Play, it is a satisfying result. But as Dr. Barker so eloquently writes in this text,

> Seeking recognition through marriage can only be affirmative recognition in that it is necessary (and at the very least) leaves in place the framework of marriage. … affirmative

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54 *Shelby County v Holder*, 570 US __ (2013) and *Adoptive Couple v Baby Girl* 570 US __ (2013) U.S. LEXIS 4916, 2013 WL 3184627. In *Shelby County* the Court found unconstitutional provisions of the federal *Voter's Rights Act* that had been put in place to prevent racially discriminatory voting laws from being enacted in states with a history of such practices. In *Adoptive Couple* the Court addressed the status of an Indigenous father's rights in adoption where the legislation at issue was focused on the significance of keeping Indigenous families united. The majority found that where a father played no formal role there was no family to keep together.

> recognition is unlikely to be anything other than partial recognition of the range of relationships within the lesbian and gay communities. … Not only is this partial recognition insufficient to justify overlooking the feminist critiques of marriage, these critiques also demonstrate the importance of addressing redistribution as part of a radical politics of recognition.[55]

There is equality in the judgments and the change that surrounds them, but substantive equality will remain elusive as long as we focus so exclusively on inclusion within marriage rather than on transformative redistribution for all.

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55 Barker, *supra* note 4 at 197.