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# Marriage is More than Just a Piece of Paper': Feminist Critiques of Same Sex Marriage

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## Article

# ‘Marriage is more than just a piece of paper’: Feminist Critiques of Same Sex Marriage\*

Susan B. Boyd\*\*

### ABSTRACT

*This article reviews feminist critiques of same sex marriage and analyzes how marriage as a socio-legal institution relates to inequality based on factors such as sex, race and class. The article first identifies how the legalization of same sex marriage can be viewed as a positive step in the quest for equality and recognition of lesbians and gay men. It then describes the legal and statistical trends in relation to marriage in Canada, as one of the first countries to legalize same sex marriage. The heart of the article discusses the key feminist critiques of both marriage and same sex marriage, drawing on an international survey of primarily English language literature. It considers why these critiques have been understated in the debates on same sex marriage and reviews empirical studies on the views of lesbians and gay men on marriage. While acknowledging that legal marriage can offer important rights to some couples, the conclusion suggests alternatives to placing marriage at the center of the lesbian and gay movement for equality and recognition.*

**Keywords:** *Marriage, Same Sex Relationships, Equality, Feminism, Recognition, Redistribution*

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## I. INTRODUCTION

Two Taiwanese women were married in a Buddhist lesbian wedding near Taipei in August 2012.<sup>1</sup> In law, this marriage is not valid, as Taiwan has not legalized same sex marriage, in contrast to several other countries worldwide.<sup>2</sup> Nevertheless, this lesbian wedding apparently received quite positive media coverage and was a cause for celebration by many. Indeed, there is a history of such public weddings in Taiwan, and one couple that staged such a marriage in 2006 tried to register to marry.<sup>3</sup> When they were declined, the couple began a lawsuit, although they subsequently withdrew the suit, apparently due to delays by the court.<sup>4</sup> On the legislative front, the cabinet in Taiwan drafted a bill in 2003 to legalize same-sex marriages and to allow same sex couples to adopt children. While this bill has not yet been reviewed by the Taiwanese parliament, same sex marriage is clearly a live political issue in Taiwan, as it is in numerous other countries, such as the United States of America.<sup>5</sup>

This article does not presume to explore the feminist debates on same sex marriage by reference to how they play out in Taiwan, and acknowledges the existing literature on the topic in languages other than English.<sup>6</sup> Instead, the goal of the article is to offer a review and assessment of English language literature on the issue, focusing mainly on feminist contributions and on how

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1. Niko Bell, Lesbian Buddhist Wedding a First for Taiwan, XTRA (Aug. 12, 2012), <http://dailyxtra.com/canada/news/lesbian-buddhist-wedding-first-taiwan>.

2. Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, Netherlands, Norway, Portugal, South Africa, Spain, Sweden, several states in the USA, and the Federal District of Mexico City. Uruguay and New Zealand have passed laws that will come into effect in 2013. The United Kingdom has passed a law that will legalize same sex marriage in England and Wales, expected to come into effect in 2014. Several other countries or jurisdictions are considering bills to legalize same sex marriage, including Andorra, Finland, Germany, Ireland, Luxembourg, Nepal, Scotland, and Taiwan.

3. Most information about same sex marriage in Asia is drawn from Douglas Sanders, *Same-Sex Marriage: An Old and New Issue in Asia*, in CONTEMPORARY GENDER RELATIONS AND CHANGES IN LEGAL CULTURES 211 (Hanne Petersen et al. eds., 2013).

4. Christie Chen, Gay Couple Withdraws Same-Sex Marriage Case, FOCUS TAIWAN (Jan. 23, 2013), <http://focustaiwan.tw/news/asoc/201301230024.aspx>.

5. The United States Supreme Court handed down decisions in two cases on same sex marriage on June 26, 2013. In *United States v Windsor*, a majority of 5 held section 3 of the federal *Defense of Marriage Act*, which defined marriage as “a legal union between one man and one woman”, to be unconstitutional. In *Hollingsworth v Perry*, California’s Proposition 8 was at issue, which added a provision to the California Constitution stating that “only marriage between a man and a woman is valid or recognized in California.” State officials chose not to defend the constitutionality of the statute, and the majority of the Court decided that a private party did not have standing to defend the constitutionality of the state statute in federal court. Thus, the appeal to the US Court of Appeals for the Ninth Circuit was vacated, leaving intact the US District Court ruling that struck down Proposition 8.

6. E.g., Chao-ju Chen, Hunyin Tsowei Falu\_ Shang Tê Ihsinglien Fuch’üan Yü T’êch’üan [*Marriage as Heterosexual Patriarchy and Privilege: A Legal Feminist Critique*], 27 NÜ HSIAO HSIAO CHIH [J. WOMEN’S & GENDER STUD.] 113 (2010).

marriage relates to inequality, and also offering a Canadian perspective. The article first identifies the ways in which the legalization of same sex marriage can be viewed as a positive step in the quest for equality of lesbians and gay men and, indeed, in the quest for equal rights for all. It then briefly describes the legal and statistical trends in Canada in relation to marriage, given that Canada was one of the first countries to legalize same sex marriage. The heart of the article discusses the key feminist (and related) critiques of both marriage and same sex marriage, drawing on an international survey of primarily English language literature, before considering why these critiques have been understated in the same sex marriage debates. Some empirical studies that have been conducted in relation to the views of lesbians and gay men on same sex marriage (or civil partnership) are then reviewed, before the article concludes with suggestions for strategies alternative to placing same sex marriage at the center of the lesbian and gay movement for equality and recognition.

Before beginning, it must be emphasized that feminist critiques of same sex marriage should not be understood as efforts to derail the quest for equality by lesbians and gay men, or by same sex couples. Instead, these critiques form part of a larger critical analysis of the institution of marriage from both feminist and queer perspectives.<sup>7</sup> As the two Taiwanese Buddhist lesbians said: “Marriage is more than just a piece of paper.”<sup>8</sup> It is also a key socio-legal institution in society, and one that does not always have benign consequences. It has important, and sometimes very problematic, socio-economic consequences for some individuals and for some groups. These consequences are relevant whether a person is heterosexual or gay. A critical analysis of marriage illuminates the flaws in an equality strategy that places marriage at its centre. At the same time, as we see below, not all feminists are critical of marriage, same sex or otherwise, reflecting the diversity of feminist opinion in relation to issues such as this.

Critiques of marriage can be difficult for many people to accept. Women especially are still socialized into the expectation that marriage is the norm and that a key goal in their lives should be to find a man, to be married, and to have children.<sup>9</sup> In many cultures, it is expected that children should be born into a marriage and raised by legally married couples. In fact, as we shall see below, this argument is often made to support the legalization of same sex marriage, so that children raised by same sex couples will be “legitimated” by marriage. Even in Western countries, where the number of

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7. NICOLA BARKER, NOT THE MARRYING KIND: A FEMINIST CRITIQUE OF SAME-SEX MARRIAGE 3 (2012).

8. Bell, *supra* note 1.

9. See, e.g., Elizabeth A. Sharp & Lawrence Ganong, *Living in the Gray: Women's Experiences of Missing the Marital Transition*, 69 J. MARRIAGE & FAM. 831, 832 (2007).

unmarried couples has increased radically over the past two decades,<sup>10</sup> divorce rates are high, and women have unprecedented economic opportunities, it is not clear that marriage has been “deinstitutionalized”, even if it has been transformed.<sup>11</sup> North American intimate life, instead, remains embedded within a tradition of romantic love, which suggests that self-fulfillment is best realized in the context of a married dyadic commitment, preferably life-long.<sup>12</sup>

## II. PROGRESSIVE ARGUMENTS IN FAVOUR OF SAME SEX MARRIAGE

Numerous reasons are typically presented for the need to legalize same sex marriage.

### A. *Granting Full Legal Personhood*

First, many proponents of same sex marriage argue that recognizing marriage rights is a marker of the recognition of human rights and equality in a country. It is, quite simply, the right thing to do. So, for instance, an editorial in the English language *China Post* in Taipei in September 2011 was titled “Taiwan could lead Asia with full recognition of gay rights.” The editorial noted that Taiwanese President Ma said, when he was mayor of Taipei City, that “Gay rights are a part of human rights.” He then went on to state :

The fight for equal rights for gays has been described as “the last major human rights struggle.” How a nation treats its gay citizens is a good indicator of the general progressiveness of its society.<sup>13</sup>

Similarly, during the struggle for same sex marriage in Canada, the connection between same sex marriage and full citizenship rights, or legal personhood, for gay men and lesbians was clearly articulated,<sup>14</sup> and

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10. See, e.g., Statistics Canada, *2011 Census of Population: Families, Households, Marital Status, Structural Type of Dwelling, Collectives*, THE DAILY, Sept. 19, 2012, <http://www.statcan.gc.ca/daily-quotidien/120919/dq120919a-eng.htm>.

11. Stephanie Coontz, *The World Historical Transformation of Marriage*, 66 J. MARRIAGE & FAM. 974, 979 (2004).

12. Neil Gross, *The Detraditionalization of Intimacy Reconsidered*, 23(3) SOC. THEORY 286, 301 (2005); Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 853 (2004).

13. Editorial, *Taiwan Could Lead Asia with Full Recognition of Gay Rights*, THE CHINA POST, Sept. 10, 2011, <http://www.chinapost.com.tw/editorial/taiwan-issues/2011/09/10/316140/Taiwan-could.htm>.

14. See, e.g., KATHLEEN LAHEY, ARE WE “PERSONS” YET? LAW AND SEXUALITY IN CANADA (1999).

accepted, as we see below.

B. *Normalizing Same Sex Relationships*

Second, given that marriage is viewed as a desirable institution in society and the “normal” thing for adults to do, for same sex couples to be able to legally marry “normalizes” their relationship and, arguably, enhances positive recognition of their relationships. Cheshire Calhoun has argued that lesbian (and gay) oppression arises from the status of lesbians and gay men as outsiders or “outlaws”, for instance, vis-à-vis marriage and family.<sup>15</sup> Being able to enter the institutions of marriage and family arguably elevates their status considerably and, in turn, may bolster the strength of those institutions.

C. *Disrupting Traditional Ideas about Family*

A third and more feminist argument in favour of same sex marriage is that it changes normative ideas about family and de-genders marriage, disrupting the idea that marriage and kinship rest on naturalistic and biologicistic notions of reproduction and family.<sup>16</sup> Same sex marriage might also contribute to feminist efforts to eradicate essentialist assumptions about the natural complementarity of female and male roles. The fact that social conservatives are so adamantly opposed to same sex marriage arguably shows that they are worried about potential to disrupt traditional ideas about family.

D. *Promoting Acceptance*

A fourth point is that being able to be legally married contributes to the acceptance of same sex relationships, and potentially of children born within them, by family members and by society. For example, the lesbians who married in Taiwan said:

Marriage is more than just a piece of paper. It’s something a whole family shares in.<sup>17</sup>

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15. CHESHIRE CALHOUN, FEMINISM, THE FAMILY, AND THE POLITICS OF THE CLOSET: LESBIAN AND GAY DISPLACEMENT 132 (2000). For an engagement with, and refutation of, Calhoun, see BARKER, *supra* note 7, at ch. 4.

16. See generally, e.g., Nan D. Hunter, *Marriage, Law and Gender: A Feminist Inquiry*, in SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE 107 (Lisa Duggan & Nan D. Hunter eds., 1995); Barbara J. Cox, *A (Personal) Essay on Same-Sex Marriage*, in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 27 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997).

17. Bell, *supra* note 1.

Although the brides' parents did not ultimately attend the wedding because it became clear that it would be a big media event with publicity, the photos indicate that the marriage garnered a great deal of support.<sup>18</sup> Given that this marriage was not legal, and yet still invoked support from family members and the couple's religion, presumably a legalized same sex marriage would offer even greater recognition and support to same sex couples.

#### E. *Enhancing Benefits and Rights*

Fifth and finally, marriage typically offers both economic benefits (e.g. the ability to claim spousal support and inheritance rights) and status benefits (e.g. decision-making if a spouse is incapacitated) that can assist spouses in some difficult life circumstances. Although unmarried cohabitants are gaining similar rights in some jurisdictions, marriage remains the clearest route to obtaining these benefits. In particular, the disadvantaged partner in an intimate relationship may obtain important financial compensation, for instance, for their unpaid labour that benefited the other partner during the relationship, or protection from violence at the end of a relationship.

### III. THE CANADIAN CONTEXT

In Canada, gay men and lesbians have made great progress in relation to human rights. There is, however, ongoing evidence of homophobia – or the unreasoning fear of or antipathy towards homosexuals or homosexuality – notably in the form of assaults on or bullying of individuals or couples perceived to be gay.<sup>19</sup> As well, some challenges to the recognition of same sex marriage and other legal innovations continue to emanate from some religious groups. For example, some marriage commissioners would like to be able to refuse to officiate over same sex marriages on religious grounds, even though they are publicly appointed officials.<sup>20</sup>

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18. *Id.*

19. See *Hate Crimes Targeting LGBT Community Remain Most Violent in Canada*, EGALÉ CANADA HUMAN RIGHTS TRUST (2012), <http://egale.ca/discrimination-and-hate-crimes/hate-crimes-targeting-lgbt-community-remain-most-violent-in-canada>; CATHERINE TAYLOR & TRACEY PETER, EVERY CLASS IN EVERY SCHOOL: FINAL REPORT ON THE FIRST NATIONAL CLIMATE SURVEY ON HOMOPHOBIA, BIPHOBIA, AND TRANSPHOBIA IN CANADIAN SCHOOLS, EGALÉ CANADA HUMAN RIGHTS TRUST (2011), <http://egale.ca/wp-content/uploads/2011/05/EgaleFinalReport-web.pdf>; Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011).

20. In the province of Saskatchewan, an effort to exempt some marriage commissioners failed: *Marriage Commissioners Appointment Under The Marriage Act (Re)*, 2011 SKCA 3 (Can.).



Overall, however, the Canadian story is one of more or less steady progress towards legal recognition of the reality of both homosexuality and of same sex partnerships. Canada decriminalized homosexuality in 1969<sup>21</sup> and was the third country to legalize same sex marriage in 2005.<sup>22</sup> In between those two dates, many incremental changes occurred. First came basic changes to human rights laws, introducing protection against discrimination on the basis of sexual orientation.<sup>23</sup> Although Canada's constitutional *Charter of Rights and Freedoms*<sup>24</sup> did not explicitly list sexual orientation as a prohibited ground of discrimination, its highest court, the Supreme Court of Canada, did eventually "read in" sexual orientation to the other grounds such as sex, race and religion.<sup>25</sup>

In terms of the legal recognition of same sex relationships, Canada's courts and the legislatures gradually revised the definition of "spouse" or "common law partner" in many statutes to include same sex partners who had cohabited for a particular period of time in a conjugal or "marriage-like" relationship, usually between one and three years. For example, same sex partners are included as "common law partners" in Canadian federal tax laws if they have lived together for one year (or if they are married, of course).<sup>26</sup> Most family law statutes recognize same sex partners, even if unmarried, for the purposes of legal issues such as spousal support, child custody, child support, and, sometimes, marital property.<sup>27</sup> Important legal remedies are therefore available at the end of an unequal relationship, for example, for economically dependent partners. Early in the twenty-first century, several courts declared the opposite sex definition of marriage to be unconstitutional, violating the equality rights of lesbians and gay men.<sup>28</sup> In 2005, the Civil Marriage Act revised the legal definition of marriage so that same sex partners could legally marry.<sup>29</sup>

Statistically, Canada's latest census in 2011 found that the number of same sex couples had increased significantly from 2006, by 42.4%.<sup>30</sup>

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21. Criminal Law Amendment Act, 1968-69, S.C. 1968-69, c. 38 (Can.).

22. Civil Marriage Act, S.C. 2005, c. 33 (Can.).

23. Quebec was the first jurisdiction in Canada to include sexual orientation as a prohibited ground for discrimination in 1977. See *Same-Sex Rights in Canada*, CBC NEWS, Jan. 12, 2012, <http://www.cbc.ca/news/canada/story/2012/01/12/f-same-sex-rights.html>.

24. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

25. *Egan v. Canada*, [1995] 2 S.C.R. 513 (Can.).

26. See *Rosenberg v. Canada* (Att'y Gen.) (1998), 158 D.L.R. 4th 664 (Can. Ont. C.A.); Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s 248.

27. *E.g.*, Family Law Act, SBC 2011, c. 25 (Can.).

28. See, *e.g.*, *Halpern v. Canada* (Att'y Gen.) (2003), 225 D.L.R. 4th 529 (Can. Ont. C.A.); *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698 (Can.).

29. Civil Marriage Act, S.C. 2005, c. 33 (Can.). The new definition of marriage is: "Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others" (*id.* § 2).

30. Statistics Canada, *supra* note 10. The population of Canada in total is: 34, 482, 779.

Nevertheless, the extent of same sex partnerships should not be overstated, being only 0.8% of all 7,861,860 couples in Canada in 2011. Nor should the rate of marriage in the lesbian and gay community be overstated. Many couples choose to live unmarried in “common law” unions instead of entering legal marriages. As mentioned above, common law couples are accorded many, but not all, rights and responsibilities that married couples have, depending on what province they reside in. Although the numbers of same sex marriages nearly tripled across Canada from 2006 to 2011, after same sex marriage was legalized in 2005, only about 32.5% of all same sex couples recorded by Census Canada were legally married in 2011 – about 21,015, in contrast to the 43,560 same sex common law couples. The percentage of marriages (as opposed to living common law) amongst same sex couples was, however, up from 16.5% in 2006, and it may be that as time goes on the percentage will keep rising.

Having given the demographic trends from Canada, which show that same sex marriage is on the rise, even if it constitutes only a small minority of marriages in Canada, let us proceed to the heart of this article: a review of the critiques of the legalization of same sex marriage as a key strategy in the struggle for lesbian and gay equality.

#### IV. CRITIQUES OF SAME SEX MARRIAGE

A survey of international literature on same sex marriage reveals dissident voices concerning the embrace of same sex marriage emanating mainly from the United States, the United Kingdom, Scandinavia, and Canada. Some dissidents are also found from within countries such as the Czech Republic, Spain, and Israel.<sup>31</sup> These skeptical voices about the rush to lobby for marriage rights include both lesbian feminist and gay male activists.<sup>32</sup> By and large, though, there seems to have been more enthusiasm for marriage rights within the gay male community than within the lesbian community. With a few exceptions, the experience reflected in the following quote from a working class, Aboriginal Canadian woman who was the non-biological mother of her child is representative of the public discussions in Canada: “You know, marriage wasn’t an issue for the lesbians. And we kept standing up at the [EGALE] meeting . . . and saying, ‘That’s not our issue’. And the rich gay men stood up and said, ‘We want to be able to marry

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31. See, e.g., Simona Fojtová, *Czech Lesbian Activism: Gay and Lesbian Parental Rights as a Challenge to Patriarchal Marriage*, 15(3) J. LESBIAN STUD. 356 (2011); Katerina Liskova, Taky chcete být normální? Homosexuálové, manželství a rodina [*Do You Wanna Be Normal Too? Homosexuals, Marriage, and Family*], BIOGRAF J. QUALITATIVE RES., Jan. 27, 2006, <http://www.biograf.org/clanek.php?clanek=3803>.

32. Simon Formanek, *Demokracie, Filosofie, Bisexualita* [*Democracy, Philosophy, Bisexuality*], ADVOJKA (Sep. 7, 2008), <http://www.advojka.cz/archiv/2008/28/demokracie-filosofie-bisexualita>.

each other’.”<sup>33</sup>

For this lesbian mother, legalizing same sex marriage did little to help her to obtain legal rights in relation to her child and may even have deflected attention from such issues.

Early statistics in Spain indicated a greater take up of the opportunity to marry among gay male couples than lesbian couples.<sup>34</sup> Raquel Platero, writing in the Spanish context, raises the possibility that same sex couples may be less interested in marrying if they do not need to sponsor a partner to enter the country, or do not need marriage to protect their wealth or their children.<sup>35</sup> She also notes that the emphasis on same sex marriage has marginalized many other issues confronting lesbian, gay, bisexual, and transsexual (LGBT) communities. A small interview study in the United Kingdom revealed that some interviewees felt that in the context of global oppression of gays and lesbians, including threats to their lives, civil partnership was “rather missing the point.”<sup>36</sup> Some interviewees also raised the question of economic insecurity: partners living on small incomes or pensions stood to lose a great deal in the material sense if they had entered a civil partnership. As we see below, this concern is real.

So far we have seen that views on the campaign for same sex marriage are fragmented, even within the lesbian and gay movement. The next part of this article reviews the critiques at a more theoretical level. Feminists writing on same sex marriage often point to critiques related to both recognition and redistribution of economic wellbeing.<sup>37</sup> Both of these critiques will be addressed, highlighting who is left out of the recognition that same sex marriage brings and who is disadvantaged by the redistribution of wealth related to same sex marriage.

#### A. *Recognition: Who is Recognized and Who is Marginalized?*

Same sex marriage clearly contributes to the public recognition, and

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33. Fiona Kelly, *Severing the Link Between Marriage and Children's Best Interests: A Canadian Case Study*, 28 EQUAL OPPORTUNITIES INT'L 267, 276 (2009).

34. Raquel Platero, *Love and the State: Gay Marriage in Spain*, 15 FEMINIST LEGAL STUD. 329, 335-36 (2007). The 2011 Census in Canada indicated that married same sex couples were more likely to be male (54.5%) than female (45.5%), but this was also the percentage breakdown for common-law same sex spouses, so it appears either that there are more gay male couples than female, or that the gay male couples are more likely to claim some form of relationship status on the census. See STATISTICS CANADA, PORTRAIT OF FAMILIES AND LIVING ARRANGEMENTS IN CANADA, Catalogue no. 98-312-X2011001, at 8 (2012), <http://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-312-x/98-312-x2011001-eng.pdf>.

35. Platero, *supra* note 34, at 335-36.

36. Alison Rolfe & Elizabeth Peel, *'It's a Double-Edge Thing': The Paradox of Civil Partnership and Why Some Couples are Choosing Not to Have One*, 21(3) FEMINISM & PSYCHOL. 317, 326 (2011).

37. BARKER, *supra* note 7, at 15.

arguably the legitimation, of same sex partners. As we saw earlier, this recognition is central to arguments in favour of same sex marriage. Yet even the apparently straightforward quest for recognition via same sex marriage rights can be challenged.

### 1. *Marriage and Heteronormativity*

First, same sex marriage arguably adopts already existing models for amorous relationships – what some call “heteronormativity,” or the embrace of heterosexual norms even within gay and lesbian communities. As Heather Brook has said, “(hetero)sexual performatives remain a key trope in marriage and (to a lesser extent) marriage-like relationships.”<sup>38</sup> These heterosexual performatives would include gender inequality and the institution of the nuclear family. The photos of the Buddhist lesbian wedding provide a good example of heteronormative practice, notably in their wearing of traditional long, white wedding dresses.<sup>39</sup> While this example may seem trivial, the more serious concerns with assimilation to heteronormativity will become clearer below.

A related, and more troubling point is that marriage can be viewed as an ideological “enclosure,” which prioritizes coupledness and heterosexuality, making these the norms against which all other relationships are measured.<sup>40</sup> Marriage also becomes the privileged environment within which to raise children. An editorial in Canada’s most prominent national newspaper during the same sex marriage debates illustrated perfectly the ideologically conservative bent of many arguments for same sex marriage:

By embracing marriage, homosexuals remind others that it is, or should be, the norm for committed couples. It is the best place to experience love, sex and companionship together. It is the best place to raise children. Marriage's “till death do us part” pledge of permanence gives people the security they need to give themselves fully to the other. It is one of the ironies of the same-sex marriage debate that conservatives who once condemned the hedonistic, selfish and licentious “gay lifestyle” would now deny homosexuals the right to opt into the bourgeois comfort of marriage.<sup>41</sup>

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38. Heather Brook, *How to do Things with Sex*, in *SEXUALITY IN THE LEGAL ARENA* 132, 133 (C. Stychin & D. Herman eds., 2000).

39. Bell, *supra* note 1.

40. CAROL SMART, *THE TIES THAT BIND: LAW, MARRIAGE AND THE REPRODUCTION OF PATRIARCHAL RELATIONS* 143 (1984).

41. Editorial, *Gays in the 'Hood'*, *GLOBE AND MAIL*, Jan. 31, 2005, at A12.

Many arguments for same sex marriage effectively bolster these traditional ideas about marriage and family. The briefs and testimony presented to the Parliamentary hearings on same sex marriage in Canada show that some witnesses arguing for same sex marriage emphasized that legalizing same sex marriage would strengthen marriage and family.<sup>42</sup> A typical argument in favour of same sex marriage in Canada was the following made by the Foundation for Equal Families: “The foundation believes that equal marriage will in fact strengthen the institution of marriage by expanding the range of loving couples who subscribe to its tenets.”<sup>43</sup>

It can easily be understood why these arguments were made, as they were “safe” rationales for expanding the definition of marriage to include same sex couples, due to their invocation of mainstream norms. But equally, these arguments obscured both the exclusionary aspects of marriage and its darker sides, both of which are discussed below.

## 2. *Marriage and the Marginalization of Other Models of Living*

Radical activists in Canada and elsewhere have suggested that the emphasis on marriage and coupledness stigmatizes alternative models of intimacy, including communal living, chosen families that fall outside of the nuclear dyadic model, and non-monogamous and polyamorous relationships.<sup>44</sup> According to some, this trend also “threatens to suffocate queer subculture.”<sup>45</sup>

The viability of living as a single person is also challenged by the major focus on marriage. In fact, the first Norwegian association of gays and lesbians did not have same sex marriage on its agenda, claiming that this focus on marriage diminished the value of the individual and constituted potential discrimination against single persons:

The value of the individual does not depend on the ability, will or opportunity to establish a relationship with another person. DNF-48 cannot accept any form of discrimination of single people – financially or in human terms. The Association will support all policies that aim to remove this discrimination wherever it is

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42. Claire Young & Susan Boyd, *Losing the Feminist Voice? Debates on The Legal Recognition of Same Sex Partnerships in Canada*, 14 FEMINIST LEGAL STUD. 213, 229-30 (2006).

43. House of Commons, Standing Committee on Justice and Human Rights, *Evidence of Michelle Douglas (President, Foundation for Equal Families)*, 37th Parl., 2nd Sess., No. 15, 905 (Feb. 11, 2003), <http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=CommitteeMeeting&Acronym=JUST&Mee=15&Language=E&Mode=1&Parl=37&Ses=2>.

44. BARKER, *supra* note 7, at 173-82.

45. Jens Rydström, *Legalizing Love in a Cold Climate: The History, Consequences and Recent Developments of Registered Partnership in Scandinavia*, 11(1/2) SEXUALITIES 193, 214 (2008).

making itself felt. (DNF-48, National Convention 1973).<sup>46</sup>

A specific example of how single persons could be marginalized as a result of the emphasis on gay marriage is that in the past, single lesbian women and unmarried women have experienced difficulties in gaining access to fertility clinics, for instance in England and the State of Victoria (Australia), thus diminishing women's ability to make decisions in relation to their reproductive choices.<sup>47</sup>

Writing in the Scandinavian context, Jens Rydström notes that the trajectory has been towards an emphasis on couples living together and away from (the few) radical critiques of the traditional nuclear family and consideration of alternative forms of intimate relationships, such as communal living and polyamory.<sup>48</sup> Law plays a role in this process of limiting the ability to imagine alternative forms of living. UK/Canadian legal scholar Carl Stychin cautioned some time ago about the risk that:

[t]he disciplinary, normalizing function of liberal law reform may constrain us, by acting to limit the variety of ways of living – of styles of life – which sexual dissidents historically have developed. That is, my fear is that legal recognition may limit our ability to recognise that we can construct our lives so as to defy the categories which law traditionally has sought to impose upon us.<sup>49</sup>

With the move towards the legal recognition of same sex relationships, the dichotomous construction of “good” versus “bad” relationships has moved away from straight versus gay towards a still troubling distinction between responsible versus irresponsible sexual practices. As Platero puts it, the legalization of same sex marriage could problematically result in “the construction of a ‘good and respectable’ married lesbian citizen as against a ‘bad and unstable’ unmarried and non-recognised lesbian (non) citizen”.<sup>50</sup> Moreover, Rydström notes that this construction could result in discrimination: “If those ‘bad’ homosexuals become discriminated against and punished in relation to the respectable, registered homosexuals, then we

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46. Arnfinn J. Andersen, *Sexual Citizenship in Norway*, 25 INT'L J. L., POL'Y & FAM. 120, 123 (2011).

47. See, e.g., Edmund Broch, *Gay Couples and Women Over 40 to Receive Fertility Treatment Through NHS*, PINKNEWS, May 22, 2012, <http://www.pinknews.co.uk/2012/05/22/gay-couples-and-women-over-40-to-receive-fertility-treatment-through-nhs/>; Jenni Millbank, *Every Sperm Is Sacred? Denying Women Access to Fertility Services on the Basis of Sexuality or Marital Status*, 22 ALTERNATIVE L.J. 126 (1997).

48. Rydström, *supra* note 45, at 195-96.

49. CARL STYCHIN, *GOVERNING SEXUALITY: THE CHANGING POLITICS OF CITIZENSHIP AND LAW REFORM* 4 (2003).

50. Platero, *supra* note 34, at 338.

have a reason to strongly question gay marriage.”<sup>51</sup>

### 3. *Marriage and Gender Inequality*

The feminist critique of marriage encompasses the situation of heterosexual as well as lesbian women. Marriage has tended, historically, to inscribe fairly strict gendered roles, constructing women as caregivers who are dependent on their breadwinner husbands.<sup>52</sup> Indeed, within modern heterosexual marriages, women and men still tend to follow this pattern, especially when children are born.<sup>53</sup> Although this pattern has shifted somewhat in some contexts, and marriage is now touted as an equal partnership, it has changed to a lesser extent than is often thought, with women paying an economic price for motherhood in particular, due to their economic dependency on their husbands.<sup>54</sup> For example, married mothers may take part time work, but this choice leaves mostly intact the sexual division of labour, if their husbands work full time. Moreover, to the extent that capitalism relies on the fact that families will perform caregiving labour for “free” within the home – so that, for instance, the state does not have to subsidize the costs of child care – it does not matter whether it is same sex or opposite sex couples that organize their division of labour so that one person will be an unpaid caregiver.<sup>55</sup> Capitalism benefits regardless of the sex of the couple, but the consequence is that the caregiver becomes economically dependent on their partner. Although research shows that same sex couples tend to adopt less strict gender roles than opposite sex couples, not all do so, with an unequal division of labour often being observed.<sup>56</sup> Moreover, the external pressures to provide privatized caregiving within the family remain constant in capitalist societies such as the United States and Canada.<sup>57</sup>

A common response to this critique that marriage engenders inequality is that individuals may challenge traditional norms within their own marriages, regardless of the ideological expectations. For example, some married men take on the caregiver role and some married women are the

51. Rydström, *supra* note 45, at 215.

52. Rosemary Auchmuty, *Same-Sex Marriage Revived: Feminist Critique and Legal Strategy*, 14 FEMINISM & PSYCHOL. 101, 105 (2004).

53. See *Women Are Less Likely Than Men to Participate in the Labor Market in Most Countries*, THE WORLD BANK (Apr. 9, 2012), <http://data.worldbank.org/news/women-less-likely-than-men-to-participate-in-labor-market>.

54. BARKER, *supra* note 7, at 144-52; ANN CRITTENDEN, THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED (2001); MARTHA A. FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 37 (2004).

55. Brenda Cossman, *Sexing Citizenship, Privatizing Sex*, 6 CITIZENSHIP STUD. 483, 484 (2002).

56. See BARKER, *supra* note 7, at 154-58. Barker provides an excellent discussion of this literature, notably CHRISTOPHER CARRINGTON, NO PLACE LIKE HOME: RELATIONSHIPS AND FAMILY LIFE AMONG LESBIANS AND GAY MEN (1999).

57. FINEMAN, *supra* note 54, at 199.

primary breadwinners. Despite this non-normative behavior within a minority of marriages, which has been happening for some decades, the institution of marriage at a macro level still embodies patriarchal and heterosexual norms.<sup>58</sup>

#### 4. *Marriage and Racism*

Another problem with the legal institution of marriage is that through history it has been implicated in racist practices. Within the American legacy of slavery, the “racialized engendering of marriage had very different consequences for white and black women.”<sup>59</sup> Notably, slaves were forbidden to marry and miscegenation statutes in some states in the United States prohibited marriages between individuals of different races until the US Supreme Court declared these statutes unconstitutional in 1967.<sup>60</sup> In Canada, marriage provided a mechanism for the imposition of colonialist and patriarchal norms on Aboriginal communities, with very negative consequences for Aboriginal women, who lost their status if they married non-Aboriginal men.<sup>61</sup>

Moreover, Suzanne Lenon has drawn attention to the racialized basis of arguments for same sex marriage in her study of debates in Canada.<sup>62</sup> She points to the frequently made argument that continuing to prohibit same sex marriage is analogous to continuing to prohibit interracial marriages. Similarly, some argue that using registered or civil partnerships for same sex couples and denying marriage rights would be analogous to segregation of African-Americans or “separate but equal”. Lenon suggests that these arguments fail to take account of the intersectionality of gender, race and sexuality and that they posit a particular gay subject who merits same sex marriage, specifically one who is “racialized” as white.<sup>63</sup>

Given the discriminatory history and use of marriage laws through history, both with regard to women and racialized minorities, it is not surprising that many radicals in the 1960s and 1970s resisted entering legal marriage, which could be seen as resting on profoundly hierarchical social and economic relations. As Spanish writer Raquel Platero notes: “Marriage is not a neutral institution when it is so underpinned with structural

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58. See BARKER, *supra* note 7, at 144-52.

59. ROSEMARY HENNESSY, PROFIT AND PLEASURE: SEXUAL IDENTITIES IN LATE CAPITALISM 65 (2000).

60. *Loving v. Virginia*, 388 U.S. 1 (1967).

61. Sharon D. McIvor, *Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights*, 16 CAN. J. WOMEN & L. 106, 112 (2004).

62. Suzanne J. Lenon, *Marrying Citizens! Raced Subjects? Re-Thinking the Terrain of Equal Marriage Discourse*, 17 CAN. J. WOMEN & L. 405 (2005).

63. *Id.* at 419. See also Priya Kandaswamy, *State Austerity and the Racial Politics of Same-Sex Marriage in the US*, 11(6) SEXUALITIES 706 (2008), discussed further below.



inequalities of race, gender, class and ethnicity.”<sup>64</sup>

The next part of this article deals more specifically with the class and economic aspects of marriage, in particular its relationship to redistribution of wealth.

#### B. *Redistribution: Marriage and Economic Inequality*

In addition to the concerns about the conservative and heteronormative impetus of legal recognition, those who are concerned about economic inequalities in society have addressed the relationship between marriage and the redistribution of wealth or economic wellbeing. Achieving recognition of one’s intimate relationship is almost inevitably accompanied by regulation of some sort. Because marriage has a regulatory role, being much more than a simple contract, we must look at the role that it plays in society, including its economic role.

To understand this point about the regulatory role of marriage, it must be remembered that marriage is not just a private contract between two people but it is also a system of organizing and allocating rights, responsibilities, and public resources. It serves as a tool for the redistribution of wealth in society, and not always for the benefit of all married partners. Yes, marriage usually comes with some rights to share in matrimonial property, and this right has been an important gain for many women who have performed unpaid labour in the home and participated in the workforce to a lesser degree than their husbands.<sup>65</sup> Inheritance rights have also accrued historically more easily for those who are legally married or children born within marriages, and still do in some jurisdictions.<sup>66</sup> These rights and remedies can be important also for those in same sex relationships.

Less often acknowledged is the fact that marriage can be a socio-legal tool that deprives one of economic benefits and that diminishes the potential for economic independence of individuals. Class and gender are both highly relevant here. Gaining legal recognition as spouses can benefit wealthier couples or couples whose relationships are premised on the economic dependency of one partner.<sup>67</sup> But individuals in lower income couples often lose entitlement to state benefits because their income is aggregated for the

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64. Platero, *supra* note 34, at 337.

65. Martha A. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study in Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WISC. L. REV. 789, 801-03.

66. Jill Insley, *Unmarried couples ‘should have equal inheritance rights’*, The Guardian, Dec. 14, 2011, <http://www.theguardian.com/money/2011/dec/14/unmarried-couples-equal-inheritance-rights>.

67. Claire Young, *Taxing Times for Lesbians and Gay Men: Equality at What Cost?*, 17 DALHOUSIE L.J. 534, 547 (1994).

purposes of computing entitlement.<sup>68</sup> For instance, entitlement to social assistance may be lost when two individuals are legally recognized as a couple. Moreover, lesbian couples may well be more susceptible to this risk than gay male couples, given that women tend to earn less and inherit less wealth.<sup>69</sup>

Another way of explaining this effect of marriage or spousal recognition is that extending spousal status to lesbians and gay men reinforces the neo-liberal privatization of economic responsibility by placing it primarily on family members, rather than the state.<sup>70</sup> Thus, the more couples that are legally recognized, the more couples the state can require to support each other financially, for example through spousal support obligations, therefore relieving the state and the taxpayer from responsibility. In fact, an important Supreme Court of Canada decision finding that same sex partners should have the same spousal support obligations towards each other as opposite sex couples stated explicitly that a main purpose of spousal support law was to alleviate the burden on the public purse by shifting the obligation to provide support for needy persons from the state to family members.<sup>71</sup> More surprisingly, perhaps, a proponent of same sex marriage in the Canadian debates endorsed this view: “Benefits to Canada, to the state, include the promotion of intra-family solidarity, the empowerment and solidarity of couples and families and certainly a *reduced social burden for the state*.”<sup>72</sup> While this privatizing impetus may make sense at first glance, when probed more deeply, it works quite well for wealthier elements of society, but is punitive for those with lower incomes.<sup>73</sup>

This critique of privatization within capitalism has been made in the LGBT movement. Lesbian feminists in Denmark, for instance, early on “were opposed to a law that they saw as a reproduction of patriarchal structures, and above all they opposed the formalization of mutual economic

68. See, e.g., *id.*; Susan Boyd & Claire Young, ‘From Same-Sex to No Sex’? Trends Towards Recognition of (Same-Sex) Relationships in Canada, 1(3) SEATTLE J. FOR SOC. JUST. 757, 775 (2003); see also Cossman, *supra* note 55; Janet Halley, *Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 97, 100 (Robert Wintemute & Mads Andenæs eds., 2001).

69. Brenda Cossman, *Family Feuds: Neo-Liberal and Neo-Conservative Visions of the Reprivatization Project*, in PRIVATIZATION, LAW, AND THE CHALLENGE TO FEMINISM 169, 170 (Brenda Cossman & Judy Fudge eds., 2002).

70. Susan B. Boyd, *Family, Law and Sexuality: Feminist Engagements*, 8(3) SOC. & LEGAL STUD. 369, 377-82 (1999).

71. *M. v. H.*, [1999] 2 S.C.R. 3, *paras.* 4, 53, 106 (Can.).

72. House of Commons, Standing Committee on Justice and Human Rights, *Evidence of Marie-France Bureau*, 37th Parl., 2nd Sess., No. 14, 905 (Feb. 6, 2003), <http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=CommitteeMeetingEvidence&Acronym=JUST&Mee=14&Language=E&Mode=1&Parl=37&Ses=2> (emphasis added).

73. Young, *supra* note 67; Boyd & Young, *supra* note 68; Halley, *supra* note 68; Cossman, *supra* note 69.

responsibility, noting that it engendered dependency. The women's movement had struggled for independent women who would count as individuals rather than depending on a breadwinner . . . and it was not a gain to achieve a new kind of dependency."<sup>74</sup> This point is actually a combination of a critique of the terms of recognition ("Why do we need that petit-bourgeois, well . . . *crap?*")<sup>75</sup> and a critique of women's economic dependency on their spouses, which in turn relieves the state and the taxpayer of responsibility.

We have seen that strong feminist (and other radical) critiques have been raised about the focus on same sex marriage rights. The next part seeks to explain the relative silence of such dissenting voices in public debates and litigation.

#### V. THE INVISIBILITY OF FEMINIST VOICES IN THE SAME SEX MARRIAGE DEBATES

Some years ago, Judith Butler pointed out that "options outside of marriage are becoming foreclosed as unthinkable, and how the terms of thinkability are enforced by the narrow debates over who and what will be included in the norm."<sup>76</sup> But she also noted that politics "demands that we take a stand for or against gay marriage."<sup>77</sup> It is indeed difficult to assume a critical or even nuanced stand on same sex marriage in the face of the often quite vicious homophobic discourses that are marshaled against gay marriage.<sup>78</sup> Most lesbians and gay men and their supporters do not want to raise a perspective that might bolster conservative anti-gay discourse. This difficulty likely accounts for the relative silence amongst, say, lesbian feminist critics of marriage, a silence that has been observed in Canada.

A study of the parliamentary hearings in Canada on legal recognition of same sex partners revealed the silence of critical lesbian feminist voices as well as the political polarization to which Butler refers. The main LGBT group in Canada, EGALÉ (Equality for Gays and Lesbians Everywhere), for instance, took a purely formal equality approach, arguing that same sex couples should have the same rights as heterosexual couples. EGALÉ did not discuss concerns about the potentially gendered impact of the

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74. Rydström, *supra* note 45, at 197-99.

75. *Id.* at 198-99.

76. Judith Butler, *Is Kinship Always Already Heterosexual?*, DIFFERENCES: J. FEMINIST CULTURAL STUD., Spring 2002, at 14, 18. *See also* Platero, *supra* note 34, who discusses the absence of feminist perspectives on the impact of marriage on women especially, noting that the tendency for binary standpoints to be taken results in there being little room to problematize the institution of marriage.

77. Butler, *supra* note 76, at 19.

78. Young & Boyd, *supra* note 42.

assimilation of same sex partners into the law or the privatization that might result, with attendant disadvantages for lower income couples: “Having access to the same choices as heterosexuals is what is fundamental for us, as gays and lesbians.”<sup>79</sup>

The lack of the capacity to choose legal marriage was constructed as discrimination. Mr. John Fisher for EGALE stated: “We have a constitution that requires that all Canadians be treated equally under the law. Opposite-sex couples can get married. Same-sex couples can’t. That’s not equality. It’s discrimination, and it’s prohibited by the Charter of Rights.”<sup>80</sup>

More surprisingly, even the few feminist groups and individuals who raised some critical concerns did so, as a rule, after endorsing the formal equality human rights arguments in favour of legalizing same sex marriage. For example, West Coast LEAF, a group seeking equality for women, first supported same-sex marriage on the basis that to deny it contravened the *Charter of Rights and Freedoms*, and then raised the larger issue of the role that marriage has played in “enforcing women’s economic inequality, allowing women’s victimization by domestic violence, and devaluing the important work of caregiving.”<sup>81</sup>

By far the majority of witnesses who spoke in favour of legalizing same sex marriage did so, however, from a formal equality standpoint.

#### A. *The Role of Formal Equality*

In addition to reflecting a reluctance to join or bolster homophobic voices against same sex marriage, the silence of dissenting voices on the value of marriage illustrates the hegemony of formal equality in Canada and elsewhere. In fact, the allure of the use of formal equality can be attributed to its very simplicity. Douglas Sanders explains: “The claim to marriage is a simple, easily understood demand. It tells heterosexuals that they are not the only people who deserve a normal, unstigmatized life. It captures the goal of equality with great clarity.”<sup>82</sup>

Sanders’ argument that “[r]eductionism is a necessary strategy” when a

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79. House of Commons, Standing Committee on Justice and Human Rights, *Evidence of Mr. John Fisher (Director of Advocacy, Egale Canada)*, 37th Parl., 2nd Sess., No. 13, 1015 (Feb. 4, 2003), <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=679436&Language=E&Mode=1&Parl=37&Ses=2>.

80. *Id.* at 920.

81. House of Commons, Standing Committee on Justice and Human Rights, *Evidence of Ms. Alison Brewin (Program Director, West Coast LEAF Association)*, 37th Parl., 2nd Sess., No. 29, 1355 (Apr. 1, 2003), <http://www.parl.gc.ca/committeebusiness/CommitteeMeetings.aspx?Cmte=JUST&Language=E&Mode=1&Parl=37&Ses=2#DT20030204JUSTMEE13>.

82. Sanders, *supra* note 3, at 233.

minority is trying to gain rights<sup>83</sup> assists in an understanding of why critical arguments are marginal in most law reform processes. The testimony of witnesses in the Canadian debates was geared towards appealing to “ordinary” Canadians and offering an easy to comprehend equal rights discourse.

Witnesses giving evidence to the Canadian committee hearings stressed their ordinariness and similarity to opposite sex couples. Dawn Barbeau said about her relationship that “our finances have gradually become more and more intertwined . . . we have joint accounts; we own property or a house together; our car is our joint property.”<sup>84</sup> Martha Dow testified as follows: “I come to you as a traditional lesbian, who’s been together for 19 years and has children. My partner is quitting work in a couple of weeks so she can stay home with our children. We need to be recognized for our equality with other couples who make choices.”<sup>85</sup>

The classic formal equality strategy also was apparent in the Canadian court challenges to the opposite sex definition of marriage. The litigants tended to be situated within an increasingly palatable queer mainstream.<sup>86</sup> Some scholars writing about this queer mainstream suggest that the “sex” in “same sex” has been rendered virtually invisible in these discourses.<sup>87</sup> Sex was not very present in the Canadian litigation on same sex marriage, but the trappings of middle class relationships were. Almost all litigants were white, middle class, and middle-aged. They tended to emphasize joint finances, reciprocal wills, monogamy and the desire to be “just like” other couples, which they would be but for their sexuality. A significant number were affiliated with a Christian church. As well, they were committed to a traditional familial ideology that not only affirmed marriage, but also “economic interdependence, relationship longevity, monogamy, and dyadic parenting.”<sup>88</sup>

To be fair, the way that arguments need to be made under our *Charter of Rights and Freedoms* encourages this sort of comparative argument: if a group want the status that another group already has, then it is most

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83. *Id.*

84. House of Commons, Standing Committee on Justice and Human Rights, *Evidence of Ms. Dawn Barbeau*, 37th Parl., 2nd Sess., No. 29, 1455 (Apr. 1, 2003) <http://www.parl.gc.ca/committeebusiness/CommitteeMeetings.aspx?Cmte=JUST&Language=E&Mode=1&Parl=37&Ses=2#DT20030204JUSTMEE13>.

85. House of Commons, Standing Committee on Justice and Human Rights, *Evidence of Ms. Martha Dow*, 37th Parl., 2nd Sess., No. 29, 1155 (Apr. 1, 2003) at 1155, <http://www.parl.gc.ca/committeebusiness/CommitteeMeetings.aspx?Cmte=JUST&Language=E&Mode=1&Parl=37&Ses=2#DT20030204JUSTMEE13>.

86. Kelly, *supra* note 33, at 269; Lenon, *supra* note 62. See also Yuvraj Joshi, *Respectable Queerness*, 43(2) COLUM. HUM. RTS. L. REV. 415 (2012).

87. Mariana Valverde, *A New Entity in the History of Sexuality: The Respectable Same-Sex Couple*, 32(1) FEMINIST STUD. 155 (2006).

88. Kelly, *supra* note 33, at 269.

compelling to argue that you are the same as, or almost the same as, that other group. The hegemony of formal equality rights discourse in law leaves virtually no room for critical analysis of the institutions of marriage and family, and their relationship to the political economy and to social relations of inequality. The marriage litigants in the Canadian same sex marriage challenges were quite clearly not challenging normative heterosexuality. Rather, despite being gay, these litigants affirmed a heteronormative model of intimate relationship. They underplayed the diversity that exists in lesbian and gay relationships, as well as, for that matter, heterosexual relationships. This tendency has also been identified in the American context.<sup>89</sup>

The litigants (especially lesbians) in the same sex marriage court cases also tended to argue that the best environment within which to raise children was marriage. This argument veers dangerously towards a return to a notion that children born outside marriage are “illegitimate.”<sup>90</sup> Another argument was that children would feel more “normal,” raising concerns about how children not born within marriage might be treated.<sup>91</sup>

Through these discursive moves, the lesbian and gay marriage litigants, ironically, ended up taking a position that was virtually indistinguishable from their largely right wing conservative Christian opponents: that marriage is a basic element of society.<sup>92</sup>

#### B. *The Role of Major LGBT Organizations*

In addition to the pull of formal equality discourse identified above, research indicates that the relative silence of feminist and critical voices in public debates on same sex marriage was no accident. Some major LGBT organizations have taken steps to silence those dissenting voices, even when they existed. For example, studies of the LGBT community in the UK reveal somewhat muted, but nevertheless clear voices doubting, or at least being ambivalent about, the merits of the move to civil partnership in that country. Yet the leading LGBT organizations such as Stonewall, which claimed to speak for the whole community, had adopted “an overly consensual position on civil partnerships, and one that predominantly represents the views of gay men, who have been in the majority amongst those having civil partnerships.” In contrast, dissenting voices, particularly those of lesbian women, remained largely silent.<sup>93</sup>

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89. See YVONNE ZYLAN, *STATES OF PASSION: LAW, IDENTITY AND THE SOCIAL CONSTRUCTION OF DESIRE* (2011).

90. Shelley A.M. Gavigan, *Equal Families, Equal Parents, Equal Spouses, Equal Marriage: The Case of the Missing Patriarch*, 33(2d) SUP. CT. L. REV. 317, 334 (2006).

91. Kelly, *supra* note 33, at 270.

92. *Id.* at 271.

93. Rolfe & Peel, *supra* note 36, at 320.

According to Rydström, one of the reasons that the same-sex marriage agenda prevailed in Scandinavia,<sup>94</sup> despite the fact that only a minority of the LGBT community supported it, was that those in favour of same sex marriage were well organized and spoke the same discursive language as the state authorities. Moreover, the direct gains of the politics of visibility and assimilation into the mainstream were easy to point out to the members of the LGBT community.<sup>95</sup>

Taking a longer perspective, Rydström has also argued that the history of gay marriage law in Scandinavia (including registered partnerships) was written from a positive perspective since many writers were trying to marginalize opponents to the law. For example, even though lesbian feminists were especially outspoken in the 1980s, Danish gay activists Bent Hansen and Henning Jorgensen, in their writing about the 1989 Danish law on registered partnerships in the 1993 ILGA Pink Book, under-emphasized the points that the feminist lesbians made. Rydström says:

Downplaying the internal differences within their organization, they claimed that the discussions for and against the law within the gay and lesbian community were held by a minority, whereas “most gays were interested merely in obtaining recognition from society and in having their practical, legal, and economic problems solved.” By describing the feminist and radical opponents of the law as a small and isolated group opposed to a practical solution of ordinary people’s problems, they conveyed an impression of internal unity, and they avoided mentioning that no lesbian couples were registered during the first day’s celebrations.<sup>96</sup>

Similarly, Priya Kandaswamy states that in the United States, marriage was not a major focus of the LGBT movement until the 1990s, with earlier activism focusing on issues like health care, HIV and AIDS, repealing laws on sodomy, and generalized homophobia and heterosexism within society.<sup>97</sup> She suggests that the successes of same-sex marriage advocates in the United States “do not reflect a mass gay and lesbian movement for marriage but rather have largely been won through legal activism on the part of large national gay and lesbian rights organizations.”<sup>98</sup> As in Scandinavia, these

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94. *E.g.*, Denmark legalized same sex marriage on June 15, 2012; Sweden and Norway in 2009.

95. JENS RYDSTRÖM, *ODD COUPLES: A HISTORY OF GAY MARRIAGE IN SCANDINAVIA* 88 (2011).

96. *Id.* at 25 (citation omitted).

97. *See also* comments of Pedro Carmona, a gay activist from Spain who published a text in the newspaper about same-sex marriage and how it was never a priority demand of all gays and lesbians in Spain. Pedro Carmona, *Olvidos*, *DIAGONAL LAPLAZA*, Jun. 16, 2006, <http://www.diagonalperiodico.net/la-plaza/olvidos.html>.

98. Kandaswamy, *supra* note 63, at 714.

large organizations have made the case for the importance of marriage by employing “a liberal narrative of progressive inclusion that positions same-sex marriage at the inevitable end of America’s long march toward equal rights for all.”<sup>99</sup>

Even more significantly, Kandaswamy shows that this long march toward equal rights draws on a nationalist vision of what it means to be American that has also been deployed to preserve racial inequalities within the United States, notably through the use of marriage as a marker in the regulation of social welfare. Kandaswamy’s analysis of the “sameness” or formal equality discourse of the LGBT mainstream movement is particularly telling: “In making claims to citizenship, the gay marriage movement seeks recognition not only as the same as those privileged citizens who reap the benefits of being ‘fully American’ but also as fundamentally different from those who have been constructed as undeserving of the full rights of citizenship.”<sup>100</sup>

By citizens who are “undeserving,” Kandaswamy is referring to poor, single mothers in the USA, who are often constructed as “black” even though many Caucasian Americans also receive social assistance. Her argument is that the benefits that gay and lesbian activists have sought through marriage are better understood as privileges that only certain groups possess in a racially stratified welfare state such as the United States.

These studies indicate, then, that the silence of critical voices in litigation and in debates on legalizing same sex marriage may be the result of some level of organized thwarting of the expression of these voices. The next part turns to the question of what interviews with lesbians and gay men reveal about their attitudes to same sex marriage and related institutions such as civil partnership.

#### VI. EQUIVOCATING ON MARRIAGE: EMPIRICAL STUDIES OF SAME SEX PARTNERS

Empirical studies do not necessarily support the notion that most lesbians and gay men are pro-marriage or view it as the crux of their campaign for equality. For instance, interviews conducted by Fiona Kelly with lesbian mothers in two Western Canadian provinces found that, despite the fact that same sex marriage had by then been legalized, only in nine of the thirty-six families were the mothers married. In only two other families did the mothers plan to marry in the future. Of those that had married, most had done so for practical reasons (e.g. protecting themselves from legal

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99. *Id.*

100. *Id.* at 716.



claims to parenthood of their child by a known sperm donor) and few connected their decision to marry with a belief that marriage was a better environment within which to raise children.<sup>101</sup> Furthermore, a significant number of the mothers expressed views that were derived from the feminist critiques of marriage as a patriarchal and heteronormative institution that has not served women well. However, the author of the study cautioned that the next generation of lesbian mothers might be less critical. They will have the opportunity to marry prior to having their children and will also be less likely to have strong ties to the second wave feminist critique of marriage. Adam Green sounds a similar note, cautioning that it is unclear whether the radical potential of same sex marriage will endure, or whether the more radical elements he found in his interviews “will slowly erode as the younger lesbian and gay spouses are socialized into the dominant meaning-constitutive tradition without the mediating effects of a competing, queer meaning-constitutive tradition.”<sup>102</sup>

A small study of legal consciousness amongst lesbians and gay men in the UK found that participants who had not entered a civil partnership (the closest thing to same sex marriage available to same sex partners at the time in the UK) expressed mixed attitudes towards the idea of civil partnerships. Whilst being in favour of legal recognition and the step that it represented toward greater equality, they were resistant to the increased regulation that came with legal recognition.<sup>103</sup> This finding of contradictory feelings on the part of many gay men and lesbians is echoed in a small interview study in the UK with same sex partners in long term relationships who were not considering a civil partnership in the foreseeable future.<sup>104</sup> Whilst considering the option of civil partnership as an important marker of progress and deploying a liberal rights discourse in order to do so, the same participants often expressed concern about civil partnership: “For most female participants, this critique was firmly rooted in a feminist discourse,”<sup>105</sup> with a critique of weddings, religious ceremonies, power imbalance, and so on. Gay men were less critical of these aspects, but offered a different critique, which was that civil partnership “relied on conforming to conventional heterosexual values and mores and did not allow for the diversity and creativity of same-sex relationships.”<sup>106</sup>

Qualitative interviews conducted by Carol Smart with UK couples who

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101. Kelly, *supra* note 33, at 273.

102. Adam Isaiah Green, *Queer Unions: Same-Sex Spouses Marrying Tradition and Innovation*, 35(3) CAN. J. SOC. 399, 429-30 (2010).

103. Rosie Harding, *Recognizing (and Resisting) Regulation: Attitudes to the Introduction of Civil Partnership*, 11(6) SEXUALITIES 740 (2008).

104. Rolfe & Peel, *supra* note 36.

105. *Id.* at 324.

106. *Id.*

had embraced marriage or civil partnerships produced a more nuanced conclusion. These lesbians and gay men had chosen to conduct a form of commitment ceremony. Some were more conservative than their own parents, while some of their friends were more critical of marriage and heteronormativity than they were.<sup>107</sup> This study reminds us about the diversity of views within the LGBT community. Moreover, the extent to which critical views of marriage are held should not be over-estimated, nor should the ways in which individuals and couples may be re-negotiating the definition and boundaries of marriage be under-estimated. At the same time, some awareness in the interview subjects of the risks of mimicking heterosexual marriage was revealed in the Smart study. Even though all interview subjects were in favour of some form of same sex marriage, and even though they adopted different styles of ceremonies (regular, minimalist, religious and demonstrative), many couples were anxious not to copy heterosexual conventions. Similarly, a Canadian interview study found that while the thirty same sex married spouses endorsed many of the traditional trappings of marriage, at the same time, they rejected other norms associated with marriage, such as monogamy or the division of labour.<sup>108</sup>

One interviewee in Smart's UK study made an interesting point, that resisting marriage might be important for a heterosexual woman who did not want to belong to a man, but stated that this was "completely different from actually two women getting married . . . it's about saying we're equal with heterosexuals, our relationship is as important as heterosexual relationships."<sup>109</sup> This quite compelling argument is similar to what Cheshire Calhoun has argued: that unlike heterosexual women, who are oppressed due to their confinement to subordinate roles in the family and society, lesbian (and gay) oppression arises from our status as outsiders, for instance, vis-à-vis marriage and family.<sup>110</sup> Marriage does make some sense as a strategy under this logic. But it remains an endorsement of a formal equality approach that does not challenge the regulatory function and the often oppressive role of marriage in society. Platero expresses this point succinctly: "Nevertheless, the entrance of gays and lesbians into the institution of marriage does not imply the transformation of dominant values; heterosexual (and, sometimes, gay male) values prevail. Same-sex marriage shares with traditional marriage a number of constraints that

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107. Carol Smart, *Same Sex Couples and Marriage: Negotiating Relational Landscapes with Families and Friends*, 55(4) SOC. REV. 671 (2007).

108. Green, *supra* note 102. The gay men interviewed by Green rejected the idea of monogamy much more often than did the lesbians (*id.* at 417).

109. Carol Smart, 'Can I Be Bridesmaid?' *Combining the Personal and Political in Same-Sex Weddings*, 11 SEXUALITIES 761, 773-74 (2008).

110. CALHOUN, *supra* note 15. But see BARKER, *supra* note 7, at ch. 4, for an engagement and refutation of Calhoun's arguments.

benefit middle class property owners and men.”<sup>111</sup>

Moreover, as noted above, Green raises the possibility that while the first generation of same sex married spouses may reimagine marital norms (to some degree), a more long term availability of same sex marriage may produce new generations of lesbian and gay couples who find a more normalized gay sexual subculture that is less contradictory and radical.<sup>112</sup> Finally, Green’s findings of the ways in which same sex married partners might resist some traditional aspects of marriage, which he seems to identify as “radical,” did not address the problematic relationship of marriage as an institution within socio-economic structures and its role in the redistribution of economic well-being. The Conclusion returns to these issues.

## VII. CONCLUSION

This article has suggested that the story of the legal recognition of same sex relationships, particularly through the legalization of same sex marriage, is less than fully positive. Why? Because although it offers the same “choice” over relationship recognition that opposite sex couples have, it has proceeded in a way that has rendered invisible important feminist critiques of marriage, familial ideology and the domestication of lesbian and gay relationships.<sup>113</sup> The hegemonic hold that normative marriage has on our imaginations about intimate relationships is powerful, and its nexus with socio-economic institutions that regulate access to economic-wellbeing cannot be underestimated.

Rosemary Auchmuty has argued that due to the influence of the women’s movement, marriage is no longer the normative structure it once was, but rather a simple lifestyle choice.<sup>114</sup> Yet statistics indicate that its influence remains considerable and that in many ways, it is much more difficult to resist marriage than to choose it due to family and societal pressures.<sup>115</sup> In Canada, married couples still constitute the predominant family structure in Canada, accounting for two-thirds of all families, even though this percentage has decreased over the past few decades, down from 91.6% in 1961. While married couples are evidently in a long-term decline, unmarried or common law couples are on the rise (16.7% of census

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111. Platero, *supra* note 34, at 338-39.

112. Green, *supra* note 102, at 430.

113. Nancy Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will not “Dismantle the Structure of Gender in Every Marriage”*, 79(7) VA. L. REV. 1535 (1993); Ruthann Robson, *Resisting the Family: Repositioning Lesbians in Legal Theory*, 19(4) SIGNS 975, 976 (1994).

114. Rosemary Auchmuty, *Law and the Power of Feminism: How Marriage Lost its Power to Oppress Women*, 20 FEMINIST LEGAL STUD. 71 (2012).

115. See SHANE PHELAN, SEXUAL STRANGERS: GAYS, LESBIANS, AND DILEMMAS OF CITIZENSHIP 74 (2001); See also Cherlin, *supra* note 12; Gross, *supra* note 12.

families), but are only legally recognized when they emulate a marriage model. In Scandinavia, the numbers of same sex marriages and registered partnerships appears to be on the rise since a low in the 1990s, and Rydström suggests that the classical feminist and left critique of marriage as a patriarchal institution has been weakened over the past few decades.<sup>116</sup> As long as marriage exists as a “choice,” it will arguably dominate, given its ideological power.

In particular, a diminishing space appears to exist for feminist voices on various issues related to the family and to economic (in)security. To the extent that feminist voices are marginalised, conservative and heteronormative discourses on marriage and family are reinforced, even as same sex relationships are recognized. Most important, perhaps, those who rely on the collective for support in fields such as health, poverty, transport, and migration will suffer unless wider discussion ensues about the broader redistribution of responsibilities rather than a simple fetishizing of romantic coupledness.<sup>117</sup> Some feminists have even argued that same sex marriage will not eliminate homophobia, just as ending racial segregation in the USA did not eliminate racism.<sup>118</sup>

What should we be lobbying for, then? Unfortunately, many of the critiques outlined above also apply to marriage alternatives such as Registered Partnerships and Civil Partnerships.<sup>119</sup> These types of relationships can be characterized by economic dependency, and a vulnerable spouse may benefit from the remedies available due to legal recognition. While these benefits of legal recognition are tangible in the lives of some individuals who choose to enter these marriage-like relationships, the privatization critique of marriage that was offered above also is relevant to these non-marriage relationships.

It would be helpful if feminists and LGBT activists, including those who support same sex marriage, would point out how the institution of marriage can reinforce inequalities in society that are very fundamental, including those based on wealth and gender, rather than ignoring this downside to marriage in legal argument. It is not enough to obtain marriage or marriage-like rights and then to become complacent, as evidence shows that

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116. Rydström, *supra* note 45, at 210-11.

117. See also Davina Cooper, *Like Counting Stars?: Re-Structuring Equality and the Socio-Legal Space of Same-Sex Marriage*, in *THE LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW* 75, 96 (Robert Wintemute & Mads Andenæs eds., 2001).

118. House of Commons, Standing Committee on Justice and Human Rights, *Evidence of Dr. Lise Gotell (Associate Professor, Women's Studies Program, University of Alberta, As Individual)*, 37th Parl., 2nd Sess., No. 30, 1020 (Apr. 2, 2003), <http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=CommitteeMeetingEvidence&Acronym=JUST&Mee=30&Language=E&Mode=1&Parl=37&Ses=2>.

119. Young & Boyd, *supra* note 42; BARKER, *supra* note 7.

marriage rights may well privilege those who are already advantaged along the lines of class, race, and even gender, and contribute to the oppression of those who are poor and otherwise disenfranchised.<sup>120</sup>

Given the weaknesses of privatized economic remedies that usually accompany legally recognized intimate relationships, numerous feminists have instead suggested that benefits such as social assistance should be extended on an individual basis, rather than focusing on adult, sexually intimate relationships as a marker of economic responsibilities.<sup>121</sup> Perhaps a society can be imagined that makes it less important to be in a legally recognized relationship in order to achieve equal respect and rights for all. As an example of activism along these lines, in Catalonia, a lesbian feminist group (Grup de Lesbianes Feministes) is fighting for the abolition of civil marriage and for the recognition of personal rights outside family or kinship relations.<sup>122</sup> This sort of exercise of legal imagination offers some promise for a future that does not use marriage or marriage-like relationships to divide on the basis of race, class or gender. Meanwhile, it will be important to recognize that many individuals will continue to choose to enter a marriage or marriage-like relationship that is recognized by law. Improving their legal rights is an important goal for those working on intimate relationships, while at the same time searching for new ways to ensure equality and human dignity for all, including those who do not enter traditional relationships that offer economic entitlements.

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120. Kandaswamy, *supra* note 63.

121. See, e.g., Shelley A.M. Gavigan, *Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian and Gay Engagement to Law*, 31 OSGOODE HALL L.J. 589 (1993); Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation?*, in *LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES* (Suzanne Sherman ed., 1992). See also NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008).

122. Platero, *supra* note 34, at 336; Grup de Lesbianes Feministes (Lesbian Feminists Group), *Exploring New Ways of Insubmision in Social Representation*, 4 ANN. REV. CRITICAL PSYCHOL. 107, 109 (2005).

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# 「婚姻不只是一張紙」： 同性婚姻的女性主義批判

Susan B. Boyd

## 摘 要

本文回顧了歷來女性主義對於同性婚姻的批判，並分析婚姻作為一個社會法律制度，如何和性別、種族、階級不平等產生關聯。首先，本文認為同性婚姻的合法化如何可被視為同性戀者爭取平等與肯認的過程中的正向發展；接著，本文說明在最早承認同性婚姻的國家之一的加拿大，目前與婚姻相關的法律及統計趨勢。本文的核心是以英語研究文獻為基礎，探討國際間女性主義對婚姻及同性婚姻的關鍵性批判，思考為什麼這些批判在同性婚姻的爭論中被忽視，並回顧、檢視同性戀者對於婚姻態度的經驗研究。結論上，本文主張合法婚姻確實提供部分伴侶重要權利，並提出數種有別於將婚姻置於同志爭取平等與肯認的運動核心的另類選擇。

**關鍵詞：**婚姻、同性關係、平等、女性主義、肯認、重分配