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# From Same-Sex to No Sex? Trends Towards Recognition of (Same-Sex) Relationships in Canada

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## **“From Same-Sex to No Sex”?: Trends Towards Recognition of (Same-Sex) Relationships in Canada<sup>1</sup>**

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Susan B. Boyd  
Claire F.L. Young

Because a universalist encompassing modernity cannot allow of an engendering position apart from itself, its own ‘self’ creates the other against which it is constituted. Not only that, not only must the other be absolutely excluded from an encompassing modernity, this very quality of encompassment means that the other must also be included...

This imperialism, as an affirmation of the universal, was integrally committed to the civilizing of the colonized, to bringing them into the fold of general humanity and, in that sense, it was committed to rendering them the same. The colonized were conveniently seen as yearning in the depths of their being for this very consummation.<sup>2</sup>

The analysis of the author quoted above prompts a questioning of the terms on which groups that have traditionally been treated as “other” in modern societies, such as lesbians and gay men, are eventually included into the dominant system. It also reveals why the terms of this inclusion may result in the diminishing of the radical potential of the “othered” group in relation to social transformation. In turn, the dominant system may be reinforced even as it extends its citizenship to those who did not formerly belong. In this article, we explore this aporia through a case study of the trends towards legal recognition of same-sex partnerships in Canada.

We seek also to broaden the terms of the debate about recognition, which often focuses on marriage, particularly in the United States. One of us attended a panel on Same Sex Marriage at the 2001 annual conference

of the American Law and Society Association in Budapest. All of the papers were given by American scholars. During discussion time, Didi Herman asked whether there was space in the current political climate to discuss whether or not marriage was *the* key political goal of the lesbian/gay community. The male panellists shuffled, and chuckled, a little uncomfortably, and asked the one woman on the panel, lesbian feminist law professor Nancy Polikoff, to respond. Overall, the impression was conveyed that there was not much space for discussion of the various political strategies open to the lesbian and gay communities. And yet, many strong voices have been raised against the obviousness of the strategy of seeking inclusion within “the family” or marriage, and the implications of this strategy. Many of those voices have been lesbians and lesbian feminists.<sup>3</sup>

It is our view that this closing down of space for discussion of strategies that do not focus on marriage or spousal recognition as an “end” in itself is problematic. Drawing on critical literature on “the family,” we work from a position that recognizes that marriage, and perhaps family law itself, has a history that is deeply interconnected with relations of oppression both within families *and* within society. As Shane Phelan succinctly puts it: “Families are the very model of patriarchy, characterized by inequality along several dimensions. In patriarchy, fathers rule over mothers, parents over children, seemingly by nature.”<sup>4</sup> We should all be familiar with, and keep in mind, the ways in which marriage has operated to reproduce women’s dependency and inequality. Furthermore, in Canada, marriage has provided a mechanism for the imposition of patriarchal and oppressive norms on Aboriginal communities, with particular consequences for Aboriginal women.<sup>5</sup>

Even the family law reforms of the past three decades, which have sought to ameliorate women’s status within marriage and their economic inequality at marriage breakdown, are arguably stop-gap measures that camouflage the continuing negative consequences of marriage for many

women.<sup>6</sup> Challenges to familial hierarchies, although they have occurred legally and socially, especially during the last three decades, “have not been established beyond legal or social contention.”<sup>7</sup> Nor have “queer families” necessarily challenged the ways in which families operate to perpetuate various hierarchies and inequalities, perhaps particularly economic hierarchies.<sup>8</sup>

Why, then, we ask, is not just spousal recognition, but also *marriage*, so clearly back on the political agenda for gays and lesbians, not only in the United States, where common law relationships have not received as much legal recognition, but also in Canada where they have? What political dilemmas does this development pose for critical thinkers and lesbians and gay men who are committed to social justice?

Our goals in this article are threefold:

1. To describe the recent multi-fold Canadian developments, mainly in relation to recognition of same-sex partners as “spouses.” These have taken a somewhat different trajectory than the American ones and may accordingly raise somewhat different questions.
2. To identify and question the terms on which these developments are occurring, and what tends to be left out of the discussion. In this part, we focus on the neo-liberal political climate of the late twentieth and early twenty-first centuries; this in turn leads to the privatizing and individualizing consequences of legal recognition of intimate relationships.
3. To play on our own ambivalence about spousal recognition strategies in order to open new avenues of thought.

## CANADIAN LEGAL TRENDS: THE TERMS OF INCLUSION

*Introduction*

Canada is somewhat distinct from many countries with respect to the evolution of lesbian and gay claims to equality. First, relatively strong human rights codes exist both provincially and federally. These codes were strengthened by the constitutional entrenchment of the Canadian Charter of Rights and Freedoms in the 1980s.<sup>9</sup> Second, since the 1970s, Canada has increasingly recognized common law heterosexual relationships through ascription for many legal purposes, a trend that is quite distinct from that in the United States. Based on a period of cohabitation, many, but not all, of the rights and duties of marriage have been extended to common law couples. Since the mid-1990s, same-sex couples have increasingly, though unevenly across provinces, been treated as common law couples. Thus, for example, same-sex cohabitants are treated as spouses for income tax purposes,<sup>10</sup> their entitlement to social assistance payments may be reduced if they have a partner, and they are spouses for a myriad of family law purposes including having the right to sue ex-partners for spousal support.<sup>11</sup>

Legal claims to equality by lesbians and gay men in Canada are also complicated by jurisdictional issues. Some matters, such as human rights, lie in the domain of both the provinces and the federal government, with every province and the federal government having enacted human rights legislation. Other matters, such as the legal definition of marriage as opposite sex, divorce, and immigration, are the sole prerogative of the federal government. Others, such as the division of matrimonial property and the issuance of marriage licenses, are the sole prerogative of the provinces.

It is against this backdrop that lesbian and gay claims to equality have been pursued. If success is defined as legal and political victories that have helped to redress discrimination against lesbians and gay men and

their exclusion from legal regimes such as family law, then looking back over the last few decades it can be said that, despite some early setbacks, those claims have been relatively successful. Early claims to equality were brought under human rights legislation and tended to focus on challenging discrimination in the workplace. These early claims included challenges to dismissal from employment or the denial of promotion.<sup>12</sup> At the same time, another stream of cases emerged in the employment context, those that focused on the denial of “spousal” or “family” benefits to same-sex partners. These cases were the forerunners of later Charter challenges to heterosexist definitions of spouse in federal and provincial legislation. One of the most notable of these pre-Charter cases was *Mossop v. Treasury Board of Canada*,<sup>13</sup> in which a gay man argued that to deny him bereavement leave to attend the funeral of his male partner’s father discriminated against him on the basis of “family status” in contravention of the Canadian Human Rights Act. He was unsuccessful in his claim, in part, because the court held that the discrimination was on the basis of sexual orientation, not family status, and, at the time the bereavement leave was denied, sexual orientation was not a prohibited ground of discrimination under the Canadian Human Rights Act.<sup>14</sup>

#### *Impact of the Charter of Rights and Freedoms*

The enactment of the Charter of Rights and Freedoms in 1982 was a watershed moment in the evolution of Canadian lesbian and gay claims to equality. In particular, the “equality” provision, section 15(1),<sup>15</sup> has had a profound effect on both the nature of the legal challenges that have been brought and also, as we discuss later, the lesbian and gay movement itself. That shift can be characterized as a move towards “rights talk” and “rights claims”. It is important to note that “sexual orientation” was not a listed prohibited ground of discrimination in the Charter when it was enacted. An amendment to add “sexual orientation” as a prohibited ground of discrimination when the Charter was at the committee stage was defeated.

This defeat was likely in part because the Minister of Justice at the time (Jean Chrétien) answered in the affirmative when asked whether the government was allowing for the possibility that the courts might interpret the open-ended list of prohibited grounds of discrimination to include additional grounds of discrimination.<sup>16</sup> It was not until 1995, however, that the Supreme Court of Canada in *Egan* confirmed that “sexual orientation” was an analogous prohibited ground of discrimination.<sup>17</sup>

During the 1990s, the Charter was used with great success by lesbians and gay men to challenge discriminatory laws.<sup>18</sup> In addition to *Egan*, three other cases in which litigants argued that a legislative provision discriminated against lesbians and gay men deserve a brief comment. In each case, a particular legislative provision was found to discriminate against lesbians and gay men on the basis of sexual orientation, leading to legislative change to the impugned provision. But these cases also set the ball rolling in terms of governments moving inexorably towards ensuring that same-sex couples received many of the same rights and responsibilities that heterosexual common law couples already had, regardless of whether or not there was a Charter challenge in progress. These decisions set the scene for the dramatic legislative change that occurred both at the federal and provincial levels in 1999 and subsequent years.

In *Vriend v. Alberta*,<sup>19</sup> the issue was the omission from the Alberta Individual Rights Protection Act (IRPA)<sup>20</sup> of protection against discrimination on the basis of sexual orientation. Vriend had been dismissed from his job as a school teacher because of his sexual orientation and he sought to have “sexual orientation” read into the Alberta human rights legislation in order to bring an action against his former employer.<sup>21</sup> The Supreme Court of Canada found that some provisions of the IRPA did contravene section 15(1) and were not saved by section 1.<sup>22</sup> The remedy was to read “sexual orientation” into the IRPA.<sup>23</sup> The importance of this decision is that it forced a government

that had until then refused to grant basic human rights protection to lesbians and gay men to do so. Indeed as Margot Young has commented, “[t]he symbolic consequences of this pronouncement in a province where political, religious, and other public figures pride themselves on their hostility to lesbian and gay rights are considerable.”<sup>24</sup>

Another groundbreaking case was *Rosenberg v. Canada (Att’y Gen.)*,<sup>25</sup> which has been described as symbolizing “a new era in the struggle for lesbian and gay equality.”<sup>26</sup> In that case, the Ontario Court of Appeal held that the words “or same-sex” should be read into the definition of spouse in the Income Tax Act,<sup>27</sup> for the purpose of registration of pension plans. This ruling effectively extended entitlement to survivor benefits under occupational pension plans to the partners of lesbians and gay men who die while covered by the plan. But the decision had far reaching consequences. The federal government did not appeal the decision to the Supreme Court of Canada and in due course amended the definition of spouse in the Income Tax Act to include same-sex couples as spouses for all tax purposes.<sup>28</sup> While this move might be seen as progressive, in fact it is—as we discuss later—highly problematic.

In 1999, the Supreme Court of Canada rendered the most important judicial decision to date on spousal recognition in *M. v. H.*<sup>29</sup> There the Court granted a lesbian the ability to claim spousal support from her former partner by striking down as unconstitutional a definition of “spouse” in a family law statute that had been limited to opposite sex cohabitants.<sup>30</sup> This case has resulted in many legislative changes at both federal and provincial levels, as we discuss below. However, it also illustrates a problematic phenomenon that has arisen in many challenges to legislation brought by same-sex partners. The progress that has been made, often through the courts, has typically occurred by showing the similarity between same-sex partners and opposite-sex partners.

Thus assimilation discourse that reinforces the heterosexual norm has been built into legal process in many ways. For instance, in *M. v. H.*,



although the Supreme Court judges were careful to state that there is no need for lesbian litigants to portray their intimate relationships as if they were “just like” those of their heterosexual counterparts,<sup>31</sup> one of the lower court decisions noted that H had been more involved in the shared business of the couple, whereas M (the applicant) “appeared content to devote more of her time to domestic, rather than business, tasks.”<sup>32</sup>

Thus, there is a concern that the need to meet certain criteria (such as sharing joint bank accounts) in order to fit within existing legal categories such as “spouse,” which often rely on conjugality, will “domesticate” the lives of lesbians and gay men.<sup>33</sup> Similarly, Australian author Heather Brook has suggested that although the concept of coverture inherent within marriage has been challenged by many recent law reforms, “its (hetero)sexual performatives remain a key trope in marriage and (to a lesser extent) marriage-like relationships.”<sup>34</sup> Perhaps the impulse towards sameness arguments is inevitable when outsider groups invoke equality and rights discourse; equality analysis requires a comparator. The claim is typically framed as, “we, Y group, want the same rights that X group already possesses, because we are essentially the same as X group in terms of the quality and security of our intimate relationships.” Phelan notes that this type of strategy is “part of a larger trajectory in political activism that denies the positioning of gays and lesbians as abject and seeks equal status as liberal subjects.”<sup>35</sup> In a number of respects, the important decision in *M. v. H.* adopted this approach.

As mentioned above, the litigation successes in Canada prompted governments to expand the definition of “spouse” to include same-sex couples in an array of laws that assign rights and responsibilities based on spousal status. In 2000, the federal government enacted the Modernization of Benefits and Obligations Act,<sup>36</sup> which amended 68 pieces of federal legislation to recognize same-sex couples, and several provinces also extended spousal or equivalent status to same-sex couples.<sup>37</sup> Most recently, on April 25, 2002, the province of Québec

introduced Bill 84,<sup>38</sup> which accords the rights and responsibilities of married couples to same-sex and opposite-sex unmarried couples who enter into a civil union. The same bill also repeals the opposite sex definition of marriage in the Civil Code, although same-sex marriage remains prohibited under federal law.<sup>39</sup>

As we have demonstrated in this brief history of the evolution of equality claims by lesbians and gay men, spousal rights were extended (other than in Québec) as a result of an analogy made to rights and responsibilities that had already been accorded to unmarried opposite-sex cohabitants based, typically, on a period of cohabitation. Being able to argue by analogy for the same status of unmarried opposite-sex cohabitants provided a middle political ground to the Canadian lesbian and gay movement, whereas in the United States and other jurisdictions without this middle ground, it seems that the clearest strategy was to seek full marriage rights and duties.

The Charter of Rights and Freedoms, which was invoked successfully in many of these cases, has had another important impact on the lesbian and gay movement in Canada. Miriam Smith, a political scientist, has documented the Charter's contribution to the shift that occurred from the politics of "gay liberation" to more legally-based claims by the lesbian and gay movement for rights and equality. As she notes, "gay liberation grew out of the counter-culture of the sixties and its meaning frames were transformational, aimed at the elimination of heterosexism, patriarchy and sex and gender roles."<sup>40</sup> She traces the role that the Charter played in the shift from those aims to a rights-focused movement that relied increasingly on litigation as its political strategy to acquire the same rights as heterosexual persons, rights that tended to be linked to spousal status. The transformation was a shift from the more leftist, radical movement that wanted to subvert the realm of sexuality to a more mainstream one that wanted to have their "families" recognized by the state. Urvashi Vaid

has similarly noted the mainstreaming of the American lesbian/gay movement.<sup>41</sup>

### *The Marriage Cases*

Interestingly, at present in Canada, even though (or perhaps in part because) same-sex partners have almost all the same rights and responsibilities of common law spouses, there is a renewed emphasis on claiming the right to marry by many lesbians and gay men.<sup>42</sup> Lesbian legal scholar Kathleen Lahey has argued strenuously that without the right to marry, lesbians and gay men do not have full legal personality.<sup>43</sup> Even the Law Commission of Canada in its recent report on personal adult relationships has recommended that “[p]arliament and provincial/territorial legislatures should move toward removing from their laws the restrictions on marriages between persons of the same-sex.”<sup>44</sup> Equality for Lesbians and Gays Everywhere (EGALE), a national lesbian/gay lobby group established during the infancy of the Charter and one that has been at the forefront of the fight for spousal status, is now very involved in litigation challenging the denial of the right to marry to same-sex couples. Its public stance is that same-sex couples should have the right to make their own relationship decisions, including the freedom to marry for those who choose it.<sup>45</sup> EGALE does not argue that all lesbians and gay men should choose marriage; rather that it should be a choice that is open to them.

Currently three “marriage” cases are being pursued in Canada, with EGALE involved in each one. In these cases, groups of lesbian and gay couples are arguing that the common law definition of marriage as being between a man and a woman contravenes the equality rights guarantee of the Charter of Rights and Freedoms, and they are asking that the province be required to issue them marriage licenses.<sup>46</sup> All three of these cases have resulted in defeat for the federal government. Most recently in *Barbeau v. B. C. (Att’y Gen.)*, the British Columbia Court of Appeal held

that the common law definition of marriage contravened the Charter, and reformulated the definition to mean “the lawful union of two persons to the exclusion of all others.”<sup>47</sup> The court suspended its order until July 12, 2004 to give the federal and provincial governments time to bring their legislation into accord with the decision.<sup>48</sup>

Earlier in *Halpern v. Canada*,<sup>49</sup> the Ontario Superior Court also held that the common law rule that defines marriage as between one man and one woman is constitutionally invalid and inoperative because it contravenes the Charter.<sup>50</sup> The court suspended the decision for twenty-four months and the majority held that if Parliament does not act within the twenty-four month period to extend the definition of marriage to same-sex couples, the common law definition of marriage will be automatically extended to same-sex couples at the end of that period.<sup>51</sup> The federal government is appealing the decision, quite possibly to buy time, given that many feel that under the Charter, restricting marriage to opposite-sex partners will ultimately be found to be unconstitutional. Meanwhile the Québec Superior Court also held that the opposite-sex definition of marriage contravened the Charter and, as did the Ontario court, suspended its declaration for two years to give the federal parliament time to change the definition.<sup>52</sup>

#### *The Conservative Backlash*

Before moving to a discussion of why marriage is so high on the agenda of EGALE and many lesbians and gay men, it is important to trace another recent development in the Canadian story of lesbian and gay claims to equality. As mentioned, the last few years have seen considerable success in terms of legal victories and legislative change for lesbian and gay couples. Needless to say, this success has not been universally applauded. Social conservatives, led in Canada by the Canadian Alliance party federally and the province of Alberta provincially, have launched a two-pronged attack. First, they have embarked on a “defence of marriage”

campaign, resonant of that in the United States. To this end, for example, the province of Alberta amended its Marriage Act to add a preamble that included the following statement:

Whereas marriage is the foundation of family and society, without which there would be neither civilization nor progress;

Whereas marriage between a man and a woman has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long standing philosophical and religious traditions.<sup>53</sup>

Meanwhile the Canadian Alliance party (the official opposition) has frequently made statements defending marriage as being “the voluntary union between one man and one woman” and they argued strenuously that the government appeal the decision in *Halpern*.<sup>54</sup> These conservative discourses have had an effect on federal legislative initiatives. The Modernization of Benefits and Obligations Act passed in 2000 to extend the application of various federal statutes to same-sex partners included a preamble that defended marriage as an opposite-sex relationship only.<sup>55</sup>

The second, and more subtle, part of the conservative attack on the recent changes to the definition of spouse relates to registered domestic partnership schemes, which have been used in many jurisdictions as a way to recognize same-sex partnerships.<sup>56</sup> The backlash version of the embracing of domestic partnerships is led by those who argue that the law should expand the group of people to whom spousal status is currently accorded by allowing *any* two people in a defined relationship to register their relationship and thus receive the rights currently enjoyed by spouses.<sup>57</sup> So, for example, as the debate with respect to the inclusion of lesbians and gay men as spouses was being waged, the right wing Reform Party (now the Canadian Alliance) began to suggest that linking benefits to “spousal” status was unfair. Perhaps, they argued, the marker of entitlement should be something else or perhaps everyone could name one person in their lives who would be their designated beneficiary (or some

such term). Although this approach need not be a conservative or homophobic one,<sup>58</sup> when these arguments were first made, they clearly reflected a desire to erase the visibility of lesbian and gay intimate relationships and possibly to avert their impending recognition. More recently, they are being used to protect marriage as a heterosexual institution, while simultaneously respecting equality rights (sometimes grudgingly) by adding a parallel system of registration.

For example, in 2002, Alberta introduced the Adult Interdependent Relationships Act,<sup>59</sup> which will provide that “adult interdependent partners” who register their relationships will have some of the same rights and responsibilities as spouses, including, in particular, those that relate to financial support of one’s partner.<sup>60</sup> An adult interdependent relationship does not include marriage but does include a relationship in which two persons share one another’s lives, are emotionally committed to one another, and function as an economic and domestic unit.<sup>61</sup>

What is exceptional about this legislation is that if the adult interdependent relationship is of three or more year’s duration, then the persons in the relationship are automatically considered to be adult interdependent partners and are bound by the legislation.<sup>62</sup> Partners who fit within the definition of adult interdependent partners but who have not been in the relationship for the requisite three-year period may register their partnerships.

It is clear that this legislation has been introduced to “defend” marriage. The preamble refers to marriage as “an institution that has traditional religious, social and cultural meaning” and affirms that a spouse is a person who is married.<sup>63</sup> The term spouse no longer includes common law relationships. The Attorney General of Alberta stated when the bill was introduced that “the Alberta government believes that marriage is fundamentally a union between a man and a woman.”<sup>64</sup> Not surprisingly, none of the government press releases on the bill even mention same-sex relationships. The bill is a classic example of the move from sex to no

sex. Conjuality is no longer the marker, rather it is economic interdependence.<sup>65</sup>

### *Why Marriage?*

We now turn to the recent focus by many in the lesbian and gay movement on the right to legally marry. Why, despite the fact that there is very little difference in Canada between the legal status of married persons and that of common law spouses, is marriage such a big issue?<sup>66</sup> We believe that there are several reasons. First, as we have discussed, the inclusion of same-sex couples as spouses has resulted in considerable backlash and homophobia from social conservatives and other right-wingers. We speculate that the more the Canadian Alliance or other right wing organizations argue that lesbians and gay men should never be able to marry, the greater the incentive will be to seek that right.<sup>67</sup> Even the Canadian government has been somewhat inflammatory in its response to the marriage cases being brought, resorting to such regressive arguments as that heterosexual procreation is a “naturally occurring phenomenon” and that “the survival of the human race depends upon” excluding same-sex couples from marriage.<sup>68</sup> In Alberta, Premier Ralph Klein has stated that he vehemently opposes marriage for lesbians and gay men and that he would use the “notwithstanding” clause of the Charter to block any legislative attempt to allow lesbians and gay men to marry.<sup>69</sup> Such statements merely strengthen the resolve of many lesbians and gay men to demonstrate that they should not be treated in this discriminatory manner.

Another reason that marriage is so high on the agenda is that the issue is about more than legal rights and responsibilities. There is a tremendous symbolism attached to marriage, a symbolism that includes public recognition of one’s commitment. One has only to read some of the affidavits of the applicants in the marriage cases currently before the courts to appreciate the importance attached to having one’s relationship publicly celebrated.<sup>70</sup> One of the themes that emerges is that marriage

brings public acknowledgement of a personal relationship and that this recognition will lead to more acceptance by family and friends of the relationship and in turn result in less homophobia in society generally. Another point made by many of the applicants in the marriage cases is that permitting same-sex couples to marry is also about being valued as members of society. As Pitfield J., trial judge in the British Columbia same-sex marriage case, said of one of the applicants, “Ms. Young is of the view that having the choice to marry and having the relationship recognized by government and society is important to her and would make her feel she is no longer a second class citizen.”<sup>71</sup> The powerful ideology of marriage is revealed through such statements, both on the part of those who advocate for same-sex marriage and those who resist it so strongly.

Having provided a review of the state of play in relation to lesbian and gay legal trends in Canada, in the next part of this article we explore and evaluate two issues. First, on what terms did the developments discussed above occur? That is, how were the claims of lesbians and gay men for equality limited and framed by the existing legal and political systems? Secondly, what is the price to be paid for focussing so much energy on achieving spousal status, and now marriage?

It is important to emphasise that we are not suggesting that the strategies and outcomes to date have been mistaken. Indeed many lesbians and gay men have benefited materially and in other ways from the changes. However, as we shall discuss, we are concerned that adopting the status quo in terms of the rights and responsibilities that go with spousal status has reinforced the existing system with all its problems, rather than seeking a more transformational strategy that might have redressed some of the more systemic problems. Put simply, the struggles of the last few decades have been about the acquisition of a limited set of legal rights that themselves rest on profoundly hierarchical social relations. As Shane Phelan puts it, key proponents of same-sex marriage understand marriage as the ideal liberal contract, and this paradigm



“downplays the inequality and subordination that are just as basic to Western marriage as and much more long-standing than, love and intimacy.”<sup>72</sup> We have used middle class means to achieve an end that has somewhere along the way become deraced, declassed and degendered. We are now in the system but little about the system has changed. Arguably “[e]fforts to include same-sex marriage that do not address the gendered structure of marriage or its function in maintaining racial division will succeed at most in winning ‘equality’ for a privileged sector of white well-off (not-so) queers.”<sup>73</sup>

#### BEYOND ASSIMILATION AND RESISTANCE

In 1995, Urvashi Vaid identified the politics of assimilation versus the politics of resistance in relation to lesbian and gay politics as one way to understand some of the dilemmas we have identified above.<sup>74</sup> Shane Phelan has more recently suggested that neither approach adequately problematizes the cultures they are confronting and that a more nuanced portrait is required.<sup>75</sup> We tend to agree. As is already apparent, we feel ambivalent about the largely successful strategy of gaining spousal recognition in Canada over the past decade, but we also recognize the huge significance of the cracks in the edifice of “family” that this strategy has achieved. In the next section, we identify some reasons for our ambivalence and consider how ambivalence concerning the contradictory implications of spousal recognition might be put to political use.

#### *The Limits of Legal Liberalism and Equality Discourse*

First, we want to think further about how the claims of lesbians and gay men were framed within and by the Canadian legal system. There is no doubt that using the equality guarantees of the Charter of Rights and Freedoms to argue for the extension of spousal status to same-sex cohabitants had a huge impact on the way challenges to discriminatory laws were presented in Canada. As mentioned earlier in our discussion of

the Supreme Court of Canada decision on spousal support in *M. v. H.*, equality rights discourse is based on comparisons. In the context of claims for spousal recognition, the obvious comparator for lesbians and gay men is heterosexual couples. If same-sex couples bringing Charter challenges forward can demonstrate that they are virtually the same as heterosexual couples, with the only difference being their sexual orientation, then with sexual orientation as a prohibited ground of discrimination under the Charter, it is highly likely that the challenge will be successful.

A graphic illustration of the “sameness” approach can be seen in the evidence put forward by litigants in the more recent same-sex marriage cases. A review of the affidavits reveals that almost all of the litigants make the point that the only difference between them and heterosexual couples is that they are both the same sex. In all other respects their relationship is identical to that of opposite-sex couples. As one litigant put it,

During our thirty-two years together, Bob and I have shared our lives, plans and finances. We have always purchased things together and have never owned anything separately. We have always had joint bank accounts, we owned a home together and we have wills, leaving all of our possessions to each other.<sup>76</sup>

Evidence of the similarity between opposite and same-sex partners thus usually focuses on an assumption that couples in intimate relationships share everything and that they are monogamous. Not only may this concept of the typical heterosexual spousal relationship be somewhat artificial, making these arguments serves to further “other” those who may not fit the mould. Given that many in the lesbian and gay community celebrate and value their differences from the normative model of the heterosexual couple, such an approach is problematic. This strategy is not “the fault” of lesbians and gay men who make claims for spousal status, as we discuss below. Rather, equality discourse tends to force arguments in this comparative, conservative direction and thereby render the diversity

of intimate relationships marginal or, indeed, invisible. However, as Davina Cooper has argued, equality analysis need not be limited to a comparative, quantitative paradigm, and can also be used to contest the social relations of *inequality* more generally.<sup>77</sup> We return to this point later in this article.

*Spousal Recognition Produces Disadvantages as well as Advantages: The Implications of Gender and Class*

Our next concern about the results of legally recognizing same-sex couples as “family” is often overlooked: spousal recognition does not bring only positive advantages for lesbians and gay men. Rather, depending on factors such as class and gender, spousal recognition may generate more disadvantages, notably financial penalties. Furthermore, these disadvantages tend to be borne by those who can least afford them, women and those with low incomes. Indeed, the positive element of symbolic recognition of same-sex relationships is too often accompanied by a negative element of exacerbated economic disadvantage.

A stark example is the inclusion of same-sex couples as spouses under the Income Tax Act. There are two particularly unfortunate tax consequences.<sup>78</sup> First, the change will result in a considerable tax grab by the government. This consequence is attributable to the rules that require the combining of spouses’ income for the purposes of the refundable GST (goods and services tax) tax credit and the Canada Child Tax Benefit.<sup>79</sup> This requirement results in an overall reduction in the value of the credit because the taxpayers are no longer treated as individuals. The result is that they will pay more tax. Secondly, serious class implications arise as a result of the change. Put simply, those with lower incomes will likely pay more tax than they would if they were to continue to be treated as individuals, while those with higher incomes are more likely to pay less tax than they would if they were treated as individuals.<sup>80</sup> There may also be gender implications. Given that women tend to earn less than men and

have lower incomes generally, lesbians are more likely to suffer a greater disadvantage than gay men. Importantly, some of this disadvantage is incurred involuntarily. Many Canadian laws, including the income tax laws, deem partners to be spouses (or spousal equivalents) once they cohabit for as little as one year, regardless of how the partners themselves define their relationship.

Another example of the economic disadvantage that flows from spousal status that is sometimes ascribed involuntarily can be found in relation to financial assistance to students. On August 1, 2001, regulations on Canada Students Loans and Canada Student Financial Assistance were changed to acknowledge same-sex common-law couples.<sup>81</sup> A common-law partner will be “recognized” if she or he “co-habited with a borrower in a conjugal relationship, having so co-habited for a period of at least one year.”<sup>82</sup> In a country where tuition fees are on the rise and it is harder for students to afford advanced education, a live-in partner’s income will now be taken into account when a student applies for loans or bursaries. This income will affect the needs assessment process and disqualify some students who otherwise would have qualified, even if they have cohabited for only one year.

These are but two examples of the problems that can arise for individuals as a result of legal recognition as partners. In a larger context, however, this form of equality has the potential to exacerbate already existing, systemic economic disadvantage. Of course, all spouses, whether opposite or same-sex, incur the same consequences from these rules. The problem is that lesbians and gay men have, in seeking recognition for our relationships, reinforced a class based disadvantage without using the radical aspects of our relationships to challenge the fundamental underlying class and gender hierarchies that are built into the system. Calhoun has suggested it is unfair to put the onus on lesbians and gay men seeking recognition to “transform gender relations, to remedy class-related inequities, and to end the privileging of long-term, monogamous

relations.”<sup>83</sup> However, unless these questions are made central to lesbian and gay politics, they will fall by the wayside in the quest for equality by lesbians and gay men. In this era of neo-conservative (United States) and neo-liberal (Canada) politics, where the dominant trend is to render these issues invisible, it is especially important to challenge that trend in any progressive social movement.

*The Broader Context: Privatization of Social and Economic Responsibilities*

When considering these issues it is important to place them against the current backdrop of the ongoing privatization of social and economic responsibilities. One of the hallmarks of the current neo-liberal era in Canada is an increasing privatization of economic responsibility for individuals’ economic security and a retrenchment of the welfare state that had existed, at least in a limited fashion, setting Canada apart from the United States.<sup>84</sup> Cutbacks to social assistance programs, the emergence of workfare programs, and an increasing emphasis on the private family as being responsible for the care of the elderly and disabled in society have characterized this period. These trends in turn have a disproportionately harsh impact on women, those living in poverty and/or with disabilities, groups that often require more proactive assistance from society.

Our concern is that by including same-sex couples as spouses the government is further reducing its fiscal responsibilities to its citizens by assigning that responsibility to the private same-sex family, with a significantly unequal impact on citizens. Thus, for example, if our relationships end, we may be required to provide spousal support to our partners, thereby alleviating the state’s economic responsibility.<sup>85</sup> Our incomes are aggregated for the purposes of many state benefits such as social assistance and student loans, thereby resulting in less access to state funding and placing more responsibility on the private sector. We can receive spousal survivor pensions provided by a deceased spouse’s

employer, thereby lessening our reliance on (and our entitlement to) the more universal public pensions. Moreover, trends that bolster privatization of economic responsibility tend to diminish general public support for publicly funded programs, especially among those who are already relatively economically privileged and can insulate themselves from the impact of cutbacks.<sup>86</sup>

In a political climate that endorses individual rather than collective responsibility for well-being, we tend to not ask questions to which lesbian feminists especially have drawn attention. For example, why should access to such economic goods as insurance or housing depend on one's "family or spouse-like status, which is in turn proven through other economic accomplishments (such as joint bank accounts)?"<sup>87</sup> As Ruthann Robson wisely points out, we are all too apt to fall into a stance that assumes that obtaining benefits available to spouses is positive; this stance misses the point that the way we distribute benefits in many societies is highly flawed:

This approach prioritizes the individual's problem of an inequitable position within the wealth-distribution system over the problem of collective inequities in the distribution of wealth. A criticism of this approach is that obtaining a benefit such as health insurance should not be dependent on being 'related' to an individual sufficiently privileged to have insured employment: the problem is not simply that some people (who would be insured but for their lack of legal relation to a insured worker) are denied insurance but that anyone is denied insurance.<sup>88</sup>

To Robson's analysis we would add that even within the current system of wealth distribution, spousal recognition can generate economic disadvantages for particular couples rather than advantages, a key example again being the income tax system in Canada, as discussed above.

### A WAY FORWARD? AVOIDING EITHER/OR SOLUTIONS

What are the implications of our analysis? We will now consider whether there is a way forward in these debates that avoids either/or answers to whether spousal recognition is a good or a bad strategy. We believe that this question, as well as whether we should either “assimilate” or “resist,” is too narrowly framed. In this part we discuss several issues, including working to achieve “formal equality” and then working towards a broader notion of equality, decentring lesbians and gay men as equality’s primary concern, and decentring sex (and marriage).

#### *Change from Within?*

One possibility is that, as some feminists have argued in the past, it may be necessary to achieve “formal equality” before a social group can be in a position to challenge the substantive inequities of the current situation. Thus, we might first struggle within the limits of liberal equality discourse to achieve the rights that many lesbians and gays seek, that is to have their intimate relationships recognized and treated equally with those of heterosexuals. Once so empowered, we might then struggle for a broader notion of equality that addresses the redistribution of wealth more generally. For instance, the security of being legally recognized as “family” potentially provides security and an avenue for lesbian and gay groups to turn political attention to work more closely in coalition with anti-poverty groups, presumably with greater legitimacy as “equal” citizens. Can this moment of achieving something close (in Canada at least) to formal equality be used to point out the gender-based, race-based, and class-based results of “success?” Now that legal recognition has occurred, can this enhanced position be employed to work for further change?

Difficulties with this approach are that, not only might we be so eager for recognition that we may settle for too little, but also, political complacency may result once spousal recognition is attained.<sup>89</sup> Once

symbolic and legal recognition of queer families is achieved, the political strategy will be incomplete unless a trenchant critique emerges of the limits of such recognition in delivering redistribution of economic well-being. Thus far, there is little evidence that those seeking spousal recognition in Canada are beginning to shift the focus towards the broader issues. For example, the national lesbian and gay lobby group EGALE has given little indication as yet that it intends to embrace these issues directly. At a grassroots level, lesbian and gay groups are focusing on inclusivity by, for example, working on issues respecting transgendered and transsexual persons. They are not necessarily focusing on issues of poverty, which tend to be left to anti-poverty groups to work on.<sup>90</sup> Moreover, it is possible that those who raise concerns about spousal recognition as a strategy are viewed somewhat as traitors to the cause, particularly at a moment when Canadians are being asked to respond to various reform options proposed by the federal government, which include same-sex marriage.<sup>91</sup> Certainly, at an intellectual level, those who raise the broader issues have been charged with failing to place the interests of lesbians and gays at the centre of our analysis.<sup>92</sup> The space for debate thus appears to be limited and the opportunity to coalesce around these issues and challenge the neo-liberal agenda is being missed.

*Shift the Gaze Outwards*

Davina Cooper's recent work provides another way of thinking about this question. Cooper argues for a more equivocal response, rather than choosing one side or the other of the debate. She suggests that spousal recognition is an historically embedded development, a product not only of the increasing shift towards formal gay equality that we have identified in our paper, but also, significantly, of "the failure to develop more collective forms of commitment and responsibility, in fields such as health, poverty, transport, and migration."<sup>93</sup> Thus, it is wrong to criticize



lesbians and gay men who develop “a conjugal gaze and imaginary,” as this vision is a reasonable response to social conditions.<sup>94</sup>

Cooper points to two levels of analysis that are key. Interestingly, she adopts an—at first glance surprising—approach of decentering the group (e.g. lesbians and gay men) as equality’s primary concern, instead focusing on the individual—using an equality of power theory that she has previously elaborated—and on the organizing principles that structure societies. She suggests that we must look both to individuals (as, after all, the very reason for challenging social inequalities derives from people’s ethical entitlement to equal participation and benefits from society), seeking to provide all with the same level of capacity to shape their environment, and *also* to the social inequalities and asymmetries that pattern and organize our society. Cooper emphasizes “the importance of recognising the intersections between different forms of social inequality, as well as the way in which they interact with legitimised forms of social ordering.”<sup>95</sup>

Thus, Cooper suggests that without disparaging spousal recognition as a consciously chosen political strategy, we must at the same time consider its impact on other social relations and other organizing principles of society. The fact that spousal recognition as a political strategy has arisen for concrete reasons does not eliminate our responsibility to carefully examine how spousal recognition intersects with other social and economic issues that progressive and radical forces have struggled with for decades. We return at this point to the wider context of privatization and the difficulty in the current global context of articulating collectivist visions for citizenships and social responsibility.

As Cooper’s work indicates, spousal recognition has a tendency to ask us to look inwards rather than outwards, especially given the privatizing impulse of family in the current conjuncture: “Quintessentially then, spousal recognition is not about relating equally and positively towards strangers, except in as much [sic] as the spousal partner has shifted from

legal stranger to kin.”<sup>96</sup> The challenge is how to honour individual quests for intimacy whilst at the same time strengthening social or collective responsibility towards those who are not regarded as intimates. Cooper’s approach thus moves away from the “either/or” dichotomy. Cooper raises the possibility that if same-sex spousal recognition provides a way of giving legitimacy and publicity to norms that assert greater spousal and familial democracy and a fairer, more equal gender division of labour, then these more progressive familial values may have a broader impact. Drawing on Morris Kaplan, she notes that since spousal recognition for lesbians and gay men is directed mainly at third parties, albeit notably those with political and economic power (e.g. in the legal system), then the possibility exists of shifting the focus away from the introspective norms of spousal space to more public-oriented norms.<sup>97</sup> The difficulty rests, of course, in how to generate this shift in a political climate that supports self-interested, individualistic, inward-looking strategies for survival rather than collective ones.

#### *Same-Sex Marriage?*

Given Cooper’s suggestion that it is not helpful to dismiss the move towards spousal recognition, how should we assess same-sex marriage or registered partnerships? As Nancy Polikoff has said, many of the debates about the merits of marriage and spousal recognition were academic until recently, but they are no longer.<sup>98</sup> Cheshire Calhoun makes the powerful suggestion that precisely because the idea that lesbians and gay men are unfit for family is so central to the ideological construction of lesbian and gay identity, family issues must be placed at the very center of lesbian and gay politics. This line of thought, which Calhoun and others such as Cox have presented so persuasively is, we think, problematically grounded in an acceptance of marriage and family as a central organizing feature of citizenship.<sup>99</sup> While Calhoun presents much evidence of how lesbian feminist critiques of “family” have failed to place lesbian concerns at the

center of analysis, we cannot accept the part of her analysis that reinforces the place of marriage and family as key institutions that necessarily must organize society, identity, and the distribution of wealth and benefits.

Marriage is, in some sense, an individualistic act that fits well within our neo-liberal times: everyone for herself, not relying on the community. Feminist critiques have long exposed this ideology of marriage, and the difficulty of challenging this social construction from within. Shane Phelan extends this type of analysis by thinking about its implications for citizenship. She accepts that extending marriage rights to same-sex couples will “change cultural assumptions about who may and does love whom, about the meaning of reproductivity and parenting.”<sup>100</sup> However, she quickly adds that this does not mean that assumptions about the relationship between kinship and citizenship will change: “we run the risk of reconsolidating the idea of the responsible citizen as economically independent—or at least married to a provider—thus removing the burden of notice and care from other citizens.”<sup>101</sup>

#### *Why Marriage at All? Decentering Sex*

On this issue, Martha Fineman’s work is instructive.<sup>102</sup> Nancy Polikoff has recently followed Fineman’s arguments that marriage as a legal category should be abolished—although ceremonies could continue—because it fails to envision a truly transformative model of family for all people and is problematically embedded in liberal notions of equality and choice.<sup>103</sup> These arguments are resonant of earlier feminist critiques of marriage and calls for the de-centring of marriage as a tool of regulation. In 1984, in an argument that tends to be forgotten at this point in time, Carol Smart pointed out that marriage might not be retrievable by feminists; that the most significant power struggles may be found within marriage, struggles that are resistant to amelioration via modest reforms.<sup>104</sup> Almost inevitably, marriage as an ideological “enclosure” prioritizes coupledness and heterosexuality, a norm against which all else is measured;

as well, it becomes the privileged context for reproduction of children.<sup>105</sup> As Smart astutely pointed out, marriage was thus “as significant to the unmarried as to the married and to the homosexual as to the heterosexual.”<sup>106</sup> The aim of feminists such as Smart who were critical of marriage as a social construction was not to extend the legal and social definition of marriage to cover those who had been excluded, but rather to abandon the status of marriage altogether and devise a system of rights and obligations that are not dependent on “coupledom,” marriage or quasi-marriage.

Somewhat unusually in American intellectual thought, Fineman has not been shy to challenge the centrality of marriage and family to social and legal regulation, and her recent work has re-awakened these debates. She has emphasized relationships of dependency instead of the adult sexual dyad. In her 1995 book *The Neutered Mother*,<sup>107</sup> Fineman suggested that marriage should be replaced with protection of the “Mother-Child” Dyad as the core, legally privileged family connection, a metaphor for the relationship between inevitable dependants and their caretakers. These relationships, for Fineman and Polikoff, are the ones that need the resources and protection of society. Other benefits, such as health care, would be extended on an individual basis, thus eliminating the necessity to focus on adult, sexually intimate relationships. Since neither opposite-sex nor same-sex relationships would receive legal recognition by the state, both would in that sense be equal.

In 2001, the Law Commission of Canada embraced some of these ideas by asking whether the law should move away from the granting of rights and responsibilities on the basis of spousal status to some other marker, for example, relationship of “emotional and economic dependence.”<sup>108</sup> In a somewhat related move, although distancing itself from the broader—and more radical—question raised by the Law Commission, the Government of Canada recently offered as one reform option the possibility of removing all legal effect from marriage, leaving it exclusively to the

religions.<sup>109</sup> A new system for organizing legal rights and responsibilities of those in intimate relationships would therefore have to be devised, opening an opportunity for revisioning the framework within which we consider these relationships. Bruce MacDougall has suggested that whereas extension of recognition of same-sex relationships, for instance in the *M. v. H.* spousal support context, is mainly an “assimilative measure,” “[e]xtension of benefits to friends and siblings and so on would be much more corrosive of traditional conceptions of family and support and conjugality.”<sup>110</sup>

This revisiting of how states allocate rights and responsibilities may lead to a position that may well de-sex the way we allocate rights and responsibilities. This argument has considerable attraction. But, it should be noted that this arguably less assimilative trend is occurring at the moment from a less than radical stance. The more the state recognizes private dependencies and responsibilities in the current neo-liberal economic climate, the more likely it is that it will tend to offload responsibility onto those private relationships, resulting in more expectations being made of those relationships in terms of taking care of “their own.” At the same time there is also a concern that the more relationships are recognized by the state, the more state intervention will result in terms of regulating the way those relationships operate. From a different angle, Davina Cooper has suggested, at the turn of the 21<sup>st</sup> century, we are witnessing “the institutional pervasiveness of private norms in the popular discourse of social inclusion,” so that “private norms” of belonging, familialism, and home are increasingly dominating public discourse.<sup>111</sup> These norms do not tend to challenge social inequalities; rather they reflect established interests that exclude and alienate others. “Hegemonic private norms...reflect a sensibility and form of organisation based on discipline, consumption, limited responsibility, and a zero-sum conception of belonging.”<sup>112</sup>

Phelan asserts that the primary change we really need is “the erosion of the idea of kin relations as the only people upon whom one may legitimately call for aid in times of need.”<sup>113</sup> As she points out, the most significant “success story” in this regard is the response of the lesbian and gay communities to AIDS, with caring networks being established without necessary reference to kinship.<sup>114</sup> However, again, this development occurred within, and was constrained by, the capitalist society within which we live. The “very success of these groups in acquiring state funding has led them to adopt dominant goals and imperatives. Governmental preferences for research and prevention programs—not to mention criminal law—over care for people living with HIV or AIDS has meant that the original “family”-focused organizations have given way to corporate campaigns that no longer challenge ideas of kinship.”<sup>115</sup> We suggest that merely expanding the nature of relationships that are recognized by the state only reinforces the privatization of economic responsibility. The only difference is that the private sphere is made larger.

#### CONCLUSION

In the end, we are left with a dilemma that relates to different levels of analysis. On the one hand, we agree with those who argue that in the longer term, marriage as a legal category should be abolished, and that public financial preferences for limited forms of sexual relationships are discriminatory. However, as long as marriage exists as a legal institution, it should be open to same-sex couples. We also feel that domestic partnership schemes should be available as well for those opposite and same-sex partners who wish to avoid the ideological baggage of marriage.

As mentioned above, some are concerned about how ironic it is that as soon as lesbians and gay men begin to acquire spousal status, the move is to erase sex from that status, and to eliminate marriage as a legal category. As a result of such concerns, the Lesbian and Gay Legal Rights Service in

New South Wales, Australia proposed a model that included simultaneous but distinct recognition of both a “de facto partner” and a “domestic partner” regime, the former to recognize live-in sexual relationships, and the latter to recognize other forms of important interdependent relationships.<sup>116</sup> Both were to be based on a presumption-based (ascription) rather than an opt-in system, in order to deal with power imbalances within relationships that may inhibit some from opting into a registration system.

That said, ascription too has its downside. In our community work we hear all too often, especially from older, poorer lesbian couples, that they are furious with our federal government for now making them legal spouses without them having agreed to this status. This anger arises from the fact that laws dealing with economic issues all too often penalize legally recognized couples who are not economically secure. This too is a problem that can be linked to restructuring and privatization of economic responsibilities in late capitalism. A second point is that many couples who choose to live their lives in different and non conformist ways do not want to be the “conventional” couple that the law tries to make them be. For them the law destroys the radical essence and potential of their relationship. One avenue to consider is that in non-financial areas (e.g. medical visits, immigration), there could be state recognition of intimate and important relationships based on the individual’s decision as to the importance of the relationship.<sup>116</sup> Such a measure would allow some freedom for couples to determine how their relationships will be defined. Other mechanisms could ensure that financial exploitation is not allowed to occur without a remedy.

The tensions that are obvious in these concluding remarks reflect the tensions in the issues we are considering. There is no obvious solution; rather we argue, with authors such as Kris Walker, that we need to seek changes to the economic conditions that make it so important for (some) gay men and lesbians to seek marriage. In order to do so, we need to

focus not only on the questions of recognition of same-sex relationships, but also to forge coalitions with other excluded “families.”<sup>117</sup>

In the end, we remain convinced that achieving recognition for lesbian and gay relationships will ultimately connote “progress” only when the links between recognized relationships and socio-economic inequalities within capitalism are fully exposed and challenged. This remains the challenge for the lesbian and gay communities: not to become complacent now that at least partial recognition has occurred. Some might argue that posing the questions in this way takes the sex out of queer politics—or the lesbian out of lesbian feminist politics, as Calhoun might say. We would respond that the questions now being raised by the very challenge of recognizing same-sex relationships are relevant to all citizens, not only lesbian and gay citizens, and to all who are concerned with achieving social justice. Although we are not convinced that Fineman’s re-focusing of attention on relations of inevitable dependency is necessarily sufficient, it certainly points to a different approach to which relationships state policy should recognize. Accordingly, a focus on sex may well be unnecessary, except to the extent that it is needed to ensure the visibility of lesbian and gay lives, and that they are not erased in the very process of receiving recognition.

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<sup>1</sup> We have taken our title from Deborah Jones, *From Same-Sex to No Sex*, VANCOUVER SUN, June 9, 2001, at A19.

<sup>2</sup> PETER FITZPATRICK, MODERNISM AND THE GROUNDS OF LAW 63 (2001).

<sup>3</sup> See, e.g., URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION 3 (1995); Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation?*, in LESBIAN AND GAY MARRIAGE 20–21 (Suzanne Sherman ed., 1992); Nancy Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage*, 79 VA. L. REV. 1535, 1535–50 (1993); Ruthann Robson, *Resisting the Family: Repositioning Lesbians in Legal Theory*, 19(4) SIGNS 975, 975–96 (1994). Others will be referred to below.

<sup>4</sup> SHANE PHELAN, SEXUAL STRANGERS: GAYS, LESBIANS, AND DILEMMAS OF CITIZENSHIP 66 (2001).

<sup>5</sup> TERESSA NAHANE, MARRIAGE AS AN INSTITUTION OF OPPRESSION IN ABORIGINAL COMMUNITIES (1995).



<sup>6</sup> Mary Jane Mossman, *Running Hard to Stand Still: The Paradox of Family Law Reform*, 17 DALHOUSIE L.J. 5–34 (1994).

<sup>7</sup> PHELAN, *supra* note 4.

<sup>8</sup> Susan B. Boyd, *Family, Law and Sexuality: Feminist Engagements*, 8(3) SOC. & LEGAL STUD.: INT'L J. 369, 369–90 (1999).

<sup>9</sup> CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms). Hereinafter referred to as the Charter.

<sup>10</sup> For more on this issue see Claire F.L. Young, *Taxing Times for Lesbians and Gay Men: Equality at What Cost?*, 17 DALHOUSIE L.J. 534, 534–59 (1994).

<sup>11</sup> *M. v. H.*, [1999] 171 D.L.R. (4th) 577.

<sup>12</sup> See, e.g., *Damien v. Ontario* (H. R. Comm'n), [1976] 12 O.R.2d 262 (in which a horse racing steward was fired because he was gay after a 20 year career); *Haig v. Canada*, [1992] 9 O.R.3d 495 (in which two members of the armed forces demonstrated that they had been denied promotion because they were gay).

<sup>13</sup> *Mossop v. Treasury Board of Canada*, [1993] 1 S.C.R. 554.

<sup>14</sup> Sexual orientation was added to the Canadian Human Rights Act, R.S.C., ch. H-6 (1985), as a prohibited ground of discrimination as a result of *Haig v. Canada*, [1992] 9 O.R.3d 495.

<sup>15</sup> Section 15(1) reads as follows: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” It should be noted that while the Charter was enacted in 1982, section 32(2) suspended the effect of section 15 on equality rights until 1985.

<sup>16</sup> MIRIAM SMITH, *LESBIAN & GAY RIGHTS IN CANADA: SOCIAL MOVEMENTS & EQUALITY SEEKING, 1971-1995* 67 (1999).

<sup>17</sup> *Egan v. The Queen*, [1995] 2 S.C.R. 513 was a challenge to the exclusion of same-sex couples from the definition of spouse in the Old Age Security Act. The Supreme Court of Canada unanimously held that “sexual orientation” was a ground of discrimination under section 15(1) of the Charter and, by a majority of 5 to 4 that the refusal to give the plaintiff a spousal allowance under the Old Age Security Act was discrimination on the basis of sexual orientation in contravention of section 15(1). By a majority of 5 to 4, the Court also found, however, that the discrimination was justified under section 1 of the Charter and therefore the refusal by the federal government to pay the spousal allowance was held to be permissible.

<sup>18</sup> The Charter is part of the Constitution of Canada and therefore it expressly enables judges to override statutes that are inconsistent with it. It applies to both the federal and provincial governments and regulates the relations between governments and private persons, but not between private person and private person.

<sup>19</sup> *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

<sup>20</sup> R.S.A., ch. I-2 (1980). After *Vriend* had commenced his legal action the legislation was amended and renamed the Human Rights, Citizenship & Multiculturalism Act, R.S.A., ch. H-11.7 (1980).

<sup>21</sup> *Vriend v. Alberta*. [1998] 1 S.C.R. 493.

<sup>22</sup> *Id.* at 522.

<sup>23</sup> Section 1 of the Charter reads as follows: “*The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” This section allows a court to uphold legislation, even if it is discriminatory in contravention of section 15(1) of the Charter.

<sup>24</sup> Margot Young, *Change at the Margins: Eldridge v. British Columbia (A.G.) and Friend v. Alberta*, 10 CANADIAN J. WOMEN & L. 244, 246 (1998).

<sup>25</sup> *Rosenberg v. Canada (Att’y Gen.)*, [1998] 38 O.R.3d 577.

<sup>26</sup> Laura Eggertson, *Gays, Lesbians Hail Decision on Pensions: Federal Move Will Lead to Revisions, Activists Say*, TORONTO STAR, June 23, 1998, at A1 (quoting John Fisher, Executive Director, Equality for Gay and Lesbians Everywhere (EGALE)).

<sup>27</sup> R.S.C., ch. 1, § 252 (4) (1985).

<sup>28</sup> It is interesting to note that the change was to redefine “spouse” which had previously included married persons and those in opposite sex common law relationships to refer only to a married person. A new definition of “common law partner” was added to the Act. That definition includes individuals who live in a conjugal relationship with a person of the opposite or same-sex for a period of at least 12 months. Despite the different definitions used, the tax rules apply in exactly the same manner to married persons, opposite-sex couples and same-sex couples.

<sup>29</sup> *M. v. H.*, [1999] 171 D.L.R. (4th) 577.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 615–16.

<sup>32</sup> *M. v. H.*, [1999] 132 D.L.R. (4th) 538, 545.

<sup>33</sup> See Robson, *supra* note 3.

<sup>34</sup> HEATHER BROOK, *How to do Things with Sex, in SEXUALITY IN THE LEGAL ARENA*, 133 (Carl Stychin & Didi Herman eds., 2000). Brook uses J.L. Austin’s work on performative utterance and Judith Butler’s theory of performativity in making her argument.

<sup>35</sup> PHELAN, *supra* note 4, at 73.

<sup>36</sup> Modernization of Benefits and Obligations Act, S.C., C-23, ch. 12, (2000).

<sup>37</sup> Some of the more recent provincial changes include the following. In 1999 and 2000, following on earlier legislative amendments that dealt with the inclusion of same-sex couples for some family law purposes, British Columbia enacted legislation that extended the definition of spouse to include same-sex couples for many purposes, including wills variation and estate administration. See the Definition of Spouse Amendment Act, S.B.C., ch. 29 (1999) and the Definition of Spouse Amendment Act, S.B.C., ch. 24 (2000). Ontario enacted An Act to Amend Certain Statutes Because of the Supreme Court of Canada’s Decision in *M. v. H.*, S.O., ch. 6 (1999) which added “same-sex partners” to sixty-five pieces of legislation that referred to “spouse.” Québec amended twenty-eight statutes to grant same-sex couples the same benefits and obligations as opposite sex common law couples. See An Act to Amend Various Legislative Provisions Concerning De Facto Spouses, S.Q., ch. 14 (1999). Nova Scotia extended the application of many statutory provisions that applied to opposite sex common law spouses to same-sex couples. See the Law Reform Act, S.N.S., ch. 29 (2000), S.N.S. 2000, c. 29.

<sup>38</sup> Act of Apr. 25, 2002, B. 84, National Assembly of Quebec (instituting civil unions and establishing new rules of filiation).

<sup>39</sup> Until recently, this prohibition was reflected only in the common law. However, section 5 of the Federal Law-Civil Law Harmonization Act, No. 1, ch. 4 (2001) recently clarified that "Marriage requires the free and enlightened consent of a man and a woman to be the spouse of the other." This section was declared unconstitutional by the Québec Superior Court in *Hendricks v. Quebec*, [2002] R.J.Q. 3816.

<sup>40</sup> SMITH, *supra* note 16, at 43.

<sup>41</sup> VAID, *supra* note 3.

<sup>42</sup> Marriage rights were an earlier focus of the lesbian and gay movement, but a negative court decision (*Layland v. Ontario*, [1993] 14 O.R.3d 658), and the political composition of the Supreme Court of Canada at the time, persuaded lesbian and gay groups to divert their political strategy towards the rights and duties of unmarried couples instead.

<sup>43</sup> KATHLEEN LAHEY, ARE WE 'PERSONS' YET? LAW & SEXUALITY IN CANADA (1999).

<sup>44</sup> LAW COMM'N OF CAN., MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES, BEYOND CONJUGALITY: RECOGNIZING & SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS, Recommendation 33 (2001).

<sup>45</sup> See EGALE Canada, *EGALE Monthly Update*, Aug. 2001.

<sup>46</sup> Jurisdictionally, the issue is complex because while the federal government has jurisdiction over marriage and divorce (Constitution Act, § 91(26)), the provinces have exclusive jurisdiction over the solemnization of marriage (Constitution Act, § 92(12)), which means that marriage licenses are issued by the provinces.

<sup>47</sup> *Barbeau v. B.C. (Att'y Gen.)*, [2003] B.C.C.A. 251, ¶ 7.

<sup>48</sup> *Id.*

<sup>49</sup> *Halpern v. Canada (Att'y Gen.)*, [2001] 95 R.F.L. (5th) 41.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 52.

<sup>52</sup> *Hendricks v. Quebec*, [2002] R.J.Q. 3816.

<sup>53</sup> Marriage Amendment Act, R.S.A. ch. 3 (2000).

<sup>54</sup> See Kevin Sorenson, *News Column*, at <http://www.crowfoot.ca/mpcolumns/2002-09-27-kevin-column.htm>.

<sup>55</sup> See Modernization of Benefits and Obligations Act, S.C., C-23, ch. 12 (2000).

<sup>56</sup> See Nicole LaViolette, *Waiting in a New Line at City Hall: Registered Partnerships as an Option for Relationship Recognition Reform in Canada*, 19 CAN. J. FAM. L. 115 (2002); LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS (R. Wintemute & M. Andenaes eds., 2001).

<sup>57</sup> It should be noted that when the recent changes to give same-sex couples spousal status are discussed by detractors, the talk is only about "rights," and never about the responsibilities that go with spousal status.

<sup>58</sup> See the literature reviewed by Nicole LaViolette, *see* LaViolette, *supra* note 56, at 150-52. Interestingly enough, a similar argument about a designated beneficiary was made by the intervener group that included EGALE in the case of *Mossop v. Treasury Board of Canada*, [1993] 1 S.C.R. 554.

<sup>59</sup> Adult Interdependent Relationships Act, R.S.A., C-30, (2002), (not yet in force).

<sup>60</sup> These include, for example, the requirement to financially support one's partner, the right to recover damages for the wrongful death of a partner and the ability to make a financial claim against the estate of one's partner. See our discussion of the privatizing impact of the redefinition of spouse to include same-sex couples later in this article.

<sup>61</sup> See Adult Interdependent Relationships Act, R.S.A., C-30, §1 (f), (2002).

<sup>62</sup> *Id.* §§ 1-2.

<sup>63</sup> *Id.* at pmb1.

<sup>64</sup> *News Release*, ALBERTA JUSTICE, May 7, 2002 (quoting David Hancock).

<sup>65</sup> It is important to note that the concept of expanding the group of those relationships that are subject to certain rights and responsibilities is not a new, or necessarily conservative approach. The concept of the registered domestic partnership has been used in Nova Scotia specifically to extend rights and responsibilities to same-sex couples (although it is also open to opposite sex couples.) Registration of Domestic Partnerships Regulations, N.S. Reg. 57(01) and the Law Commission of Canada has recommended that parliament and provincial legislatures should pass laws enabling adults in conjugal relationships to register their relationships and thus bring themselves within the ambit of laws that would ascribe duties and give rights to them. See LAW COMM'N OF CAN., MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES, BEYOND CONJUGALITY: RECOGNIZING & SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS, Recommendation 31 (2001).

<sup>66</sup> The most significant difference is that in some provinces, such as British Columbia, common law spouses are not subject to the rules that apply to married persons respecting division of matrimonial property on separation or divorce. A recent Charter of Rights and Freedoms challenge brought by an unmarried woman who had been in a long term opposite sex relationship to this distinction between married and common law couples was rejected by the Supreme Court of Canada, in *Walsh v. Bona*, [2002] S.C.C. 83.

<sup>67</sup> In an article in the *National Post*, Canadian Alliance Justice critic Vic Toews said, "[m]arriage is one of the cornerstones upon which our society has been built. The Canadian Alliance believes that marriage should be defined as it always has been— as a voluntary union between one man and one woman." Vic Toews, *Time is Running Out on Marriage*, NATIONAL POST, July 24, 2002.

<sup>68</sup> See EGALE Canada, *supra* note 45.

<sup>69</sup> Robert Benzie & Lisa Gregoire, *Klein Draws the Line at Gay Marriage*, THE NATIONAL POST, July 19, 2002, at A1.

<sup>70</sup> See *Aff. Of Applicants in EGALE, Inc. v. Canada (Att'y Gen.)*, [2001] 95 B.L.C.R.3d 122, available at <http://www.islandnet.com/~egale/documents/Affidavits-BC-Marriage.htm>.

<sup>71</sup> See EGALE, Inc., 95 B.L.C.R.3d at 132.

<sup>72</sup> PHELAN, *supra* note 4, at 74.

<sup>73</sup> *Id.* at 80.

<sup>74</sup> VAID, *supra* note 3.

<sup>75</sup> PHELAN, *supra* note 4, at 80.

<sup>76</sup> Aff. of Lloyd Thornhill at ¶ 93, EGALE, Inc., 95 B.L.C.R.3d 122, available at <http://www.islandnet.com/~egale/documents/Affidavits-BC-Marriage.htm>.

<sup>77</sup> DAVINA COOPER, *Like Counting Stars?: Re-Structuring Equality & the Socio-Legal Space of Same-Sex Marriage*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL EUROPEAN & INTERNATIONAL LAW 75–77 (R. Wintemute & M. Andenaes eds., 2001).

<sup>78</sup> For a detailed explanation see Claire F.L. Young, *Equality, Freedom and Democracy: Tax Law and the Canadian Charter of Rights and Freedoms*, in COMMERCIAL LAW AND HUMAN RIGHTS 235–55 (Stephen Bottomley et al eds., 2002); See also Young, *supra* note 10.

<sup>79</sup> R.S.C., ch. 21, § 91 (1998).

<sup>80</sup> The reasons for this consequence are discussed in detail in Young, *supra* note 10.

<sup>81</sup> Canada Student Financial Assistance Regulations, C.R.C. 230, § 1 (2001).

<sup>82</sup> *Id.* § 2.

<sup>83</sup> CHESHIRE CALHOUN, FEMINISM, THE FAMILY, & THE POLITICS OF THE CLOSET: LESBIAN & GAY DISPLACEMENT 138–39 (2000).

<sup>84</sup> *But see* Martha Albertson Fineman's recent work for a similar critique in the American context: *Cracking the Foundational Myths: Independence, Autonomy, & Self Sufficiency*, 8 AM. U.J. GENDER, SOC. POL'Y & L. 13 (2000). See also MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, & OTHER TWENTIETH CENTURY TRAGEDIES* (1995). In the Canadian context, see PRIVATIZATION, LAW & THE CHALLENGE TO FEMINISM (Brenda Cossman & Judy Fudge eds., 2002).

<sup>85</sup> In *M. v. H.*, the Supreme Court of Canada referred explicitly to the privatizing objective of spousal support as a key rationale for extending these laws to include same-sex relationships. Cory and Iacobucci J.J., writing for the majority, emphasized repeatedly that the definition of spouse at issue and the spousal support provisions to which it gave access were “designed to reduce the demands on the public welfare system.” *M. v. H.*, [1999] 171 D.L.R. (4th) 577, ¶ 53. See also *id.* ¶ 283 and *id.* ¶ 356.

<sup>86</sup> For an elaboration of this point, see Susan B. Boyd, *From Outlaw to InLaw: Bringing Lesbian & Gay Relationships Into the Family System*, Y.B. OF NEW ZEALAND JURISPRUDENCE 31, 31-53 (1999).

<sup>87</sup> Robson, *supra* note 3, at 986.

<sup>88</sup> *Id.*

<sup>89</sup> For more on these arguments see Boyd, *supra* note 8, at 369-90; Boyd, *supra* note 86, at 31-53.

<sup>90</sup> However, a conference planned by EGALE for May, 2003 has indicated that “our claims for formal equality may be drawing to a close” and more attention is being paid to substantive equality issues by community groups around the country. The conference announcement lists intersectionality of grounds such as race, gender and class with sexual orientation as an issue. See EGALE conference announcement, available at <http://www.egale.ca/conferencecall.asp> (last visited Dec. 31, 2002).

<sup>91</sup> CAN. DEP'T OF JUSTICE, MARRIAGE AND LEGAL RECOGNITION OF SAME-SEX UNIONS: A DISCUSSION PAPER (2002). EGALE has asked its members to respond to the government consultation by supporting same-sex marriage.

<sup>92</sup> CALHOUN, *supra* note 83, at 138-9.

<sup>93</sup> COOPER, *supra* note 77, at 96.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 95.

<sup>96</sup> *Id.* at 92. Somewhat similar, perhaps, is Phelan's point that the current structures of citizenship in the United States are "inextricably bound with the generation of strangers." PHELAN, *supra* note 4, at 152.

<sup>97</sup> COOPER, *supra* note 77, at 94-5. See MORRIS B. KAPLAN, *SEXUAL JUSTICE: DEMOCRATIC CITIZENSHIP & THE POLITICS OF DESIRE* (1997).

<sup>98</sup> Nancy D. Polikoff, *Why Lesbians & Gay Men Should Read Martha Fineman*, 8 J. OF GENDER, SOCIAL POLICY & L. 167 (2000).

<sup>99</sup> CALHOUN, *supra* note 83, at 160. See also Barbara J. Cox, *The Lesbian Wife: Same-Sex Marriage as an Expression of Radical & Plural Democracy*, 33 CAL. W. L. REV. 155, 155-67 (1997).

<sup>100</sup> PHELAN, *supra* note 4, at 158.

<sup>101</sup> *Id.*

<sup>102</sup> FINEMAN, *supra* note 84.

<sup>103</sup> Polikoff, *supra* note 98.

<sup>104</sup> CAROL SMART, *THE TIES THAT BIND: LAW, MARRIAGE & THE REPRODUCTION OF PATRIARCHAL RELATIONS* 142-46 (1984).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 143.

<sup>107</sup> FINEMAN, *supra* note 84.

<sup>108</sup> LAW COMM'N OF CAN., *supra* note 44.

<sup>109</sup> CAN. DEP'T OF JUSTICE, *supra* note 91.

<sup>110</sup> Bruce MacDougall, *Case Comment on M v. H*, 27(1) MANITOBA L.J. 141, 162 (1999).

<sup>111</sup> COOPER, *supra* note 77, at 85.

<sup>112</sup> *Id.*

<sup>113</sup> PHELAN, *supra* note 4, at 158.

<sup>114</sup> *Id.* at 159.

<sup>115</sup> *Id.*

<sup>116</sup> H. Katzen & M. Shaw, *The Bride Work Pink*, (1994), available at <http://www.girl.org.au>. See Jenni Millbank & Wayne Morgan, *Let Them Eat Cake & Ice Cream: Wanting Something 'More' from the Relationship Recognition Menu*, in *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN & INTERNATIONAL LAW* 295, 308-09 (R. Wintemute & M. Andenaes eds., 2001).

<sup>116</sup> Kristen L. Walker, *United Nations Human Rights Law & Same-Sex Relationships: Where to from Here?*, in *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN & INTERNATIONAL LAW* 743, 750 (R. Wintemute & M. Andenaes eds., 2001).

<sup>117</sup> *Id.* at 752.