

THE STATE OF MARRIAGE

by

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I. INTRODUCTION

In 1996 the legal regimes in many nations confronted the issue of same-sex marriage. In May the High Court of New Zealand/Aotearoa rendered *Quilter v Attorney-General*¹ and declined to find that the female plaintiffs were entitled to obtain a marriage licence and marry. Although the applicable act, the Marriage Act of 1955, does not explicitly prohibit same-sex marriages or explicitly require male-female marriages, the Court concluded that "it must be Parliament which chooses to enact the necessary law."² A few months later, the legislative body of the United States did enact a law on the subject, the Defense of Marriage Act (DOMA).³ This federal law does not permit same-sex marriage, but instead provides that states need not recognise same-sex marriages of other states⁴ and that the federal government will only recognise marriages between members of "the opposite sex." DOMA itself is a reaction to a ruling by the Hawai'i Supreme Court in *Baehr v Lewin*,⁵ holding that the denial of a marriage license to a same-sex couple must be evaluated under the Hawaii state constitution's equal protection clause which

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¹ [1996] NZFLR 481. The six plaintiffs were three female couples who had applied to the Registrar General for marriage licenses and been denied.

² *Ibid.*, 505.

³ PL 104-199, 110 Stat 2419 to be codified at 28 USC §1738C.

⁴ *Ibid.* The statute provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

⁵ 852 P2d 44 (Haw 1993).

includes discrimination on the basis of sex.⁶ The Hawai'i Supreme Court found that unless the state could prove a compelling state interest, the denial of a marriage license to same-sex couples constituted a denial of equal protection and remanded the case for trial. On remand the Honourable Kevin Chang found that the sex-based classification in the Hawai'i statute was unconstitutional on its face and as applied under the state constitution's equal protection clause.⁷

While this Article concentrates on developments in New Zealand/Aotearoa and the United States, these developments mirror conditions in other nations. For example, last year in Canada an Ontario judge declared the Family Law Act unconstitutional to the extent that it excludes same-sex couples from alimony provisions.⁸ This newest Canadian decision follows Canadian Supreme Court cases such as *Re Attorney-General of Canada and Mossop*,⁹ denying family status to same-sex couples for purposes of bereavement leave, and *Egan v Canada*,¹⁰ denying old age benefits to a same-sex partner of 45 years, as well as flurries of activity in the provincial legislatures.¹¹ In the context of these activities a sophisticated legal theory of gay and lesbian

⁶ Article I, §5 of the Hawai'i Constitution provides: No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry. Haw Const art I, §5 (1978). In addition to the equal protection claim on which they prevailed, plaintiffs also argued that the denials of marriage licenses to same-sex couples was a denial of the right to due process under Article I, §5, and a denial of the right to privacy under Article I, §6 of the Hawai'i Constitution which explicitly provides that "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest." The court, however, rejected both the due process and privacy claims, concluding that it did not believe that "a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions" or "that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed." 852 P P 2d at 57.

⁷ *Baehr v Miike* 65 USLW 2399, 1996 WL 694235 (Circ Ct Haw (December 3, 1996)). Lawrence Miike is the Director of the Department of Health, substituted for the previous director, Lewin.

⁸ *M v H* (1996) 27 OR (3d) 593, 132 DLR (4th) 538 (Ont Ct (Gen Div)).

⁹ *Re Attorney-General of Canada and Mossop* (1993) 100 DLR (4th) 658.

¹⁰ *Egan v Canada* [1995] 2 SCR 513, (1995)124 DLR (4th) 609.

¹¹ See for example, Susan Boyd, "Expanding the 'Family' in Family Law: Recent Ontario Proposals on Same Sex Relationships" (1994) 7 CJWL 545; Ann Robinson, "Lesbiennes, mariage et famille" (1994) 7 CJWL 393 (discussing Quebec).

equality has emerged.¹²

In Australia last year the Attorney General of New South Wales stated that he would advocate a same-sex domestic relations act. With the approval of the Australian federal cabinet, the 1996 census counted same-sex couples as "family". The Supreme Court of New South Wales rendered an important decision regarding termination of a lesbian relationship.¹³ In Europe, the Republic of Iceland joined the republics of Sweden, Norway, and Denmark in including same-sex couples in their respective Registered Partnership Acts. The Kingdom of the Netherlands passed a Marriage Bill which includes same-sex marriage.

Such global developments regarding same-sex marriage and relations raise a host of jurisprudential issues, including the structure of government itself and the government's relationship with its citizens.

II. JURISPRUDENTIAL ISSUES RAISED BY SAME-SEX MARRIAGE

A. *The Structures of Government*

Claims to legalise same-sex marriage often challenge the structures of legitimate government. For example, the New Zealand High Court in *Quilter* abdicated responsibility for individual rights to Parliament, as if New Zealand were not a common law nation with an independent judiciary but a civil law state with an especially stunted notion of judicial review. Despite the gender neutral language of the Marriage Act and the High Court's conclusion that the Marriage Act discriminates on the basis of sexual orientation in contravention of the Bill of Rights Act, the Court nevertheless refused to interpret the Marriage Act consistent with the Bill of Rights Act because that would require the Court "to interpret the law in a way I do not perceive Parliament to intend."¹⁴ Section 4 of the Bill of Rights Act provides that the courts cannot "[d]ecline to apply any provision" of a Parliamentary enactment "by reason only that the provision is inconsistent with any provision" of the Bill of Rights.¹⁵ Nevertheless, the gender neutral language of the Marriage Act allows a court to interpret it *consistently* with the Bill of Rights Act, as

¹² For an intelligent and comprehensive discussion of the Canadian context, see Didi Herman, *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* (1994).

¹³ *W v G* (1996) 20 Fam LR 49.

¹⁴ *Supra* n 1 at 505.

¹⁵ New Zealand Bill of Rights Act 1990, s 4. I am indebted to an anonymous referee of the *Yearbook* for bringing this argument to my attention.

required by s 6. A judicial perception that "social policy" is a matter for Parliament even when the Bill of Rights Act requires redress renders the judiciary expendable and the Bill of Rights Act meaningless.

In contrast, Judge Epstein of the Ontario Court of Justice considered the uneven Ontario legislation with regard to recognising same-sex couples and concluded that the legislature's failure to act in this specific instance made the judiciary's obligation to remedy the discrimination even more pronounced.¹⁶ While Judge Epstein's reasoning has special force under the Canadian constitutional scheme incorporating the Charter of Rights,¹⁷ his explication of the judiciary's role is inherent in a democratic society. This role has been set out by Canadian Supreme Court Chief Justice Lamer:¹⁸

As for the suggestion that judges intrude into the legislative sphere, the truth is that many of the toughest issues we have had to deal with have been left to us by the democratic process. The legislature can duck them. We can't. Think of abortion, euthanasia, same sex benefits, to name a few. Our job is to decide the cases properly before us to the best of our abilities. We can't say we are too busy with other things or that the issue is too politically sensitive to set up a royal commission. We do our duty and decide.

Under Justice Lamer's view, a judiciary that does "duck" an issue is not fulfilling its duty in a democratic society.

In the United States context, struggles around the issue of same sex marriage have also implicated the structure of government, in particular the constitutionally mandated federalist structure of the nation. DOMA alters the relations between the states as well as the relations between the federal government and the states. Like other federalist governments, the United States Constitution sets out the operations of laws between its various states.¹⁹ The proper scope of relations among the states of the United States is expressed throughout the text and structure of the Constitution, and is addressed in particular in the "full faith and credit clause" which provides that full faith and credit shall be given in each state to the public acts, records, and proceedings of every other state.²⁰ Marriage certificates fall into the category

¹⁶ *M v H* supra n 8, OR at 614, DLR at 560.

¹⁷ The Canadian Charter is entrenched. It does not contain a section similar to s 4 of the New Zealand Bill of Rights Act.

¹⁸ Supra n 16, OR at 617-8, DLR at 563-564, *quoting* Speech of Chief Justice Lamer to the Empire Club of Canada, April 1995.

¹⁹ See Honourable Mr Justice WMC Gummow, "Full Faith and Credit in Three Federations" (1995) 46 South Carolina LR 979 (discussing the United States, Canada and Australia).

²⁰ US Const art IV §1.

of public acts, records, and proceedings and the long-standing law has been that a marriage valid in one state is valid in every other. This has been true despite the fact that laws differ between states. For example, if the minimum age for marriage in one state is 14 years of age, a 14 year old validly married in that state still has a valid marriage even if she or he moves to a state in which the minimum age for marriage is 16. Such problems can also be analysed under conflicts of law doctrine, which allows "public policy" exceptions to recognising the effects of laws from other jurisdictions. The interface of the full faith and credit clause and choice of law doctrines has prompted much scholarship given the prospect of same-sex marriage in Hawai'i.²¹ DOMA attempts to supersede these interstate conflicts through federal legislation.

DOMA also alters the federalist relation between the federal government and the states. Unlike most other federalist nations, under the United States Constitution the national government was intended to have only specifically enumerated powers, and all residual general authority was to remain with the states. Domestic relations and family law are considered matters to be governed by the general powers of the states. Most federal statutes that require definitions of marital relations, including social security and tax codes, rely upon state definitions. Thus, the determination of whether a person is married or not for purposes of the federal tax code, for example, would depend upon the state laws where the marriage was validated. The differences between state laws in this area are not considered to be a vital federal interest.

Recent legal developments in New Zealand/Aotearoa, the United States, and Canada, demonstrate the manner in which a challenge to the marriage statutes implicates the structural frameworks of government. Responses to the controversial issue of same-sex marriage have resulted in alterations to well-established respective roles of judiciaries and legislatures and the respective roles of the state and the federal governments in the United States. Nevertheless, while responses to this issue may be destabilising state structures, the root of the conflict is in the state's relation to the persons claiming that the state is acting unjustly.

²¹ See eg, Robert L Cordell II, "Same-Sex Marriage: the Fundamental Right of Marriage and an Examination of Conflict of Laws and the Full Faith and Credit Clause" (1994) 26 Columbia Human Rights LR 247; Barbara J Cox, "Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?" [1994] Wisconsin LR 1033; Deborah M Henson, "Will Same-Sex Marriages Be Recognised in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's *Baehr v Lewin*" (1993-94) 32 U Louisville Journal of Family Law 551; Thomas M Keane, "Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages" (1995) 47 Stanford LR 499.

B. Individual Rights

Perhaps the most important jurisprudential issue raised by same-sex marriage is the legal regime's relationship with its citizens, especially its citizens who do not belong to dominant groups. The legalisation of same-sex marriage can be a litmus test of the state's willingness to recognise its sexual minority citizens as full members of the polity. From the perspective of the state, marriage is a civil relation of the highest order; excluding certain groups from marriage is thus an indication of the status of those groups.²²

In New Zealand/Aotearoa the Human Rights Act prohibits discrimination on the basis of sexual orientation, which is defined as "a heterosexual, homosexual, lesbian, or bisexual orientation."²³ Such a provision indicates that the nation of New Zealand/Aotearoa holds its sexual minority members in a regard equal to its other citizens. Honouring such a ban on discrimination would require the reinterpretation of any statutes, practices, or policies which discriminate on the basis of sexual orientation. The language of the Marriage Act does not limit marriage to members of the opposite sex and is thus not facially discriminatory. For the plaintiffs to prevail in *Quilter*, the High Court needed only to require the Registrar General to apply the Act in a non-discriminatory manner.

Instead, the High Court became entangled in tangentials.²⁴ It looked to the "traditional view" of marriage, concluding that "judicial dicta" since 1795 limited marriage to "one man and one woman."²⁵ The Court then considered other statutes, most of which referred to husbands and wives, and reasoned that such statutes should not be "interpreted in a way where language and ordinary interpretation rules have to be strained to produce the result sought."²⁶

²² However, the availability of legalised marriage does not necessarily mean that a group is considered equal. See Laura F Edwards, "The Marriage Covenant is at the Foundation of all Our Rights: The Politics of Slave Marriages in North Carolina after Emancipation" (1996) 14 Law and History Review 81.

²³ Human Rights Act 1993, s 21 (m).

²⁴ While some may consider this view harsh, once the court recognises that discrimination on the basis of sexual orientation is occurring, then remedying that discrimination should be paramount; all else is tangential.

²⁵ *Supra* n 1 at 486.

²⁶ *Supra* n 1 at 489. The statutes the Court considered included: Family Protection Act 1955; Administration Act 1969, as amended 1987; Joint Family Homes Act 1964; Judicature Act 1908; Legal Services Act 1991; Matrimonial Property Act 1976; Family Proceedings Act 1980; Parental Leave and Employment Protection Act 1987; Rates Rebate Act 1973; Social Security Act 1964; Status of Children Amendment Act 1987; Accident Rehabilitation and Compensation Insurance Act 1993; Adoption Act 1955; Government Superannuation Fund Act 1956; and the Holidays Act 1981. The Court reasons that because the words "husband" or "wife" appear in the statutes, these statutes would not be applicable to same-sex marriages.

Based upon the traditional common law view and statutes other than the one directly applicable, the Court concluded that the Marriage Act should not be interpreted in a manner consistent with the Bill of Rights Act. The result of *Quilter* is that the Bill of Rights Act ban on discrimination on the basis of sexual orientation is meaningless if it is contrary to "judicial dicta" or ancillary statutes. Such an impoverished interpretation of the right to be free from discrimination on the basis of sexual orientation exhibits a fundamental dismissal of gay and lesbian persons as equal to heterosexual persons in the polity.

In the United States context, DOMA exhibits a similar fundamental dismissal of the equality of gay and lesbian persons. Even the name of the act, Defense of Marriage Act, expresses a particularly parochial paranoia constructing gay men and lesbians as a threat which must be defended against. The legislative history of DOMA elaborates on this theme, stating that the "appropriately entitled" Act is a "modest effort" to "combat" the "orchestrated legal campaign by homosexual groups to redefine the institution of marriage" which is a "radical proposal that would fundamentally alter the institution of marriage."²⁷ Such a fundamental alteration would occur, according to the House of Representatives Committee on the Judiciary, because marriage exists for the procreation of children.²⁸

Even the Hawaii Supreme Court in *Baehr v Lewin*²⁹ fails to accord full respect to gay and lesbian persons. The Hawai'i Supreme Court acknowledged that although there is a fundamental right to marry, this right does not extend to same-sex couples.³⁰ Furthermore, in a rather disingenuous footnote, the Court

²⁷ House Report No 104-664 (July 9, 1996) 104th Cong, 2nd Sess 1996.

²⁸ The House Report attempts to deflect the obvious objections to its articulation of procreation as the purpose of marriage by resorting to *ipse dixit* reasoning:

There are two standard attacks for this rationale for opposing a redefinition of marriage to include homosexual unions. First, it is noted that society permits heterosexual couples to marry regardless of whether they intend or are even able to have children. But this is not a serious argument. Surely no one would propose requiring couples intending to marry to submit to a medical examination to determine whether they can reproduce or to sign a pledge indicating that they intended to do so. Such steps would be both offensive and unworkable. Rather, society has made the eminently sensible judgment to permit heterosexuals to marry, notwithstanding the fact that some couples cannot or simply choose not to have children.

Second, it will be objected that there are greater threats to marriage and families than the one posed by same-sex "marriage," the most prominent of which is divorce. There is great force in this argument But the fact that marriage is embattled is surely no argument for opening a new front in the war.

²⁹ *Supra* n 5.

³⁰ *Ibid*, 57.

distanced its opinion from sexual orientation³¹ and in another footnote accused the state attorney-general of injecting the issue of homosexuality into a case in which it would otherwise be absent.³² The Hawai'i Supreme Court's reliance on gender as a category can thus be interpreted as a failure to adequately consider the issue of sexual orientation by masking the issue as one of gender unrelated to sexuality.

C. Gender

As the Hawai'i Supreme Court opinion in *Baehr v Lewin* indicates, legal responses to same-sex marriage can elucidate the government's position on the relevance of, and respect for, gender categories. The jurisprudence of sex discrimination is elucidated in same-sex challenges to marriage laws in jurisdictions in which discrimination on the basis of sexual orientation is not prohibited. This lack of protection requires the argument to proceed on the theory of sex discrimination. Prohibiting same-sex marriage is sex discrimination because it is a prohibition which is based upon the sex of one's chosen partner. This is the argument accepted by the Hawai'i Supreme Court in *Baehr v Lewin*. However, most previous courts held that the prohibition of same-sex marriage was not sex discrimination because it applied equally to both sexes, even in instances in which there was an explicit state constitutional provision prohibiting sex discrimination.³³

The meaning of gender is explored not only through doctrines of sex discrimination, but also through precedent regarding transsexual marriages.

³¹ *Ibid*, 51 n11. The court stated:

"Homosexual" and "same-sex" marriages are not synonymous; by the same token, a "heterosexual" same-sex marriage is, in theory, not oxymoronic. A "homosexual" person is defined as "[o]ne sexually attracted to another of the same sex." *Taber's Cyclopedic Medical Dictionary* 839 (16th ed. 1989). "Homosexuality" is "sexual desire or behavior directed toward a person or persons of one's own sex." *Webster's Encyclopedic Unabridged Dictionary of the English Language* 680 (1989). Conversely, "heterosexuality" is "[s]exual attraction for one of the opposite sex," *Taber's Cyclopedic Medical Dictionary* at 827, or "sexual feeling or behavior directed toward a person or persons of the opposite sex." *Webster's Encyclopedic Unabridged Dictionary of the English Language* at 667. Parties to "a union between a man and a woman" may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals.

³² *Ibid*, 52 n 12.

³³ See *Singer v Hara* 522 P2d 1187 (Wash App 1974) (relying on Art 31 of the Washington Constitution which provides "[e]quality of rights and responsibilities under the law shall not be denied or abridged on account of sex)."

For example, in *Quilter* the High Court had no difficulty distinguishing the transsexual cases, commenting that "in New Zealand for marriage to take place there must be parties who visually at least are male and female."³⁴ The Court's emphasis on the visual could be interpreted as an interest in mere appearances, except that the preceding sentence focuses on situations in which "one of [the] parties has undergone reconstructive surgery, by the removal of a male penis and the construction of a vagina in its place or the construction of a penis from a female vagina."³⁵ Such an approach is similar to that taken in the United States cases. The most notorious of these cases is *MT v JT*, in which a New Jersey appellate court held a marriage valid where one party was a post-operative male-female transsexual and the other party was male.³⁶ In one sense, the court applied a broad nonessentialist definition of gender and reached the conclusion that a previously male person could become female. In another sense, the court's conservatism mandated that marriage include persons of the "opposite sexes" and made gender determinations based upon stereotypical sexual functioning. As the New Jersey court stated, "it is the sexual capacity of the individual which must be scrutinized", requiring the "coalescence of both the physical ability and the psychological and emotional orientation to engage in sexual intercourse as either a male or female."³⁷ Such scrutiny not only reifies gender roles, of course, but dictates heterosexuality.

Thus, legalisation of same-sex marriage raises jurisprudential issues concerning the structure of the government, the state's treatment of its minorities, and the state's understanding of sex/gender. It is also important, however, to explore the legalisation of same-sex marriage from another perspective - the perspective of the lesbian, gay, bisexual, or transsexual citizen and her or his relationship with the legal regime, as well as her or his intimate and community relations.

III. "QUEER" AND LESBIAN LEGAL THEORIES AND THE QUESTION OF LEGALISED MARRIAGE

The jurisprudential issues of same-sex marriage must also be addressed from the perspectives of lesbians and gay men. I am not suggesting that among these people there exists a single nonperspectival perspective or even a majority perspective.³⁸ The debates within lesbian and gay communities regarding

³⁴ *Supra* n 1 at 486.

³⁵ *Ibid.*

³⁶ 355 A2d 204 (NJ App 1976).

³⁷ *Ibid.*, 209.

³⁸ For a brilliant and comprehensive discussion of the range of theoretical approaches that might apply, see Margaret Davies, *Asking the Law Question* (1994).

marriage demonstrate the existence of a multitude of opinions on this subject.³⁹ Furthermore, the demise of identity politics suggests that one cannot contend that being gay or lesbian means one has a radical or progressive political stance, or even that one believes that being gay or lesbian is significant to the construction of identity.⁴⁰ Nevertheless, any jurisprudential analysis of the legalisation of same-sex marriage is incomplete without at least an attempt to theorise the issue from the subject positions of lesbians and gay men. Thus, the perspectives of lesbian legal theories⁴¹ and "queer" legal theories are relevant.

Invoking such theoretical perspectives involves an interrogation of the purposes of same-sex marriage for gay men and lesbians. Based upon the arguments, discussions, and discourses surrounding same-sex marriage, it seems that for gay men and lesbians, ensuring the availability of legal marriage is seen as a means of achieving three goals often expressed as desires. First, we want our relationships not to suffer in comparison to heterosexual relationships. Second, we want the legal system to be responsive to solving disputes among lesbians and gay men. Third, we want the legal reality and social perception of equality with heterosexuals. These goals are discussed in turn.

A. *The desire that our relationships not suffer by comparison*

Comparative suffering can occur when our relationships are rendered invisible in comparison with other relationships that are legally recognised. Sharon Kowalski's story exemplifies this problem.⁴² In November of 1983, Sharon Kowalski was in a car accident and suffered extensive physical and neurologic injuries limiting, among other things, her ability to communicate. Until her

³⁹ For a cogent examination of what she calls the "We Are Family/We are Not Family" debate, see Brenda Cossman, "Family Inside/Out" (1994) 44 *University of Toronto Law Journal* 1. For a response to intra-community criticism that gay/lesbian marriage may be problematic, see Evan Wolfson, "Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique" (1994 - 1995) 21 *NYU Review of Law & Soc Change* 567.

⁴⁰ For an overview of the problems of identity and identity politics, see Ruthann Robson, "The Specter of a Lesbian Supreme Court Justice: Problems of Identity in Lesbian Legal Theorising" (1993) 5 *St Thomas LR* 433. For a view that sexual orientation is an identity, see Fernando J Gutierrez, "Gay and Lesbian: An Ethnic Identity Deserving Equal Protection" (1994) 4 *Law & Sexuality* 195.

⁴¹ See generally, Ruthann Robson, *Lesbian (Out)Law: Survival Under the Rule of Law* (1992).

⁴² For a detailed discussion of the circumstances surrounding the litigation, see Karen Thompson & Julie Andrzejewski, *Why Can't Sharon Kowalski Come Home?* (1988).

accident, she had been living with her lover Karen Thompson in a house they were buying together. After her accident, the persons legally responsible for Sharon were her parents, who did not believe that their daughter was a lesbian or could be involved in a lesbian relationship with anyone, including Karen Thompson.⁴³

The prospect of being excluded from visiting her lover prompted Karen Thompson to bring an action in court. In one of the many court papers filed in the litigation, a doctor testifying on behalf of Sharon's parents stated that "visits by Karen Thompson would expose Sharon Kowalski to a high risk of sexual abuse."⁴⁴ Eventually, Sharon's parents withdrew their claim to be her guardian, but the trial judge still refused to name Karen Thompson as guardian. The trial judge expressed concerns that Sharon's parents still objected to Karen as guardian (in part on the basis of her lesbianism), that Karen had been involved with at least one other woman in the years since Sharon's 1983 accident, and that Karen invaded Sharon's privacy by revealing her sexual orientation to her parents and by taking her to lesbian and gay gatherings. Rather than naming Karen as guardian, the judge named a supposedly neutral third party.

Reversing, a Minnesota appellate court relied on the uncontroverted medical testimony that Sharon Kowalski had sufficient capacity to choose her guardian and had consistently chosen Karen Thompson.⁴⁵ The court also noted that Karen Thompson was "the only person willing to care for Sharon Kowalski outside an institution."⁴⁶ In a phrase that the lesbian and gay press reiterated in tones of victory, the appellate court also confirmed the trial court's finding that Sharon and Karen were a "family of affinity, which ought to be accorded respect."⁴⁷

Although there was a successful outcome in the case, it resulted in eight years of litigation and perhaps permanent damage to Sharon's possibility of rehabilitation. These costs illustrate the suffering that lack of legal recognition of our relationships can perpetrate. Advocates of same-sex marriage correctly point out that if Sharon and Karen had been legally married,⁴⁸ then Karen Thompson would have been Sharon Kowalski's legal guardian absent unusual circumstances.

A milder form of comparative suffering occurs when we cannot avail ourselves of the benefits available to married heterosexual persons. Such benefits may

⁴³ Ibid, 26-32.

⁴⁴ Ibid, 163.

⁴⁵ *In re Guardianship of Sharon Kowalski*, Ward 478 NW2d 790 (Minn App 1991).

⁴⁶ Ibid, 794.

⁴⁷ Ibid, 797.

⁴⁸ Sharon and Karen had "exchanged rings" in an extralegal ceremony.

include those imposed by laws such as tax differentials for married couples, inheritance laws, the ability to sue for wrongful death, entitlement benefits such as social security, and citizenship/immigration regulations, as well as those benefits afforded by private interests recognising the legal category of spouse, such as insurance benefits. Advocates of same-sex marriage argue that same-sex couples should be entitled to the same benefits as couples who can marry. Again, the availability of marriage would solve this problem.

B. The desire that the legal system respond to same-sex disputes

The recognition of same-sex marriage would also provide married lesbians and gay men with legal rights as against each other. Not all of our relationships are eternal, and of those that end, many do not end on amicable terms. Gay men and lesbians, like other members of society, may look to the legal system to solve disputes regarding the distribution of property accumulated during the relationship, or to make decisions about custody or visitation of children. Because the legal system does have rules for dissolution of marriages, the exclusion of gay men and lesbians from the divorce process could be theorised as "suffering by comparison." Nevertheless, I think it is more accurate to acknowledge that we want the legal system to protect us from ourselves.

The "selves" from whom we desire protection are not the "selves" willing to use alternative dispute resolution forms such as mediation.⁴⁹ The gay men and lesbians at issue are those more likely to use problematic arguments against their former partners. For example, the Australian case of *W v G*, decided in 1996 by the Supreme Court of New South Wales, involved the termination of a lesbian relationship in which the plaintiff sought portions of real and personal property and "equitable compensation" for two children born through alternative⁵⁰ insemination.⁵¹ The defendant argued that the relationship was one of "room-mates or flatmates" and that any child support should be claimed from the legal father - the sperm donor - and not from her. The defendant through counsel further argued that :⁵²

the formation of stable families is a socially desirable necessary aim and to visit legal obligations upon non-parents to support a child in a homosexual or lesbian relationship is contrary to public policy in that: it will encourage the conception of children by artificial insemination in the absence of a father; will present as "normal" a relationship which is

⁴⁹ Hilary Astor, "Mediation of Intra-Lesbian Disputes" (1996) 20 Melbourne University LR 953.

⁵⁰ The term "alternative" is preferred by many lesbians, including me, to the term "artificial."

⁵¹ *Supra* n 13.

⁵² *Ibid*, 65.

not recognised by the child maintenance legislation; it will encourage the evasion of provisions of the Human Tissue Act; and will encourage the bringing into the world of children without a father.

The present state of the law, and the social context in Australia and elsewhere, encourages a gay man or lesbian to use homophobic arguments to escape responsibilities.⁵³ For proponents of same-sex marriage, the solution to ending such destructive arguments is marriage. Legalised marriage would mean legalised dissolution of marriage and child custody/support determinations. Thus, we would be in the same position as our heterosexual counterparts, an end which is seen as desirable in and of itself in terms of equality.

C. The desire for the legal realities and social perceptions of equality

Third and last, we want equality.⁵⁴ The desire for equality permeates the first two desires, but is also an independent desire. It can also override some of our own misgivings about the institution of marriage, especially as it has been persuasively criticised by feminist scholars. In common law countries, legal marriage historically meant the union of a man and a woman into a single person - the man. Until the Married Women's Property Acts in the 1900s, married women were not considered persons with legal status to own property or enter into binding contracts. The children of the marriage were owned by the father. In contemporary times, divorce continues to be controlled by the State. While marriage is considered contractual rather than a consequence of status, there are three parties to this contract: the man, the woman, and the State. Although the man and woman have limited power to alter the terms of the marriage agreement, through prenuptial agreements, for example, the State retains enormous power. A change in the State's understanding of the contractual terms can have devastating effects on women. For example, the phrase "displaced homemaker," refers to women who were married in the 1950s when the marriage contract terms included being a full time housekeeper, raising children, and supporting the husband's career, in exchange for a promise of longevity enforced by alimony. Many of these

⁵³ For an overview of Australian law, see Gail Mason, "(Out)Laws: Acts of Proscription in the Sexual Order" in Margaret Thornton (ed) *Public and Private: Feminist Legal Debates* (1995) 66, 72-76; Sylvia Winters, "Gay and Lesbian Relationships and the Law of New South Wales" (1992) 1 *Australian Gay & Lesbian Law Journal* 72-80.

⁵⁴ The notion of equality is itself problematic. For example, in seeking equality to heterosexuals, gay men and lesbians make heterosexuality the norm by which other sexualities are measured. This then raises other issues, such as whether other sexualities are entitled to formal equality or comparable equality, as evidenced by the so-called sameness/difference debates of feminist legal theory.

women were divorced 30 years later when the revised marriage contract included a year of rehabilitative alimony to allow the former wife to attend secretarial school.

Yet critiques of marriage, feminist or otherwise, are fundamentally irrelevant to the equality argument. Analogising marriage to an American automobile, such as the Ford Pinto, illustrates the irrelevance. One might criticise the Ford Pinto for its design flaws, which caused injuries and accidents resulting in protracted litigation.⁵⁵ On such evidence, one might refuse to purchase a Ford Pinto. However, it is easy to imagine one's reaction to a legal system which limited the availability of Ford Pintos to a certain select group. For those outside the group, the Ford Pinto would become a symbol of their exclusion. Just as for some of those included in the group, the Ford Pinto would become a symbol of their preferential status. The relative merits of the Ford Pinto become secondary when the issue is equality. Thus, arguments about the problems inherent in marriage as an institution are not convincing to those who perceive marriage as a symbolic issue of equality for gay men and lesbians.

IV. ABOLISHING MARRIAGE

It seems to me that all three of the goals lesbians and gay men seek to accomplish through legalised same-sex marriage would be more completely realised by the abolition of any state sanctioned marriage. For gay men and lesbians, the abolition of marriage would mean that our relationships would not be in a different legal category from other relationships. This would solve the problems of suffering by comparison and the larger issue of equality in this segment of the law. In terms of a desire to have rights as against each other, and which rights those would be, this would require revisiting the scheme of ordering intimate relationships through legal processes.

⁵⁵ The Ford Pinto was a subcompact car manufactured by the Ford Motor Company of the United States with a fuel tank positioned behind (rather than above) the rear axle, a series of bolts located near the fuel tank which could pierce the tank, a fuel filler tank prone to disconnect causing gasoline to spill, and an economic bumper. These specifications contributed to the Pinto's propensity to burst into flames when the car was involved in a rear end collision. The Ford Pinto situation became especially notorious because there is evidence that the Corporation had knowledge of the design defects which could cause death, but performed a cost-benefit analysis (valuing each life at US\$200,000) and determined that the costs of remedying the problems by a safety device which would have cost Ford one hundred thirty seven million US dollars did not outweigh the benefit of the lives lost which would cost Ford only thirty six million US dollars. See *Grimshaw v Ford Motor Company* 119 Cal App 757, 174 Cal Rptr 348 (1981); Gary T Schwartz, "The Myth of the Ford Pinto Case" (1991) 43 Rutgers LR 1013.

While the abolition of marriage may seem radical,⁵⁶ it must be remembered that the marriage to which this Article refers is legal marriage. As such, the abolition of marriage could easily be accomplished through a swift legislative act. Or the judiciary in numerous nations could logically declare legal marriage as a contravention of many individual rights, not limited to discrimination on the basis of sexual orientation, but including gender and marital status discrimination. Such abolition of marriage would not mean that marriage as a social, as a spiritual or religious, or as a psychological matter would be outlawed.

Instead, the abolition of legalised marriage would mean that the State would not relate to its citizens on the basis of their intimate relations. Most of us would agree with the State's articulated practice of non-discrimination on the basis of gender in pay scales in public employment as well as with the State's imposition of non-discrimination on private employment. The practice of discrimination, however, was a product of thinking not only of gender roles but also of the "family wage" system that provided more pay for men who were supporting families. It seems to me that contemporary practices based upon familial relations are similarly problematic.

Abolishing legal recognition of marriage would also mean that a nation could not resort to formal marital relations to determine the rights of its citizens. This is especially pertinent in the national engagement with minority populations, including ethnic minorities and indigenous populations. The state sanctioning of intimate relations is an imperialist and colonising act. Even when the state seeks to recognise "common law" marriages, it forces persons into categories which may not accurately reflect social realities. The example of Hawai'i is instructive in that the categories of family and marriage are plastic and performative, with kinship being attributed to those who act as kin, including friends and lovers.⁵⁷ It is not simply a matter of concluding that some cultures have a more expansive definition of "family," but a recognition that for some cultures "family" is not a meaningfully inherent category.⁵⁸ The privileging of marriage as the primary legal expression of an intimate relationship, even if including same-sex couples, does violence to the complex configurations of intimate relations.

⁵⁶ Although not so radical that other legal scholars do not agree. See generally, Martha Fineman, *The Neutered Mother, the Sexual Family and other Twentieth Century Tragedies* (1995); Wayne Morgan, "Love is a Battlefield" Paper Presented at ALTA 1996. See also, Student Note, Steven K Homer, "Against Marriage" (1994) 29 Harv CR-CLLR 505.

⁵⁷ Robert Morris (Kap_ 'ihiahilina), "Configuring the Bo(u)nds of Marriage: The Implications of Hawaiian Culture and Values for the Debate about Homogamy" (1996) 8 Yale J Law & Humanities 105.

⁵⁸ For further discussion of the category of family, see Ruthann Robson, "Resisting the Family: Repositioning Lesbians in Feminist Legal Theory" (1994) 19 SIGNS 975.

Further, the abolition of marriage would assist those people resisting the privatisation of government responsibilities toward individuals. Much of the contemporary privatisation discourse seeks to encourage "family" responsibility while allowing the government to escape from its obligations. As Jane Kelsey notes in the New Zealand/Aotearoa context, attacks on the welfare state are rhetorically coupled with blaming breakdowns in traditional patriarchal family structures for all social ills.⁵⁹ Moreover, specific reforms aimed at dismantling the welfare state often take direct aim at those who dare to be unmarried. For example, the government of New Zealand/Aotearoa altered the universal allowance for students over 20 to target unmarried students under 25, whose eligibility would be based upon parental income, whether or not the students lived at home or came from a non-university town.⁶⁰ A typical pattern in privatisation is to limit support for "single adults" because such people possess no dependents, and then to limit family support on the basis that the disadvantages such people suffer are attributable to deviation from the requisite two-parent family. Thus, while no one is forced to marry under present legal regimes in the common law nations, the choice whether or not to marry is loaded with various incentives and disincentives which are enforced by state power.

The abolition of the legal institution of marriage would prevent the state from using marriage as a conduit to accomplishing its own ends, be they fiscal reorganisation or the maintenance of dominant gender, ethnic, racial, or sexual configurations. This is not to argue that the individual as the basic unit of society is without severe political and philosophical problems.⁶¹ However, the problems inherent in individualism are not solved by permitting the State to vary its relations to individuals based upon their marital status.

The same-sex marriage issue is an opportunity to challenge not only the status of gay men and lesbians, but the status of the State's recognition and imposition of intimate relations for its subjects through its legal regime. While legal regimes are presently confronting the issue of same-sex marriage and reaching disparate results, the larger question of the wisdom of the legal institution of marriage has yet to be seriously addressed by such regimes. The present state of marriage includes "the state" as a necessary actor; it is time to question whether all of us are being served by such an inclusion.

⁵⁹ Jane Kelsey, *The New Zealand Experiment: A World Model for Structural Adjustment?* (1995) 332-4.

⁶⁰ *Ibid.*, 224.

⁶¹ See Anna Yeatman, "Justice and the Sovereign Self" in Margaret Wilson and Anna Yeatman (eds) *Justice and Identity: Antipodean Practices* (1995) 195; Margaret Thornton, "Embodying the Citizen" in Margaret Thornton (ed) *Public and Private: Feminist Legal Debates* (1995) 198.