

1. Love and Marriage

*Cuz if you liked it then you should have put a ring on it
If you liked it then you shoulda put a ring on it.¹*

Introduction

William Eskridge argues that ‘marriage is an institution that is constructed, not discovered by societies’.² The history of marriage seen through its laws certainly bears this out. Marriage has meant different things at different times. It has transmogrified from being a religious sacred institution to a contractual legal one, from a patriarchal institution to a more equal partnership based on freedom and equality. Over time, marriage has been understood in many different ways. It has been considered central to sexual expression and the procreation of children, the formation of community and of social and political alliances. It has been considered as an important way to regulate property, citizenship and the giving and receiving of care. While many of these functions are not denied by a contemporary understanding of the institution, a significant argument now exists that marriage in contemporary society is, and should be understood primarily as an institution that gives expression to love. It is the aim of this book to test the visibility of this view in the legal discourse and to assess the consequence of this for the meaning of both marriage and love.

This chapter will briefly outline the development of the law of marriage in England and Australia, from old common law principles, to reforms in the nineteenth and twentieth centuries, before turning to a discussion on how we can best now understand the institution and the extent to which we can consider it a love institution. Finally, the chapter will turn to consider the consequences of connecting marriage with love, particularly in the light of feminist critiques of both marriage and love.

The Common Law of Marriage

A good place to begin a discussion on the common law of marriage is with Sir William Blackstone’s *Commentaries on the Laws of England*, first published in

1 Beyonce Knowles, ‘Single Ladies’ (written by T L Harrell, B Knowles, T Nash & C Stewart) c2009. <http://www.metrolyrics.com/single-ladies-lyrics-beyonce-knowles.html#ixzz0s85Xep6J> accessed 28/06/10.

2 W N Eskridge jnr, ‘A History of Same-Sex Marriage’ (1993) 79(9) *Virginia Law Review* 1485.

1765–1769. The influence of this work and its author cannot be underestimated; it has been described by some as being the second most important text after the Bible.³

Blackstone makes the distinction between marriage as a civil contract and marriage as a spiritual union. As a civil contract, marriage must satisfy certain preconditions: the parties must be free and willing to enter into the contract, as well as meeting the conditions for being capable of entering into the contract (age or parental consent, mental competency, consanguinity and affinity). Apart from death, the only other way to end a marriage was to get a divorce. A divorce (*vincula matrimonii*) could be granted if the marriage was prohibited under canonical laws (consanguinity of the parties, consummation) or because the marriage had become ‘improper or impossible’ due to one of the parties having an ill temper or committing adultery (divorce *a mensa toro*).

The consequences of marriage were significant, especially for women. Blackstone sets out in the following paragraphs a regime of marriage which dogged married women for centuries:

[B]y marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing: and is therefore called in our law-french a *feme covert* ... her condition during marriage is called her *coverture*.⁴

But, though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and as acting by his compulsion. And therefore all deeds executed, and acts done, by her, during her *coverture*, are void; except it be a fine, or the like matter of record, in which case she must be solely and secretly examined, to learn if her act be voluntary.

[T]he husband also (by the old law) might give his wife moderate correction. For, as he is to answer for misbehaviour, the law thought it reasonable to intrust him with this power of refraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer.⁵

3 S B Presser, ‘Marriage and the Law: Time for a Divorce?’ in J A Nichols (ed), *Marriage and Divorce in a Multicultural Context: Multi-Tiered Marriage and the Boundaries of Civil Law and Religion* (Cambridge University Press, Cambridge 2012) 81.

4 Sir William Blackstone, *Commentaries on the Laws of England in Four Volumes*, vol 1 (Garland Publishing Inc, New York 1978) 442.

5 Blackstone, *Commentaries on the Laws of England* 444.

From this beginning, Susan Blake argues that marriage in the common law tradition can be understood via an analysis of the three inter-related concepts of unity, consortium and support.⁶ The concept of unity is traced to the Bible and the creation of Eve from Adam's rib. She claims that it is this concept of unity that justifies the idea that upon marriage the couple became one person, and that person is the husband. This justifies the appropriation of the wife's property by the husband, and the almost total prohibition that the law placed upon a married woman's right to participate separately in any economic activity.

Consortium⁷ is a very broad concept that can be understood around the idea of 'a sharing of two lives' and 'implies a companionship between each of them, entertainment of mutual friends, [and] sexual intercourse'.⁸ The concept has in the past been used to justify legal principles such as: that a husband and wife should live together;⁹ that each spouse has a duty to provide reasonable services to the other; and that a married couple has a right to privacy.¹⁰ Finally, Blake claims financial support as another of marriage's central ideas. At common law a husband had an obligation to support his wife. So much so that the wife could evoke the common law agency of necessity and pledge her husband's credit if he was not providing essentials for her and her children. This would include the provision of food, clothing and housing. But the payback for this support was great.

Alongside these ideas of marriage, arguably the most decisive of the institution's meanings comes from the fact that it entrenched the dominance of the male/husband, and the complete subordination of the female/wife. This was so complete in the legal definition of marriage that it led many to have argued that historically, marriage was in fact a 'civil death' for women, who were treated like children, idiots, criminals and even slaves.¹¹ Lawrence Stone claims that the only thing that saved women from the hell that marriage could legally be was the 'skilful resistance of many wives and the compassion and goodwill of many

6 S H Blake, *Law of Marriage* (Barry Rose Publishers Ltd, Chichester 1982) 7–12.

7 For an argument as to the injustices that this concept had in Australia, see M Thornton, 'Loss of Consortium: Inequality Before the Law' (1984) 10 *The Sydney Law Review* 259–276.

8 *Crabtree v Crabtree (No 2)* [1964] ALR 820 quoted in Thornton 'Loss of Consortium' 265.

9 See *Dunn v Dunn* [1948] 2 All ER 822 and *Munro v Munro* [1950] 1 All ER 832.

10 Blake, *Law of Marriage* 8–11.

11 M Lindon Shanley, *Feminism, Marriage and the Law in England, 1850–1895* (Princeton University Press, Princeton New Jersey 1989) 10–11. The fact that children had more legal capacity is a point well recognised in an eighteenth century book on the laws of marriage. J Walthoe, *Baron and Feme or, the Law of Husbands and Wives* reprint of the 1700 edition, (Garland Publishing Inc, New York 1978). See this argument in D Post, 'Why Marriage Should Be Abolished' (1996–97) 18 *Women's Rts L Rep* 283–313. See also J S Mill & H Taylor (1869) 'The Subjection of Women' <http://archive.org/details/subjectionofwome00millrich> accessed 21/06/13.

husbands'.¹² It is worth noting here that feminists have been instrumental in the reforms that have taken place to marriage and continue to be careful and watchful over the institution.¹³

The common law tradition teaches us that a marriage is a unity between two people, but the relationship between them is not equal. The man is the superior of the two. In fact, the woman is not only inferior, but her existence is legally 'suspended' during marriage. This translates into a husband being entitled to act for her and any children of the marriage. Therefore, married women could not sue, could not be sued, could not sign a contract and could not make a valid will. Upon marriage her personal property became her husband's.¹⁴ A husband had authority over domicile decisions and all matters relating to the upbringing and education of their children. The rights of the husband extended to his right to 'moderately correct' her if she misbehaved. This was emphasised by Lord Hale's much repeated maxim that a husband could beat his wife 'although not in a violent or cruel manner – not with a stick thicker than his thumb'.¹⁵ Ultimately (as will be discussed in more detail in chapter two) the husband also had unlimited sexual access to his wife. Sir Matthew Hale in *History of the Pleas of the Crown* (1736) stated that a husband cannot be guilty of 'a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself in this kind unto her husband which she cannot retract'.¹⁶

To complete the picture, something must be said of the role of equity. At least in relation to the ownership and control of property, some married women could find some protection from some of these harsh laws from the courts of equity.¹⁷

12 I Stone, *Broken Lives* (Oxford University Press, Oxford 1993) 26.

13 See, for example, M A Fineman, 'The Meaning of Marriage' in A Bernstein (ed), *Marriage Proposals: Questioning Legal Status* (New York University Press, New York 2006); C Smart, *The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations* (Routledge & Kegan Paul, London 1984).

14 A husband could not alienate this property but he could dispose of any income that came from it as he pleased.

15 Lord Hale quoted in Lee Holcombe, *Wives and Property: Reform of the Married Women's Property Law in Nineteenth Century England* (Martin Robertson, Oxford 1983) 30. The impact that these laws had on married women was clearly harsh. Many accounts of horror stories can be found. For example, see Francis Cobbe's essay 'Wife Torture in England' in *The Contemporary Review* April 1878 <http://www.keele.ac.uk/history/currentundergraduates/tltp/WOMEN/HANNAM/TEXT/HAN19IIA.HTM> accessed 17/01/2013, and W Moore, *Wedlock* (Weidenfeld, London 2009).

16 Sir Matthew Hale, *History of the Pleas of the Crown 1736* vol 1 P R Glazebrook (ed), (Professional Books Ltd, London 1971) 629. This will be discussed further in chapter two.

17 This protection from Equity was realistically only available to the wealthy and therefore of limited protection for women in general. Leaving aside the expense of the courts themselves, the whole concept of the trust was really only workable in very wealthy families where it was possible to tie up property and capital. Furthermore, it was arguable as to whether the protection was for the benefit of the married woman, or rather for the protection of the assets of the family of origin against an interloping husband. A trust could, in fact, place a married woman in the power of multiple men, as she was then controlled not only by her husband, but also male trustees and solicitors. R Auchmuty, 'The Fiction of Equity' in Susan Scott-Hunt and Hilary Lim (eds), *Feminist Perspectives on Equity and Trusts* (Cavendish, London 2001). See also M Conway, 'Equity's Darling?' in S Scott-Hunt & H Lim (eds), *Feminist Perspectives on Equity and Trusts* 43.

Along with infants and lunatics, wives were considered a special group requiring protection from the equity courts. On some level this protection was given for all of the above injustices. In the case of ownership and control of property, women could have control over property by the use of trusts. Once a trust was created for her, this property was regarded as separate property over which she and her trustee had control. This trust would also enable her to have contractual capacity in relation to that separate property. Equity also recognised as her property, rather than her husband's, gifts given from friends and lovers and, on the question of custody of children, equity courts were willing to deny a father custody of his children if the welfare of the children justified it. Equity did nothing, however, to protect married women from physical and sexual abuse.

Nineteenth-Century Reform

The nineteenth century saw a number of significant reforms that began the erosion of some of the worst aspects of marriage. The Married Women's Property Act of 1870, despite being described as a legislative abortion,¹⁸ was the beginning of some recognition that married women had some rights over property. In very simple terms, the Act gave women the right to own and control property acquired through inheritance, and retain as their own property money earned through employment and investments. The Married Women's Property Act of 1882 carried through the legislative aims of the 1870 Act and passed into law the principle that married women had the same rights in respect to property as unmarried ones. It established that women could acquire, hold and dispose of all property, could enter contracts, sue and be sued (civil and criminal actions) and could carry out any business separate to their husbands. Subsequent Acts were passed to fill gaps in the equality principle as they arose. The Married Women's Property Act of 1893, for example, bound women's separate property to any contract regardless of when it was acquired, and the Law Reform (Married Women and Tortfeasors) Act removed the idea of separate property and replaced it with the idea of married woman's property. This change removed the idea from equity that married women only had the right to own property as a special and separate right. Lee Holcombe argues that this reform constituted the abolishment of the wife as a '*feme covert*'.¹⁹

At the same time as reforms to women's right to own property were taking place, further change was coming to marriage with the erosion of the idea that marriage was an institution entered into for life. Notwithstanding the significance of the Reformation, divorce was difficult to obtain during the

18 Arthur Arnold quoted in Holcombe, *Wives and Property* 179. These outcomes were far short of what the original framers of the Act had sought.

19 Holcombe, *Wives and Property* 224.

eighteenth and nineteenth centuries. England's traditional divorce laws largely rested with the ecclesiastical courts and were thus rarely granted. Parliament could grant a divorce via a private act, but this was complex and expensive. Between 1670 and 1857, only 325 people obtained a divorce, and only four in total were obtained by female petitioners.²⁰ So difficult was the process of obtaining a divorce, Leonie Star asserts that for many, bigamy, murder and for a short time, wife sale, were the only alternatives.²¹

In 1857, the parliament of the UK passed the Matrimonial Causes Act. This Act created a civil court that was empowered to grant divorces without any reference to ecclesiastical courts. It created a new Court for Divorce and Matrimonial Causes. The grounds upon which divorce could be granted were different for men and women (the infamous divorce double standard). A husband only needed proof of his wife's adultery, whereas for a wife, a divorce could only be granted if her husband's adultery was accompanied by other offences such as incest, bigamy, sodomy, bestiality, cruelty or desertion. This view was in keeping with the general double standard that existed in society that tolerated male infidelity while simultaneously punishing women severely for it.

Early colonial Australia provided an interesting context for these laws. The States were encouraged to pass their own version of the 1857 Act, and did so. South Australia was the first in 1857 and New South Wales the last in 1873. Conditions in early Australia were not ideal for permanent and monogamous relationships. Many convicts had left families behind with little hope of ever seeing them again, there was a high mobility rate, with many moving frequently in search of 'better conditions and greater wealth', and there was a general shortage of women. These conditions made for a greater need for a clear-cut divorce law. As Henry Finlay argues:

There was a major need for the availability of a law of divorce that would allow a deserted wife an independent existence without a husband, where the latter absconded. In a colony where there was a scarcity of women, it also made her free to contract another marriage with a provider for her children, in preference to the greater uncertainty of de facto habitation.²²

20 L Star, *Counsel of Perfection: The Family Court of Australia* (Oxford University Press, Australia 1996) 25.

21 Star, *Counsel of Perfection* 26–27. See also L Stone, *Road to Divorce: England 1530–1987* (Oxford University Press, Oxford 1990).

22 H Finlay, 'Divorce and the Status of Women: Beginnings in Nineteenth Century Australia' Australian Institute of Family Studies seminar paper <http://www.aifs.gov.au/institute/seminars/finlay.html> accessed 21/03/2013.

As a result, bigamy based on the presumption of death was much more widespread in Australia than in England. Despite the different conditions and attempts to pass laws that were more in keeping with the social conditions in Australia, the laws followed more or less the same pattern as they did in England.

By the end of the nineteenth century, married women had won a number of important rights in relation to the ownership of property and the right to leave a marriage. There were other significant reforms in relation to the custody of children. The Infant Custody Act 1839 allowed the Court of Chancery to award mothers custody of their children under the age of 16. Some protection was also won in relation to domestic violence. The Matrimonial Causes Act of 1878 allowed women who had been beaten by their husbands to get a separation order from a local magistrate, putting an end to the idea that he could chastise her physically. Such an order would thereafter prevent her husband from seeking a restitution of conjugal rights, an action that was otherwise not abolished till the late twentieth century.²³ Another victory came in 1891 in the case of *Regina v Jackson* when the Court held that a husband does not have the right to make a prisoner of his wife in the home.²⁴ These changes in the law did not change the fact that women had the right only to apply to a court to be able to leave an abusive and brutal husband, they did not have the right to leave per se. As Shanley points out, to do so would leave a wife open to being guilty of desertion, receiving an order for restitution of conjugal rights, lose her right to claim maintenance, and affect her claim to her property (before 1882).²⁵ Furthermore, as it is still the case, there is a significant gap between the law as written and the law as practiced. Francis Cobbe's essay 'Wife-torture in England' documents a shocking tolerance by the courts towards domestic violence during this period.²⁶ The economic realities also meant that it was difficult for women to leave an unhappy marriage and support themselves and their children. Nevertheless, significant reform did take place in the nineteenth century and continued into the twentieth century.

Twentieth-Century Reform

Reform to marriage during the twentieth century was substantial. The introduction of no fault divorce, the removal of some old common law vestiges of patriarchy and the general development of a rights and equality based discourse had significant impact.

23 Matrimonial Proceedings and Property Act 1970 UK; Family Law Act 1974 AUS.

24 *R v Jackson* [1891] 1 QB 671.

25 Shanley, *Feminism, Marriage, and the Law in England, 1850–1895* 174.

26 Cobbe, 'Wife Torture in England'.

The federal jurisdiction for marriage was exercised for the first time in Australia by the passing of the Matrimonial Causes Act of 1959. This Act legislated 14 grounds for divorce. The grounds mirrored some already existing state legislation. Some of these grounds were adultery, desertion, wilful refusal to consummate the marriage, cruelty, rape, sodomy, bestiality and habitual drunkenness and habitual intoxication as a result of drug use. These causes were applied equally to men and women thus removing the infamous divorce double standard.²⁷ This Act also removed the inability to consummate a marriage as a ground for the making of a declaration of nullity, another significant departure from the religious meaning of marriage. The importance of consummation, however, remained ambiguous given that a possible ground for divorce was to wilfully refuse to consummate a marriage. The Act was predicated on the idea that divorce would be granted if one of the parties was at fault, the only provision which would allow parties to divorce without this requirement was if the parties had been separated for five years. Out of 24,500 divorces granted under this Act, the most popular of the grounds were desertion (9,000), adultery (8,000), separation and cruelty.²⁸

No-fault divorce was introduced with the passing of the Family Law Act (FLA) in 1975 (Matrimonial Causes Act 1973 in the UK). This Act can be seen as both a reaction to, and a scaffolding of the many social changes that had occurred in the previous decades. Nonetheless it remains one of the most contentious pieces of legislation ever passed in Australia.²⁹ The FLA removed from the process the attribution of blame and the need to provide clear and graphic evidence of that blame, and instead replaced all 14 grounds with a single one, 'irretrievable breakdown',³⁰ evidenced simply by a 12-month separation.³¹ The granting of a divorce thus became an administrative rather than an adversarial process, it provided a marriage that was no longer working with 'a decent burial with the minimum of embarrassment, humiliation and bitterness'.³²

27 For a discussion of the divorce double standard see A S Holmes, 'The Double Standard in the English Divorce Laws, 1857–1923' (1995) 20(2) *Law and Social Inquiry* 601–620.

28 Starr, *Counsel of Perfection* 57. The 'fault' scheme under the Matrimonial Causes Act has been described as creating incentives to commit abuses, encouraging collusion and perjury, and blackmail. L Young & G Monahan, *Family Law in Australia* seventh edition (Lexis Nexis Butterworths Australia 2009) 189. The process required for divorce under this legislation has been described as sordid and highly adversarial. See E Cox in ABC Radio National 'Finding Fault' *Hindsight* 15/08/10 <http://www.abc.net.au/rn/hindsight/stories/2010/2977277.htm> accessed 02/09/2010. See also S Swain, *Born in Hope: The Early Years of the Family Court of Australia* (UNSW Press, NSW 2012) 51.

29 Starr *Counsel of Perfection* 51.

30 The FLA however also empowered the newly established Family Law Court to make determinations on spousal maintenance; child maintenance; child custody and contact, and property distributions. All of these are ancillary to the granting of a divorce. The Act also abolished the right for damages for adultery, enticement and criminal conversation.

31 FLA s 48(2).

32 Great Britain Law Commission, 'Reform of the Grounds of Divorce: The Field of Choice' report no 6 in Starr, *Counsel of Perfection* 55.

The FLA makes a number of other important provisions. In regard to the custody of children, it legislated the principle that custody decisions must be made according to the principle of what is ‘in the best interest of the child’, and a rebuttable presumption exists that parental responsibility be equally shared between fathers and mothers.³³ In regard to property distribution, the court has wide discretion to make orders according to the parties’ contribution (financial and non-financial) and their future needs. There no longer exists any assumption that property obtained during a marriage belongs to the husband alone. In regards to financial support, both parents are now considered responsible for the maintenance of the children of a marriage and spousal maintenance is regarded in gender neutral terms, it is no longer automatically assumed, and it is usually granted for only limited and short term circumstances.³⁴

Furthermore, in keeping with a more individualistic view of marriage, the FLA encourages parties to come to their own agreements in relation to their financial settlement, maintenance payments and custody arrangements, giving courts power in these areas only when the parties themselves cannot reach agreement or when the agreements reached are considered unjust or inequitable.³⁵

There were other legal changes that had significant impact upon the institution of marriage. In 1991, (much later than one would have believed) the common law finally removed the marital immunity against rape. In *R v L* the High Court of Australia said that the notion ‘was out of keeping with the view society now takes of the relationship between the parties to a marriage’.³⁶ Justice Brennan went so far as to question the validity of the common law principle itself arguing that sex in marriage, according to ecclesiastical law, was always subject to consent.³⁷ Other legal reforms such as the recognition of de-facto relationships³⁸ and civil unions,³⁹ as well as reforms that removed the distinction between children born in wedlock and outside of it,⁴⁰ further challenged the centrality of marriage in organising intimacy, family and procreation.

33 See sections 60CA, 60CC, 61C, 61DA.

34 See Part VII.

35 See sections 63AA, 63B and 85–89.

36 *R v L* (1991) 174 CLR 390 (Mason CJ, Deane & Toohey JJ). In England the immunity was also removed in the same year in the case of *R v R* [1991] 2 WLR 1065.

37 *R v L* (1991) 174 CLR 396 (Brennan J). This case will be discussed further in chapter two.

38 State legislation recognising de-facto relationships began to be passed in the 1980s. See M Harrison, ‘The Legal System and De Facto Relationships’ (1991) 30 *Family Matters* 30–33. See R Probert, *The Changing Legal Regulation of Cohabitation: From Fornicators to Family 1600–2010* (Cambridge University Press, Cambridge 2012).

39 Civil Union legislation currently exists in Victoria the ACT and Tasmania. Tasmania was the first state to pass legislation in 2004.

40 In the mid-nineteen seventies most states passed legislation to remove disadvantages for ex-nuptial children. See Law Reform commission of NSW Issues Paper 1 (1981) — De Facto Relationships <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/ip1chp3> accessed 16/01/2013.

Finally, mention must be made of international and national human rights discourse. The signing of international treaties against the discrimination of women (Convention for the Elimination of Discrimination against Women 1979), and the subsequent passing of anti-discrimination laws such as The Sex Discrimination Act (1984), outlawed both explicit and implicit discrimination based on sex and gender. These international and domestic laws catapulted society into a discourse of rights which has led to a general rethinking of how men and women were and are treated in the workplace and in the home, and has further added to the erosion of marriage as a patriarchal institution.

The Meanings of Marriage: Holy Estate, Oppressive Patriarchy, Equal Love

This brief legislative history shows considerable changes to the meaning of marriage in the past 300 or so years. There are now a plurality of meanings to marriage.⁴¹ Some have described marriage as an institution at a crossroad.⁴² In the introduction I expressed this as marriage embodying a number of contests. Returning to Blake's three concepts of unity, consortium and support, we can say that in many ways the institution still reflects these principles, but the way that we understand the principles themselves has now changed.

Marriage is no longer overwhelmingly seen as a religious, life-long or patriarchal institution. Despite the fact that churches continue to take a very active interest in marriage, as evidenced by the public discourse around same-sex marriage, statistics show that, for many, marriage is more secular and contractual than religious. In 2007, 63 per cent of marriages were conducted in a civil ceremony alone;⁴³ this reflects a radical departure from the idea of marriage as 'a state of existence ordained by the Creator', 'a holy estate' and a 'sacred obligation'.⁴⁴ Similarly, marriage is no longer a life-long institution. In Australia, a third of all marriages end in divorce.⁴⁵ The other significant change that has occurred to marriage is the slow removal of men's total power and control over their wives. Reforms during the nineteenth and twentieth centuries slowly eroded the idea that husbands own their wives and can use, and abuse, them as they see fit.

41 As Martha Fineman says, the reasons for marrying are as 'diverse as the inhabitants of our contemporary, secular state'. 'The Meaning of Marriage' 33.

42 See M Garrison and E S Scott (eds), *Marriage at the Crossroads: Law, Policy and the Brave New World of Twenty-First-Century Families* (Cambridge University Press, Cambridge 2012). See also Martha Fineman, *The Autonomy Myth: Theory of Dependency* (New York Press, New York 2004) and 'The Meaning of Marriage'.

43 C Frew, 'The Social Construction of Marriage in Australia' (2011) 28 *Law in Context* 81.

44 J Witte jnr, *From Sacrament to Contract: Marriage, Religion and Law in the Western Tradition* (Westminster John Knox Press, Louisville Kentucky 1997) 194.

45 <http://www.mydivorce.com.au/divorceadvice/divorce-statistics-australia.htm> accessed 10/01/2013.

Even though much has changed, marriage still remains a problematic institution for feminists. Dianne Post,⁴⁶ for example, has described marriage as an enterprise that has a 50 per cent failure rate, which results in domestic violence in 63 per cent of cases, and which results in child abuse in up to 80 per cent of cases. She says that if this was any other enterprise it would be abolished, instead, 'politicians extol it, courts ruminate over its value to society, and business, religious and cultural leaders pander to its mystique'.⁴⁷ This view leads many to question the worthiness of the existence of the institution *in toto*.

Martha Fineman, for example, has consistently argued that the state should not support and privilege the family unit as defined via marriage. Marriage, Fineman argues, has become a largely irrelevant institution, whose primary and important functions and goals can and are being met elsewhere.⁴⁸ She argues that the state should, in fact, abandon civil marriage as an institution and instead support relationships which ensure that human needs are met humanely and justly.⁴⁹ Abolishing marriage would take gender equality seriously by letting individuals themselves bargain for the content of their agreements.⁵⁰ Disputes arising from such agreements would be dealt with according to general principles of equity and common law rather than specialised principles of family law. This would ensure 'that a lot more regulation (protection) would occur once interactions between individuals within families were removed from behind the veil of privacy that now shields them'.⁵¹ By abolishing marriage, the state would be removing protection for such behaviour and exposing women and children to the same protections that the law offers all citizens. In fact, Fineman says, 'we would even begin to develop theories of tort to compensate sexual affiliates for conduct endemic to family interactions but considered unacceptable among strangers'.⁵²

46 D Post, 'Why Marriage Should be Abolished' (1996–97) 18 *Women's Rights Law Reporter* 283–313.

47 Post, 'Why Marriage Should be Abolished' 283. How Post arrives at these figures is not clear, but her point is valid, there are many unhappy and failed marriages and much domestic violence and child abuse by any measure of the statistics.

48 Fineman argues that the functions that are currently fulfilled by marriage can be and are being fulfilled by other relationships. She claims that marriage is expected to do a lot of essential work in our society, 'children must be cared for and nurtured, dependency must be addressed, and individual happiness is of general concern', but all of these tasks can be met by transferring the legal status and the social and economic subsidies to the relationship of caretaker and dependent. This change would not only be fair but it would also be more reflective of current realities. Fineman quotes US data which shows that less than a quarter of households are made up of married couples and their children. Fineman, 'The Meaning of Marriage' 30, 39, 42.

49 M Fineman, *The Autonomy Myth*. See also N D Polikoff, 'Why Lesbians and Gay Men Should Read Martha Fineman' (2000) 8 *American University Journal of Gender Social Policy and Law* 167–176. However this is not to say that marriage is universally condemned by feminists. See, for example, Pat Maniardi who said, 'I believe women — and men — would like love, security, companionship, respect and long term commitment to each other. Women rarely get much of this, in marriage or out, but we want it.' P Maniardi, 'The Marriage Question in the Feminist Revolution' cited in C A Douglas, *Love and Politics: Radical Feminist and Lesbian Theories* (Isis Press, San Francisco 1990) 169.

50 Fineman, 'Meaning of Marriage' 58.

51 Fineman, 'Meaning of Marriage' 58.

52 Fineman, 'Meaning of Marriage' 59. Furthermore, abolishing marriage would be of benefit to same-sex couples whose relationships currently do not enjoy the same status of marriage. If the state does not prefer

While many are calling for the abolition of the institution altogether, it is important to acknowledge that, for many, marriage still retains importance through its traditional meanings. Churches still see the institution primarily in religious terms. Empirical studies also show that religious believers are more likely to marry than non-religious believers,⁵³ and that, at least at the time of entering into marriage, people intend it to be a life-long relationship.⁵⁴ And many still argue that the institution is largely constructed around patriarchy.⁵⁵ Every now and then we are reminded of some of these meanings of marriage. For example, take the case in 2008 of Italian bishop Lorenzo Chiarinelli, who refused to allow a young paraplegic man to marry in the Catholic Church on the grounds that he would be unable to consummate the marriage.⁵⁶ Consider also the fact that, in 2012, the Anglican Sydney diocese approved a new form of words for marriage vows that includes a promise by the wife to submit to her husband.⁵⁷

For those who reject traditional meanings, a number of different theories to understand modern marriage have been postulated. Witte claims that by the turn of the twenty-first century marriage is viewed as ‘a private bilateral contract to be formed, maintained, and dissolved as the couple sees fit’.⁵⁸ This would imply that marriage is now to be understood by the same forces that underlie all contracts, freedom, equality and intention. This is undeniably so, but it ignores other important aspects of the relationship associated with for example happiness, satisfaction, care and altruism. In other words, a contractual understanding of marriage does not make room for an understanding of its emotional underpinnings.

Wilcox and Dew argue that marriage today has become an expressive ‘super relationship’ for soulmates, whose primary focus is the emotional fulfillment of

a form of sexual affiliation then ‘none would be prohibited’, and if ‘substantial economic and other societal benefits currently afforded to certain heterosexual units would no longer be justified’, then ‘punishments of “deviant” sexual connections would no longer be permitted’. Fineman, ‘Meaning of Marriage’ 59.

53 See B Hewitt and J Baxter, ‘Who Gets Married in Australia?: The Characteristics Associated with a Transition Into First Marriage 2001–6’ (2012) 48 *Journal of Sociology* 43–61.

54 Empirical studies show that a major reason given for getting married is the desire to make a life-long commitment to another person. See Relationships Australia, ‘Relationships Indicator Survey’ <http://www.relationships.org.au/what-we-do/research/australian-relationships-indicators> accessed 16/02/2013.

55 See also Martha Fineman, *The Autonomy Myth* and ‘The Meaning of Marriage’. See also Post, ‘Why Marriage Should Be Abolished’.

56 Discussion of this case on a blog featuring the story brought this telling comment from a reader, again reminding us of the importance that is attached to marriage as procreation. The blogger said, ‘apparently the secular media decided to present this unremarkable and perennial fact as “news”, as part of the evil campaign to convince people that “marriage” can be redefined to mean simply a public declaration that two people love each other’. ‘No Church Wedding for Impotent Man’ *Cath News* 12/06/2008 <http://www.cathnews.com/article.aspx?aeid+7581> accessed 07/13/2009.

57 This new form of words requires the minister to ask the bride: ‘Will you honour and submit to him, as the church submits to Christ?’ and the bride is required to pledge ‘to love and to submit’. K Burke ‘To Love and to Submit: A Marriage Made in 2012’ *Sydney Morning Herald*, 25/09/2012 <http://www.smh.com.au/action/printArticle?id=3581935> accessed 1/06/2013.

58 Witte, *From Sacrament to Contract* 195.

each of the spouses in the marriage. This is in contrast to the traditional model of marriage that has focussed on the norms of permanency, fidelity, mutual aid, parenthood and gender complementarity.⁵⁹ It is the emotional content of the relationship, therefore, that one must look to for its definition. The lens that best provides this is romantic love. One of the motifs, if not the central motif of marriage in the west in the twenty-first century is romantic love. Empirical studies bear this out. The longitudinal study conducted by Relationships Australia consistently reports that love is either the top reason, or one of the top reasons people give for marrying. (Other factors include companionship and wanting to signify a life-long commitment.) In 2008, a staggering 91 per cent of respondents said it was the reason they married.⁶⁰ Alison Diduck and Felicity Kaganas argue that, when all is said and done, marriage is still seen as ‘the ultimate commitment one can make to a sexual or emotional partner’,⁶¹ and while it is undeniable that there may be many motivations for marriage, Bix claims, they are almost always framed within the language of love.⁶²

The coming together of love and marriage has been documented by Stephanie Coontz in her book *Marriage, a History: How Love Conquered Marriage*.⁶³ Coontz shows that the idea of marrying for love was a highly radical idea, which came to be accepted in the west by the end of the seventeenth century. Before this time, marriage served a variety of social, economic and political purposes. As Coontz puts it, it did much of the work of markets and governments and it ‘orchestrated people’s personal rights and obligations in everything from sexual relations to the inheritance of property’.⁶⁴

However, she says that by the end of the seventeenth century marriage came to be seen as a private affair, and its success was based upon how well it met the emotional needs of its members. This developed in the eighteenth century, when marriage was elevated to new sentimental heights:

The Victorians were the first people in history to try to make marriage the pivotal experience in people’s lives and married love the principal focus of their emotions, obligations and satisfactions ... Victorian

59 Wilcox & Dew, ‘Is Love a Flimsy Foundation?: Soulmate Versus Institutional Models of Marriage’ (2010) 39 *Social Science Research* 687–699.

60 See Relationships Australia, ‘Relationships Indicator Survey’ <http://www.relationships.org.au/what-we-do/research/australian-relationships-indicators> accessed 16/01/2013. See also A Diduck & F Kaganas, *Family Law Gender and the State: Text, Cases and Materials* (Hart, Oxford 2006) 35–36; P R Amato, ‘Institutional, Companionate, and Individualistic Marriages: Change Over Time and Implications for Marital Quality’ in Garrison & Scott (eds), *Marriage at the Crossroads* 107–125.

61 Diduck & Kaganas, *Family Law, Gender and the State* 36.

62 B Bix, ‘Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage’ (1998–1999) 40 *William & Mary Law Review* 145–208.

63 S Coontz, *Marriage: A History — How Love Conquered Marriage* (Penguin Books, New York 2005).

64 Coontz, *Marriage: A History* 9.

marriage harboured all the hopes of romantic love, intimacy, personal fulfilment, and mutual happiness that were to be expressed more openly and urgently during the twentieth century.⁶⁵

Coontz argues that by the middle of the nineteenth century there was unanimity in the middle and upper classes in Europe and North America that 'the love-based marriage, in which the wife stayed at home protected and supported by her husband, was a recipe for heaven on earth'.⁶⁶

According to Marilyn Yalom, there is now a consensus that 'love has become synonymous with marriage in the western world'.⁶⁷ In her book, *A History of the Wife*, Yalom documents a letter to a 'Dear Abby' advice column in which the writer seeks advice regarding whether she should marry a man who would be 'a wonderful husband and father' but whom she does not love. The letter-writer asks: 'he is all a woman could ask for in a husband, but is that enough to replace love?' The answer comes back decidedly from Abby: 'If you marry this man, knowing in your heart you do not love him, you will be doing yourself and him a great disservice.'⁶⁸ This view is widespread. Lawrence Stone, for example, argues that there is a clear distinction in modern western societies between a marriage of interest and a marriage of love, with the former considered 'morally reprehensible'.⁶⁹

Even among the aristocracy, where there is still an understanding that marriages are dynastic rather than love unions, the rhetoric cannot be escaped. When the engagement between Prince Charles and Diana Spencer was announced in 1981, it was well understood that Charles had to marry, and that considerable work had been done to find him a wife who would fulfil all of the necessary requirements of being a princess and future queen. In a pre-wedding television interview, Prince Charles was asked whether he loved Diana. There was a moment of visible discomfort before he replied that it is hard to know what love is.⁷⁰ As Mary Evans explains, he could not answer truthfully that the marriage had been a result of 'dynastic pressures' and the best he hoped from the marriage was an 'amicable relationship'.⁷¹ As Evans claims, 'To admit openly that it is possible to enter a marriage and not be in love is tantamount to a refusal of Western culture and a distancing from one of the crucial tenets of popular culture.'⁷² It must also be

65 Coontz, *Marriage: A History* 177–78.

66 Coontz, *Marriage: A History* 162.

67 M Yalom, *A History of the Wife* (Perennial, New York 2001) xv.

68 'Dear Abby Advice Column' July 3 1998 *San Francisco Chronicle* in Yalom *History of the Wife* xi.

69 Stone, *The Family, Sex and Marriage in England 1500–1800* 86.

70 A Carthew, interview with Prince Charles and Lady Diana ITN 24 Feb 1981 http://news.bbc.co.uk/onthisday/hi/dates/stories/february/24/newsid_2516000/2516759.stm accessed 1/12/2010.

71 M Evans, 'Falling in Love is Falling for Make Believe: Ideologies of Romance in Post-Enlightenment Culture' (1998) 15 *Theory Culture and Society* 269.

72 Evans, 'Falling in Love is Falling for Make Believe' 269.

noted here that the idea of love based marriages has spread beyond western and English-speaking societies.⁷³ Furthermore, as will be shown in chapter four, the popularity of same-sex marriage doesn't make much sense unless we understand marriage as an institution grounded in romantic love.

Consequences of the Love Marriage (The Feminist Critique of Love)

The connection of love and marriage is not without its problems. Romantic love, from the very beginning, was considered a dangerous idea. Its connection with liberty and freedom, its disconnection from family, class, social and religious duty, make it an obvious target for criticism. Its association, no matter how misconceived, with free love and sexual freedom made it a threat to traditional family structures and to life-long monogamous marriage. This point has some weight. The association of love with marriage has been shown to make the institution of marriage a less stable and more fickle one.⁷⁴ Many point to the casualties of romantic love. These casualties are said to be high divorce rates, loneliness, poverty and social instability. As Solomon puts it:

Most of the world looks upon our romantic fantasies as a source of social chaos and irresponsibility ... [o]ur emphasis on romance encourages vanity instead of camaraderie, seclusion instead of community, whimsicality instead of responsibility, emotional excitement instead of social stability. The result seems to be a culture that is fragmented, frustrated and lonely just as much as (and because) it is romantic.⁷⁵

Beck and Beck-Gersheim, echoing some of the feminist's arguments we will see below, claim that modern love can turn into a destructive force. The meaning of love, they suggest, is always open for negotiation and always at risk. Love can

73 See R Goodwin, *Personal Relationships Across Cultures* (Routledge, USA 1999).

74 Empirical studies do show that marriages based on love are flimsy and much more likely to end in conflict and divorce than those based on values of permanency embedded in religious institutions. See W B Wilcox & J Dew, 'Is Love a Flimsy Foundation?: Soulmate Versus Institutional Models of Marriage' *Social Science Research* 39 (2010) 687–699.

75 Solomon, *About Love* 54. Even more than this, romantic love, along with romanticism in general, is seen as containing within it a deathly streak because it portrays true love as something that must be not only indifferent to, but even welcoming to death. Passionate love is not only the basis for a meaningful life but can also form the basis for a meaningful death. As West puts it, '[i]n reality the relationship of lovers is always vulnerable to frustration either by a hostile society or as a result of the waywardness of human emotion. Romantic extremism responds by showing its willingness to sacrifice reason, social order and, if necessary, life itself for the sake of its absolute commitment to love "even unto death". The impossibility of love in this world becomes the reason for its pursuit in another. A preoccupation with death was, indeed a recurrent feature of romantic thought.' D West, *Reason and Sexuality in Western Thought* (Polity Press, Cambridge 2005) 112.

end on one person's say-so at any time; there is no right of appeal. Love is the opposite of instrumental and rational behaviour, it makes its own rules 'out of sexual desire unhampered by moral or legal obligations'.⁷⁶ They argue:

For individuals who have to invent their own social settings, love becomes the central pivot giving meaning to their lives. In this world where no one demands obedience or respect for old habits, love is exclusively in the first person singular, and so are truth, morality, salvation, transcendence and authenticity ... Growing out of itself and its own subjective views, it easily turns totalitarian; rejecting any outside authority, and agreeing to take over responsibility, to compromise and be fair only for emotional reasons.⁷⁷

However, the most sustained critique of romantic love (not just marriage) comes from feminism. While both Solomon and Giddens have argued that the connection of love with freedom and equality can be liberating and empowering for women,⁷⁸ this assertion has been hotly contested by some feminists. Shulamith Firestone described romantic love as the pivot of oppression for women, describing love as a holocaust, a hell and a sacrifice.⁷⁹ In this, she echoed Simone de Beauvoir, who argued that given the unequal position of men and women, love becomes 'a curse that lies heavily upon a woman confined in the feminine universe, woman mutilated, insufficient unto herself. The innumerable martyrs to love bear witness against the injustice of a fate that offers a sterile hell as ultimate salvation.'⁸⁰ These views have been reiterated by later feminists. As Carol Smart puts it, feminists have identified love as an aspect of 'patriarchy's ideological armament through which women became hooked into dependent relationships with men, entered into an unfavourable legal contract (namely marriage) and ultimately ended up with care of the children'.⁸¹ Here Smart points to one of

76 Beck & Beck-Gernsheim, *The Normal Chaos of Love* 194.

77 Beck & Beck-Gernsheim, *The Normal Chaos of Love* 171.

78 See R C Solomon, 'Love and Feminism' in R B Baker K J Winger & F A Elliston (eds), *Philosophy and Sex*, third edition (Prometheus Books, New York 1998) and A Giddens, *The Transformation of Intimacy: Sexuality Love and Eroticism in Modern Societies* (Polity Press, Cambridge 1992).

79 S Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* (Bantam Books, New York 1970).

80 S de Beauvoir, *The Second Sex* trans H M Parshley (Alfred A Knopf, New York 1953) 669. See also Mary Woolstencraft and Harriet Taylor as discussed in S Mendus, *Feminism and Emotion: Readings in Moral and Political Philosophy* (MacMillan Press Ltd, GB 2000).

81 Smart, *Personal Life* (Polity Press, Cambridge 2007) 60.

the central underpinnings of the feminist critiques. Love is not itself oppressive but becomes so because of the social context in which it is conducted, namely patriarchy⁸² and the public and private divide.⁸³

This feminist critique of love, sex (and marriage) is developed by Eva Illouz in her latest book, *Why Love Hurts*. Illouz remains committed to love as a central idea of modernity and champions its egalitarian optimism and its ability to subvert patriarchy.⁸⁴ However, she also recognises that love is also the source of much misery, stemming from the ‘institutional arrangements’ around it. Love is played out in ‘the marketplace of unequal competing actors’ where some people, mostly men, are able to ‘command a greater capacity to define the terms in which they are loved by others’.⁸⁵ Control is exercised by the ways in which choice, freedom, autonomy and commitment are differently played out between men and women. Within all of these structures, Illouz argues, there is a mismatch of goals and expectations, and ‘a set of conundrums’.⁸⁶ In relation to commitment, for example, men are less likely to want marriage and a family because these are no longer sites of control and domination, men now measure success not according to a successful commitment, but rather, success on the sexual market. As such, men wish to remain uncommitted for as long as possible. Women on the other hand, see the sexual market as a marriage market and are in it for a shorter period of time because of career goals, and because of the prevalence of the categories of sexiness and beauty closely tied to age.⁸⁷

These feminist critiques are rooted in the social and cultural context that marriage is practiced in. However, feminists have also found love’s internal ideology to be problematic. While acknowledging the power of patriarchy and the division of spheres as problematic, Marilyn Freidman considers the central problem of love to stem from its long association with the idea of merger.⁸⁸ Friedman argues that the features of merger experienced within romantic love are that: the needs and

82 Mary Evans has described love as a ‘plot by men to sugar the evil pill of patriarchal domesticity’. ‘Falling in Love is Falling for Make Believe: Ideologies of Romance in Post-Enlightenment Culture’ (1998) 15 *Theory Culture and Society* 273. For Stevi Jackson, the feminist critique of love is epitomised by the popular saying, ‘it starts when you sink into his arms and ends with your arms into his sink’. S Jackson, ‘Even Sociologists Fall in Love: An Exploration in the Sociology of Emotions’ (1993) 27(2) *Sociology* 204.

83 Elena Pulcini has argued the main prism through which love oppresses is the private sphere. Love she argues not only ties women to the private sphere but reduces them to being guardians of sentiments and privacy. It is true that this embodies some power but it is a hidden power which not only creates inequality but also masks it. E Pulcini, ‘Modernity, Love and Hidden Inequality’ trans L Fraser in *Love and Law in Europe: Complex Interrelations* (EUI Working papers, European University Institute 2000/2) 41–42.

84 Illouz, *Why Love Hurts* 5.

85 Illouz, *Why Love Hurts* 6.

86 Illouz, *Why Love Hurts* 241–44.

87 See Illouz, *Why Love Hurts: A Sociological Explanation* (Polity, Cambridge 2012) chapter three. See also A Jonasdottir’s ideas around love power in ‘What Kind of Power is Love Power?’ in A Jonasdottir *et al* (eds), *Sexuality, Gender and Power* (Routledge, London 2011).

88 Aristophanes, followed by courtly and romantic love, make the idea of unification between two bodies and souls central to romantic love.

interests of each person become entwined or pooled together; couples feel each other's highs and lows; there is mutual consideration and awareness; couples care for and protect each other; couples can communicate with each other efficiently; couples make joint decisions and long term plans; there is a division of labour; couples desire to be seen as good by each other, and want to be valued by their partners in a way that they value themselves.⁸⁹ Friedman does not necessarily see these features as negative in themselves, but they can represent a significant reduction in personal autonomy, and this is more dangerous for women than for men for a number of reasons. First, she argues, when seen in a social context, love 'is guided by norms and stereotypes. Foremost among these are gender norms and ideals of romantic heterosexual love.'⁹⁰ One such ideal, for example, is that women should marry 'up'; that a woman should marry someone who is 'taller, stronger, older, richer, smarter and higher up on the social scale'⁹¹ than she is. The result of this is that women will always be seen as bringing less to the relationship than the men, and it is this, Freedman claims, which makes the romantic merger of identities more risky for women than for men.⁹² But even overall, she argues that the concept of merger is risky:

Lovers may be very different from each other in their resources, capacities, and commitments they bring to their love. These differences can create imbalances of power, authority, and status within a romantic relationship. When two lovers become one, the one they become may very well be more than the other. Or the merger might take place within one lover alone, so to speak.⁹³

Wendy Langford also disputes the ideology of love itself as being positive. Love is not the great ideal that it is claimed to be. She argues that while the idea that love has spread principles of justice and fairness widely is an attractive and optimistic view, it is empirically unsustainable and conceptually misguided. Along with others,⁹⁴ Langford is a strong critic of Giddens' view of contemporary love as outlined above. Langford says that, while our society has come to 'venerate deliverance' through love, with promises of 'liberty, equality and togetherness', romantic love is in fact a 'process by which restrictions, inequality and dissatisfaction are merely obscured'.⁹⁵ She argues that the rhetoric that love takes us higher and allows us to develop is wrong, rather, '[l]ove does not merely fail to give us what we desire but in so doing compounds painful

89 Friedman, 'Romantic Love and Personal Autonomy' 169. See also M Friedman, *Autonomy, Gender, Politics* (Oxford University Press, New York 2003) 167–68.

90 Friedman, 'Romantic Love and Personal Autonomy' 173.

91 Friedman, 'Romantic Love and Personal Autonomy' 173.

92 Friedman, 'Romantic Love and Personal Autonomy' 178.

93 Friedman, 'Romantic Love and Personal Autonomy' 169.

94 See also Jamieson, 'Intimacy Transformed?'

95 Langford, *Revolutions of the Heart: Gender, Power and the Delusions of Love* (Routledge, London 1999) 21.

feelings of dissatisfaction and low self-esteem'.⁹⁶ Its effects are not positive, not even neutral, they are largely negative.⁹⁷ While love promises happiness and freedom from social constraint, it in fact delivers the opposite.⁹⁸ Echoing some of Friedman's arguments, the problem according to Langford is that the success of romantic love depends upon a particular abstract individual type and model of rational behaviour that is seldom found in reality. The individual required is 'self aware and operates on the basis of reason'. Not only is this individual rarely found in society at large, she is rarely found among women, and even more rarely found in the context of love.⁹⁹

What emerges from the above critique is that love, far from being the liberating and egalitarian idea which many claim it is, is instead oppressive and degrading to women. This critique is further strengthened when we consider it alongside the feminist critiques of sex (as we must, given the earlier discussed slippage that occurs between sex and love).

Illouz has argued that the contemporary sexual market is dominated by ideas of freedom and choice, and is motivated by a desire to accumulate as much sexual capital as possible. This model of sexual behaviour, 'promoted by modern masculinity and too often endorsed and imitated by women',¹⁰⁰ does not meet any larger social and ethical goals, nor does it 'build ethical and emotional models congruent with the social experience of women'.¹⁰¹ Feminists have long argued about sex and its impact on the position of women in society.¹⁰² Two of the strongest voices in the feminist debate over the oppressive nature of heterosexual sex have been Catherine McKinnon and Andrea Dworkin. The view that sex (meaning heterosexual sex) is the 'linchpin of gender inequality', and that heterosexuality institutionalises 'male sexual dominance and female submission', is central to MacKinnon's arguments against sex.¹⁰³ She argues that women are defined by male dominance and female subordination. Women's sexuality is defined according to male desire and as such it is not possible to speak of women's pleasure or agency in a sexual relationship with a man.¹⁰⁴ Similarly, according to Dworkin, 'because women are exploited as a sex class

96 Langford, *Revolutions of the Heart* 50.

97 Langford, *Revolutions of the Heart* 50.

98 Langford, *Revolutions of the Heart* 4. Echoing this, Mary Evans argues that 'accumulated evidence of the last centuries suggest that people in the West have suffered more in their personal lives from 'love' than any other single ideology.' Evans links romantic love with rape and violence against women, claiming that those 'cultures which condone romance are also beset with the misreadings of it'. Evans 'Falling in Love with Love is Falling for Make Believe' 273.

99 Langford, *Revolutions of the Heart* 152.

100 Illouz, *Why Love Hurts* 247.

101 Illouz, *Why Love Hurts* 247.

102 See S Seidman, *Embattled Eros: Sexual Politics and Ethics in Contemporary America* (Routledge, New York 1992) chapter 3 'Defining the Moral Boundaries of Eros: The Feminist Sexuality Debates'.

103 C MacKinnon, 'Feminism, Marxism, Method and the State: An Agenda for Theory' (1982) 7 *Signs* 533.

104 MacKinnon, *Feminism Unmodified* 135.

for sex, it is impossible to talk about women's sexuality outside the context of forced sex'.¹⁰⁵ Women cannot be equal to men if they are used as a tool for men's desires: 'What is lost by the woman when she becomes a sexual object, and when she is confirmed in that status by being fucked, is not recoverable.'¹⁰⁶ This is a contentious view. Simone de Beauvoir, for example, said that women needed to invent new 'non-oppressive' ways of understanding heterosexual sex, and not just accept established ideas.¹⁰⁷ Carole Vance claims that '[f]eminism must increase women's pleasure and joy, not just decrease our misery'.¹⁰⁸ Amber Hollibaugh points out that 'sex is not the same for all of us', and that by denying these differences feminism risks alienating many women. She asks, 'are we creating a political movement that we can no longer belong to if we don't feel our desires fit a model of proper feminist sex?'.¹⁰⁹ Camille Paglia and Naomi Wolf have argued that to reduce female sexual existence to sexual oppression completely obscures female sexual pleasure and agency.¹¹⁰ Furthermore, some feminists have argued that to deny pleasure and agency is to risk a new era of puritanism.¹¹¹

The discussion so far has shown that love has been and continues to be a problematic concept for many feminists. We must be careful not to overstate this. Some feminists dismiss the idea of romance as a site of women's oppression and complicity in patriarchal structures and instead see love as a site of resistance, transformation and agency. As already stated, Illouz sees love as egalitarian and subversive, and she is not alone in this regard. Pearce and Stacey, like Radway before them, argue that love retains its ability to liberate women from patriarchy because of its 'narrativity'. They argue that an engagement with the narrative of romance enables women to facilitate the 'rescripting of other areas of life'.¹¹² Langhamer has also shown how in everyday courtship behaviour young women in twentieth century Britain have been able to act as 'architects of their own lives and as active agents of social change'.¹¹³

105 A Dworkin, 'Renouncing Sexual Equality' cited in C A Douglas, *Love and Politics* 180.

106 A Dworkin, *Intercourse* (The Free Press, New York 1987) 16.

107 A Schwarzer, *After the Second Sex: Conversations with Simone De Beauvoir* (Pathenon Books, New York 1984) 36.

108 C Vance, 'Pleasure and Danger: Towards a Politics of Sexuality' in C Vance (ed), *Pleasure and Danger: Exploring Female Sexuality* (Routledge Kegan Paul, Boston 1984) 24.

109 A Hollibaugh, 'Desire for the Future: Radical Hope' in Vance (ed), *Pleasure and Danger* 403–04.

110 See C Paglia, *Sex, Art, American Culture* (Vintage Books, New York 1992); N Wolf, *Fire with Fire: The New Female Power and How it Will Change the 21st Century* (Random House, New York 1993); N Wolf, 'The Porn Myth' *New York News and Features* http://nymag.com/nymetro/news/trends/n_9437/ accessed 29/06/10.

111 K Abrams, 'Sex Wars Redux: Agency and Coercion in Feminist Legal Theory' (1995) 95 *Columbia Law Review* 311.

112 L Pearce & J Stacey (eds), *Romance Revisited* (Lawrence & Wishart, London 1995) 13. See also J A Radway, *Reading the Romance: Women, Patriarchy and Popular Literature*, (University of Carolina Press, Chapel Hill 1991).

113 C Langhamer, 'Love and Courtship in Mid-Twentieth-Century England' (2007) 50 *The Historical Journal* 196.

Conclusion

Legally, marriage has moved away from traditional meanings that associated it with religion and patriarchy. It is now more loosely considered a relationship that can be determined according to the parties themselves, especially when there are no children involved. Marriage is now more closely tied to love than ever before. This is evident in the social and cultural discourse of marriage, and in empirical studies on why people marry. If marriage is tied to love, the next important question is: to what extent does this connection impact upon both of these institutions? This inquiry must be aware that love has two predominant readings, one negative and one positive. We have seen that love is disassociated with duty and social boundaries, and is instead associated with ideas of freedom, equality, agency, choice and progress. This reading of love says that it represents a relationship whose content is negotiated between lovers themselves free of any external rules, it is an 'empty canvass, a subjective and mutual invention', capable of many permutations: a relationship that requires free and autonomous beings. It is these features of love that, at least in part, have made it the desirable existential goal it has become. But love has another side, it is closely linked with patriarchy and, as we will see in later discussion, with heterosexuality. This reading claims that the dominant scripts of love are tied up with procreation, family, marriage and domesticity, with monogamy and fidelity. As such, for women, love too readily translates into becoming a wife and mother.¹¹⁴ This reading of love negates the ideas that love is free from rules and barriers, and renders it less likely to deliver its promises of freedom and equality. In any conversation about love both of these readings must be acknowledged.

The situation is further complicated by the fact that marriage is also a contested idea. There are multiple readings of marriage and multiple reasons people marry. Any discussion on the impact that love and marriage have on each other must consider these multiple meanings.

114 This resonates with the queer critique of love, which will be discussed later in the book.

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