

## 4. The Foregrounding of Love in the Same-Sex Marriage Debate

*Love Does not Discriminate*<sup>1</sup>

### Introduction

Previous chapters have outlined a number of legal challenges to the traditional meanings of marriage. In relation to the connection between marriage, sex and procreation, *Re Kevin* asserted that sexual intercourse and procreation alone do not define marriage. In relation to the idea that marriage is about economic unity and support, *Garcia* reasserted this connection and continued the law's attempt at balancing the tensions between the home and the market that are so clearly manifest in the marriage relationship. In previous chapters, the small ways in which love is explicit and implicit in the legal discourse of marriage have been shown. When we turn to consider the same-sex marriage debate, however, love takes centre stage. This debate has specifically demanded that marriage be understood as a relationship ruled by love and that the law be altered to reflect this.

This argument can be traced by examining two key legal episodes in the same-sex marriage debate in Australia: the changes made to the Marriage Act in 2004, and the passing and subsequent disallowance of the Civil Union Act in the Australian Capital Territory in 2006. In examining these two episodes, this chapter shows how the debate became one about whether we understand marriage to be about procreation or love, as well as demonstrating how the connection between marriage and procreation is flawed and Christian underpinnings of this connection are open to debate. Finally, the chapter turns to the question of what the same-sex marriage debate will do, not only for the meaning of marriage, but also for the meaning of love. We know that marriage is a conservative institution fighting to break free from its oppressive past. What is less well understood is that love also can be read conservatively. As we have seen from some feminist critiques of love, it is closely connected to patriarchy and traditional gender roles, and, as we will see from the queer critique in this chapter, it replicates heteronormativity. The recognition of same-sex marriage, however, has the potential to imbue both institutions with a more progressive and radical meaning.

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<sup>1</sup> Slogan on placard at protest march in Canberra to support marriage for same-sex, intersex and transgender couples. 2/08/2009 *Sunday Canberra Times* 4.

## The Same-Sex Marriage Debate

Support for same-sex marriage is not universal in the Australian gay and lesbian community. The gay marriage debate is often depicted as a struggle between the LGBTI<sup>2</sup> community and political progressives against right wing conservatives and the Christian right. However, there is also considerable opposition to gay marriage from within the LGBTI and progressive traditions. This opposition stems from a number of inter-related factors. Marriage is too 'loaded' an institution, its association with patriarchy and the oppression of women make it an unviable institution for many progressively minded people, regardless of their sexuality. Judith Butler's view of gay marriage is indicative of this position:

For a progressive sexual movement, even one that may want to produce marriage as an option for non heterosexuals, the proposition that marriage should become the only way to sanction or legitimate sexuality is unacceptably conservative ... What does this do to the community of the non married, the single, the divorced, the uninterested, the non monogamous, and how does the sexual field become reduced, in its very legibility, once we extend marriage as a norm?<sup>3</sup>

Furthermore, the acceptance of marriage as a form for same-sex relationships is seen as a risky strategy. Michael Warner argues that agitating for same-sex marriage replicates and privileges heterosexuality and 'authorizes the state to make one form of life — already normative — even more privileged'.<sup>4</sup> This may lead to those relationships being erased because they don't fit the legal model of marriage.<sup>5</sup>

Opposing gay marriage is not the same as stating that equality of rights between heterosexual and same-sex relationships is not desirable. However, it is argued

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2 Lesbian, Gay, Bi-sexual, Transsexual and Intersex. I have used the term LGBTI to be as inclusive as possible, but this inclusivity at times can appear to be insensitive to the diversities that exist between the groups these initials denote. In particular, when it comes to marriage, it must be made clear that the issues facing transsexual people are quite different from those facing same-sex couples. I only discuss them together because a liberal reading of transsexual marriage in the case of *Re Kevin* was understood by many as implying a liberal attitude towards same-sex marriage.

3 J Butler, 'Is Kinship Always Already Heterosexual?' (2002) 13 *Differences* 21–44. See also N D Polikoff, 'We Will Get What We Ask For: Why Legalising Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"' (1993) 79 *Virginia Law Review* 1535–1875. This article articulates very clearly the argument against the idea that same-sex marriage will transform the institution of marriage for the better.

4 M Warner, *The Trouble With Normal: Sex, Politics, and the Ethics of Queer Life* (Free Press, New York 1999) 112.

5 For example, Katherine Franke's comparison of the campaign for gay marriage with the campaign for the right to marry for African-Americans following their emancipation as slaves leads her to worry that it might have some of the same outcomes. She shows how the right to marry was used as a weapon to 'civilise' African Americans and get them to adopt the domestic patterns of elite white Americans. She argues that, in that period, a right to marry collapsed into an obligation to do so, a negation of other relationships they once enjoyed, and a punitive approach toward those who broke the rules and duties of marriage. She warns that these same outcomes could emerge from the legal recognition of same-sex marriage. K Franke, 'The Curious Relationship of Marriage and Freedom' in Garrison & Scott (eds), *Marriage at the Crossroads* 87–106.

by some that, in so far as marriage itself is capable of delivering such a goal,<sup>6</sup> it is not the only way to achieve it. Jenni Millbank has argued that marriage ought not to be the only 'yardstick for legal equality',<sup>7</sup> that reform should proceed according to what is needed to remove discrimination in specific contexts rather than the 'one-stop comprehensive' formal equality that would be achieved through marriage. She says, 'relationship recognition for lesbian and gay families should proceed on the basis of what is needed by such families rather than by simply assuming that formal equality is the only, or most desirable goal'.<sup>8</sup>

Despite opposition to gay marriage within the community, the amendments to the Marriage Act to legislate the meaning of marriage as a union between one man and one woman forced many to take a more entrenched position than otherwise would have been the case,<sup>9</sup> and, within a short space of time, same-sex marriage increasingly came to be seen as an important 'equality goal' in Australia. Surveys show that support for gay marriage doubled between 2001 and 2005,<sup>10</sup> but its popularity cannot be reduced simply to a capricious stand against conservatism. Marriage remains a goal because it is a means by which legal rights and status are allocated to people in society, and the state's denial of this to one group is seen as a means of reinforcing inequality. In large part, therefore, the arguments for same-sex marriage are articulated in the language of liberalism, with a focus on rights, justice and equality.<sup>11</sup> As Tamara Metz puts, it while the institution of marriage is problematic, the fact is that, 'a commitment to equal treatment before the law demands it. Period.'<sup>12</sup> But even more than this, the debate has shown us that what we thought was becoming an obsolete institution, in fact, still carries with it a meaning many crave. Marriage 'elicits *ethical recognition*',<sup>13</sup> provides 'moral approval' and embodies the 'complex normative account of the

6 Many argue that it isn't. See J Josephson, 'Romantic Weddings, Diverse Families' (2010) 6(1) *Politics and Gender* 130.

7 J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law: Part One — Couples' (2006) 34(1) *Federal Law Review* 9.

8 Millbank, 'Recognition of Lesbian and Gay Families in Australian Law: Part One — Couples' 8–9; R Graycar & J Millbank, 'From Functional Family to Spinster Sisters: Australia's Distinctive Path to Relationship Recognition' (2007) 24 *Journal of Law and Policy* 122.

9 Nicola Roxon MP claimed that 'it was not until this bill was proposed by the government that calls were made more widely for marriage to be broadened to encompass same-sex couples'. Commonwealth, Parliamentary Debates House of Representatives June 16 2004 (Nicola Roxon) [http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?ID=2262589](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2262589) accessed 13/05/2008. The same point is made by Graycar & Millbank, 'From Functional Family to Spinster Sisters' 161.

10 Graycar & Millbank, 'From Functional Family to Spinster Sisters' 161. See also Pink News 'Australian Territory Legalises Gay Civil Partnership Ceremonies' <http://www.pinknews.co.uk/2009/11/11/australian-territory-legalises-gay-civil-partnership-ceremonies/> accessed 13/11/2009. Carol Smart, in her studies on same-sex weddings, found that the political nature of choosing same-sex marriage is well understood by those couples that are getting married. See C Smart, 'Can I Be Bridesmaid?: Combining the Personal and Political in Same-Sex Weddings' (2008) 11(6) *Sexualities* 763–778.

11 A Wilson, 'Feminism and Same-Sex Marriage: Who Cares?' (2010) 6(1) *Politics and Gender* 134.

12 T Metz, 'Demands of Care and Dilemmas of Freedom: What We Really Ought to be Worried About' (2010) 6(1) *Politics and Gender* 120.

13 Metz, 'Demands of Care and Dilemmas of Freedom' 123.

relationship it names'.<sup>14</sup> It is an 'idealised' rite of passage for couples, signifying the 'successful transition into adulthood', responsibility and social legitimacy.<sup>15</sup> As such, it is desired by 'couples who have long been outside the boundaries of legitimacy'.<sup>16</sup> For example, see how the following comment from a prominent sex advice columnist makes the connection between marriage, respectability and 'real love':

Once our relationships were only respected if we had remained together for a long, long time. Only longevity earned us some modicum of respect. Straight couples could always rush that validity by getting married. Now ... some gay kids, desperate to have their gay love taken seriously, will wield their new marriage licenses and say: 'See how real our love is? ... You better respect us now!'<sup>17</sup>

It appears that despite the very many legal changes to the institution which, many have argued, have moved the relationship away from one of status, and despite the many negative associations especially for women, marriage retains a significant degree of status and respectability. The continuing popularity of marriage as a goal can be explained by its legal and social meanings, and by the practical benefits it bestows on couples. Where it continues to be popular, some of this popularity must also be attributed to its connection with romantic love.

## Legal Episodes in the Debate

### Amending the Marriage Act (1961)

In May 2004, then Attorney General Phillip Ruddock presented the Marriage Legislation Amendment Bill 2004 to the Federal Parliament. In the second reading speech, the Attorney General explained that the Bill was needed because there was considerable community concern about the erosion of the institution of marriage. He explained that

the government has consistently reiterated the fundamental importance of the place of marriage in our society ... It is a central and fundamental

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14 Metz, 'Demands of Care and Dilemmas of Freedom' 123.

15 Diduck & Kaganas, *Family Law, Gender and The State* 34.

16 L J Marso, 'Marriage and Bourgeois Respectability' (2010) 6(1) *Politics and Gender* 152.

17 Dan Savage, sex advice quoted in 'Young, Gay & Married (And Divorced)' *Out Now Global* <http://joemygod.blogspot.com/2008/04/young-gay-married-and-divorced.html> accessed 10/06/2010.

institution. It is vital to the stability of our society and provides the best environment for the raising of children. The government has taken steps to reinforce the basis of this fundamental institution.<sup>18</sup>

The Bill did three things: firstly, it provided a definition of marriage as a voluntary union between a man and a woman; secondly, it prevented Australian courts from recognising same-sex marriages that had taken place in other countries; thirdly, it prevented same-sex couples from adopting children from overseas.

On the issue of definition, while the 1961 Marriage Act did not provide a definition of marriage, section 46 required a marriage celebrant to state that 'marriage according to Australian law, is the union of a man and a woman to the exclusion of others, voluntarily entered into for life'.<sup>19</sup> Significantly, during the passing of the original Marriage Act, a proposed amendment to specifically define marriage had been defeated in the Senate. It had then been argued by Liberal Senator John Gorton (who later became Prime Minister from 1968–1971) that the definition of marriage was best left to the common law.<sup>20</sup>

The Howard government's desire to legislate the definition was motivated by significant concern among some Liberal MPs that the courts were moving away from a traditional meaning of marriage. The decision to validate a transsexual marriage in *Re Kevin* was clearly a matter of concern for some MPs, as were comments made out of court by members of the judiciary which showed a leaning towards a 'contemporary meaning' of marriage.<sup>21</sup> These concerns led to a delegation of 30 members of parliament concerned about the recognition of same-sex relationships in overseas jurisdictions and the impact that this was likely to have on Australia approaching the Prime Minister, John Howard. Alby Shultz later identified himself as one of these MPs and openly disclosed the role that religious organisations played in the debate:

it is my belief that moving away from the traditional definition of marriage would be to the detriment of our society. Marriage provides

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18 Second Reading Speech, Commonwealth, Parliamentary Debates House of Representatives May 27 2004 (Phillip Ruddock) [http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?ID=2259205](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2259205) accessed 14/04/2008.

19 Marriage Act (1961) section 46. The definition of marriage in section 46 derives from the UK case of *Hyde v Hyde and Woodmansee* [1861–1873] All ER Rep 175. For an analysis of this definition and its relevance for a modern society see S Poulter, 'The Definition of Marriage in English Law' (1979) 42(4) *The Modern Law Review* 409–429. The article was written in the 1970s and makes some interesting comments about same-sex marriage being accepted in the future.

20 Sen John Gorton in the Senate debates on the passing of the original Marriage Act (1961) quoted in Commonwealth, Parliamentary Debates House of Representatives June 16 2004 (Arch Bevis) [http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?ID=2262773](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2262773) accessed 13/05/2008.

21 See, for example, comments made by Sen Guy Barnett, Commonwealth, Parliamentary Debates Senate June 17 2004 (Guy Barnett) [http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?ID=2014889](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2014889) accessed 15/05/2008.

stability and is a solidly-built roof under which children can grow and be nurtured. The Australian Family Association has strongly supported this view, as has the Australian Christian Lobby.<sup>22</sup>

It is also worth noting that 2004 was a big year for the meaning of marriage in the US. The US House of Representatives passed the Marriage Protection Act, and many states held referenda to consider amendments to the Constitution concerning the definition of marriage.<sup>23</sup> This activity reverberated in Australia.

It was suggested by Graycar and Millbank, however, that the definition of marriage was seized upon as a cynical political exercise by the Howard government, designed to act as a wedge issue leading up to an election.<sup>24</sup> Its effect, according to Graycar and Millbank, was to reaffirm the 'special-ness of marriage' and to single out 'lesbians and gay men as objects of exclusion'.<sup>25</sup> It was indeed the case that gay marriage did become, and still is, a wedge issue in Australian politics. This aspect of the debate is illustrated most clearly by the Australian Capital Territory's thwarted attempts to pass legislation that came closer than ever before to legislating gay marriage.

## Civil Union Bill ACT (2006)

When the ACT Government began consulting with the LGBTI community in Canberra on the best model to adopt in the ACT for the recognition of same-sex relationships, the community favoured a model which closely resembled a marriage.<sup>26</sup> As such, on 28 March 2006, then Labor Chief Minister, Jon Stanhope, introduced into the ACT legislative assembly the Civil Union Bill 2006. He explained the content of the Bill in the following way:

A civil union will be treated in the same way as marriage under territory law. A civil union is not a marriage but, will, so far as the law of the ACT is concerned, to be treated in the same way. The government is of the view that this is preferable to providing an alternative form of marriage that would not have equal recognition to commonwealth marriage. The

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22 Commonwealth, Parliamentary Debates House of Representatives June 17 2004 (Alby Shultz) [http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?ID=2263265](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2263265) accessed 13/05/2008.

23 A Bernstein, 'Questioning Marriage' in A Bernstein (ed), *Marriage Proposals Questioning a Legal Status* (New York University Press, New York 2006) 1–29.

24 Graycar & Millbank, 'From Functional Family to Spinster Sisters' 160–61.

25 Graycar & Millbank, 'From Functional Family to Spinster Sisters' 160.

26 'Our consultation made it very clear that the community would prefer the legislation include a formal ceremony and that that was important to couples both personally and more broadly in tackling discrimination against same-sex couples.' Heidi Yates, representative for gay lobby group Good Process, in Ross Peake, 'Angry Corbell Abandons Gay Plan' 5/5/2008 *Canberra Times* [http://www.canberra.yourguide.com.au/printerFreindlypage.asp?story\\_id+1237202](http://www.canberra.yourguide.com.au/printerFreindlypage.asp?story_id+1237202) accessed 5/05/2008.

civil union is a new concept that can be used by anybody, regardless of gender. It will give couples functional equality under the ACT law with married couples but does not replace or duplicate marriage.<sup>27</sup>

This Bill was quickly met with opposition. On May 3 2006, the Liberal leader, Bill Stephaniak, introduced into parliament an alternative Bill based on the Tasmanian registration model, the Registration of Relationships Bill 2006, which, he argued, did not undermine the values of marriage. Just over one week later Stephaniak tabled in parliament a petition gathered by the Australian Christian Lobby and signed by 1,710 people who opposed the Civil Union Bill. The petitioners said: 'We the undersigned believe that this creates a marriage like relationship which so mimics marriage as to confuse and diminish it.'<sup>28</sup>

Extensive debate followed regarding the extent to which a civil union under this legislation mimicked marriage. Zanghellini explains that under the Bill a civil union resembled marriage because 'a ceremony was required for it to be brought into existence and because a validly contracted civil union was to be treated like marriage for the purposes of all ACT laws'.<sup>29</sup> However, civil unions were different to marriage not only in name but also because they would always be regarded differently to marriage in other jurisdictions, including the federal one.

The Federal Liberal Government was vehemently opposed to the Bill for two main reasons. They argued firstly that the ACT Government did not have the constitutional power to legislate for marriage, and secondly that marriage as an institution should be preserved as a union between one man and one woman. The ACT Civil Unions Bill was seen to be creating a relationship between same-sex couples which was too close to that marriage model, and therefore eroded the idea that it takes a man and woman to have a marriage.

The Civil Union Bill became the Civil Union Act (2006) (ACT) but it never came into effect. On 13 June 2006, Governor-General Michael Jeffery, on the advice of the Federal Government, disallowed the Civil Union Act (2006) under section 35 of the Australian Capital Territory (Self-Government) Act (1988). The Federal Government disallowance was described as 'autocratic'<sup>30</sup> as 'very unusual',<sup>31</sup> and, by one Greens Senator, as 'homophobia dressed up as an argument about state rights'.<sup>32</sup>

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27 Australian Capital Territory, Parliamentary Debates Legislative Assembly 28 March 2006, 657 (Jon Stanhope).

28 Australian Capital Territory, Parliamentary Debates Legislative Assembly May 11 2006, 1519 (Bill Stephaniak).

29 A Zanghellini 'Marriage and Civil Union: Legal and Moral Questions' (2007) 35(2) *Federal Law Review* 265.

30 Australian Capital Territory, Parliamentary Debates Legislative Assembly Dec 12 2006, 3953 (Simon Corbell).

31 George Williams described the act as 'very unusual' in Farah Farouque, 'Why or Why Can't I Have a Civil Union' 10/06/2006 *The Age* <http://www.theage.com.au/news/in-depth/why-oh-why-cant-i-have-a-civil-union/2006> accessed 22/05/2008.

32 Sen Rachel Siewart Commonwealth, Parliamentary Debates Senate June 15 2006 [http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?ID=2345461](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2345461) accessed 13/05/2008.

The ACT Government persevered. On 12 December 2006 the ACT Government presented into the ACT Parliament the Civil Partnership Bill 2006. This new Bill made the following changes in the hope of addressing the concerns of the federal government:

- The new Bill did not use the word 'union'. This would remove any confusion, as the word is more closely associated with marriage because it is used to describe marriage in the Marriage Act 1961;
- The new Bill did not specify that a civil partnership is to be treated like a marriage;
- A civil partnership could be entered into by any two people whether they were same-sex or not; and
- The ceremony associated with a civil partnership would not be performed by marriage celebrants, but rather by civil partnership notaries.

The new Bill was still not considered acceptable to the Federal Government and the Federal Attorney-General announced that his government would not rule out again using the Governor-General's disallowance power to override the Act.<sup>33</sup> The ACT government left the Bill on the books, but waited until after the coming federal election to stage their next move. In November 2007, the Rudd Labor Government was elected and the ACT announced it would revive the legislation.<sup>34</sup> By now, however, the Federal Labor Party and its socially conservative Christian leader, Kevin Rudd, had eagerly succumbed to conservative pressure and declared its own commitment to the principle that marriage is between a man and a woman. Negotiations between the ACT Government and the Federal Government came to a conclusion in May 2008 with a clear understanding that the Federal Government would not allow the ACT to pass legislation which in any way mimics marriage. An angry ACT Government had no choice but to scrap all previous plans and introduce legislation that instead mimics the Tasmanian registration model.<sup>35</sup>

On 11 November 2009, the ACT legislature once again opened up the issue by passing the Civil Partnerships Amendment Bill 2009. This Bill, introduced by the ACT Greens and supported by the ACT Labor Party, introduced the right of parties to declare their relationship before a civil partnership notary, and thus introduced the much sought after ceremony that had been attempted by past

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33 Phillip Ruddock MP Attorney-General 'ACT Civil Partnerships Bill Does Not Remove Concerns' (Press Release, 6 Feb 2007).

34 Cathy Alexander, 'Corbell to Revive Gay Union Act' 30/11/2007 *Canberra Times*<http://canberra.yourguide.com.au/news/local/news/general/corbell-to-revive-gay-union> accessed 13/05/2008.

35 Ross Peake, 'Angry Corbell Abandons Gay Plan' 5/5/2008 *Canberra Times*[http://www.canberra.yourguide.com.au/printerFreindlypage.asp?story\\_id+1237202](http://www.canberra.yourguide.com.au/printerFreindlypage.asp?story_id+1237202) accessed 5/05/2008.

versions of the legislation.<sup>36</sup> The first ‘partnership’ under the new law took place on 25 November 2009.<sup>37</sup> After initial concerns that the Federal Government would override this amendment, it has remained untouched. However, the issue of gay marriage has not gone away. In 2013, three countries — Uruguay, New Zealand and France — passed legislation that legalises gay marriage, bringing the total of countries to do so to 14.<sup>38</sup> A Bill recognising gay marriage has passed the House of Commons in England,<sup>39</sup> and US President Obama is now supporting gay marriage and has stated:

Our journey is not complete until our gay brothers and sisters are treated like anyone else under the law — for if we are truly created equal, then surely the love we commit to one another must be equal as well.<sup>40</sup>

In Australia too there is a shift in the mood. Kevin Rudd recently announced that he had changed his position on the issue and was now a supporter of gay marriage and the Labor Party has agreed to allow a conscience vote in parliament on the issue.

Sensing a possible change of mood, the ACT once more introduced legislation. The Marriage Equality (Same Sex) Act 2013 passed the legislative assembly in October 2013, but its fate was short lived. The Act was successfully challenged in the High Court on the constitutional ground of inconsistency with a federal law (section 109). The ACT therefore remains without gay marriage legislation and the rest of Australia spasmodically argues the issue.

## The Struggle for the Meaning of Marriage

### Procreation v Love

In large part, the same-sex marriage debate in the ACT became an argument about whether we understand marriage as an institution whose *raison d’être* is procreation or love. For Labor and the Greens, the goal became not only to recognise same-sex relationships but also to recognise them as love relationships.

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36 The Bill also facilitates the creation of civil partnership notaries and the recognition of civil partnerships made in other jurisdictions. It avoids the issue of mimicking marriage by being for the exclusive use of same-sex couples.

37 <http://actgay.e-p.net.au/news/280-first-ceremony-takes-place-in-canberra> accessed 2/12/09.

38 B Miller, ‘Joy, Anger as France Legalises Same-Sex Marriage’ <http://www.abc.net.au/news/2013-04-24/joy-anger-as-france-legalises-same-sex-marriage> Accessed 24/04/2013.

39 ‘Gay Marriage Bill Passes Britain’s House of Commons’ <http://www.abc.net.au/news/2013-05-22/britains-gay-marriage-bill-passes-major-hurdle/4704878> accessed 14/06/2013.

40 ‘Obama’s Evolution On Gay Marriage’ <http://abcnews.go.com/Politics/obamas-evolution-gay-marriage/story?id=19150614> accessed 14/06/2013.

Love had been raised in the federal parliamentary debates around the changing of the Marriage Act,<sup>41</sup> but it became more central in debates about the ACT's Civil Unions Bill. Andrew Barr MLA said that the Civil Union Bill is about,

supporting loving, caring relationships regardless of the sexuality of those involved. ... Saying no to civil unions is to say that some relationships are more legitimate than others; that some loving, committed long-term relationships are; for some inexplicable reason, of lesser value.<sup>42</sup>

Jon Stanhope said that '[t]hose of us who enjoy rich and enduring marriages might ask ourselves how we would feel if we were to be suddenly and rudely informed that our love was a lesser love'.<sup>43</sup>

In the Senate, Greens Senator Kerry Nettle told a story of a lesbian couple in the ACT who had been planning their civil union when the legislation was struck down. When the news had reached their daughter that her mothers could no longer have a civil union she had declared that it was not the Prime Minister's business who can fall in love. Senator Nettle went on to say:

I reckon that the 12-year-old has a better handle on what this debate is about than a lot of parliamentarians do. She understands that this debate is about love. It is about who can love each other and who can have their relationship recognised.<sup>44</sup>

Senator Bob Brown also thought it was a debate about love: 'What is it about these gentlemen that they cannot recognise thousands of Australia's loving relationships'.<sup>45</sup> Senator Christine Milne also saw the debate as being about love, arguing that: 'it is about recognising love and commitment — and isn't that the very definition of the marital ideal, of what marriage, of what civil union is fundamentally about; love and commitment?'<sup>46</sup>

The fact that, for many, the argument for same-sex marriage is about the recognition of same-sex love is also evident in the way the struggle is being conceived by

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41 Arch Bevis, in the debate about the changes to the Marriage Act, said that 'the thing that establishes ... loving relationships is not gender and is not sexuality. Love, respect and tolerance for one another and honesty with one another are keys to that lasting loving partnership. I know a number of people, people I have worked with and people who are friends of mine, who are gays and lesbians in longstanding relationships who I believe have that same love and respect and tolerance and open honesty with one another that I identify in my relationship with my wife.' Commonwealth, Parliamentary Debates House of Representatives June 16 2004 (Arch Bevis) [http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?ID=2262773](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2262773) accessed 13/05/2008.

42 Australian Capital Territory, Parliamentary Debates Legislative Assembly May 11 2006, 1602 (Andrew Barr).

43 Australian Capital Territory, Parliamentary Debates Legislative Assembly May 11 2006, 1623 (Jon Stanhope).

44 Commonwealth, Parliamentary Debates Senate June 15 2006 (Kerry Nettle) [http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?ID=2345413](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2345413) accessed 13/05/2008.

45 Commonwealth, Parliamentary Debates Senate June 15 2006 (Bob Brown) [http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?ID=2345425](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2345425) accessed 13/05/2008.

46 Commonwealth, Parliamentary Debates Senate June 15 2006 (Christine Milne) [http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?ID=2345449](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2345449) accessed 13/05/2008.

activists. For example, the Victorian Gay and Lesbian Rights Lobby's campaign for relationship recognition is called 'Equal Love'.<sup>47</sup> Recently the Mayor of the NSW town of Byron Bay moved a motion to recognise gay marriage and establish a 'Love Park' in town as a symbol of recognition and acceptance of gay and lesbian relationships. That this is a love park rather than a 'tolerance', 'acceptance', 'inclusion', 'justice', 'equality' or 'rights' park, is telling.

The same-sex marriage debate is very much about making romantic love visible outside of heterosexual relationships. It is quantitatively about breaking down the disassociation that exists between same-sex couples and love, because love as much as marriage carries with it the badges of legitimacy and respectability. In Senator Milne's speech, however, we get to the crux of the matter. What we are seeing here is a debate not just about who can love, but also about whether love and marriage go together. What we see in this debate is the argument that, on the one hand, marriage is about love and nothing else — this being the modern romantic love rhetoric of marriage —, and, on the other, the argument that marriage is not only about love, but also about procreation. The central debate and issue is very clearly stated by ACT Liberal MLA, Vicki Dunne, in the following lengthy quotation. Here she argues that heterosexual relationships are different to homosexual ones because they are 'ordered towards reproduction, towards having children' and, as such, she argues, are fundamentally different and more valuable to society than homosexual relationships:

Heterosexual relationships, particularly marriage, have the potential to produce a material benefit to society in the form of new members, something separate from and external to the relationship. Homosexual relationships on the other hand, are simply not like that. The partners might be just as affectionate and they may be just as sincere as those in a heterosexual relationship, but that does not alter the simple fact ... that their relationship is formed for a different purpose ... The fundamental *raison d'être* for society's recognition of heterosexual relationships through the legal institution of marriage is not the recognition of the love and affection ... Love and affection are enormously important qualities but ultimately they are the ones which are superimposed on the fundamental rationale for the legal institution of marriage which is reproduction.<sup>48</sup>

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47 See <http://www.vglrl.org.au/campaigns/equal-love/index.php>.

48 Australian Capital Territory, Parliamentary Debates Legislative Assembly May 11 2006, 1619 (Vicki Dunne). See also Senator Stephen Fielding (Family First): 'The major difference between marriages and same-sex relationships is that marriages can produce children' Commonwealth, Parliamentary Debates Senate June 15 2006 [http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?ID=2345445](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2345445) accessed 13/05/2008; Patrick Farmer (LP): 'The institution of marriage remains the principal basis of our social foundation. We need to promote this view of marriage for what it truly is — a pillar of our society — and it should not be altered.' Commonwealth, Parliamentary Debates House of Representatives June 16 2004 (Patrick Farmer) [http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?ID=2263233](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2263233) accessed 13/05/2008.

This position, that marriage is more about procreation than anything else, relies on another often made argument: that a heterosexual family is the best model for society. This view is typified by the following statement by Peter Jensen, Anglican Archbishop of Sydney:

We are better off generally speaking, living in families founded by a man and a woman who have made their initial public promises of lifelong fidelity. It is the family so constituted that is the primary source for the love and care without which we cannot survive. It is this family that best meets our relationship needs. It is this family that provides children with the experience of the interaction of human maleness and femaleness. It is children of this family who we may expect will look after their aged, lonely and sick.<sup>49</sup>

The same argument was rehearsed in almost identical terms in the debate on the same-sex adoption Bill introduced into the NSW Parliament in August 2010. Debate on this Bill consisted of, on the one hand, the NSW Council of Churches asserting the importance of a heterosexual relationship in bringing up children, while, on the other hand, supporters of the Bill arguing that the sexuality of parents makes little difference to their ability to provide a loving and secure environment for children to grow up in.<sup>50</sup>

Indeed, the whole debate around same-sex marriage and same-sex families forms part of a much wider debate about how we understand family and relationships and whether such concepts must be constructed around sex, gender and traditional heterosexual forms. The concept of family is problematic for same-sex couples because it has been understood as being framed within these factors. While outward signs point to a change in these perceptions, the understanding of family via biology and nature continue to exercise influence. Many have challenged this understanding. Judith Butler, for example, is one of many who point to the success of non-traditional family forms not only in same-sex families but also in other cultures; African American families in the US and

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49 Peter Jensen, Anglican Archbishop of Sydney, 'Unique Union' *The Australian* May 8, 2008 <http://www.theaustralian.com.au/news/unique-union/story-e6frg73o-1111116275570> accessed 25/07/10. See also Alby Shultz (LP): 'it is in the best interest of children to have a mother and a father' Commonwealth, Parliamentary Debates House of Representatives June 17 2004 (Alby Schultz) [http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?ID=2263265](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2263265) accessed 13/05/2008. See also comments during the 2010 federal election campaign by Family First candidate Wendy Francis, who was quoted as saying: 'Children in homosexual relationships are subject to emotional abuse. Legitimizing gay marriage is like legalising child abuse.' Wendy Francis, Family First candidate for 2010 federal election, cited in C Glennie, 'Family First candidate sparks outrage over gay marriage' *ABC PM* 09/07/2010 <http://www.abc.net.au/pm/content/2010/s2977960.htm> accessed 10/08/2010. Recently, the Australian Christian Lobby released a media alert warning that legalising same-sex marriage would create a 'new stolen generation' because it would be robbing children from their biological parents. See 'Mr Rudd's Change On Marriage Sets Up a New Stolen Generation' ACL media release 21/05/2013 <http://www.acl.orf.au/2013/05/mr-rudd%E2%80%99s-change-on-marriage-sets-up-a-new...> accessed 1/06/2013.

50 J Macey, 'Same-Sex Adoption bill in NSW Parliament' *ABC PM* 31/08/2010 <http://www.abc.net.au/pm/content/2010/s2998784.htm> accessed 1/09/2010.

Na families in China, for example.<sup>51</sup> But a more sustained change needs to occur. John Borneman has called for a general re-evaluation, from seeing descent and affinity as part of marriage and procreation and heterosexuality toward a recognition of the diversity of ‘forms of intimacy and sociality’ that have existed over time and in different places, and which have fulfilled the essential function of caring and being cared for.<sup>52</sup>

In the meantime, in relation to the same-sex debate, two fallacies must be challenged; first, that procreation can only occur as a result of sex and heterosexuality; and second, that it is this context that creates the best environment to bring up children. The reality is that children are born to couples via a variety of means, such as artificial insemination, donors and surrogacy agreements. The reality, we also know, is that many people marry without ever intending to have children, because they already have them, because they are infertile, or simply because they do not want to. All of these points were made in *Re Kevin*. In relation to heterosexual parents being the best parenting model, as Labor MP Anthony Albanese suggested, it might be the case that same-sex couples actually make better parents. He argued: ‘I have seen a lot of bad parents. I have not seen bad same-sex parents. I do not know very many, but every same-sex couple I know really wants their child and loves their child. That should be respected’.<sup>53</sup> Furthermore, leaving aside the parents, empirical studies consistently show that growing up in a same-sex family either has a neutral or a positive effect on raising children.<sup>54</sup>

## Christianity and Marriage

The persistence of the marriage for procreation argument can be attributed to the influence of Christianity on the discourse of marriage. Take for, example, Liberal Party MP Robert Baldwin’s position: ‘what I am seeking to do is ensure that the Christian values of marriage — being an institution between a man and a woman for the purpose of procreation — remain as the cornerstone of the foundation

51 Butler, ‘Is Kinship Always Already Heterosexual?’ 15–16.

52 J Borneman, ‘Caring and Being Cared For: Displacing Marriage, Kinship, Gender, and Sexuality’ in J D Faubon (ed), *The Ethics of Kinship Ethnographic Inquiries* (Rowan & Little Field Publishers, Boston 2001) 30, 43.

53 Commonwealth, Parliamentary Debates House of Representatives June 16 2004 (Anthony Albanese) [http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?ID+2263289](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID+2263289) accessed 13/05/2008.

54 Charlotte Patterson’s study on gay and lesbian families for the American Psychological Association found no study that concluded that a parent’s sexuality had a negative psychological impact upon the development of their children. Charlotte J Patterson, *Lesbian and Gay Parenting* American Psychological Association 1995 cited in T A Salzman & M G Lawler, ‘New Natural Law Theory and Foundational Sexual Ethical Principles: A Critique and a Proposal’ (2006) 47 *The Heythrop Journal* 191. Joan Laird in her study found that children of gay and lesbian parents were more tolerant and empathetic than children brought up in heterosexual families. Joan Laird, ‘Lesbian and Gay Families’ in F Walsh (ed), *Normal Family Processes*, second edition (Guilford Press, New York 1993). See L Nicholson, ‘The Myth of The Traditional Family’ In H Nelson (ed), *Feminism and Families* (Routledge, New York 1997) 27–42.

of our society'.<sup>55</sup> Leaving aside the question of whether we are to understand marriage in a modern secular society such as ours as a religious institution, it is important to note, without wishing to overstate the case, that one can find support within Christianity for the proposition that marriage is for love. Within the Catholic tradition, Aquinas said that marriage was an institution that relies upon '*societas/amicitia*' a kind of friendship and companionship as well as upon procreation.<sup>56</sup> Erasmus too saw love as part of marriage and in fact goes further in defining love as both sensual and spiritual.<sup>57</sup> Edmund Leites argues, however, that the idea that marriage is about love within Christian theology finds its most prominent expression in Puritan theories of marriage. By looking at the works of leading theologians of the seventeenth century, such as William Gouge, Richard Baxter, Daniel Rogers and Jeremy Taylor, Leites argues that the Puritans saw love as one of the greatest goods in life, as being central to marriage, and as one of the duties of married of life. He says that, according to these writers, 'love is not simply permitted, given the existence of a higher, holier, "spiritual" relation between man and wife, nor is it allowed only to forward the other purposes of marriage, it is required as a constituent and intrinsic element of a good marriage'.<sup>58</sup>

The connection between marriage and love in Christian theology, however, should not be overstated. That marriage is for procreation is still a central view within Christian faith and, even when love is admitted as a part of marriage, it is still the case that the meaning of love itself converges around the heterosexual procreative act. Take, for example, the views of the prominent Catholic and natural law theorist John Finnis. Finnis agrees with Aquinas's conception of marriage as being for both procreation and *amicitia*, however, he says that *amicitia* is a bond that occurs between couples only as a result of a particular sexual act, that is, penile-vaginal penetration. This sexual act, and only this sexual act, is capable of creating unity between two people. This view is reiterated by many: Lee and George say that while oral sex and anal sex constitute body parts coming together, it is not the same thing as penile-vaginal sex because only then is there a biological unification between two people.<sup>59</sup> Germain Grisez says that every animal, whether male or female, is incomplete in relation to reproduction, that each animal is only a potential part of a mated pair. He suggests that '[t]his is true also of men and women: as maters who engage in sexual intercourse suited to initiate new life, they

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55 Commonwealth, Parliamentary Debates House of Representatives June 17 2004 (Robert Baldwin) [http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?ID=2263225](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2263225) accessed 13/05/2008.

56 J Finnis, 'Law, Morality and "Sexual Orientation"' (1995) 9 *Notre Dame Journal of Law Ethics and Public Policy* 28–29.

57 See Leites, 'The Duty to Desire: Love, Friendship, and Sexuality in Some Puritan Theories of Marriage' (1982) 15 *Journal of Social History* 385–86.

58 Leites, 'The Duty to Desire' 388–89.

59 P Lee & R P George, 'What Sex Can Be: Self Alienation, Illusion or One-Flesh Union' (1997) 42 *American Journal of Jurisprudence* 146.

complete each other and become an organic unit. In doing so, it is literally true that they become one flesh'.<sup>60</sup> In order to realise the good that is in marriage (either procreation and/or love) the couple must achieve unity and complementarity 'so really and so completely that they are two in one flesh'. 'One flesh reality', is achieved via 'marital consent' and 'bodily communion'.<sup>61</sup> Conjugal sex is required to achieve this heightened state of togetherness. But not any sexual contact will do, only the union of the reproductive organs is capable of achieving the required complementarity.

This reliance on the reproductive act for love is not the same as equating marriage with procreation. This is too crude an interpretation. Having children is not required for a marriage to be valid.<sup>62</sup> Having a child is an extrinsic act to marriage and cannot therefore define marriage. Marriage is to be defined by its intrinsic value and this value is to be found in friendship (love) and parenthood. For Finnis then, 'the moral importance of the marital act ... is determined by its intrinsic procreative and unitive meanings, not by any instrumental, that is extrinsic meaning',<sup>63</sup> such as procreation.

## The Struggle for the Meaning of Love

What emerges from the new natural law view of marriage and love is the centrality of the idea of complementarity. In the new natural law view, complementarity is understood in different ways: it can be biological, genital, reproductive, parental and affective.<sup>64</sup> Central to it is the idea that there are certain 'realities that belong together in the created order and that together produce a whole which neither produces alone'.<sup>65</sup>

The idea of complementarity to an understanding of love is not unique to new natural law theory. Returning briefly to Plato's *Symposium*, here we find the expression *par excellence* that love is the unification of two halves, the creation of a full being. Aristophanes' myth tells that, long ago, human beings were physically very different. They had four hands, four legs, two heads and two sets of genitalia. They could move forwards and backwards and would move very quickly by cart-wheeling on all eight limbs. In this powerful form, humans were a great threat to the gods and for this reason Zeus decided to cut them

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60 G Grisez, *The Way of the Lord Jesus* vol 2: Living a Christian Life (Franciscan Press, Quincy University 1993) 146.

61 Grisez, *The Way of the Lord Jesus* 586.

62 Although there is an argument implied here that sex is required.

63 Salzman & Lawler, 'New Natural Law Theory' 185.

64 Salzman & Lawler, 'New Natural Law Theory' 185.

65 Salzman & Lawler, 'New Natural Law Theory' 186.

in half. Humans were miserable in their reduced state and spent their whole time searching for their 'other half'. When they found each other they stayed together, foregoing all other activity in fear of losing each other again.<sup>66</sup>

The history of romantic love continued to build upon this idea of merging. The courtly tradition, known for ennobling love, also saw love as an intense and passionate relationship that established a 'oneness' between the lovers. This idea progressed even further during the eighteenth and nineteenth centuries with the idea that love could involve, to borrow Singer's words, a 'oneness with an alter ego, one's self, a man or woman who would make up one's deficiencies, respond to one's deepest inclinations, and serve as possibly the only person with whom one could communicate fully'.<sup>67</sup> Robert Nozick claimed that the central idea of romantic love is a desire to 'constitute a new entity in the world, what might be called a *we*'.<sup>68</sup> Delaney says that 'perhaps the most important thing people associate with the ideal of romantic love, is this desire to unite with another person in profound psychological and physical ways'.<sup>69</sup> By the end of the twentieth century, Marilyn Friedman described love as having become 'merger mania'.<sup>70</sup>

The idea of a merger does not have to be between a man and a woman *per se*, Aristophanes certainly did not specify that the two halves were of opposing sex. In fact, he specifically said that some would be of the same-sex. The idea has, however, continued to be understood as a man and a woman coming together. Branden, for example, describes romantic love as fulfilling our need to 'encounter, unite with, and live out vicariously our opposite-gender possibilities: The need, in males, to find an embodiment in the world of the internal feminine: The need in females, to find an embodiment in the world of the internal masculine.'<sup>71</sup>

The idea of the male and female coming together to form a unity is a popular idea that we can find expressed in other places. Zanghellini points out that it is a common message in popular culture, evolutionary psychology and can be found also in unexpected places such as the discourse of difference that exists in some strands of feminist theory.<sup>72</sup> Complementarity and merger are, in turn,

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66 The idea can also be found in other traditions that have nothing to do with love. For example, the concepts of Ying and Yang in Chinese philosophy. See Aristophanes' myth in Plato *Symposium*.

67 Singer, *The Nature of Love* vols 3 & 4.

68 R Nozick, *Examined Life: Philosophical Meditations* (Simon and Shuster, New York 1989) 70.

69 Delaney N, 'Love and Loving Commitment: Articulating a Modern Ideal' (1996) 33(4) *American Philosophical Quarterly* 340.

70 Friedman, *Autonomy, Gender, Politics* (Oxford University Press, New York 2003) chapter 6; 'Romantic Love and Personal Autonomy' 115–139. She is critical of this in relation to the impact it has on women's autonomy.

71 Zanghellini, 'Marriage and Civil Union' 225.

72 Zanghellini, 'Marriage and Civil Union' 290–91.

easily understood within the concepts of nature and procreation that are central tropes in both marriage and love. These elements are evident in the same-sex marriage debate. However, as discussed, romantic love is a contested idea.

In contemporary society, romantic love is considered a radical power capable of breaking down the most entrenched of social cultural and religious barriers. It is associated with freedom, individual satisfaction and equality. Theorists such as Giddens have equated it with the democratisation of the private sphere. It is these features that make it threatening to traditional institutions. At the same time, perhaps paradoxically, romantic love is considered quite conservative and it has been linked with the replication of both patriarchy and heteronormativity.

## The Heteronormativity of Law and Love (The Queer Critique of Love)

In *The Straight Mind* Monique Wittig says that to 'live in society is to live in heterosexuality ... heterosexuality is always already there within all the mental categories. It has sneaked into dialectical thought (or thought of differences) as its main category.'<sup>73</sup> It is not surprising, therefore, to find profound heterosexual assumptions at work in our understanding of romantic love.

In the long running 1979 Harvey Fierstein play, *Torch Song Trilogy*, Arnold's mother is shocked when Arnold compares the loss of his gay partner, who has been murdered in a homophobic attack, to his mother's loss of her husband. Arnold responds to his mother's admonishment by saying:

Cause everybody knows that queers don't feel nothin' ...

Cause everybody knows that queers don't matter! Queers don't love!<sup>74</sup>

What Arnold exclaims here is the silence of homosexual love within romantic love.<sup>75</sup>

Cheshire Calhoun has argued that romantic love is constructed in our society in a way that excludes 'non-heterosexual' love.<sup>76</sup> Calhoun argues that romantic love, like other emotions, is dependent upon a society's emotional scripts. Such scripts have the function of teaching us those emotions, the proper object of

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73 M Wittig, *The Straight Mind* (Harvester Wheatsheaf, New York 1992) 40–43.

74 Harvey Fierstein, *Torch Song Trilogy* (Villard Books, New York 1983 c 1979) 144–46.

75 Incidentally, he is also pointing out the silence that exists around homosexual death.

76 C Calhoun, *Feminism, the Family, and the Politics of the Closet: Lesbian and Gay Displacement* (Oxford University Press, New York 2000); 'Sexuality Injustice' (1995) 9 *Notre Dame Journal of Law Ethics & Public Policy* 241–274; 'Making Up Emotional People: The Case of Romantic Love' in Bandes (ed), *The Passions of Law* (New York University Press, New York 1999) 217–240; 'Family's Outlaws: Rethinking the Connections Between Feminism, Lesbianism and the Family' in H Nelson (ed), *Feminism and Families* (Routledge, New York 1997) 131–150.

them, how to assess their authenticity and how to perform them.<sup>77</sup> The problem in relation to homosexual and lesbian love is that there are no paradigm scenarios or emotional scripts to follow. Even more importantly, there are actual barriers to the performance of romantic love for gay and lesbian couples, such as the prohibition to marry and to have a family.<sup>78</sup>

Paul Johnson<sup>79</sup> has argued that the heterosexual construction of love is maintained by its association with traditional scripts of marriage and domesticity, (as well as its connection with nature).<sup>80</sup> The link between love and traditional scripts of relationships, domesticity and procreation are so pervasive that they find expression in the gay and lesbian community itself. Sean Slavin's study of sexual practice among gay men found that the men struggled to make sense of their sexual and romantic lives through the binaries of sex and love, and sex and relationships.<sup>81</sup> Slavin found that the men to some extent accepted these traditional binaries, but at the same time were frustrated by the attempt to make sense of their relationships in these ways.<sup>82</sup> As Lauren Berlant has put it, when there is only one plot, and that plot counts as life, then 'those who don't or can't find their way in that story — the queers, the single, the something else — can become so easily unimaginable, even often to themselves'.<sup>83</sup>

Slavin has argued that gay men have to fight for the recognition of the relationships they actually have. Open relationships, casual sex with regular partners, multiple sex partners, can all represent love and must not be categorised as only sex.<sup>84</sup> This view has been voiced by others. Bell and Binnie have argued that love must move away from the couple and include non-monogamy, polyamory and episodic sexuality.<sup>85</sup> The recognition of 'other' relationships is central to the breakdown of the heteronormativity of love. They argue that one of the positive contributions that gay liberation has made is the blurring of the distinction between sex and love, between the categories of friend, lover and partner. This blurring has

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77 Calhoun, 'Making Up Emotional People' 222.

78 Calhoun, 'Making Up Emotional People' 222.

79 Johnson, *Love, Heterosexuality and Society*.

80 Johnson, *Love, Heterosexuality and Society* 40.

81 S Slavin, 'Instinctively, I'm Not Just a Sexual Beast: The Complexity of Intimacy Among Australian Gay Men' (2009) 12 *Sexualities* 79–96.

82 Slavin, 'Instinctively, I'm Not Just a Sexual Beast' 93.

83 L Berlant (ed), *Intimacy* (University of Chicago Press, Chicago 2000) 6. The same point is made by Judith Butler who says '[i]f you're not real, it can be hard to sustain yourself over time'. J Butler, 'Is Kinship Always Already Heterosexual?' (2002) 13 *Differences* 25.

84 Slavin, 'Instinctively, I'm Not Just a Sexual Beast' 93.

85 D Bell and J Binnie, *The Sexual Citizen: Queer Politics and Beyond* (Polity Press, Cambridge 2000) 128.

introduced an ethic to casual sex that includes 'affection, care, respect, consent and playfulness.'<sup>86</sup> This contribution can be extended to love itself, love can be played out in different kinds of relationships based on new scripts.<sup>87</sup>

The importance of replicating heterosexual love scripts (monogamy, family, parenthood, domesticity)<sup>88</sup> has proven to be important for success in legal disputes in a number of different contexts. In the case of *Re Kevin*, for example, a case can be made that a large part of the success that that couple had in having their relationship recognised as marriage was the extent to which they so successfully replicated the scripts of domesticity and family. Kevin and Jennifer presented themselves very much as the model of a heterosexual couple committed to each other and committed to the romantic ideal. They were in a long-term relationship, had one child and were expecting another. In evidence before the Court, Kevin was described repeatedly as a loving husband and father. Friends gave evidence the couple was, '[j]ust another married couple living their lives with their son'<sup>89</sup> and 'your average mum and dad with a much loved little boy',<sup>90</sup> and described Kevin as 'a fine husband and father to Quentin'.<sup>91</sup> Justice Chisolm described Kevin and Jennifer and their child as a family in 'every sense of the word.'<sup>92</sup>

Contrast these facts with the UK *Corbett v Corbett* case.<sup>93</sup> The couple in *Corbett* could not be more different to the couple in *Re Kevin*, they fitted more readily in the stereotypical bohemian and sexually deviant LGBTI life/sex scripts. April Ashley was a male-to-female transsexual. She worked as an entertainer in the South of France with a well-known troupe of 'transvestites'<sup>94</sup> at the Hotel Carousel. She also worked as a model and had become a minor celebrity following a series of articles in the *News of the World*.

Arthur Corbett was divorced and had four children. He was interested in 'transvestism'. He enjoyed dressing as a woman and had had homosexual experiences with several men. The Court described him as someone who had

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86 Bell & Binnie, *The Sexual Citizen* 134. See also J Weeks, *Invented Moralities: Sexual Values in an Age of Uncertainty* (Polity Press, Cambridge 1995); S Seidman, *Romantic Longings: Love in America, 1830–1980* (Routledge New York 1991).

87 F Manalansaniv, 'Queer Love in the Time of War and Shopping' in G E Haggerty & M McGarry (eds), *A Companion to Lesbian, Gay, Bisexual, Transgender, and Queer Studies* (Blackwell Publishing, MA 2007) 77–86.

88 See Johnson, *Love, Heterosexuality and Society*.

89 *Re Kevin* 170 (Chisholm J).

90 *Re Kevin* 170 (Chisholm J).

91 *Re Kevin* 170 (Chisholm J).

92 *Re Kevin* 168 (Chisholm J).

93 *Corbett v Corbett (otherwise Ashley)* [1970] 2 All ER 33.

94 The language used in the original case is 'transvestite' and 'transvestism'.

become 'more and more involved in the society of sexual deviants, and interested in sexual deviations of all kinds ... He is a man who is extremely prone to all kinds of sexual fantasies and practices.'<sup>95</sup>

Arthur Corbett had sought a meeting with April because he was fascinated by her success as a female; April had gained some fame in 'transvestite' circles. Following their meeting, however, Arthur claimed that he developed an interest in her as 'a man would for a woman'. In other words, he fell in love with her, although such language was not used in the case.

Despite their turbulent relationship, and despite the fact that April found Arthur to be a 'difficult and perplexing person',<sup>96</sup> April eventually agreed to marry him. The marriage lasted only 12 days. The Court could not establish the extent to which the relationship had been sexual, but it was clear that this relationship was not conventional. Their love for each other was not displayed by the couple living together, having sex together, sharing daily life and so on. Unlike Jennifer and Kevin, they did not adhere to the traditional heterosexual scripts of love, relationships and domesticity. The Court described Arthur's feelings for April as an obsession, and described him as living 'in the grip of his fantasies'.<sup>97</sup> Words such as 'commitment', 'affection', 'desire' or 'love' are never used to describe this relationship, and both April and Arthur were judged incapable of such emotions. Instead of love, they were described as feeling 'obsession';<sup>98</sup> instead of desire they were 'prone to sexual fantasies and practices'.<sup>99</sup> Justice Ormond puts it as plainly as can be:

Listening to each party describing this strange relationship, my principal impression was that it had little or nothing in common with any heterosexual relationship which I could recall hearing about in a fairly extensive experience of this court.<sup>100</sup>

Their fate was sealed, their marriage would never receive the legal recognition April wanted. How could it? Unlike Kevin and Jennifer, their relationship had 'little or nothing in common' with the heterosexual ideal of romantic love.

The heteronormativity of both marriage and love makes many cautious, but while the legal recognition of same-sex marriage has the potential to reinforce the heteronormativity of marriage and of love, it is also capable of strengthening the radical rhetoric of love and has the potential to radicalise marriage.

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95 *Corbett v Corbett* 37–38 (Ormrod J).

96 *Corbett v Corbett* 38 (Ormrod J).

97 *Corbett v Corbett* 39 (Ormrod J).

98 *Corbett v Corbett* 38 (Ormrod J).

99 *Corbett v Corbett* 38 (Ormrod J).

100 *Corbett v Corbett* 38 (Ormrod J).

Feminists and Queer theorists are right to say that accepting marriage into their political frameworks can be read as a watering down of the radical nature of their love, but it can be equally argued that it will have the opposite effect. The recognition that love can be played out in different kinds of relationships, based on new scripts, is central to the breakdown of the heteronormativity of love and central to a positive reading of love. This could be read as an aspect of queering love.

Just as there are positive feminist readings of love, so too are there positive queer readings of love. Berlant, for example, argues that love is ultimately a site of optimism, change and transformation: 'love approximates a space to which people can return, becoming as different as they can be from themselves without being traumatically shattered; it is a scene of optimism for change, for transformational environment'.<sup>101</sup> Johnson claims that 'whilst romantic love may create the hell of mutual alienation it also retains its primacy as an anti-alienating potential because it offers a way of expressing forms of pleasurable subjective transformation'.<sup>102</sup> To be able to achieve this, however, love must be seen as being connected rather than disconnected to agency, as being connected to but not subordinate to desire, and, importantly, it must be seen as something that exists outside of heterosexual scripts. Berlant says that when queer thought enters the discourse of love, it must not teach 'that we are all alike and compelled to repeat our likeness intelligibly, but by teaching some of what we've learned about love, under the surface, across the lines, around the scenes, informally'.<sup>103</sup> Queering love for Berlant is achieved when it lives up to its promises of existing outside of established institutions, when it challenges all rules connected with it which presume to establish principles for living.<sup>104</sup> In other words, when love delivers what it promises, intimate relationships that are free of oppressive and traditional forms and rejects established rules and barriers. The project then is to break down a number of associations that define love: to break down the binary of love and sex and see them instead as existing in more fluid combinations; to break down the connection that now exists with, on the one hand, same-sex relationships and sex, and on the other, heterosexual relationships and love;<sup>105</sup> and to break down the connection between love and marriage, family and procreation. Same-sex marriage can assist this project.

Recognition of same-sex marriage does not have to be a recognition of the oppressive and heteronormative love that feminists and queer theorists have warned us against, rather it can be a recognition of the radical and optimistic

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101 L Berlant, 'Love: A Queer Feeling' in T Dean & C Lane (eds), *Psychoanalysis and Homosexuality* (Chicago University Press, Chicago 2000) 448.

102 Johnson, *Love, Heterosexuality and Society* 83.

103 Berlant, 'Love: A Queer Feeling' 448.

104 Berlant, 'Love: A Queer Feeling' 443.

105 Same-sex relationships are seen as either sexual or platonic but rarely as loving in the romantic sense.

love that breaks down barriers of culture, religion, class and sexuality and values and creates equality. It will recognise a love that is closer to Giddens' idea of a democratic and inclusive love. It will not achieve the broad recognition of all loving relationships that exist in society that many queer theorists want, but it will expand the recognition beyond the narrow heterosexual model and progress us along the road to making love even more radical than we now think it is.

## Conclusion

The legal debate over same-sex marriage has exploded not only the meaning of marriage but also of love. In the legal episodes previously discussed, while traditional meanings of marriage were being discarded, little was said about how we are to interpret modern marriage. This void can be filled by romantic love. In the same-sex marriage debate, this has become an explicit argument. Here, the argument comes down to whether marriage is about procreation or love. The view that has so far appeared to dominate is that marriage is about procreation. Deconstructing the debate, however, shows that for a significant number of participants in the debate, marriage can also be about love. Just when we appear to have broken down the connection between marriage and procreation, which is considered to be *the* barrier, we discover that the barrier is also love itself. Framing the debate as one in which procreation and love compete for the central place is, in fact, not very helpful at all, because the two institutions appear to be grounded in the same ideas. The central tropes in both marriage and love are biology, nature and procreation.

A less understood aspect of the debate is how we understand love. The idea of love that appears to dominate the debate is one embedded in love as merger and complementarity. Christianity and new natural law see this as being achieved only via the sexual merger of a male and female body. This is not unique to the Christian view of love, however. It has permeated our understanding of love since classical times and has retained currency throughout the history of the western idea of love. Viewing the same-sex marriage debate through this lens, it is difficult not to conclude that the orthodox idea of love does not serve us well. In particular, it makes the idea that romantic love is liberating sound hollow. The way we conceive of romantic love does not mean that '*love does not discriminate*'.<sup>106</sup> It is not the great leveller in society that Solomon and others<sup>107</sup> insist it is. Cinderella might have got her prince and all that came with it, but no matter how much she loved, she would not have got her prize if *she* had been a *he*.

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106 Quote on a placard at a rally in support of same-sex marriage in the ACT in 2009.

107 See the discussion on romantic love.

This is a pessimistic view of the idea of love that emerges from the debate, and ignores another, more optimistic, reading. The same-sex marriage debate can also be read as enforcing the idealistic ideas of love which many see as revolutionary and capable of breaking down entrenched barriers. Agitating for same-sex marriage on the ground that marriage is about love rather than procreation challenges not only the heteronormativity of marriage but also of love. Two readings of love can come out of the legal recognition of same-sex marriage. One of those readings is that love is indeed steeped in both patriarchy and heterosexuality; the other is that it is a radical and liberating force. I think that the latter reading has more force. Feminism and queer theory have come too far to agitate for the recognition of the rights of women and LGBTI to now enter an institution and simply get subsumed into its dark past. The more likely outcome is that the institution of marriage will change to reflect these new modes of loving and help to reflect the radical reading of romantic love and obscure the other.

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