International Journal of Law in Context, 10,1 pp. 5–25 (2014) © Cambridge University Press 2014
doi:10.1017/S1744552313000347

Must equal mean identical? Same-sex couples and marriage

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Abstract

This paper pushes against the successful rhetoric of formal equality by which same-sex couples are the same as different-sex couples and opening existing regimes of marriage to them best recognises their equal moral worth. Drawing on social science research that indicates differences in the economic organisation of same-sex couples, the paper explores the possibility that a different marriage regime for the spouses' reciprocal duties might combine recognition of their equal moral worth with sensitivity to their needs. The study sharpens the understanding of contemporary investments in marriage law for everyone and offers a better justification for formal equality: same-sex couples may be treated identically to different-sex couples not because they are the same, but despite their differences.

Introduction

In locating gay men and lesbians relative to heterosexual conjugality, scholars in sociology and queer theory have explored tensions between sameness and difference. They have contrasted the impulse towards normalcy with a focus on chosen family and queer life as a self-reflective, radical experiment (e.g. Weston, 1997; Weeks, Heaphy and Donovan, 2001; Warner, 2000). That emphasis on distinctiveness has not translated into lobbying, litigation and law reform. On gay issues, as on others, claims for *substantive* equality – for respectfully tailoring treatment to a group's relevant features while recognising its equal moral worth – have met with relatively little success (Hunter, 2008). Instead, successful legal efforts have partaken of a transnational discourse of *formal* equality, by which it is axiomatic that giving gay men and lesbians access to marriage on terms identical to those for different-sex spouses is the way to accord them equal respect and dignity.

The grant of formal equality to gay men and lesbians has generated an uneven critical reception. It has received critique from conservative quarters. Scholars from feminist, queer or other left viewpoints have challenged the project of formal equality, often with an eye to how access to marriage might intensify the marginalisation of those unlikely to take it up (e.g. Spade, 2011; Warner, 2000). Few scholars, however, have studied the financial frameworks governing marriage and divorce from the perspective of those same-sex couples who might henceforth access them.

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The question of fit should not be taken for granted. An obvious reason is that marriage traditionally bore women's economic dependency on men 'embedded deep within', and reforms implementing gender neutrality may not have extirpated all gendered assumptions (Barlow, 2009, p. 32; on the law of ancillary relief's heteronormativity, see Bendall, 2013).

This paper aims to make space for posing an important question too often forgotten or ignored by supporters of rights for gay men and lesbians: whether the push for entry to marriage is the best, or even an appropriate, means of achieving substantive equality. What regulatory approach would engagement with the empirical research on same-sex couples generate? Would it look the same as the politically successful campaign for identical treatment, under the banner of civil partnership or marriage? Furthermore, might examining these questions yield insights about contemporary investments in marriage and problems with its regulation, be the spouses of the same or different sexes? The difficulty of exploring these inquiries testifies to the commitment to formal equality and the challenges of holding together different treatment and equal moral worth.

The paper consists of three parts. Whilst public lawyers and theorists often debate marriage at an abstract level of equality and dignity, Part I grounds the discussion in primarily private law. It divides the obligations which flow from marriage into categories, using the example of the Canadian province of Quebec. By reference to the findings of social scientists, Part II sets out the basis for challenging the assumption that access to marriage on the existing terms best remedies same-sex couples' long-time legal neglect. That basis includes distinctive traits of same-sex couples, same-sex couples' focus on governmental and societal recognition, and gaps in the research. Moving past acknowledgement of those methodological difficulties (Leckey, 2013), Part III develops that challenge. Framing access to marriage as a question of an identity group's exclusion by the majority is problematic, since marriage redistributes resources at an individual level within the group. That part explores the controversial possibility that the regime applicable to formalised same-sex couples by default might consist of identical duties on the part of third parties and a lighter, more flexible economic regime as between the spouses. Might such an approach combine recognition of same-sex couples' equal moral worth with sensitivity to their on-the-ground difference? Whether or not the proposal is taken up, the discussion clarifies the symbolic significance of the regulation of spouses' economic relations. That symbolism or communicative dimension gestures towards a more satisfying justification for treating same-sex couples identically to different-sex ones. Formal equality may be appropriate not because same-sex couples are the same as different-sex couples, but despite their differences.

I. Legal effects of marriage

A. Unbundling marriage law

The prevailing treatment of marriage takes it as a unitary contract and institution, as forest more than trees. Consequently, two important contrasts often pass unnoticed. One concerns the identity of the relevant actor or, in legal language, the debtor of the obligation correlative to a creditor's right. Much advocacy for recognition of same-sex couples has focused on the state benefits conferred on married, different-sex couples. Scholars have, of course, referred to marriage's effects as between the spouses. It has been noted that 'the rights of marriage are not always "of the couple" but rather, often, lie *against* one spouse' (Halley, 2001, p. 109; on marriage as 'its own little social security system', see Hale, 2011, p. 4). Yet often the distinction is not tracked rigorously. For present purposes, a distinction lies between rules obligating third parties and ones reciprocally obligating the spouses. 'Third parties' in this sense includes governments and entities such as employers and insurance companies. As much literature on same-sex marriage notes, third parties take marital status into account for many purposes (governments in the US in particular lavish hundreds if not thousands of benefits

https://doi.org/10.1017/S1744552313000347 Published online by Cambridge University Press

on married spouses).[1] Contrasting third parties with the spouses avoids the dichotomy public/private, which feminist and other critical scholars have challenged persuasively. The state's role in enacting and enforcing the rules that obligate the spouses provides one basis for that challenge.

The other contrast is temporal. 'Midgame' rules operate only during the functioning of a formalised union such as marriage or civil partnership. Other, 'endgame' rules operate only on its breakdown or dissolution (this distinction comes from Ellickson, 2010, p. 92). Still other rules, such as the spouses' duty to maintain one another, may operate while the relationship flourishes, but typically require enforcement only once it has withered. Juxtaposing the two contrasts sets up four categories: third parties' obligations during the marriage and afterwards and the spouses' obligations during the marriage and afterwards. Critically, the duties occupying those cells need not operate monolithically. Duties in one or more of the cells might attach to a couple without triggering the duties in all four. To be sure, the duties of third parties and of the spouses may be connected. State recognition for one purpose might be justified by reference to the spouses' having assumed reciprocal responsibility in relation to another. Some observers would decry such justification as neoliberal and privatising. Whatever the politics, however, such connections have obvious limits. Unbundling occurs where spouses are permitted to modify their duties vis-à-vis each other by prenuptial agreement, leaving unaltered third parties' duties towards the couple.[2] Thus a prenuptial agreement altering the property rules applicable on eventual dissolution has no impact on one spouse's capacity to sponsor the other for immigration or on entitlement to survivor's benefits under a public pension. Further evidence that the status of marriage is compatible with variation in the spouses' economic relations arises from the contractual choice amongst two or more matrimonial regimes in civil-law jurisdictions (Pineau and Pratte, 2006, para. 140, p. 186). The piecemeal treatment accorded in some jurisdictions to unmarried cohabitants serves as another reminder that no necessary unity binds the elements which register conjugality in law. These categories will become less abstract when matched with the private law of a selected jurisdiction.

B. The case of Quebec

Quebec's Civil Code sets out the architecture of its general private law, making it relatively easy to identify the enacted rules of marriage (however much adjudication, custom and practice moderate their operation). While separate property during marriage in common-law jurisdictions feeds the misimpression that law enters only at the end, selection of a civil-law jurisdiction emphasises the legal effects during an intact union. The civil law makes it explicit that marriage, even as a going concern, affects spouses' property relations (Malaurie and Aynès, 2010, para. 25, p. 13). It attaches a matrimonial regime to the spouses, understood as the 'body of rules governing patrimonial relations of the spouses, both as between themselves and with respect to third persons' (Quebec Research Centre of Private & Comparative Law, 1999, 'matrimonial regime'). Moreover, the effects of marriage in Quebec are especially onerous. It thus provides a strong example from which to question the assumption that equality demands opening existing marriage law to same-sex couples.[3] If the case

1 *United States v. Windsor* 570 U.S. 12 (2013).

2 See, e.g., *Granatino v. Radmacher* [2010] UKSC 42, [2011] 1 AC 534; *Hartshorne v. Hartshorne* 2004 SCC 22, [2004] 1 SCR 550; Law Commission, 2011.

3 While its silence on sexual matters (non-consummation not a ground of validity; adultery not a ground for dissolution: Barker, 2006) distinguishes the regulation of civil partnership in the UK from that of marriage, Canadian jurists have pressed same-sex unions into the existing marital framework. Same-sex partners marrying or entering a civil union in Quebec must be informed of 'the advisability of a premarital medical examination' (respectively, arts. 368 para. 2, 521.3 para. 2 CCQ); marriage and civil union in Quebec entail a reciprocal duty of fidelity and a reciprocal obligation that the parties 'live together' (art. 392 CCQ); and courts have for divorce purposes deviated from the established definition of adultery as vaginal

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for considering alternative property rules for same-sex partners is unpersuasive in Quebec, it will be weaker still where the property distributions are less extensive or more discretionary.

In Quebec, couples – of the same or different sexes – may find themselves subject to marriage law by two avenues. They may marry, under a federal law effective throughout Canada that has allowed two spouses of the same sex since 2005.[4] Alternatively, they may contract a civil union. The provincial legislature had created that status in 2002 to address the situation of same-sex couples.[5] The drafters attached to the civil union virtually the entire corpus of rules applicable to married spouses. An exception is dissolution, which the spouses may accomplish by a notarised joint declaration where the interests of their common children are not at stake.

This paper focuses on the economic rules affecting the spouses' rights and duties towards each other during their union and on its dissolution. Spouses are obligated to 'contribute towards the expenses of the marriage in proportion to their respective means' and may do so 'by their activities within the home'.[6] The nod to 'activities within the home' affirms the value of contributions to the family's financial well-being that are indirect, insusceptible of valuation and proof, or both. It does most work where, in line with traditional gendered patterns, a substantial specialisation of labour has taken root (Lefebvre, 2011, p. 4). Despite that provision's aspirational air, disproportionate contribution to the expenses of the marriage may substantiate an eventual claim for a 'compensatory allowance' on principles of unjust enrichment.[7] Spouses owe each other maintenance.[8] In addition, a regime attaches to the spouses' 'family residence'. In protection of the family's dwelling place, measures constrain the unilateral exercise of powers enjoyed under the law of property – to give, to charge, to lease, to sell (and in the case of the furniture, even to remove it).[9]

Many rules operate on breakdown of a marriage or civil union. The court may award to either spouse the use or ownership of the furniture and other movable property serving for household use. A judge may also award the lease of a rented family residence to the lessee's spouse or grant use of a dwelling to the spouse to whom custody of a child is awarded.[10] Two sets of rules aim to concretise a legislative ideal of the spouses' substantive equality by reallocating the value of property. The regime of the 'family patrimony' calls for dividing between the spouses, in equal shares, the increase in value during the marriage of a notional mass consisting of the family's residences and their furnishings, motor vehicles used for family travel, and accrued pensions benefits.[11] Controversially, and in diminishment of spouses' traditional freedom to choose their matrimonial regime, the family patrimony cannot be renounced or varied by contract in advance of the end of the relationship.[12] For the spouses' property outside the family patrimony, a second set of rules carries out a deferred community of gains. This 'partnership of acquests' divides between the spouses, once more in equal shares, the value of the spouses' 'acquest' property from

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penetration in order to include same-sex relations (Divorce Act RSC 1985, c 3 (2nd Supp), s 8(2)(b)(i)); *P (SE) v. P (DD)* 2005 BCSC 1290, 259 DLR (4th) 358; *Thébeau v. Thébeau* 2006 NBQB 154, 302 NBR (2d) 190).

4 Civil Marriage Act SC 2005 c 33.

5 Arts. 521.1ff. CCQ.

6 Art. 396 CCQ.

7 Art. 427 CCQ.

8 Art. 585 CCQ.

9 Arts. 401–408 CCQ.

10 Arts. 409, 410 CCQ.

11 Arts. 414–426 CCQ.

12 Art. 423 CCQ.

https://doi.org/10.1017/S1744552313000347 Published online by Cambridge University Press

the marriage (excluding as 'private' any property owned on marriage or acquired by inheritance or gift). Partnership of acquests is the Civil Code's 'legal' or default matrimonial regime; spouses may opt by solemn contract for separate property (or for the archaic community of property).[13] The equality embodied here is substantive, not formal, since the spouses share equally in the gains on account of their equal moral worth, without reference to the economic value of their respective contributions.[14] That is, on marriage breakdown, the unpaid contributions to family life made by the home-maker who devoted time to the raising of children are valued equally with the breadwinner's.

In addition to this provincial law, the Parliament of Canada's Divorce Act empowers a court to order one former spouse to pay support to the other, on bases of compensation or need.[15] For the purpose of spousal support, the Supreme Court of Canada has taken judicial notice of the 'feminisation of poverty' and the economic disadvantage suffered by wives on marriage breakdown (Diduck and Orton, 1994).[16] Jurisprudence thus suggests that the support obligation has been used, 'at least in part, as a remedy for social inequality' (Ferguson, 2008, p. 69).[17]

By and large, the regimes of matrimonial property make their effects felt once the marital partnership is over. Unlike an immediate community of property, they do not alter title to property during the marriage. Yet they reach back into the intact relationship, dispelling any sense that the happy marriage has no law. In a way that complicates characterisation of the property interest which crystallises when the relationship ends, a spouse may be required to compensate the other for dissipation of the family patrimony in advance of the marriage's end.[18] Similarly, while the partnership of acquests leaves to the spouses the 'administration, enjoyment and free disposal' of their respective property, each requires the other's consent for disposing gratuitously, *inter vivos*, of acquest property beyond 'property of small value or customary presents'.[19] Last, during the marriage, presumptions operative in the absence of evidence as to a good's acquisition tilt the scales in favour of sharing.[20]

Table 1 summarises the obligatory and default rules in Quebec, classified by the contrasts introduced above. The duties of third parties are weightiest and most numerous while the spouses' union endures. In contrast, the spouses' obligations towards each other bite most sharply on relationship end.

How might one make sense of all this law? In a rupture from the prior default regime of community of property, which had vested the husband with full powers of administration, the current rules are drafted with scrupulous gender neutrality.[21] The family patrimony and the

13 Arts. 432, 440 CCQ.

14 The Married Women's Property Acts of the 1880s in common-law jurisdictions (like the married women's civil emancipation in Quebec in the 1960s) had achieved formal equality, making women equal to their husbands in abstract legal capacity, entitling each spouse to his or her respective earnings or endowments.

15 RSC 1985, c 3 (2nd Supp), s. 15.2; *Bracklow v. Bracklow* [1999] 1 SCR 420.

16 *Moge v. Moge* [1992] 3 SCR 813.

17 Confirming that the Canadian case of Quebec represents a stronger test case for the present inquiry than does England, it must be acknowledged that contemporary English law could be read as not having any purpose that is dependent on gender, taking instead an essentially individualistic approach, couple by couple (see, e.g., *Granatino v. Radmacher* [2010] UKSC 42, [2011] 1 AC 534).

18 Art. 421 CCQ. See also Family Law Act, RSO 1990, c F3, s 5(6)(d).

19 Arts. 461, 462 CCQ.

20 Arts. 459, 460 CCQ.

21 Anomalously, intended spouses must, by the English version of art. 374 para. 2 CCQ, declare their wish 'to take each other as husband and wife', but no gender-differentiated obligations flow as a result.

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Table 1 Financial and property rules applicable to legal spouses

Debtor (relevant actor)	Timing	
	During the relationship	**On relationship end or afterwards**
Third parties (governments, public bodies, employers, etc.)	Pensions; health care; insurance; employment benefits; welfare; restrictions on lender's security taken in the family home without consent of borrower's spouse	Landlord's duty to transfer lease to non-lessee spouse
Spouses one to another	Duty of maintenance; constraints on alienation without other's consent of family residence and its furnishings; bar on unilateral gifting of acquest property; need to compensate for dissipation of the family patrimony	Duty of maintenance; sharing of gains in property under family patrimony and partnership of acquests; possible compensatory allowance; transfer of lease or use of family residence to other spouse

partnership of acquests inscribe into the Civil Code a vision of marriage as a joint economic partnership. Quebec's regime was, however, designed so as to benefit a class of wives. Legislative debates testify that the family patrimony was aimed to address the economic precariousness experienced on the end of marriage by women who, before divorce was on the cards, had married into a regime of separate property and specialised in unpaid work (Roy, 2000). Those provisions obligating the wealthier spouse to make an equalisation payment to the other will matter most where the spouses' respective gains during the marriage are asymmetrical or where title does not acknowledge the extent of each partner's contributions.[22] The paradigmatic situation in which those regimes will do the most work is that of a marriage in which the spouses have carried out a 'traditional' specialisation of labour.

A word about children is in order. As in many Western jurisdictions, the legislature of Quebec has largely unmoored the law of parentage and parental authority or responsibility from the law of marriage.[23] In a largely aspirational register, the Civil Code states that spouses in marriage or in civil union 'take in hand the moral and material direction of the family, exercise parental authority and assume the tasks resulting therefrom'.[24] Children's impact on marriage is, however, recognised more concretely. Some rules addressing the fall-out of marriage provide for cases involving children. Recall that a right to use the family residence is possible when incidental to custody of a child.[25] The maintenance provisions in Canada's Divorce Act refer to 'the functions performed by each spouse during cohabitation' and the need to 'apportion between the spouses any financial consequences arising from the care of any child of the marriage'.[26] Beyond such explicit measures, however, provincial rules dividing property equally between the spouses can be

22 Case-law would point to family farms — inherited or purchased in one spouse's name — as magnets for such difficulties (Chambers, 2010).

23 Remaining exceptions include the presumption of the husband's paternity vis-à-vis children born to his wife: art. 525 CCQ.

24 Art. 394 CCQ.

25 Art. 410 para. 2 CCQ.

26 RSC 1985, c 3 (2nd Supp), ss 15.2(4)(b), 15.2(6)(b). Compare Matrimonial Causes Act 1973 s 25(2)(f) ('contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family').

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understood as responsive to a specialisation of labour that children's presence in a household tends to intensify. It is significant, then, that matrimonial property law in Quebec and other Canadian provinces provides no exception for couples without children. In Quebec, for example, the judicial discretion for departing from equal division of the family patrimony is narrow, bearing on a spouse's 'economic fault'.[27]

In addition to the supposition of breadwinner and home-maker, do the regimes channel a legislative hunch that, the spouses' legal equality notwithstanding, a vulnerable spouse's economic interests may require protection? The family patrimony's compulsory or 'public order' character channels concern about unequal bargaining power between the spouses. For its part, the protective regime of the family residence matters most where one spouse holds title to the family home and cannot be trusted to obtain the other's consent before dealing with it.

Motivated by commitment to the formal equality of the classes of same-sex and different-sex spouses, legislative drafters have given the former access to marital regimes predicated on a specialisation of labour – one often associated with child rearing – and disposed to counter exploitation and gendered inequality. Part II examines whether that decision finds support in the sociological evidence.

II. Data on same-sex couples

A. Distinctive traits

It has been posited that the UK's Civil Partnership Act 2004 – and likewise marriage and civil union law in Quebec and elsewhere – might rely on 'models of heterosexual behaviour (such as money sharing and mutual financial responsibility) that may not adequately reflect the lived experiences' of lesbian and gay couples (Burns, Burgoyne and Clarke, 2008, p. 482). Whilst varying findings and interpretations abound, social science research challenges formal equality's diktat that there is no difference between same-sex and different-sex couples potentially relevant to the regulation of their economic relations.[28]

Shortly after the entry into force of Vermont's civil union, Balsam, Beauchaine, Rothblum and Solomon studied three classes of couple: different-sex married couples and same-sex couples having and not having undertaken a civil union. The most noticeable differences emerged between same-sex couples as a group and heterosexual married couples. Whether in a civil union or not, same-sex couples showed a lesser likelihood of having children and a greater likelihood of sharing housework and finances (Balsam *et al.*, 2008, p. 103). Other researchers report that same-sex couples expect lesser financial entwinement than do different-sex couples. Most of Burns, Burgoyne and Clarke's respondents would 'help a partner out' in the event of job loss or inability to work, but saw such help as ad hoc 'assistance' rather than as the obligational sharing of losses accruing to an integrated economic unit (2008, p. 497).

Much research on same-sex domesticity points to a strong egalitarian ideal for division of labour, a reluctance for one spouse to be dependent on the other, and an emphasis on negotiation (Kurdek, 2007; Esmail, 2010; Perlesz *et al.*, 2010; Julien and Chartrand, 1997). It is thought that bargaining power may be more evenly distributed within same-sex than different-sex couples, on account of their common gender and more closely matched preferences (Klawitter, 2008, p. 434). Beyond that ideal, research indicates that, while different-sex couples continue to divide tasks along traditional gendered lines, lesbian and gay male couples are indeed more egalitarian in division of housework

27 Art. 422 CCQ; *MT v. J-YT* 2008 SCC 50, [2008] 2 SCR 781 [28]. From Ontario, see Family Law Act RSO 1990, c F3, s 5(6).

28 Part II draws on Leckey (2013, pp. 181–86).

https://doi.org/10.1017/S1744552313000347 Published online by Cambridge University Press

and the respective allocations of time between home and the labour market (see, e.g., Burns *et al.*, 2008, p. 484; Solomon, Rothblum and Balsam, 2005, pp. 562, 572; Kurdek, 2007). Same-sex couples may be likelier than different-sex couples to keep their finances separate (Burns *et al.*, 2008, p. 484). These studies might reduce the necessity or appropriateness of rules affecting the family residence and couples' property during their common life.

Other research, however, complicates these narratives. These strands of research call to mind the caution that sociological narratives regarding gay men and lesbians may be '(often unwittingly) driven by an overly affirmative agenda that often goes hand in hand with particular liberationist or emancipatory ... agendas' (Heaphy, 2008, [3.4]). Giddings reports that lesbian couples exhibit divisions of labour ranging from the purposefully egalitarian to distributions mirroring the most unequal heterosexual stereotypes (1998, pp. 97–98). The 'gender-empty' approach which views lesbian and gay domesticity as non-gendered and freely negotiated may be problematic (Oerton, 1997, p. 424). Carrington reports a disjuncture between the 'public portrayals and presentations of egalitarianism' on the part of gay and lesbian families and their prevailing household realities (1999, p. 176). Contrary to the accounts of negotiation and choice which arise absent gender differences, partners in same-sex relationships who specialise in domestic labour may do so not out of inclination or choice, but on account of their paid work relative to that of other family members (Carrington, 1999, p. 193). In turn, structural factors such as race and class affect the partners' respective earning power (Weston, 1996; Sutphin, 2010, p. 192; see also Heaphy, 2011). Avowals of equality notwithstanding, unequal incomes within a couple may make it 'incredibly difficult to resist those patterns of dominance' that cohere around the higher earner's role and status (Burns *et al.*, 2008, p. 499). Debt is another factor illustrative that same-sex couples, 'like all couples, are not free from cultural, social or biographical constraints' (Heaphy, Smart and Einarsdottir, 2013, p. 14). Literature on domestic violence within same-sex households offers one more (e.g. Ristock, 2011; Donovan, forthcoming in 2014).

Studies also address child rearing by same-sex couples. Male couples with children are likelier than married different-sex and female couples with children to have a 'traditional' employment situation, with one partner out of the labour force (Prokos and Keene, 2010, p. 946). Some studies indicate a distinct role for the biological mother vis-à-vis the social or stepmother, including greater responsibility running the household (see, e.g., Moore, 2008; also Badgett, 2001, p. 159; but see Perlesz *et al.*, 2010, p. 386). If one detects concern for child rearing in marriage law, it is germane that married same-sex couples are likelier than unmarried same-sex couples to be raising children. For example, the Canadian census of 2011 reported that over one-fifth (21.3%) of female married couples had children versus 15.4 per cent of unmarried female couples; 5.9 per cent of married male couples had children versus 2.8 per cent of cohabiting male couples.[29] Still, to the extent that the regulation of marriage aims to address the economic fall-out of parenting, the class of formalised same-sex couples is overinclusive.[30]

If the data presented in this section suggest a basis for doubting that the property rules made available to same-sex couples who formalise their union make a good fit, other factors call for further caution.

29 Online: ‹http://www12.statcan.gc.ca/census-recensement/2011/dp-pd/tbt-tt/Rp-eng.cfm?LANG=E&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=0&GID=0&GK=0&GRP=1&PID=102659&PRID=0&PTYPE=101955&S=0&SHOWALL=0&SUB=0&Temporal=2011&THEME=89&VID=0&VNAMEE=&VNAMEF=›.

30 This query is distinct from the argument, appropriately rejected by Canadian courts, denying same-sex couples the right to marry on the basis of marriage's intrinsic ties to child rearing: *Hendricks v. Québec (Procureur général)* [2002] RJQ 2506 [147] [149] (Sup Ct), varied *Ligue catholique pour les droits de l'homme c Hendricks* [2004] RJQ 851 (CA); also *Halpern v. Canada (Attorney General)* (2003) 65 OR (3d) 161 [94] (CA).

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B. Difficulties

Obstacles bedevil any inquiry as to how 'ergonomically' the state shapes itself around the 'contours of [same-sex] relationships as they are lived' (Cooper, 2004, pp. 185, 114). The sampling problems with the gay and lesbian population are well known. Studies repeatedly acknowledge that the samples accumulated by snowball sampling or other techniques result in groups that overrepresent White, educated and middle-class gay men and lesbians (see, e.g., Balsam *et al.*, 2008, pp. 114–15; Schecter, Tracy, Page and Luong, 2008, p. 419). Two further difficulties with formal equality emerge when the existing data are reviewed in the light of the distinctions drawn in Part I.

The first difficulty relates to the questions of whom the claims for marriage target and who bears the impact of marriage law: third parties or the spouses? Recognition of the couple by third parties is a prominent concern for researchers and those gay men and women who wish to marry. Much of the scholarly literature on same-sex couples focuses, for the purposes of third parties, on their moral worth and legibility as family. Affirmations are made that 'lesbian and gay people fit the bill' as families in the economic sense (Badgett, 2001, p. 164) and prove 'successful in creating stable long-term partnerships' (Coltrane and Adams, 2008, p. 87). Such emphasis on gay men's and lesbians' familial or conjugal commitment must be read as responsive to the social and political hostility to same-sex relationships. It aims to combat the assumption that same-sex couples are unstable or less committed than married different-sex couples.

Similarly, much activism has focused on the duties affecting governments and other third parties during the intact relationship. For example, the constitutional case in which the Supreme Court of Canada recognised sexual orientation as a suspect ground for governmental distinctions concerned the spousal allowance for intact couples under the Old Age Security Act.[31] In the UK, the regime of inheritance tax and the favourable treatment of spouses made the death of one partner another salient moment for governmental recognition. The concerns prominent in lobbying and debate did not include 'access to the courts for property redistribution purposes' (Bottomley and Wong, 2006, p. 44; also Barker, 2012, p. 99). Exceptionally, the Supreme Court of Canada has decided a discrimination claim concerning whether a private maintenance obligation arose after two lesbians had ceased cohabiting.[32]

The reasons for marrying voiced by same-sex couples emphasise the attention to third parties in the drive for marriage. While different-sex couples marry for many reasons, those identified by same-sex couples fasten on third parties. Schecter *et al.* provide rich narratives of couples' manifestations of commitment, including but not limited to same-sex marriage. Their same-sex respondents reported a political dimension: getting married in order to fight homophobia and claim greater acknowledgement of the couple by families and peers (2008, p. 417; further on recognition by family, see Shipman and Smart, 2007, paras. 4.8–4.10). Authors of another study reported three main reasons for choosing a civil union: mutual love and commitment; a desire for legal status for their relationship; and to increase societal knowledge of gay and lesbian relationships (Solomon *et al.*, 2005). Badgett's interviews included reasons directly regarding the couple. But hers, too, underscored the wish to make a political statement about the equality of gay men and lesbians or a feminist statement related to the equality of men and women (2009, p. 89).

Turning briefly from research to law, the reasoning at the core of the leading Canadian judgment on same-sex marriage as a constitutional right concerned the symbolism of the restrictive definition of marriage. The government's failure to open marriage to same-sex couples telegraphed the message that same-sex couples were incapable 'of forming loving and lasting relationships' and that same-sex relationships were 'not worthy of the same respect and

31 *Egan v. Canada* [1995] 2 SCR 513.

32 *M v. H* [1999] 2 SCR 3.

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recognition as opposite-sex relationships'.[33] Such analysis focuses on the communicative significance of third parties' conduct towards gay and lesbian couples (on symbolic recognition, see further Barker, 2012, pp. 103–109).

The political thrust of gay or lesbian couples' decision to marry or contract a civil union may abate or change over time. Indeed, recent research on younger civilly partnered couples reports 'practices of ordinariness' and 'claims to ordinariness', although such claims may themselves be political (Heaphy *et al.*, 2013, pp. 170–71). Legislative drafters purporting to offer equality to gay men and lesbians should nevertheless be aware of this dimension. Such externally focused motives for marriage are not probative as to the degree of economic sharing intended by same-sex couples. Nor, more concretely, do they speak to the likelihood that title alone will result in a distribution of property that the pattern of the couple's shared life renders unfair.

The second difficulty concerns the temporal focus, or the relationship stage, of social scientists' study of same-sex couples. Researchers have not studied how same-sex couples unwind their relationship absent any regulation by family law.[34] Relationship breakdown is addressed as it affects parenting, but not the partners' financial disentanglement. Table 2 roughly fills in practices observable by social scientists absent legal recognition of same-sex couples.

By contrast with Table 1, which maps the economic rules entailed by marriage, Table 2's column for relationship end is mostly empty. Presumably, former same-sex partners form a population even more scattered and invisible than intact same-sex couples. In any event, scholars who draw on the social science make little acknowledgement of the dearth of data regarding relationship end and afterwards. Given the intensity of the legal effects on and after relationship breakdown, however, it seems fair to query the alignment between legal rules and prior expectations and practices. While some scholars have been alert to the ways in which legal recognition would herald increased litigation amongst same-sex partners, gay and lesbian rights campaigns have by and large kept silence 'about the possible meanings or application of the principle of equality in relation to separating lesbian and gay couples' (Monk, 2010, p. 98 [footnote omitted]).

If one's view is that the legal recognition of same-sex relationships should aim to track them 'as they are lived', the evidentiary gap poses a problem. Where marriage or civil partnership is made available to same-sex couples, the content of all four cells of Table 1 attaches to couples who so commit. Again, much of the social practice demonstrates a wish to be recognised by third parties more than a desire to be subjected to the regimes regulating spouses' economic relations during or after their union. To that end, data on spouses' household practices during the relationship are used to justify third parties' obligations. Although marriage affects the spouses' economic relations in ways felt most keenly on dissolution, there is a shortage of data regarding the inter-spousal obligations desired by same-sex couples or appropriate for them. These observations, combined with the gendered history and rationale of the rules entailed by marriage and divorce, call into question the formal-equality project of identical treatment for same-sex partners. Of course, such concern about the absence of data on the post-breakdown practices of same-sex couples matters only if discernible differences between same- and different-sex couples might justifiably affect their legal regulation, a consideration explored in Part III.

Before pursuing that issue, a contrast internal to the gay and lesbian push for family recognition can be drawn. The legal recognition of parenting in various scenarios arguably rests on a sturdier basis. Parental status entails obligations for third parties and for the parents. Some effects of parentage operate whilst the child's parents are in a couple; those relating to residence, access and

33 *Halpern v. Canada (Attorney General)* (2003), 65 OR (3d) 161 [94] (CA). On the discourse of love, see Osterlund (2009) and Grossi (2012).

34 A rich source of insights might be the obligation-creating agreements concluded by same-sex couples where no conjugal form was open to them.

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Table 2 Economic and social practice regarding same-sex couples

Actor	During the relationship	On relationship end or afterwards
Third parties (governments, public bodies, employers, etc.)	Voluntary grant of employment benefits	
Spouses one to another	Organisation of households; sharing of domestic labour; sharing of expenses; joint accounts; raising of children	Post-separation parenting

maintenance take effect when the spouses embark on 'parenting after partnering' (Maclean, 2007). Moreover, the litigation around parents and parental status has consistently foregrounded not only the happy situations of intact couples seeking recognition as a child's parents, but also disputes after breakdown of the adults' relationship (see, e.g., Millbank, 2008).

III. Rethinking equality as sameness

A. The limits of identity politics

Successful claims have opposed the minority group of gays and lesbians – who may as a class experience 'pre-existing disadvantage and vulnerability'[35] – against the majority. The group-based paradigm 'suggests that lesbians and gay men have shared interests and needs, and that as a class equality means access to the benefits possessed by groups more privileged than they' (Cooper, 2004, p. 102). Badgett provides a textbook example of this framing: '[S]ame-sex couples cannot marry, so providing any benefits to married couples by definition results in discrimination against gay people. If same-sex couples could marry, any benefits that go to married people would then be distributed without regard to sexual orientation' (2001, p. 205).[36]

This aspiration of distributing benefits without regard to sexual orientation calls to mind the gendered provenance of reforms to divorce law. Although exit rules condition parties' options and decisions during the relationship (Halley, 2011), financial regulation has its most obvious effects at a relationship's unwinding and afterwards. In many Western jurisdictions, reforms to family law undertaken in the 1970s and 1980s could be viewed as the upshot of a gender struggle (if not a war) between men and women. A presumption of equal sharing of gains, a robust understanding of marriage as a partnership, and a 'rich principle of contribution and compensation' (Chan, 2013, p. 60) may be understood as efforts to correct distributions as between individual spouses. They may also be understood as tackling systemic issues, such as the pervasiveness of gendered divisions of labour and the systemic undervaluation of women's work. A related concern is that 'women, as a class, lose systematically far more than do men. Women are generally less highly valued in the marriage market following a divorce than they were prior to their first marriage' (Cohen, 1987, p. 268; for cautions about compensating for systemic social inequalities through the private obligations of family law, see Ferguson, 2008). Even rules calling for formally equal division retain a connection to feminist identity politics and structural gender subordination (as

35 *M v. H* [1999] 2 SCR 3 [69], Cory J.

36 Benefits to married people might still discriminate on bases such as race and class (e.g. Conrad, 2010). Brake (2012, pp. 88–102) contends that such benefits might discriminate on the basis of 'amatonormativity', the undue favouring of relationships of romantic love.

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do debates around 'equal parenting' and fathers' and mothers' rights and duties post-separation). The takeaway for male or female couples, however, is unclear. To use Cohen's (1987) terms, on dissolution of a same-sex marriage, who gave whom the best years of his life?

It is important to emphasise the limited analytical purchase of focusing on discrimination claims advanced by a minority identity group defined by sexual orientation. Such a focus may capture the gist of what happens when the state or another third party delivers benefits to same-sex couples via their marital status. Think of pensions or the right to sponsor a spouse for immigration. It is awkward, however, for addressing the disadvantages that flow from 'recognising' same-sex couples, for example when aggregated household income reduces entitlement to state benefits. Such effects may attach even to couples who do not formalise their relationship (Harding, 2011, pp. 121–22; also Young and Boyd, 2006). The focus on the group is clumsier yet for discussing the private-law rules of marriage which allocate property and resources as between spouses. Compared with the 'explicit homophobia in the old cases [which] positioned all lesbians and gays against the law', the economic rules which operate on dissolution of a *de jure* relationship create 'both winners and losers *within* the lesbian and gay community' (Monk, 2010, p. 98). Each order partitioning the net value of the family patrimony or dividing a mass of acquests benefits a former same-sex partner at the other's expense. In other words, once it has achieved access to marriage and divorce law, a gay and lesbian equality movement allied with identity politics raises distributive questions that are 'identity-indifferent' (Halley, 2000, p. 55).[37]

Once gay men and lesbians' erasure or outright exclusion as a group has been combated, and some recognition by third parties assured, inquiry as to the character of their economic partnership may follow. Indeed, suspending judgment on whether the equal moral worth of same-sex couples requires treating them identically to different-sex couples may be most possible where formal equality has been largely achieved (Harding, 2011, p. 182; see generally Leckey, forthcoming in 2014). Might the gendered history and rationale of marriage's economic rules cast doubt on the project of formal equality for same-sex couples? It may be helpful to shift the lawyerly division of labour from experts in civil rights or constitutional law – conversant with the lexicon of equality and recognition at an abstract level – to those familiar with the details of marriage law.

B. Difference and equal respect?

Substantive equality's premise is that a commitment to recognising groups' equal moral worth and to treating them with equal respect may call for treating them in relevantly different ways (Faraday, Denike and Stephenson, 2009).[38] For gay men and lesbians, the ostensible similarity between the conduct of intact same-sex couples and different-sex couples has justified access to the ensemble of legal rules flowing from marriage. The social science canvassed in Part II signals the importance for same-sex couples of recognition by the state and other third parties, while identifying differences at the level of the partners' economic relations. If the duties entailed by marriage are divisible, might same-sex couples be situated similarly to heterosexual couples so as 'to deserve the right to marry' (Lee, 2010, pp. 119–20) without that similarity determining their appropriate economic relations?

Before proceeding, it is worth clarifying the role of empirical evidence in legal design in this context. Measures on dissolution allocate property in ways other than the parties would do

37 This discussion builds on Leckey (2013, pp. 186–88).

38 In the Canadian context, the judgments that best embody differential treatment as a means of conveying equal respect and substantive equality are probably *Eldridge v. British Columbia (Attorney General)* [1997] 3 SCR 624 (equality right of deaf persons requiring state-funded interpreters in health care) and *Vriend v. Alberta* [1998] 1 SCR 493 (antidiscrimination statute underinclusive for omission of protection from discrimination on the basis of sexual orientation).

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consensually. Allocative measures on divorce have never been justified as merely recognising or regularising, in a direct way, how most divorcing couples would order their affairs absent regulation. There is a clear contrast with some areas of private law, in which the default rules may roughly track custom and be intended to do so. Or they may fill in rules on which the parties might have agreed had they considered a matter. Instead, property division for separating partners is a matter of justice. Such regimes impose the distribution adjudged to be just, by some external standard, on an assumption – here is the place for empirics – of how spouses are likely to have acted during their union. In Quebec, for example, the regime of the family patrimony was intended to impose sharing beyond that reached by the spouses (although arguably not without roots in 'everyday law': Kasirer, 1995). Similarly, rules applicable in other jurisdictions generate allocations more robust than the spouses would arrive at absent those rules. The sense that the relevant interests exceed those of the parties underwrites the suggestion that, from the spouses' perspective, financial settlements on divorce should be 'unfair' (Herring, 2005). In other words, the use of social practice encounters limits on a terrain of justice. These observations shift the focus from what same-sex couples might expect in favour of what rules might be appropriate or just for them.

When it comes to remedying historical discrimination, how admissible are data pointing to differences? Readers of earlier drafts of this paper rejected out of hand the possibility of a regime tailored to same-sex couples, with foreboding allusions to 'separate but equal' in the American history of race relations.[39] This objection's instinctive quality attracts suspicion. The conclusion regarding the American context of race is that Blacks and Whites are not different in a way relevant to the provision of public schooling and other services. Irrespective of their race, individuals are subsumed under an abstract commitment to equal dignity and equal moral worth. What is the appropriate parallel in marriage law? The broad brushstrokes of changes to marriage law since the nineteenth century – the married woman's civil emancipation, recognition of the possibility of marital rape – may be derivable from the ideal of equality and repudiation of discrimination familiar to constitutional theorists. Questioning those developments in the present day by recourse to data would be inadmissible. In addition, it is right to be mindful of the conscription of prohibitions on miscegenation and polygamy into nation-building projects of White supremacy (see, e.g., Carter, 2008). Nevertheless, the rules regulating the relations of spouses and their household – down to the furniture – have accrued over time, less abstractly, on the basis of assumptions about family life grounded more or less in evidence available to legislative drafters.[40] The data support the hypothesis that same-sex couples, however robust and worthy of respect their love or commitment, might be different in ways relevant to the detailed regulation of inter-spousal economic relations. At least in principle, similarity of legal treatment as between same-sex and different-sex couples concerning third parties may be compatible with dissimilarity regarding the couple's economic life.[41]

The proposal for discussion would maintain identical treatment of formalised same-sex couples by third parties while presuming a different regime for the spouses' relations with each other. The

39 *Plessy v. Ferguson* 163 US 537 (1896).

40 Inclusion in Quebec's family patrimony of 'motor vehicles used for family travel' (art. 415 para. 1 CCQ) counters any legislative ambition of timelessness, 'in deference to that great locus of conjugal togetherness of the late twentieth century' (Kasirer, 2006, p. 25).

41 The appetite for pursuing substantive equality by respectfully recognising difference is higher in the parenting case. Scholars have called for law to recognise 'planned lesbian families in all their diversity' (Kelly, 2009, p. 222; also Boyd, 2007, p. 87). Commentators have insisted that legislative drafters take into account lesbian-parent families' 'unusual context', including that the role of a birth mother's female partner in planned conception is neither that of stepfather nor that of infertile social father of a donor-conceived child (Diduck, 2007, pp. 477, 473).

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reported value on maintaining economic independence during the union might militate against restricting the disposition of the spouses' individual property during the relationship. For unions with a lesser likelihood of entrenched gender roles, there might appropriately be a lesser place for obligatory rules of equal division or a presumption of equal division, and more for discretionary, fact-based provisions. The lesser specialisation of labour and less frequent presence of children as well as a greater commitment to the spouses' retaining economic independence are key findings. The qualification that this regime's application is only presumptive is crucial. A same-sex couple could still opt in to the regime presumptively applicable to different-sex couples (and vice versa).[42]

This proposal is distinguishable from the 'marriage lite' created in some jurisdictions for gay men and lesbians. Consider the French PaCS, open to different-sex couples too. It is a lighter form of union for both third parties and the partners. Instead, the present proposal would retain the full status of marriage. Reasons for sticking to marriage include the importance of recognition by family and society experienced by many gay men and lesbians. Logistically, too, it has become evident that statuses alternative to marriage, including the UK's civil partnership, pose difficulties when one or both spouses travel or migrate. Other states do not know how to view such statuses under domestic law.[43] Thus, while this paper aims to be alert to the 'seductive dangers of false equality' (Norrie, 2000, p. 369), it differs from outright rejections of marriage or calls for 'minimising' it (Brake, 2012). As variations across jurisdictions and across time within jurisdictions illustrate, the idea of marriage does not lead to a single set of property relations. As emerged from the unbundling of marriage law in Part I, marriage's status and dignity, and its opposability to third parties, are compatible with a variety of ways of regulating the spouses' economic relations. It should not be assumed that presumptively applying lighter property rules to gay men and lesbians on marriage would brand them with the stigma of a second-class status. Admittedly, different regimes have never attached by default to categories defined by sexual orientation.

It would be wrong to dismiss the proposal as a mean-spirited attack on spousal solidarity between same-sex partners. The impetus is the view that rules of private law – whether obligatory or subject to contracting-out – should find a defensible justification, for example in reasonable expectation or commitment (on unmarried cohabitants, see Bottomley and Wong, 2006; also Probert, 2009, p. 343). The legislative drafters of Quebec's partnership of acquests thus furnished a detailed account as to why the new regime formed a suitable default, based on their best understanding of (different-sex) marriages on the cusp of the 1970s (Civil Code Revision Office, 1968). No regime – obligatory or subject to opt-out – will eliminate the potential for opportunism and exploitation. Any couple, irrespective of gender mix, must accept the disadvantages as well as the advantages when it accesses an institution. The question is whether the alignment between the rules provided and those intended to take them up is good enough. Even where contractual variation is possible, their stickiness makes it worth trying to get default rules more or less right (Sunstein and Thaler, 2003) or to be intentional about the choices they force (Emens, 2007, pp. 836–38). Conversely, the informational costs and risks of misunderstanding associated with more than one regime demand consideration.

Pragmatically, applying rules outside the paradigm for which they were designed may aggravate, not palliate, relative disadvantage. Rules preventing the owner of the family residence from charging it as security or selling it without his spouse's consent have an obvious protective vocation where there is an economically powerful spouse and a home-maker whose contributions to the family's economic development are indirect. If both spouses are financially independent, though, those

42 Naturally, the suitability of subjecting the heavier regime to consensual opting-in depends on the relative weighting of evidence pointing to egalitarianism and to power imbalances, addressed in Part II.

43 For recognition – after litigation – of a civil partnership as a 'marriage' for purposes of Canadian law, see *Hincks v. Gallardo* 2013 ONSC 129, 113 OR (3d) 654, on appeal to Ont CA. Court File No. C56581.

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rules may hamper the ability of the spouse who happens to own the family residence to use his or her major asset as collateral while imposing no comparable restriction on the capacity of the other unilaterally to exploit wealth held in another form.[44] In a similar vein, civil partnership's supersession of any prior will – a legal effect imposed while making the new regime largely identical to marriage – may interact perversely with measures taken by same-sex partners to order their financial affairs when no formal recognition was on offer (Monk, 2011, pp. 243–47). If the mismatch is severe, identical treatment of same-sex couples may cash out in their substantive inequality.

Turning from the example of Quebec's regime to the law of other jurisdictions brings a nuance into view. The paper's proposal would have lesser effect in jurisdictions, such as England, where discretionary rules are more prominent in the regime enacted for different-sex marriages. In such circumstances, law already allows for greater variation case by case. A discretionary model, sensitive to the heterogeneity of couples undergoing dissolution, would blunt this paper's concerns with the push for formal equality for same-sex couples. The basis for reduced concern would not, though, be the merits of identical treatment. It would be that, substantively, the regime already on offer better fits the catchment group than might the rigid regime devised by Quebec's legislative drafters for different-sex marriages. If this observation reduces the proposal's effects in English family law, its jurisdiction specificity undermines the universality of identical treatment as the best means for legislating equal respect and moral worth.[45] In a way foreign to the abstract discourse of formal equality, the appropriate strategy for same-sex couples would depend on a jurisdiction's family law.

The proposal raises at least two final concerns. The first is that, as an empirical matter, experience suggests that legislative drafters are unlikely to translate equal respect into a regime sensitively tailored for same-sex couples. Governments have referred to gay and lesbian difference as a basis for resisting changes to exclusionary regimes. The attractions of substantive equality's pledge to equal moral worth and respectfully differentiated treatment notwithstanding, the identity-based distinction of sexual orientation may be too historically fraught and bound to stigma to entrench in statutes regulating marriage.[46]

The second relates to the stability and durability of the differences sketched in Part II. On some views, differences in the economic life of same-sex couples are a rational reaction to their exclusion from marriage's economic rules for inducing and rewarding the specialisation of labour (Badgett, 2001, p. 160). It might be conjectured that, with marriage being available, these differences will dissipate. Certainly the recentness of legal access prevents the population of formalised same-sex spouses from being typical relative to that of different-sex couples, who have always had the

44 Ontario law's singling out of the family home – it is the sole asset the premarital value of which is not deducted from the mass of property of which the gains during the marriage are divided equally – embodies a number of assumptions about the family home, including that the economically more powerful husband would often hold title thereto. The legal approach backfires in other circumstances; an obvious case consists of women who marry, bringing as their principal asset the family home from a prior union, an allocation perhaps linked to their having custody of the children (Leckey, 2011, p. 206).

45 The open-ended character of England's discretionary regime should not be exaggerated. Discretionary provisions accrue layers of judicial and doctrinal gloss and the appellate courts' preferred approach, sensitive to gender discrimination (*White v. White* [2000] UKHL 54, [2001] 1 AC 596, 605 (HL); see also *Miller v. Miller; McFarlane v. McFarlane* [2006] UKHL 24, [2006] 2 AC 618), applies to civil partnerships (*Lawrence v. Gallagher* [2012] EWCA Civ 394 [2], application for permission to appeal to SC refused, 27 November 2012; George, 2012). Arguments in favour of a greater place for discretion would need to be situated in the context of cuts to legal aid, which boost the case for rules regarding ancillary relief over judicial discretion (Law Commission, 2012, [4.89] [4.90]).

46 The difficulties experienced by transgendered individuals in marrying provide a separate reason against embedding – or restoring – reference to the spouses' sex in marriage law (see, e.g., Sharpe, 2012).

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option to marry (Balsam *et al.*, 2008, p. 114). The preferences and conduct of same-sex couples may change in response to new law (Klawitter, 2008, p. 441). Indeed, recent empirical study of gay men and lesbians discovered widespread comfort with formal equality (Harding, 2011). Realising the nightmare of the queer critics of marriage, research on young same-sex couples also reports strong emphasis on sameness and the privatised conjugal couple (Heaphy *et al.*, 2013).

Is this pair of concerns fatal to the proposal? More than objections considered earlier in this section, both retain full force in the face of this paper's commitment to substantive equality, the unbundling of marriage, and openness to empirical research on same-sex couples. Even if exploration of the present proposal does not lead to its adoption, it may clarify the contemporary function of marriage law and the justification for extending it to same-sex couples. Section C draws out this potential.

C. Reconceiving identical treatment

Beyond the social science, the best reasons for applying identical rules to same-sex and different-sex spouses may sound in a different register. It may be reductive to characterise the allocative rules of divorce, be it Quebec's presumptions of equal sharing or the English discretion inflected by the yardstick of equality, in terms of debits and credits. Such rules may have come to transcend their prosaic roots in gender-specific task division and structural disadvantage so as to embody normative assumptions about home, care or partners' commitment to 'a sharing of lives as equals' (Chan, 2013, p. 64). In other words, a symbolic or communicative significance may have supplemented those measures' instrumental, allocative aims. To use Fraser's (1997, chapter 1) language, state-imposed redistribution amongst the spouses resonates as a form of state recognition. In this way, the justices of the Supreme Court of Canada, in a constitutional equality case, used a discourse of dignity and recognition in adjudicating a lesbian cohabitant's claim to a maintenance regime initially enacted for different-sex couples on an instrumental, distributive basis (Leckey, 2009, p. 15).[47] The recognition of same-sex couples may provide, then, an occasion for revising the understanding of family law.

Acknowledging that the economic rules operative between spouses have a role that is not only allocative, but also affirmative, calls for revising the justification for formal equality and identical treatment. Recall that, with little empirically grounded scrutiny, the prevailing discourse of formal equality grounds moral equality in the ostensibly identical functioning of same-sex and different-sex couples. Activists and litigants have framed claims as 'we are just like you' (for obvious strategic reasons). This paper offers a more textured account. Although rules of equal sharing amongst husbands and wives were intended to ensure substantive equality and justice for women, the same rules are opened to gay men and lesbians with a view to assuring their formal equality. Such a justification might underline the practical difficulties of combining affirmation of equal moral worth with respectful response to difference, rather than rejecting such a combination as undesirable. It might be conceded, too, that amongst same-sex couples the family economy with intense specialisation of labour in which rules such as Quebec's do the most work is an exception, rather than – as it was for legislative drafters – the paradigm case. In short, same-sex couples may be regulated identically to different-sex couples not on account of their sameness, but despite their differences.

How to assess this recasting of the basis for opening marriage to same-sex couples on the existing terms? It will disquiet those who fear that any whisper of queer difference courts political risks. Nor

47 *M v. H* [1999] 2 SCR 3. See, e.g., Cory J at [73]: Exclusion of same-sex cohabitants 'promotes the view that ... individuals in same-sex relationships generally, are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples'.

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will it satisfy the hardest-line queer critics of marriage.[48] Yet by mitigating the denial and erasure of difference, this justification responds, at least in part, to queer concerns about assimilation. It might temper the 'dissonance between one's public and private selves' that has arguably followed the public recognition of same-sex couples in virtue of their sameness and respectability and its consequent privatising of queer difference (Joshi, 2012, p. 448; see also Monk, forthcoming in 2014).

Conclusion

This paper resists the rhetoric of formal equality by scrutinising the politically potent claim to sameness. A commitment to substantive equality and attention to the categories of obligations flowing from marriage and to empirical research on same-sex couples offer at least a basis for tailoring rules for same-sex couples, for example by separating third parties' recognition from the spouses' economic relations. The sense, not only that lobby groups and legislative drafters are unlikely to take up the proposal, but also that the conversation is uncomfortable, reflects formal equality's firm grip on the legal imaginary. A key emergent insight is the symbolic significance of divorce law's economic effects. Another, in departure from the standard story, is a justification of identical treatment for same-sex couples not on account of their sameness, but despite their differences.

Although the transnational gay lobby for entry into marriage justifies this paper's focus on same-sex couples, its inquiry about the fit between regimes of marriage and divorce and those subject to them crosses the line of sexual orientation. Aside from offering a reminder that marriage imposes obligations as well as confers rights, the paper generates further questions. How well do marriage's frameworks accommodate the contemporary diversity of different-sex couples (see Roy, 2003)? The example of same-sex couples may help to identify anachronistic elements of marriage law; enacted duties of fidelity and of cohabitation would figure on some shortlists.[49] Yet where rethinking is in order, it may be for all marriages.[50] In this way, study of same-sex relationships may produce insights concerning marriage's potentially 'radically diverse, uncertain and ambivalent directions' for different-sex couples too (Heaphy *et al.*, 2013, p. 32).

If eliminating discrimination on the basis of sexual orientation on the threshold of marriage is not the terminus, where might such rethinking go? Efforts to reconceive familial obligation without reference to sexual orientation or even to marital status might posit children's presence as a trigger for economic duties. Such an approach would require logistical and normative scrutiny. For one thing, this factor's relevance for private law depends on the extent to which social policy compensates for the direct and indirect costs of child rearing. For another, child rearing is not the sole seed of economic dependence in long-term relationships; changeable health and career sacrifices for the family are others. Reflection on this point might heed, among other things, the queer cautions against intensifying what can tendentiously be called the cult of the child (Edelman, 2004).

It is regrettable if recognising gay and lesbian relationships has intensified marital status's significance for family law. In particular, the attachment to formal equality and the unitary view of marriage are confining. For those who find themselves outside family law on a basis other than an historically salient identity trait such as sexual orientation, greater flexibility and a willingness

48 However unscientific, it is proof of this paper's awkward intermediate position that, more than any other paper I have written, its drafts convoked opposed camps of readers who thought it went too far and not far enough.

49 Art. 392 CCQ.

50 I am indebted to Daniel Monk for discussion on this point.

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to draw on empirical evidence may be appropriate. Approaches other than formal equality must be admissible when it comes to rethinking the family lives of cohabitants, individuals living apart together (e.g. Duncan, Carter, Phillips, Roseneil and Stoilova, 2012; Lyssens-Danneboom, Eggermont and Mortelmans, 2013), or those in long-term interdependent relationships with siblings or friends. Proceeding otherwise would bode badly for those whose kinship claims are neither subsumable under formal equality nor articulable as a bid for marriage.

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