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## Couplings: Civil Partnership in the United Kingdom

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I thank the many people who have generously commented on this work in draft in its different versions. Special thanks to Anneke Smit for superb assistance. Finally, I want to express my gratitude to Ruthann Robson for her intellectual, political, and personal presence.

## COUPLINGS: CIVIL PARTNERSHIP IN THE UNITED KINGDOM

*Carl F. Stychin\**

### INTRODUCTION

In her wide-ranging scholarship, which responds to an often uncritical advocacy of the legal recognition of same-sex relationships through the institution of marriage, Professor Ruthann Robson has become an articulate and impassioned voice for those skeptical of (both) law and marriage. Writing specifically about lesbian relationships in her landmark book *Sappho Goes to Law School*,<sup>1</sup> Robson convincingly articulates the disciplinary way in which marriage would operate in a lesbian context and, one might argue, in other contexts. She describes the “codification of lesbian relationships as mimetic of traditional heterosexual ones,”<sup>2</sup> as conveyed by the “normative aspiration” of life-long monogamy<sup>3</sup> and the imposition of the legal form of divorce as a means of discipline.<sup>4</sup> Robson has also written of the way in which marriage can divide and rule a community, by the “award of benefits to those who comply [with the norm] and a concomitant disadvantage to those who do not comply.”<sup>5</sup> Moreover, she has written of the extension of marriage as a form of economic privatization, which “seeks to encourage family responsibility while allowing the government to escape from its obligations” of care.<sup>6</sup> Finally, the differential class implications of the benefits and detriments of marriage have been underscored by Robson, who describes being “troubled by the rift between class and sexuality.”<sup>7</sup>

In this article, I attempt to apply all of these insights in order to demonstrate that they are of wide-ranging analytical usefulness.

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<sup>1</sup> RUTHANN ROBSON, *SAPPHO GOES TO LAW SCHOOL* (1998).

<sup>2</sup> *Id.* at 116.

<sup>3</sup> *Id.* at 119.

<sup>4</sup> *Id.* at 116.

<sup>5</sup> *Id.* at 127.

<sup>6</sup> *Id.* at 150-51.

<sup>7</sup> *Id.* at 209.

They provide the inspiration for my consideration of the United Kingdom's Civil Partnership Act 2004, which became law on November 18, 2004 (with the first civil registrations taking place on December 21, 2005). It is fitting, in my view, to analyze the British "solution" to same-sex relationships in a symposium for Ruthann Robson and her scholarship. Throughout her work, she displays sensitivity to national variations in the way in which sexualities are regulated, and her scholarship is informed by her knowledge of many legal regimes. Furthermore, the British approach to partnership should be of interest to an American audience because it is explicitly designed as a "new" legal institution for same-sex couples. Formally, it is not marriage, and this raises the interesting issue of the applicability of Ruthann Robson's concerns about *marriage* to regimes of legal regulation of relationship more broadly.

In this article, my theoretical grounding can be located within "queer legal theory."<sup>8</sup> It may appear counterintuitive to argue that the Civil Partnership Act is a text conducive to an analysis grounded in queer theory. After all, it is now a virtual cliché that the term "queer" is associated with a politics of radical sexualities, transgression of heterosexual norms, and a challenging of sexual binaries and traditional notions of family and kinship. Queer theory, in support of these politics, has paid much attention to subjecting texts—literary, legal, political—to a deconstructive analysis, seeking to uncover the incoherence of the hetero/homo binary at the heart of the construction of those texts specifically, and of sexual identities more generally. Of course, other theoretical and political movements have engaged in similar strategies both before and after the advent of queer politics and theory. However, I would argue that queer theory provided a fresh articulation at a particular historical moment, the impact of which should not be minimized.

It is also important that queer theory emerged in response to the right wing, homophobic politics of the 1980s, when homosexuality was readily associated with discourses of disease, degeneration,

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<sup>8</sup> See, e.g., LESLIE J. MORAN, *THE HOMOSEXUAL(ITY) OF LAW* (1996); Lisa J. Bower, *Queer Problems/Straight Solutions: The Limits of a Politics of "Official Recognition,"* in *PLAYING WITH FIRE: QUEER POLITICS, QUEER THEORIES* 267 (Shane Phelan ed., 1997); Paisley Currah, *Politics, Practices, Publics: Identity and Queer Rights,* in *PLAYING WITH FIRE: QUEER POLITICS, QUEER THEORIES*, *supra*, at 231; Pierre de Vos, *The Constitution Made Us Queer: The Sexual Orientation Clause in the South African Constitution and the Emergence of Gay and Lesbian Identity,* in *LAW AND SEXUALITY: THE GLOBAL ARENA* 194 (Carl Stychin & Didi Heriman eds., 2001); Wayne Morgan, *Queering International Human Rights Law,* in *LAW AND SEXUALITY: THE GLOBAL ARENA*, *supra*, at 208; CARL F. STYCHIN, *LAW'S DESIRE: SEXUALITY AND THE LIMITS OF JUSTICE* 140-56 (1995).

and death.<sup>9</sup> In that context, the importance of theorization of *what was happening out there* was a particularly pressing political task. In 21st century Britain, many would argue that there is still a right-wing hegemony, but it is one in which the politics of sexuality has experienced a decided shift from the 1980s. In this respect, the British political experience of recent years is very different from the neoconservative revival in the United States. We see in the U.K. today a central government that understands lesbian and gay politics through the language of equality, rights, dignity, multiculturalism, and citizenship, rather than one that pathologizes the individual.<sup>10</sup> In addition, the language of active citizenship has become important as a discourse connected to the goal of the equal provision of government services to all communities within the population, including the lesbian and gay *community*.<sup>11</sup>

As well as the rhetoric, it would be churlish not to recognize the changed legal and political reality for lesbians and gay men in the U.K. It can be argued that satisfying a gay political agenda is attractive for the Labour government because it can be grounded primarily in a (low economic cost) politics of recognition, rather than the politics of redistribution. Nonetheless, this signifies a new political climate. The website of the government's Women and Equality Unit is self-congratulatory on the range of advances for which the government claims responsibility: the Adoption and Children Act 2002, as a result of which same-sex couples can apply to adopt a child jointly; paternity leave and flexible working practices available to same-sex partners; a right to register a death extended to same-sex partners; anti-discrimination legislation that tackles discrimination in employment and training on the grounds of sexual orientation and religion (a legal requirement for member states of the European Union); sexual offenses legislation that removes discrimination as between men and women, and as between those of different sexual orientations; the repeal of section 28 of the Local Government Act, which prohibited the "promotion

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<sup>9</sup> See generally CINDY PATTON, *SEX AND GERMS: THE POLITICS OF AIDS* (1985); CINDY PATTON, *INVENTING AIDS* (1990); THOMAS E. YINGLING, *AIDS AND THE NATIONAL BODY* (1997); SIMON WATNEY, *IMAGINE HOPE: AIDS AND GAY IDENTITY* (2000).

<sup>10</sup> See Jean Carabine & Surya Monro, *Lesbian and Gay Politics and Participation in New Labour's Britain*, 11 *SOC. POL.* 312 (2004); CARL F. STYCHIN, *GOVERNING SEXUALITY: THE CHANGING POLITICS OF CITIZENSHIP AND LAW REFORM* 25 (2003) [hereinafter *GOVERNING SEXUALITY*]; DAVID BELL & JON BINNIE, *THE SEXUAL CITIZEN: QUEER POLITICS AND BEYOND* 38-43 (2000); Derek McGhee, *Joined-up Government, "Community Safety" and Lesbian, Gay, Bisexual and Transgender "Active Citizens,"* 23 *CRITICAL SOC. POL'Y* 345 (2003).

<sup>11</sup> Carabine & Monro, *supra* note 10, at 317; BELL & BINNIE, *supra* note 10.

of homosexuality” by local government authorities;<sup>12</sup> the lowering of the age of consent to sixteen for gay men; the inclusion of same-sex partners in the Criminal Injuries Compensation Scheme; and the amendment of the immigration rules to improve the situation for same-sex partners.<sup>13</sup> Although many of these changes are less than ideal (and while many may continue to feel alienated from the omnipresence of a discourse of marriage and family emanating from the government), the reforms are significant.

As a consequence, does there remain a role for the deconstructive method of queer theory in this new, liberal-minded political environment? Recall that one of the productive tasks of queer theory of the 1980s and 1990s was to deconstruct the discourses that surrounded right wing policy initiatives, thereby underscoring the incoherence of the categorizations and constructions of sexuality that underpinned them.<sup>14</sup> In the context of liberal law reform—supported by many within the lesbian and gay communities—what place is there for the critical power of queer theory? In this article, I will attempt to demonstrate that there is still a useful role for this methodological toolbox. However, the focus of the deconstructive glare shifts, in my approach, away from the construction of sexual *identities* and practices per se, towards the ongoing and intense social construction of *relationships* within law and politics. In one sense, my approach might be seen to support the claim of Jeffrey Weeks that lesbian and gay politics has moved in its emphasis from identity to relationships.<sup>15</sup> However, where I may differ from Weeks is that I argue that a critical analysis of the way in which particular relationship forms are constructed, disciplined, and normalized, remains much needed.

The Civil Partnership Act, and the Parliamentary debates that occurred in 2004, provide rich material with which to engage in this analysis. By way of brief background, the government introduced the Civil Partnership Bill into the House of Lords on March 30, 2004. It emerged from the Women and Equality Unit of the Department of Trade and Industry. The proposed legislation, it

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<sup>12</sup> See GOVERNING SEXUALITY, *supra* note 10, at 25.

<sup>13</sup> DEP'T OF TRADE & INDUSTRY, WOMEN & EQUALITY UNIT, *Sexual Orientation*, <http://www.womenandequalityunit.gov.uk/lgbt/orientation.htm> (Nov. 2004); DEP'T OF TRADE & INDUS., WOMEN & EQUAL. UNIT, *Sexual Orientation: What Has the Government Done So Far?*, [http://www.womenandequalityunit.gov.uk/lgbt/what\\_done.htm](http://www.womenandequalityunit.gov.uk/lgbt/what_done.htm) (Mar. 2004).

<sup>14</sup> See, e.g., ANNA MARIE SMITH, *NEW RIGHT DISCOURSE ON RACE AND SEXUALITY: BRITAIN, 1968-1990* (1994).

<sup>15</sup> JEFFREY WEEKS, *MAKING SEXUAL HISTORY* 213 (2000).

was claimed, would create a new legal status that would allow adult same-sex couples to gain formal recognition of their relationship and grant same-sex couples who enter a civil partnership access to a wide range of rights and responsibilities.<sup>16</sup>

These rights and responsibilities were to include the duty to provide reasonable maintenance for a civil partner; the duty to provide reasonable maintenance for children of the family; assessment in the same way as spouses for child support purposes; equitable treatment for the purposes of life insurance; employment and pension benefits; recognition under intestacy rules; access to fatal accidents compensation; protection from domestic violence; and recognition for immigration and nationality purposes.<sup>17</sup> Couples would enter (opt into) a civil partnership through a statutory, civil registration procedure. A dissolution process—a formal process in the courts—would be created which mirrors divorce proceedings (rather than the simple ending of a contract unilaterally or bilaterally). There would be no requirement of cohabitation, nor any analogue drawn to the requirement of consummation. Nor would adultery be an explicit ground for dissolution. The marriage bans, however, were included.

The Bill was introduced in the House of Lords, receiving its third reading on July 1, 2004. In that process, however, it was amended by the Lords to extend its coverage to family members and carers who might wish to register and opt into the bundle of rights and responsibilities. The Bill then moved to the House of Commons, and that amendment (as well as other similar attempts to amend the legislation in order to expand its scope) was defeated. The Bill received its third reading in the House of Commons on November 9, 2004, receiving widespread parliamentary support (including from many members of the opposition Conservative party). The Commons amendments were approved by the House of Lords on November 17, 2004, and the Bill received Royal Assent the following day, making it law: the Civil Partnership Act 2004.

To repeat, my method in engaging with the Act, and the debates, is to return to queer theory's original focus on the deconstruction of binary categories. Whereas those binaries originally were centered on the foundational hetero/homo, act/identity cou-

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<sup>16</sup> DEP'T OF TRADE & INDUS., WOMEN & EQUAL. UNIT, *Sexual Orientation: Civil Partnership*, <http://www.womenandequalityunit.gov.uk/lgbt/partnership.htm> (June 2005).

<sup>17</sup> *Id.*

plings, in the current political climate of relationship recognition, my choice of binaries shifts. I interrogate the Act and the debates through six closely related dichotomies that usefully underscore a fundamental incoherence in the government's approach to civil partnership. I characterize these binaries as: marriage/not marriage; sex/no sex; status/contract; conjugality/care; love/money; responsibilities/rights. In each case, it is possible to argue that the Civil Partnership Act is located on both sides of the binary, underscoring the social construction (and ideological character) of the idea (and ideal) of "partnership" itself. My ultimate claim is that it is only by unpacking and emptying out the concept that we might then begin to devise a more radical political response to civil partnership specifically, and relationship discourse more broadly.

#### MARRIAGE/NOT MARRIAGE

It would be odd indeed if those who espouse and defend traditional values of commitment and faithfulness opposed giving gay couples the choice to live their lives according to those values.<sup>18</sup>

The marriage/not marriage binary is an obvious starting point. Arguably, the ingeniousness of the Civil Partnership Act is the fact that it can produce a legal status of "civil partner" that does not depend upon marriage, but which displays virtually all of the characteristics of a civil marriage. This is undoubtedly a strategy on the part of the government to avoid what it perceives as the likelihood of a backlash to same-sex marriage in the U.K. At the same time, it can fulfill its promise of equality by granting legal status to committed same-sex couples. Throughout its term of office, the government has strongly supported the institution of marriage for opposite-sex couples—as helping to foster stable relationships and as the best means to raise children<sup>19</sup>—and civil partnership provides an alternative, politically saleable route for same-sex couples. The social benefits that marriage offers can be furthered through civil partnership, while avoiding the criticism that same-sex unions undermine the institution of marriage. As Labour Baroness Scotland made clear during the debate:

This Bill does not undermine or weaken the importance of marriage and we do not propose to open civil partnership to opposite-sex couples. Civil partnership is aimed at same-sex couples

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<sup>18</sup> 425 PARL. DEB., H.C. (6th ser.) (2004) 186 (Alan Duncan, an openly gay Conservative MP, supporting the legislation).

<sup>19</sup> See HOME OFFICE, SUPPORTING FAMILIES: A CONSULTATION DOCUMENT (1998).

who cannot marry . . . [W]e continue to support marriage and recognise that it is the surest foundation for opposite-sex couples raising children.<sup>20</sup>

The stable couple form, it is argued, is good for the individual, for the couple, and for society (and the economy) as a whole. Long term, stable, legally recognized relationships thus become the socially preferred option. Marriage is the ideal, but civil partnership—for those unable to marry—becomes an alternative which can further the same social policy goals. As Government Minister Jacqui Smith explained in the House of Commons:

[W]e seek to create a parallel but different legal relationship that mirrors as fully as possible the rights and responsibilities enjoyed by those who can marry, and that uses civil marriage as a template for the processes, rights and responsibilities that go with civil partnership. We are doing this for reasons of equality and social justice.<sup>21</sup>

Opponents of civil partnership, not surprisingly, draw on this point in arguing that the Act creates “a parody of marriage for homosexual couples,”<sup>22</sup> and there is certainly evidence for this claim, and not only in the fact that civil partnership will extend most of the privileges granted to the married couple. Although civil partnerships cannot be formalized in religious buildings, partners are encouraged by the government to arrange ceremonies of celebration that, it is pointed out, will benefit the hospitality industry in Britain.<sup>23</sup> Whether such ceremonies should be interpreted as parodies of wedding receptions remains to be seen. Alternatively, the encouragement to celebrate might be interpreted as a demand that same-sex partners become “true believers,” demonstrating their “indoctrination” to this new(ish) institution.<sup>24</sup> But the prohibition on any religious element to civil partnership is an attempt to ensure the absence of any religious connotations similar to the marriage ceremony.

However, the Church of England representatives in the House of Lords were critical of the Act for its failure to more fully mimic the institution of marriage. First, they argued in favor of the auton-

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<sup>20</sup> 660 PARL. DEB., H.L. (5th ser.) (2004) 388.

<sup>21</sup> 426 PARL. DEB., H.C. (6th ser.) (2004) 776.

<sup>22</sup> 660 PARL. DEB., H.L. (5th ser.) (2004) 405 (Baroness O’Cathain).

<sup>23</sup> DEP’T OF TRADE & INDUS., WOMEN & EQUAL. UNIT, FINAL REGULATORY IMPACT ASSESSMENT (RIA): CIVIL PARTNERSHIP 22, *available at* [http://www.dti.gov.uk/access/ria/pdf/final\\_ria\\_for\\_cp\\_bill.pdf](http://www.dti.gov.uk/access/ria/pdf/final_ria_for_cp_bill.pdf) [hereinafter FINAL REGULATORY IMPACT ASSESSMENT].

<sup>24</sup> ROBSON, *supra* note 1, at 166.

omy of the churches in determining what is celebrated in a place of worship.<sup>25</sup> Second, the argument was made, in support of civil partnerships, that set words should be drafted (vows) to provide substance to the commitment of the partners. As it stands, the argument runs, partnership is a rather empty vessel that needs to be filled with appropriate state-sanctioned words of commitment. Thus, for example, the Lord Bishop of Oxford argued that the Act “could strengthen rather than undermine the Christian understanding of marriage,”<sup>26</sup> but urged that the commitment be made explicit as “a commitment of two people to one another to the exclusion of all others, through all the ups and downs of human existence, for life.”<sup>27</sup> Of course, this might well be read as a not very subtle urging in favor of the practice of monogamy, in the absence of any mention of adultery as grounds for dissolution. Paradoxically, then, the government is criticized by the Church of England for *insufficiently* replicating the institution of marriage (although the absence of the verbal vow is one of the few means by which supporters of the legislation can claim that partnership is distinguishable from civil marriage).

Thus, we find a culturally unique “solution” to the issue of same-sex relationships. An alternative recognition route is created that parallels, but does not intersect with, the institution of marriage, with a bundle of rights and responsibilities that cannot be split up and which must be consciously accepted. This bundle is withheld from unmarried heterosexual couples and unregistered same-sex couples, both of which lack evidence of stability and commitment justifying the privileges of the status. The social good of committed long-term relationships justifies the benefits (but alongside the responsibilities) that accrue to married/registered couples.<sup>28</sup>

From a comparative perspective, this is distinctive. Unlike the United States, the desire for marriage does not overwhelm the political arena. In this regard, Barry Adam has described an “American exceptionalism” in which politics displays a “high-stakes, all-or-nothing symbolic contention over marriage,” which has become the “central symbolic axis around which the inclusion and partici-

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<sup>25</sup> 660 PARL. DEB., H.L. (5th ser.) (2004) 399 (Lord Bishop of Oxford).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 400.

<sup>28</sup> The lack of judicial or legislative recognition of “common law couples” differentiates the U.K. from a number of other jurisdictions, and is a key explanation for the way in which the legislation has developed.

pation of lesbians and gay men turns.”<sup>29</sup> Similarly, Paula Ettelbrick has critically described “stepping stone strategies toward the real prize of marriage” for activists.<sup>30</sup> In the U.K., however, the major pressure group Stonewall strongly supports the Civil Partnership Act:

[It] will come without undermining, in any way, the institution of marriage. Civil partnership is a separate legal structure, designed for same-sex couples. There is no overlap in any way with marriage. Indeed, civil partnership arguably strengthens marriage, by recognising and valuing the importance of committed relationships to society generally.<sup>31</sup>

By contrast, the understandable aversion to any “parallel but different” status that could be described as “separate but equal”<sup>32</sup> likely would make the Civil Partnership Act instinctively unpalatable to many lesbian and gay Americans.

At the other end of the spectrum, the Act is very different in its ideological underpinnings from the French “solution” of the PACS (Du Pacte Civil de Solidarité et du Concubinage).<sup>33</sup> The PACS allows two people—whether living in a conjugal relationship or not—to register a contract in a municipality, which reduces to writing their commitment to each other, and which must include the obligation to provide mutual assistance and support. The parties are able to contract over most of the terms of their relationship and the PACS can be ended unilaterally, on notice.<sup>34</sup> The PACS can be located firmly within the French ideology of republicanism and universality. It is justified as a universally available contract to which all are equally entitled to participate on the basis of being members of the Republic.<sup>35</sup> By contrast, the Civil Partnership Act is explicitly and specifically designed for one group with no excep-

<sup>29</sup> Barry D. Adam, *The Defense of Marriage Act and American Exceptionalism: The “Gay Marriage” Panic in the United States*, 12 J. HIST. SEXUALITY 259, 273-75 (2003).

<sup>30</sup> Paula L. Ettelbrick, *Domestic Partnership, Civil Unions, or Marriage: One Size Does Not Fit All*, 64 ALB. L. REV. 905, 912 (2001).

<sup>31</sup> *Civil Partnership Bill: Parliamentary Briefing Before the House of Lords* 2 (April 22, 2004) (briefing by Stonewall), available at [http://www.stonewall.org.uk/docs/Lords\\_Second\\_Reading\\_Apr\\_2004.doc](http://www.stonewall.org.uk/docs/Lords_Second_Reading_Apr_2004.doc) [hereinafter *Stonewall April*].

<sup>32</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>33</sup> See, e.g., Anne Barlow & Rebecca Probert, *Reforming the Rights of Cohabitants: Lessons from Across the Channel*, 29 FAM. L. 477 (1999); Murray Pratt, *Post-Queer and Beyond the PACS: Contextualizing French Responses to the Civil Solidarity Pact*, in *IN A QUEER PLACE: SEXUALITY AND BELONGING IN BRITISH AND EUROPEAN CONTEXTS* 177-206 (Kate Chedgzoy et al. eds., 2002); Eva Steiner, *The Spirit of the New French Registered Partnership Law: Promoting Autonomy and Pluralism or Weakening Marriage?*, 12 CHILD & FAM. L.Q. 1 (2000); GOVERNING SEXUALITY, *supra* note 10, at 49.

<sup>34</sup> See GOVERNING SEXUALITY, *supra* note 10, at 50-53.

<sup>35</sup> *Id.* at 56.

tation that the needs of other constituencies can be satisfied by this legislation.

Moreover, unlike the PACS, which was intended to recognize a social reality with its emphasis upon easy exit from the relationship by either party, the Civil Partnership Act extends the perceived social policy benefits of marriage to a group, and attempts to discipline that group into a marriage-like institution with divorce-like dissolution procedures. Paralleling the abandonment by the government of no-fault divorce reform, the ending of a partnership through formal procedures signifies the importance of commitment, and empowers the courts with the same ability as in divorce to vary pre-existing contractual arrangements between the parties as they see fit.<sup>36</sup> As the Conservative Baroness Wilcox notes, civil partnerships “contain rights and responsibilities. They are serious and constitute a legally binding agreement. Getting out of such an agreement will be expensive and painful. We encourage the government to urge caution when promoting the Bill. Las Vegas is not where we are and not where we want to be.”<sup>37</sup>

A paradox is apparent. While long-term commitment is advocated for its benefits to individuals and to society, the seriousness of this commitment is such that it should not be entered into lightly, because of the potential consequences upon exit. Like marriage, the bundle of rights and responsibilities includes a responsibility to stay the course, and longevity is assumed to be good in itself.

Thus, civil partnerships sit uneasily on the marriage/not-marriage binary, and this appears to be justified only by the government’s fear of backlash from “middle England” against same-sex marriage. Yet Rosemary Auchmuty has argued that:

[M]ost British people could not care less whether gays and lesbians have the right to marry or not. They would certainly not object to any such extension. For them, marriage has been stripped of so much of its religious, legal or social status as to be immaterial—a mere lifestyle choice.<sup>38</sup>

If that is the case—and this again may differentiate the U.K. from the U.S.A.—then what justification can there be for this awkward category that both is and is not marriage?

An answer can be found within the literature emanating from

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<sup>36</sup> Rosemary Auchmuty, *Same-Sex Marriage Revived: Feminist Critique and Legal Strategy*, 14 FEMINISM & PSYCHOL. 101, 115 (2004) [hereinafter *Same-Sex Marriage Revived*].

<sup>37</sup> 660 PARL. DEB., H.L. (5th ser.) (2004) 395.

<sup>38</sup> *Same-Sex Marriage Revived*, *supra* note 36, at 115-16.

the law and economics movement, particularly in the work of Robert Rowthorn.<sup>39</sup> For him, the law has a legitimate interest in keeping couples together and marriage is the best predictor of the long-term duration of a relationship. Moreover, Rowthorn echoes the government position that marriage is a “marker” for numerous outcomes including mental, physical and sexual health, as well as healthy children, in large part because of the role that marriage plays in domesticating men.<sup>40</sup> From a social policy perspective, it might be asked why same-sex couples should not be encouraged to enter into such a socially beneficial institution. Rowthorn provides an answer in advocating precisely the parallel lines of marriage and civil partnership that comprise the government’s approach. The justification is the “signaling function of marriage,” which might be undermined if same-sex couples were allowed entry:

Western society places a high premium on marriage as a lifelong, sexually exclusive union and the opponents of same-sex marriage believe that homosexual couples would not subscribe to, or abide by, these rules. They would reject the ideal of lifelong monogamy. They would divorce and remarry even more frequently than heterosexuals do at present and they would be highly promiscuous while married. Such attitudes and behavior, it is claimed, would bring the institution of marriage as a whole into disrepute and undermine its value for heterosexual couples and society in general.<sup>41</sup>

Recognizing that promiscuous gays might be less attracted to marriage than monogamous ones (a debatable proposition), Rowthorn identifies the difficulty of ensuring that “marriage was reserved for homosexuals who were suitably committed.”<sup>42</sup> Rowthorn advocates “having distinct legal institutions for the two types of couples,” because it is impossible to create such a screening device (although divorce proceedings may partially provide a mechanism).<sup>43</sup> The marriage/not-marriage dichotomy thus becomes explained, as lesbians and gays are channeled into an institution which will domesticate, but which does not have expectations they may be unable to meet.

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<sup>39</sup> Robert Rowthorn, *Marriage as a Signal*, in *THE LAW AND ECONOMICS OF MARRIAGE AND DIVORCE* 132 (Antony W. Dnes & Robert Rowthorn, eds., 2002).

<sup>40</sup> *Id.* at 146-47.

<sup>41</sup> *Id.* at 150.

<sup>42</sup> *Id.* at 152.

<sup>43</sup> *Id.* at 153.

## SEX/NO SEX

This leads to the second binary that frames the Civil Partnership Act, namely, the sex/no sex dichotomy. In this respect, again, we find a culturally unique articulation of the basis of civil partnership. Throughout the explanatory material surrounding the Act, and in the debates themselves, there is an assumption—sometimes explicitly made—that civil partnerships are sexual relationships, and that they will be entered into by people who define themselves as lesbian or gay (and lesbians do not form civil partnerships with gay men).<sup>44</sup> This is an important point because it is necessary to essentialize the category of “partnership” in order to contain it, and prevent its extension to other categories that emerge in the debates, such as “carers,” “siblings,” “spinsters,” “bachelors,” and “friends.” The government makes clear that the Act “is not a cure-all for the financial problems of those outside marriage,”<sup>45</sup> but that in privileging this category of relationship (in a way analogous to married couples), the sexual dimension is a fundamental means by which to justify why the stronger analogy is to a married couple rather than to other competing categories. As one Minister explained in the House of Commons, “there is a particular significance to a partnership between two people who have chosen to share their home and their life, to love each other and to care for each other.”<sup>46</sup> It is only through the strength of that analogy that frequent claims to unfairness in treatment of—and *discrimination* against—other types of partnership, can be answered.

An interesting parallel can be drawn to other jurisdictions on this point. Susan Boyd and Claire Young describe a backlash to same-sex spousal rights in Canadian jurisdictions, in which the discourse focuses on the extension of domestic partnership benefits to any two people in a situation of “economic interdependence.”<sup>47</sup> In this way, the significance of gay spousal rights is diminished by its extension that “may well de-sex the way we allocate rights and responsibilities,”<sup>48</sup> and perhaps problematically, may erase the specificity of lesbian and gay partnerships (of a certain form). The U.K. government, however, as we have seen, seeks to resist such an extension, claiming that the Civil Partnership Act is an inappropri-

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<sup>44</sup> Moreover, bisexuality as an identity is never mentioned in the debates.

<sup>45</sup> 660 PARL. DEB., H.L. (5th ser.) (2004) 389 (Baroness Scotland).

<sup>46</sup> 425 PARL. DEB., H.C. (6th ser.) (2004) 175 (Jacqui Smith).

<sup>47</sup> Susan B. Boyd & Claire F.L. Young, “From Same-Sex to No Sex?": Trends Towards Recognition of (Same-Sex) Relationships in Canada, 1 SEATTLE J. SOC. JUST. 757, 768-70 (2003).

<sup>48</sup> *Id.* at 784.

ate vehicle to deal with economic dependence more generally, and therefore must “sex” (rather than “de-sex”) the partnership to contain the category. Surprisingly, then, we find that implicitly lesbian and gay sex (provided it is contained and disciplined within this relationship form) is one of the prime justifications for the privileging of the relationship. Sex has its privileges.

This also radically distinguishes the Civil Partnership Act from the PACS. In France, the formulation of the PACS was explicitly designed to avoid the question of sex in relationships.<sup>49</sup> Sex is a private matter that should not be relevant to the social recognition of a relational contract. In the French context, the privileging of relationships on the basis of a sexual partnership (other than marriage, of course) is seen as inappropriate, focusing as it does on the particularity of a relationship, rather than on the universal availability of the PACS as an aspect of republican citizenship.<sup>50</sup> As a consequence, the difference between the French and U.K. approaches lies in part in the distinction between a model of universal republican citizenship and a multicultural ideology increasingly focused on remedying the problems of specific, targeted communities.<sup>51</sup>

Curiously, although there is an assumption that civil partnerships are sexual relationships, the question of what constitutes lesbian and gay sex remains shrouded in mystery. Moreover, the norms of sex within lesbian and gay relationships remain equally mysterious within the material surrounding the Civil Partnership Act. Returning to the marriage/not-marriage dichotomy, there are interesting passages within the government commentary wherein the state recognizes explicitly that somehow (in an unexplained way) gay relationships are different from marriage, and this on the basis of sex. First, and perhaps most obviously, there is no provision for voidability on the grounds of non-consummation:

Consummation has a specific meaning within the context of heterosexual relationships and it would not be possible nor desirable to read this across to same-sex civil partnerships. The absence of any sexual activity within a relationship might be evidence of unreasonable behaviour leading to the irretrievable

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<sup>49</sup> GOVERNING SEXUALITY, *supra* note 10, at 57.

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

<sup>51</sup> See generally ADRIAN FAVELL, *PHILOSOPHIES OF INTEGRATION: IMMIGRATION AND THE IDEA OF CITIZENSHIP IN FRANCE AND BRITAIN* (2d ed. 2001); Jeremy Jennings, *Citizenship, Republicanism and Multiculturalism in Contemporary France*, 30 BRIT. J. OF POL. SCI. 575 (2000); Cécile Laborde, *The Culture(s) of the Republic: Nationalism and Multiculturalism in French Republican Thought*, 29 POL. THEORY 716 (2001).

breakdown of a civil partnership, if brought about by the conduct of one of the parties. However, that would be a matter for individual dissolution proceedings.<sup>52</sup>

In this moment, there is recognition that same-sex relationships might involve “no sex,” and the question of what constitutes “sexual activity,” or its absence, remains unexplained.

Relatedly, the government has considered the issue, not of “no sex,” but of too much sex, but too much sex outside of the partnership, namely, adultery. There is no provision in the Civil Partnership Act for automatic dissolution on the basis of adultery. As the government explains in its background material:

Adultery has a specific meaning within the context of heterosexual relations and it would not be possible nor desirable to read this across to same-sex civil partnerships. The conduct of a civil partner who is sexually unfaithful is as much a form of behaviour as any other. Whether it amounted to unreasonable behaviour on which dissolution proceedings could be grounded would be a matter for individual dissolution proceedings.<sup>53</sup>

The adultery non-provision is reminiscent of the law and economics concern that lesbians and gay men might not “sign up” to monogamy were they to be given access to same-sex marriage, and therefore would not submit to its disciplinary, domesticating function. But the consummation non-provision suggests that it is only through heterosexual penetration that there can be a clear test of what constitutes sexual behavior, making the determination of same-sex adultery problematic. Consequently, in the context of lesbian and gay civil partnerships, we are very much in a “grey area” in determining when the parties are in a sexual relationship (with each other), and when they have committed adultery, and what the significance of adultery is for the partnership.

While the adultery problem concerns the potential “untameability” of gays, the non-consummation problem concerns the indefinability of gays as a category, and this is a point that connects very closely to the concerns of queer theory, which is aimed at fostering category crises as a way to de-naturalize the hetero/homobinary. The platonic gay *relationship*—like the celibate gay as an

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<sup>52</sup> DEP’T OF TRADE AND INDUS., WOMEN AND EQUAL. UNIT, RESPONSES TO CIVIL PARTNERSHIP: A FRAMEWORK FOR THE LEGAL RECOGNITION OF SAME-SEX COUPLES 36 (2003), available at [http://www.dti.gov.uk/access/ria/pdf/final\\_ria\\_for\\_cp\\_bill.pdf](http://www.dti.gov.uk/access/ria/pdf/final_ria_for_cp_bill.pdf) [hereinafter RESPONSES TO CIVIL PARTNERSHIP].

<sup>53</sup> *Id.* at 35.

*identity*<sup>54</sup>—troubles the civil partnership scheme. As one member of Parliament pondered, the legislation “refers simply to ‘same-sex couples,’ so I am left wondering whether platonic same-sex couples are excluded.”<sup>55</sup> In this regard, there are some very queer moments in the House of Lords debate, particularly in the speech of Lord Higgins, who incisively underscored the issues involved:

The trouble is that the Bill implies, to some extent, that these civil partners will have a sexual relationship. However, other speeches have suggested the opposite; namely, that the Bill does not do so. . . . [I]t is not at all clear why a same-sex couple in a sexual relationship entering into a civil partnership should enjoy the tax and other benefits which a same-sex couple entering into a civil partnership which does not have a sexual relationship would not have. This brings me immediately to the point . . . of people who are living together, but not necessarily in a sexual relationship. Should they be entitled to enter into a civil partnership and enjoy the benefits which result from that?<sup>56</sup>

This conundrum is neatly summed up by Lord Higgins’ phrase, the “spinster problem”: “why should it be the case that two spinsters who have lived together for many years should not enter into a civil partnership and, as a result, enjoy the various benefits that would accrue to a same-sex couple with a sexual relationship?”<sup>57</sup>

What Lord Higgins touched upon is the social construction of sexual identities, and the use of the term spinster is particularly apt in this regard. A brief turn to lesbian *herstory* discloses the attempt to reclaim the identity of the spinster, reconstructing it as lesbian.<sup>58</sup> In other words, when is the elderly spinster couple also a couple of lesbians? The presumption of heterosexuality starts to become displaced, as the question of what amounts to an “authentic” couple (or a fraudulent one) surfaces. It seems unfair, so opponents argue, that the spinster couple cannot be civil partners—except, of course, that they can be, provided that they register and accept both the benefits and burdens of partnership. However, if they are spinster *sisters*, then they cannot register under this Act. The issue of when a couple is a “real” couple troubles the whole question of

<sup>54</sup> See Carl F. Stychin, *To Take Him “At His Word”: Theorizing Law, Sexuality and the U.S. Military Exclusion Policy*, 5 SOC. & LEGAL STUD. 179 (1996).

<sup>55</sup> 425 PARL. DEB., H.C. (6th ser.) (2004) 241 (Angela Watkinson).

<sup>56</sup> 660 PARL. DEB., H.L. (5th ser.) (2004) 428-29.

<sup>57</sup> *Id.* at 429.

<sup>58</sup> See generally MARTHA VICINUS, *INDEPENDENT WOMEN: WORK AND COMMUNITY FOR SINGLE WOMEN, 1850-1920* (1985); SHEILA JEFFREYS, *THE SPINSTER AND HER ENEMIES: FEMINISM AND SEXUALITY 1880-1930* (1985); ROSEMARY AUCHMUTY, *A WORLD OF WOMEN: GROWING UP IN THE GIRLS’ SCHOOL STORY* 92-98 (1999).

coupling in that it de-essentializes the notion of a “stable relationship.” Unwittingly, perhaps, the Lord Bishop of Chelmsford hit upon this very point when he stated, “perhaps I may say to some noble Lords opposite that this is not just about gay and lesbian couples; it is about same-sex partnership.”<sup>59</sup>

The sex/no sex binary is further complicated by the fact that cohabitation is not a prerequisite for partnership. Therefore, there is nothing to stop the registration of a civil partnership of two people who neither have sex nor live together, but who wish to take advantage of the benefits, and agree to the responsibilities of the Civil Partnership Act. Consequently, civil partnership is available to two same-sex people who neither live together nor have sex, yet it is not available to two opposite-sex people who live together and have lots of sex with each other (for whom marriage remains the only option). Moreover, the state retains the ability, for the purposes of the determination of eligibility for public benefits, to deem an opposite-sex couple as married and, under the Civil Partnership Act, to treat an unregistered same-sex couple as civil partners. This underscores the extent to which civil partnerships can impact differentially depending upon social class, a point to which I return. With no functional test, the determination of what amounts to partnership raises difficult questions, and undermines the claim that this is a voluntary “opt in” process. The relationship of sex to partnership must be a fundamental question in any such determination. However, that, in turn, raises the issue of the relationship of physical intimacy to emotional interdependence, and the definition of gay sex. What about the roommate with whom you occasionally have sex (and hold a joint bank account), when you also have a valid civil partnership with someone else with whom you may (or may not) have sex, and with whom you do not live, and from whom you might have complete financial independence?

The role of conjugal activity in the determination of authentic (or fraudulent) relationships is fraught with difficulties, in part because of what Sasha Roseneil refers to as “the postmodernization of the regime of sexuality,”<sup>60</sup> in which the links between sex, cohabitation, and emotional and financial dependence and friendship may all be loosened, and capable of being continually reworked in an

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<sup>59</sup> 662 PARL. DEB., H.L. (5th ser.) (2004) 1440.

<sup>60</sup> See Sasha Roseneil, *The Heterosexual/Homosexual Binary: Past, Present and Future*, in HANDBOOK OF LESBIAN AND GAY STUDIES 27, 32 (Diane Richardson & Steven Seidman, eds., 2002).

infinite variety of ways. In this context, the creation of a new legal status that is so closely aligned to marriage seems problematic and unrealistic, particularly in the way in which it depends upon an ambiguous (but definite) connection to sex. This in turn provides evidence for Davina Cooper's analysis of "the desiring state,"<sup>61</sup> and what she describes as the "uncomfortable" relationship of the liberal state to desire. The sex/no sex binary, I would argue, demonstrates this unease, as well as the ongoing need to essentialize the category of same-sex partnership in order that it can be regulated intensely through law. As Ruthann Robson argues, it strengthens the primacy of the "dyadic couple" and, as a consequence, "'lesser' relationships, such as 'mere' roommates or 'mere' friends, are not really relationships, and are not deserving of legal respect."<sup>62</sup>

#### STATUS/CONTRACT

The sex/no sex binary is intimately bound up with another dichotomy: status and contract. In order to bolster arguments in favor of the extension of civil partnerships to carers, friends, spinsters, and spinster sisters, opponents of the Act, as it was introduced by the government, argued that the basis of the legislation should be explicitly contractual. Partnership, they argued, should focus on recognizing and supporting agreements between people to live intertwined, interdependent lives, and the state should provide its support to all such agreements. On this point, an amendment was made in the House of Lords to replace the term "relationship" with "contract," as part of the wider strategy of amendment to include carers, siblings, and other dependent relationships. This move is closely related to the sex/no sex binary, in that it removes any assumption about sexual relationships, changing the focus to agreements to share lives. In this way, opponents hoped that the limitation within the Act to same-sex assumed sexual relationships would be rendered more difficult to sustain. The contractual point mirrors the PACS, which is justified as the legal recognition of a contract. Thus, if civil partnership is not marriage, then what can it be except a domestic contract? And if a contract, then surely anyone can contract, including spinster sisters (or, for that matter, more than two people).

Conservative Baroness Wilcox makes this precise point, when

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<sup>61</sup> Davina Cooper, *Imagining the Place of the State: Where Governance and Social Power Meet*, in HANDBOOK OF LESBIAN AND GAY STUDIES, *supra* note 60, 231, 245-46.

<sup>62</sup> ROBSON, *supra* note 1, at 116.

she argues for the extension of civil partnerships, and does so through repeated reference to contract:

These civil contracts will, I hope, be extended or adapted to bring mutual security and comfort to spinsters, bachelors, carers and other partnerships who are also disadvantaged by not being able to marry. To these groups, such contracts would bring financial security and peace of mind, particularly in old age. Too many of us live alone. . . . Society will benefit greatly if more long-term partnerships are encouraged.<sup>63</sup>

Of course, there is nothing to stop the parties in any of these relationships from forming contracts as between themselves to structure their relationships. It is the state benefits that flow (or not) to the relationships that are of relevance, and the claim is made that the Civil Partnership Act discriminates against them. As one Conservative opponent observed in the House of Commons: “[W]hat is proposed . . . would restrict to one group only the rectification of the unkindnesses and injustices.”<sup>64</sup>

These arguments were troubling for defenders of the Civil Partnership Act because they forced them to fall back on arguments that underscore the incoherence of the Act in terms of the marriage/not marriage binary. In particular, the government must point to the divorce-like proceedings, as well as the incest taboo, as justifications for limiting the scope. If you entered into a civil partnership with your grandmother, would you then be required to “divorce” your own grandmother in order to marry someone? Would you want to be your own grandfather? These arguments demonstrate that what is created is a status that is civil marriage in all but name.

But the more interesting arguments raised by both the government and the pressure group Stonewall focus on contract itself, and its apparent inapplicability to an understanding of same-sex relationships. Focusing on a relationship as a contract sullies and demeans the same-sex relationship, underscoring the sharpness of the distinction drawn between contract and (marital and marital-like) status. As Baroness Scotland explained:

[W]e still believe that “relationship” is of real importance and signifies a difference from a mere “contract.” We are dealing with intimate connections between people and we do not think that “contract” accurately expresses what we are seeking to uphold. . . . [W]e are talking about the tender relationships that

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<sup>63</sup> 660 PARL. DEB., H.L. (5th ser.) (2004) 395.

<sup>64</sup> 425 PARL. DEB., H.C. (6th ser.) (2004) 203 (Ann Widdicombe).

can happen within families, relationships of support. They are relationships. They are not contracts and we think that it would be inappropriate to describe them as such. It demeans the quality of the relationships that we hope that people in these partnerships will be able to enjoy.<sup>65</sup>

It is noteworthy in this passage that Baroness Scotland implies, in the final sentence, that quality of life will be enhanced by the legislation. Registration will improve the partnership because it provides legal recognition through the granting of a status. Moreover, her understanding of contracting is important. To view the relationship as grounded in contract seems to lessen its transcendental quality. Contracts are entered into by rational, self-interested actors, for mercenary reasons. Relationships, by contrast, simply “happen” because of, presumably, romantic and sexual love, which must not be tarnished by contract, with its implicit overtones of money and, therefore, prostitution and marrying for financial and other convenience. I will return to the binary of love and money, but this also suggests that prenuptial agreements, and the financial structuring of a relationship in advance through contract, are denigrated. So too is marriage (or civil partnership) entered into for purely pragmatic reasons. Clearly, the aim is to justify the limitation of a marital-like status to those who experience the mysteries of this transcendental, special relationship, which rises above the banalities of contract, namely, the status of same-sex partners. The presumption is that other kinds of relationships of care—which can be reduced to contract—lack these qualities.<sup>66</sup>

The pressure group Stonewall made a similar point in response to the proposed amendment:

[R]eferring to the loving and committed long-term relationships of homosexual couples as “contracts” is demeaning, and downgrades the nature of [their] commitment . . . [A] civil partnership is more than just a contract, the very concept of which does not fit with family law which has traditionally been based on relationships . . . A civil partnership, like any family structure, is not a negotiable contract with optional components. This is why the contractual analogy is unsuitable.<sup>67</sup>

This passage is telling about the social conservatism of Stonewall.

<sup>65</sup> 663 PARL. DEB., H.L. (5th ser.) (2004) 395.

<sup>66</sup> Of course, marriage itself is often referred to as a “relational contract”—a point that Baroness Scotland seems unaware of.

<sup>67</sup> *Civil Partnership Bill: Parliamentary Briefing Before the House of Lords* 4 (June 24, 2004) (briefing by Stonewall), available at [http://www.stonewall.org.uk/docs/Lords\\_Report\\_June\\_04.doc](http://www.stonewall.org.uk/docs/Lords_Report_June_04.doc).

First, we find an uncritical acceptance of the language of “family” and its traditional underpinnings. Second, and more significant, is a failure to recognize the historical importance of private ordering and the structuring of same-sex relationships outside of the limitations of family law. The freedom to “unpack” the bundle of sticks that has constituted marriage and family, and to “pick and mix” them, may have helped facilitate the evolution of relationships in ways that are now increasingly imitated by many heterosexual couples. In fact, as Rosemary Auchmuty has argued, the dissolution proceedings provide a means for judges to undermine the contractual arrangements that may have been agreed to by the parties in advance.<sup>68</sup>

This yearning for traditional family status with no optional components sits very uneasily with what Judith Stacey and Elizabeth Davenport describe as “the postmodern family” characterized by “diversity, choice, flux and contest.”<sup>69</sup> Contract represents the ideals of fulfilling the reasonable expectations of parties, rather than imposing the requirements of a status that imitates marriage. The rejection of the language of “options” in favor of “rights and responsibilities” and “tradition” thus may be a limiting and misplaced strategy. Contract (even as a metaphor) may be better positioned to respond to these postmodern relationship forms.

But the rejection of contract leaves us with a status that remains hollow (or, perhaps a more positive term is “flexible”). After all, there is no prescribed set of vows for entering a civil partnership, so it is not clear what the partners are promising to each other. So too, the absence of adultery as a per se ground for dissolution demonstrates that this aspect of marriage is not necessarily part of the partnership bundle. Moreover, a religious basis for partnership is precluded by the Act. All that the government offers is encouragement to the parties to hold a celebration to mark the occasion. Thus, while this is a status, its hollowness may allow it to be filled with the reasonable expectations of the parties.

#### CONJUGALITY/CARE

Another, closely related, way of understanding the dilemma of the Civil Partnership Act is through the binary of conjugality and care. As I have already argued, proponents of the Act must argue that same-sex relationships are fundamentally conjugal, or at least

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<sup>68</sup> *Same-Sex Marriage Revived*, *supra* note 36, at 115.

<sup>69</sup> Judith Stacey & Elizabeth Davenport, *Queer Families Quack Back*, in *HANDBOOK OF LESBIAN AND GAY STUDIES*, *supra* note 60, at 355, 356.

have the potential to be so. If, by contrast, the *essence* of civil partnership is economic dependence, then the limitation to same-sex couples becomes difficult to sustain. We are left in a situation, then, of competing analogies: to married couples or to caregivers. By focusing on care rather than conjugality, skeptics of the Civil Partnership Act argued that it is inherently unfair, particularly given that, according to the Baroness O’Caithain, “fewer than 80,000 people live as part of a same-sex couple, whereas 4.6 million people live together in non-sexual co-dependent relationships . . . .”<sup>70</sup>

Sustaining such a distinction in benefits must be on the basis of conjugality. The difficulty, though, is that advocates of the Civil Partnership Act always argue on the basis of care rather than sex. As a strategic matter, this is hardly surprising, but it opens the door to opponents’ arguments in favor of caregivers. Heart-wrenching stories of long-term same-sex dependence and care, which inevitably end in tragedy, were the discursive weapons of the proponents of the Act. But the difficulty is that those narratives are indistinguishable from, for example, the stories of the tragic spinster sisters. Because lesbian and gay conjugal relations are both present (by necessity) but absent (by strategy), a discourse of care predominated. But it also bears remembering that neither dependence nor cohabitation (nor conjugal relations for that matter) are prerequisites to registration as partners.

There is another dimension to the care and dependency discourse. Increasingly within government initiatives and debates, there is recognition that lesbians and gay people—both as individuals but mostly as couples—are involved in the care of “their” children. Legal changes under the Labour government have allowed the taking of parental responsibility by a lesbian or gay partner, and this is one of the justifications for registration. This is, however, a politically mixed message. On the one hand, it is gratifying to see lesbian and gay parenting brought into public discourse in a way that is not pathologized, and this demonstrates the changed political climate since the 1980s. On the other, the consistent message from the government is that children’s best chance of success is within a married or, failing that, civilly partnered household because of the assumption (grounded in empiricism) that the two-parent married family is the most stable and healthy. Marriage is thereby assumed to be the best basis for the raising of children. It thus remains the case that a traditional model of family is privi-

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<sup>70</sup> 660 PARL. DEB., H.L. (5th ser.) (2004) 407.

leged as an idealized locus of child-raising.<sup>71</sup>

The focus on care is also a significant part of the debates. All sides paid homage to the caregiver who sacrifices for others and therefore warrants special consideration by the state either through an amended Civil Partnership Act, or through separate legislation. The debates thereby usefully brought care into Parliamentary discourse and highlighted the relative paucity of benefits and privileges accorded to caregivers as well as the arguable unfairness of privileging sexual relationships (be they marital or otherwise) over other forms of privatized care. Ironically, opponents of civil partnership appear to advance the agenda advocated by feminists such as Martha Fineman who argues that “it is important to point out that focusing on the caretaker’s position ultimately illuminates something general about the organization of society . . . .”<sup>72</sup> The debates give space for the articulation of the value of care, and the justice of treating caregivers equally and fairly through assistance from the state. This may represent some recognition of forms of citizenship that transcend paid employment and that center on human relationships, which is a significant change from the citizenship models that have dominated U.K. public discourse.<sup>73</sup>

However, this emphasis on caregiving, like child-raising, sends out a mixed message. While the exaltation of the caregiver as an ideal citizen (as opposed to wage earner or entrepreneur) may be welcomed, it can also be argued that the Civil Partnership Act remains ideologically grounded in a privatized notion of care, wherein the state facilitates the taking on of private responsibility rather than expanding its own public, active role. Moreover, for both opponents and proponents of the Act alike, the center of care is the long-term, stable partnership presumptively located in a “family home.” As Boyd and Young argue in the Canadian context, partnership recognition is “grounded in an acceptance of marriage and family as a central organizing feature of citizenship.”<sup>74</sup> This privatization of responsibility led proponents of the Civil Partner-

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<sup>71</sup> See HOME OFFICE, *supra* note 19.

<sup>72</sup> MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 289 (2004).

<sup>73</sup> See generally RUTH LEVITAS, *THE INCLUSIVE SOCIETY?: SOCIAL EXCLUSION AND NEW LABOUR* (1998); Martin Powell, *New Labour and the Third Way in the British Welfare State: A New and Distinctive Approach?*, 20 *CRITICAL SOC. POL’Y* 39 (2000).

<sup>74</sup> Boyd & Young, *supra* note 47, at 781. See also ELIZABETH FREEMAN, *THE WEDDING COMPLEX: FORMS OF BELONGING IN MODERN AMERICAN CULTURE* vii (2002); ROBSON, *supra* note 1, at 150.

ship Act to argue that it is a cost-saving device for the state. Stonewall was explicit in its briefing paper, asserting that “[t]he taxpayer would actually save money in the area of benefit payments. Same-sex partners currently claim benefits as two individuals, meaning that they will receive more money than if their needs had been assessed as a couple.”<sup>75</sup>

The assumption is that the outward appearance of partnership (however that might be defined) demands the assumption of responsibility for care, to the advantage of the state. Thus, the state presumes that it can determine what it defines as partnerships, roommates, and friends—all categories that a queer critique is intended to trouble.<sup>76</sup>

The Civil Partnership Act encourages this privatization of care; indeed, forcing it on those who appear to fall into the category of same-sex partner. In this way, the Act becomes another “essential component of the strategy of dismantling the welfare state.”<sup>77</sup> After all, “the registration of a civil partnership involves both legal obligations as well as legal protections.”<sup>78</sup> As a consequence, as the *Financial Regulatory Impact Assessment* of the government makes clear, “[i]t is expected that civil partners will share their resources and support each other financially, reducing demand for support from the State and, overall, consuming fewer resources.”<sup>79</sup> Care thus becomes explicitly privatized on to the couple, making the differential impact of privatization depending upon social class transparent, and “the old principle of the main provider and dependent partner is still maintained.”<sup>80</sup>

But the focus on care and its privatization in the same-sex couple is also a partial and incomplete analysis of the dynamics of caregiving today. Sasha Roseneil and Shelley Budgeon argue, based on empirical data, that care increasingly takes place beyond the cohabiting couple and in extra-familial contexts. They point to three dynamics now at work which impact upon intimacy and care: (i) “a decentring of sexual/love relationships within individuals’

<sup>75</sup> Stonewall April, *supra* note 31, at 5.

<sup>76</sup> FREEMAN, *supra* note 74, at xv. See also Sasha Roseneil, *Why We Should Care About Friends: An Argument for Queering the Care Imaginary in Social Policy*, 3 Soc. POL’Y & Soc’y 409 (2004) [hereinafter *Queering the Care Imaginary*].

<sup>77</sup> Alison Diduck, *A Family by Any Other Name . . . or Starbucks Comes to England*, 28 J. L. & Soc’y 290, 307 (2001).

<sup>78</sup> RESPONSES TO CIVIL PARTNERSHIP, *supra* note 52, at 38.

<sup>79</sup> FINAL REGULATORY IMPACT ASSESSMENT, *supra* note 23, at 16.

<sup>80</sup> Fiona Williams & Sasha Roseneil, *Public Values of Parenting and Partnering: Voluntary Organizations and Welfare Politics in New Labour’s Britain*, 11 Soc. POL. 181, 187 (2004).

life narratives”; (ii) “an increased importance placed on friendship in people’s affective lives”; and (iii) “a diversification in the forms of sexual/love relationships.”<sup>81</sup> A focus on family fails to capture the increased provision of care through “networks and flows of intimacy,”<sup>82</sup> which do not center on the couple as partners in care. If friendship is replacing partnership as a central organizing principle of intimacy in many people’s lives, then the maintenance of privileged categories—whether spouse or same-sex partner or even spinster sister—becomes difficult to sustain. Care may take place in the private sphere, but it is not within a set model of relationship form, and to the extent that the state may wish to privilege certain relationship forms on the basis of dependency and care, it does so in an exclusionary way. Indeed, it forces us back into the recognition that same-sex partnership is not necessarily coterminous with care or conjugality, and demands that we think about care “beyond the conjugal imaginary.”<sup>83</sup> As one Conservative opponent suggested in the House of Commons (mirroring the queer theory critique), the legislation will “be an insult to all those who happily share their lives with relatives or friends outside marriage, because their relationships will be given institutional inferiority to [registered] homosexual ones.”<sup>84</sup>

#### LOVE/MONEY

[A]lthough it is paraded as an extension of human rights, it is nothing to do with fundamental human rights. It is about financial implications for homosexuals.<sup>85</sup>

Love and money is another dichotomy around which the Civil Partnership Act spins uneasily. For proponents of the Act, the relationship between love and money is straightforward. Long-term coupling is based upon romantic love (certainly not on contract or financial benefit), and long-term relationships are proven to be beneficial to society. Therefore, there is a social interest in providing a set of benefits to committed couples, but also in enshrining a set of responsibilities, which presumably same-sex couples in love would fulfill anyway. The rationale is that the state has an interest

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<sup>81</sup> Sasha Roseneil & Shelley Budgeon, *Cultures of Intimacy and Care Beyond “the Family”*: *Personal Life and Social Change in the Early 21st Century*, 52 *CURRENT SOC.* 135, 142 (2004).

<sup>82</sup> *Id.* at 153.

<sup>83</sup> *Queering the Care Imaginary*, *supra* note 76, at 411.

<sup>84</sup> 425 *PARL. DEB.*, H.C. (6th ser.) (2004) 213 (Christopher Chope).

<sup>85</sup> 663 *PARL. DEB.*, H.L. (5th ser.) (2004) 403 (Lord Maginnis).

in protecting and supporting stable relationships, be they married couples or same-sex partners.

For skeptics of the Act, by contrast, the rationale for the state support of relationships was probed more deeply and, for the Lord Bishop of Peterborough at least, the jury remains out on the issue: “it will remain a matter of judgment whether the extension of *positive discrimination* by creating a largely undefined or, perhaps, self-defined relationship will be beneficial to society, as well as to the individuals concerned.”<sup>86</sup>

In this passage, the Bishop recognized that the state historically has positively discriminated in favor of married couples, and this in turn raises the question whether relationships per se are necessarily social goods warranting special treatment that, as Lord Higgins articulated, amounts to “a discrimination here against the single person.”<sup>87</sup> The debate thus at least begins to raise the question of whether relationships—marital or otherwise—provide a sensible basis for making distinctions, for example, in the provision of employment pension benefits. As Lord Higgins made clear, the provision of a “wife’s pension,” justified by the likelihood of a diminished opportunity for making independent contributions may seem dubious as applicable to many same-sex couples.<sup>88</sup> The door is therefore open to thinking about unfairness in the ways in which provisions are made for old age. But only one member of Parliament linked these concerns to systemic *gender* inequality:

[S]urvivors have had no right to a partner’s pension. That has been a significant issue for many lesbian couples. Two women living together may have child care responsibilities. One of them may not work throughout her economically active life and reach retirement age without having acquired any pensionable service of her own. Bearing in mind the fact that many women are paid considerably less than men, the issue of poverty and rectifying injustice is important.<sup>89</sup>

But just as the debates on the Civil Partnership Act uncovered a class perspective with respect to those same-sex couples in em-

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<sup>86</sup> 660 PARL. DEB., H.L. (5th ser.) (2004) 423 (emphasis added).

<sup>87</sup> *Id.* at 428.

<sup>88</sup> *Id.* The pension questions raised by the Act are complex and not entirely resolved. In particular, the issue of pension provision for dependent surviving civil partners remains a contentious issue. The argument that the survivor partner’s pension should be based upon *all* of the deceased’s pension contributions, and not just those made since the coming into force of the Civil Partnership Act, has not been accepted by the government. Further announcements are promised from the government on the pension implications of partnership.

<sup>89</sup> 425 PARL. DEB., H.C. (6th ser.) (2004) 226 (Chris Bryant).

ployment (winners) and those dependent upon the state through the benefit system (losers), the debate also discloses another differential class impact, this with respect to the role of inheritance tax, still often referred to as “death duties.” In the U.K., wealth is taxed upon death, but can be transferred upon death between spouses exempt from inheritance tax. Registered same-sex partners likewise will be able to transfer wealth between themselves upon death free of tax. Critics of the Civil Partnership Act seized upon inheritance tax, questioning why those in other types of relationships of care and companionship should not also be entitled to exemption. Why should they continue to be discriminated against? As the Baroness O’Cathain stated:

If we are to extend all the rights of married couples to others, what should be the criteria? Should they be extended only to those in homosexual relationships? . . . The theoretical examples are known to everybody: people who move into a flat to care for a friend with a long-term illness; a daughter giving up a well-paid job to care for a sick mother; or two sisters who never marry, living together all their lives in the home inherited from their parents. All of these people, when it comes to the death of one or other of them, will face a swingeing inheritance tax bill, which will in most cases lead to increasing dependency on the state by those people. These sorts of cases are appalling and something has to be done about them. . . . Inheritance tax merely punishes families and other beneficiaries.<sup>90</sup>

The widespread hostility towards inheritance tax (particularly amongst Conservatives) is perhaps not surprising, given that it impacts the transfer of wealth between generations, and only protects spouses, presumably in order to ensure that widows have provision for their old age. Whether such a justification has become anachronistic, and whether it is compelling in the case of same-sex couples<sup>91</sup> is open to debate, as is the question of whether inheritance tax provides an equitable and just means for redistribution.

However, what also became clear for those focused on the financial implications of civil partnership (money rather than love) is that the presence of the ban on registration with a family member can be explained, not in terms of the analogy to marriage, but in terms of money and, specifically, tax avoidance. The Earl of Onslow was most explicit in recognizing that the formation of legally-sanctioned relationships may be about money rather than roman-

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<sup>90</sup> 660 PARL. DEB., H.L. (5th ser.) (2004) 405-06.

<sup>91</sup> See *Same-Sex Marriage Revived*, *supra* note 36, at 114.

tic love, at least for those seeking to shield wealth from the tax collector:

For some reason, the Biblical prohibition on close relationships is included in the Bill. Why? I cannot understand why. But I think I do. I think it is because I cannot register my son as my catamite and then hand the whole of my property to him without death duties. When I first heard of the Bill, I thought “Yip-pee. That is a frightfully good idea.” But one cannot do that.<sup>92</sup>

Thus, for those who advocate a wider extension of the Civil Partnership Act, the issue is not so much about the recognition of relationships of love, but more fundamentally, about the avoidance (or at least a delay) in the redistribution of wealth. While the government, and Stonewall, emphasized that the Civil Partnership Act is cost-neutral for the state (a debatable proposition) this is achieved through the privatization of the cost of care, which reduces the responsibility of the state through the benefit system. With respect to private wealth and spousal pension benefits—the concerns primarily of the upper and middle classes—the advantages of registration are clear (while the poor are disadvantaged by being deemed partners for the purposes of public support). The Act thus sits uneasily on the dichotomy of love and money, in that the government is keen that non-registration should not be financially advantageous (for those dependent upon state benefits). As well, the financial benefits that may accrue to some are limited to a clearly defined and essentialized class that is grounded in status rather than contract, in order to prevent at least the appearance of partnerships of financial convenience. Money must follow from love (status) rather than from tax planning (contract), in large measure because of the desire to control the potential cost to the state of this legislation.

#### RESPONSIBILITIES/RIGHTS

The final binary that warrants at least a mention has already been foreshadowed throughout this article: responsibilities and rights. For government supporters, the Civil Partnership Act is a carefully designed bundle of rights and responsibilities for same-sex couples, rather than special benefits or financial privileges. This is no *à la carte* of relationship options. Rather, in order to take advantage of the benefits, the responsibilities must be assumed, and this can only be done through the conscious act of registration with the state. In fact, the relationship between rights and respon-

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<sup>92</sup> 660 PARL. DEB., H.L. (5th ser.) (2004) 416-17.

sibilities is characterized within the material surrounding the Act as a careful balance between “the responsibilities of caring for and maintaining a partner with a package of rights for example, in the area of inheritance.”<sup>93</sup> Inheritance rights thus become the pay off for assuming the responsibilities of care. This is a very utilitarian notion of rights and responsibilities in which the two are quantifiable and measurable to achieve a perfect harmony.<sup>94</sup>

It is the careful tailoring of this bundle to same-sex couples that makes it inappropriate for other carers and home-sharers who, it is promised, in due course will receive their own legislation. For example, the dissolution proceedings, power of judges to make property orders, and requirements to provide support (potentially even after dissolution), make this a set of responsibilities, the government argues, that would be ill-suited to such couples as spinster sisters.

What also underpins this bundle of responsibilities and rights, though, is an underlying faith in the power of the granting of rights to shape behavior (including claims that it will lead to a reduction in homophobic violence) and to foster stable relationships. On the one hand, the government recognizes the existence of long-term stable relationships that, it is assumed, are beneficial to individuals and to society. But, on the other hand, the assumption is that law reform will strengthen those relationships, foster the forging of new long-term relationships, and improve the quality of life of those who enter into them. The power of rights thus is substantial in shaping our choices, perhaps even as powerful as love is in shaping relationships.

#### CONCLUSIONS

Perhaps part of the responsibilities that come with the seductive invitation to become the citizen you know you want to (and can) be is adherence to a vanillized homonormativity to complement the heteronormativity of the contemporary ‘familization of the social.’<sup>95</sup>

The Civil Partnership Act can be read on one level as a very “unqueer” text: deeply assimilationist, furthering a privatization of care agenda, mimicking a marriage model, and foregoing the per-

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<sup>93</sup> RESPONSES TO CIVIL PARTNERSHIP, *supra* note 52, at 15.

<sup>94</sup> GOVERNING SEXUALITY, *supra* note 10, at 28 (arguing that this linking of the granting of rights to the assumption of responsibilities is fundamental to New Labour Party ideology).

<sup>95</sup> McGhee, *supra* note 10, at 366-67.

fect opportunity to rethink in a radical way the institution of the family in law. With respect to the last point, the Act is a lost opportunity. In trying to be all things to all people—perhaps inevitable with respect to the U.K. government’s thinking on the family—I have tried to show that the Act often slips into incoherence in the way in which it straddles numerous dichotomies.

I have also touched upon how the Civil Partnership Act emerges out of a culturally distinct set of circumstances, despite the essentialism that often underpins the rhetoric. The similarity to the institution of marriage, but the aversion to the concept of same-sex marriage, shapes this distinctiveness. Cultural uniqueness, in this instance, can be rephrased as parochialism. Although the Act does make provision for the recognition of foreign partnerships, there remain complex issues surrounding recognition in the U.K. of those partnerships (such as the PACS) which may involve a very different bundle of rights and responsibilities and which are not limited to same-sex couples.<sup>96</sup> While the government seeks to essentialize same-sex relationships, it cannot essentialize the patchwork of legal regimes of relationship recognition occurring within the European Union and beyond. As Baroness Scotland conceded, “there is no common concept of same-sex registered partnership in other countries across the world.”<sup>97</sup> The dichotomy of marriage/not marriage rises again to the surface, and, as without such a universally recognized status as marriage, there is no automatic basis upon which to determine whether to recognize a foreign registered partnership.

This problem is brought into sharp relief by legal developments within the European Union, and in particular, Directive 2004/58/EC on free movement of citizens of the Union and their family members, issued in April 2004. In defining “family member,” the Directive includes “spouse” as well as “the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage.”<sup>98</sup> In this directive to member states of the European Union, we witness the attempt to impose transnational

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<sup>96</sup> See generally Barry Crown, *Civil Partnerships in the U.K.—Some International Problems*, 48 N.Y.L. SCH. L. REV. 697 (2004); Rebecca Probert & Anne Barlow, *Displacing Marriage—Diversification and Harmonisation Within Europe*, 12 CHILD & FAM. L.Q. 153 (2000).

<sup>97</sup> 660 PARL. DEB., H.L. (7th ser.) (2004) 391.

<sup>98</sup> Council Directive 2004/58/EC, art. 2(2), 2004 O.J. (L 229) 35, 38.

coherence upon the culturally diverse pattern of regimes of recognition emerging across the E.U.

This transnational point further underscores the many limitations of the Act, which are covered over by the claims to justice and equality. In the material surrounding the legislation, and in the debates, what is apparent is a lack of engagement with the many types of relationships which lesbians and gay men form, and how that diversity might be reflected through law. Nor is there any room for progressive and feminist analyses of the institution of marriage: of why and how marriage is valued and whether it has become anachronistic. There is no serious critical discussion (except, ironically, from some Conservatives) of why we privilege conjugal relations rather than relations of economic interdependence, and whether it would be possible to use the state and public benefit to help privatized care giving, and whether care can be made *less* private. Finally, the debate touches upon, but never considers, the question of what constitutes authenticity in relationships, what might amount to a fraud on civil partnership, and, for that matter, what constitutes benefit fraud by unregistered same-sex cohabitants.

As I have tried to demonstrate in this article, the basis of relationships seems to be any, or many, or all of, love, money, sex, friendship and care, but the infinite variety of ways in which they combine make law a cumbersome device for the regulation of intimacy. This is particularly true when the model of regulation is drawn from the institution of marriage and then imposed upon what are increasingly complex, postmodern and queer lives. But the underlying incoherence of the legal category of partnership may well provide, I have also suggested, room for subversion and resistance in the ways in which lesbians and gays (and, indeed, others) map on to the law's attempt at categorization. Whether and how that will occur will require empirical data after the Act comes into force. That analysis will entail looking at how queer lives intersect with what appears, on its surface, to be a very un-queer law through what may be the manipulation of the very incoherence on which it is founded.