Religion and Same-Sex Marriage

Robert Leckey*

In

La religion en droit de la famille:

Le religieux comme variable de prise de décision dans un droit familial laïcisé

David Koussens, Benjamin Prud'homme & Safa Ben Saad (eds)

(Montreal: Thémis) [forthcoming in 2019]

1 Introduction

This chapter takes up the story of same-sex marriage and religion in Canada. It moves across a range of legal sources: constitutional law, federal and provincial legislation, judgments, and advisory opinions from courts. There are civil and religious notions of marriage; civil and religious authorities exercise power regarding them. These notions and exercises of power coexist, collaborate, and overlap. Sometimes they collide. Against this reality, the courts and federal legislative drafters have fashioned a simplistic narrative by which civil marriage opened to same-sex couples in a process distinct from religious marriage. Overstatements of the separateness of civil and religious marriage distort both. They echo a broader tendency to exaggerate how separate the "secular" can be from the "religious."[1]

In contrast, this chapter regards civil and religious marriage as "distinct, but not, after all, unrelated."[2] It demonstrates that the processes by which state institutions have recognized same-sex marriage have not only altered civil marriage, but also further defined religious marriage.

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* Dean, Faculty of Law, and Samuel Gale Professor of Law, McGill University. This research was supported by the Social Sciences and Humanities Research Council of Canada. I am grateful for comments on drafts by Nicholas Bala, Benjamin Berger, Brian Bird, Marc-Antoine Gervais, Jennifer Rogers, and Shauna Van Praagh.

[1] See e.g. Janet R. Jakobsen and Ann Pellegrini, *Secularisms* (Durham, NC: Duke University Press, 2008).

[2] Robert Leckey, "Profane Matrimony" (2006) 21:2 Can. J. L. & Soc'y 1 at 18.

That is, when intervening in civil marriage with an eye to vindicating same-sex couples' right to equality, state actors such as judges and legislative drafters could not stay comfortably on the civil side of a boundary between stable artifacts of civil and religious marriage. Instead, they have continued the long process of producing "civil" and "religious" marriage. The example of civil marriage commissioners shows interprovincial variation within this process. Queer theorists may think here of how, historically, the new identity of homosexuality produced its constitutive other, the category of heterosexuality.[3] The final point to flag at the outset is that as religious motivations or justifications for state action appear increasingly out of place in a diverse contemporary society, the pursuit of equality has emerged as an admissible substitute in relation to marriage.

2 Constitutional and Legislative Backdrop

The Constitution of Canada allocates the power to regulate marriage and family matters. In exercising their authority, the Parliament of Canada and provincial legislatures have involved the institutions of organized religion in marriage. They have also taken distance from them to differentiate and develop civil marriage.

The *Constitution Act, 1867* divides authority to legislate with respect to marriage between the two orders of government.[4] Section 91(26) places "Marriage and Divorce" within federal jurisdiction. Section 92(12) empowers the legislatures of the provinces to make laws respecting the "Solemnization of Marriage in the Province." Furthermore, Parliament's criminal power (s. 91(27)) allows it to police the boundaries of marriage; it has done so, at various points prohibiting sodomy, incest, bigamy, polygamy, solemnization of marriage without lawful

[3] See e.g. Janet E. Halley, "The Construction of Heterosexuality" in Michael Warner, ed., *Fear of a Queer Planet: Queer Politics and Social Theory* (Minneapolis: University of Minnesota Press 1993) 82 at 83.
[4] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

authority or contrary to law, seduction under promise of marriage, and feigned marriage.[5] The chapter's story engages exercises of all three heads of power.

The constitutional drafting history reveals a desire to ensure uniformity in the status of persons across the country, avoiding the issues of domestic recognition plaguing the United States, where marriage and divorce fall within state jurisdiction. More relevant for present purposes, a number of concerns centred on religion. In making marriage and divorce a federal head of power, the drafters intended to limit the role of religion in laws defining the institution of marriage, at the front and back ends. Doing so would protect the English-speaking Protestant minority in Canada East (which became the Province of Quebec) from laws influenced by the French-speaking Roman Catholic majority. That is, divorce might eventually become possible. At the same time, for at least some participants, elevating power over divorce to the central government would impede access to divorce. Another thought was that federal power over marriage would allow Parliament to preclude a provincial legislature from invalidating interreligious marriages.[6] In response to countervailing concerns that the federal power over marriage might recognize a purely civil marriage ceremony – envisaged for justices of the peace within the future Province of Ontario – the drafters carved out solemnization as an exclusive provincial competence.[7]

From the outset of the Canadian federation, then, religion has played a role in the law of marriage, with law both sheltering a minority from the majoritarian religion and designating space within which religion might influence policy. At the risk of anachronism, it would have

[5] From the U.S., see Melissa Murray, "Marriage as Punishment" (2012) 112:1 Colum. L. Rev. 1, identifying use of marriage and the criminal law as domains for disciplining and regulating sexuality.
[6] F.J.E. Jordan, "The Federal Divorce Act (1968) and the Constitution" (1968) 14:2 McGill L.J. 209 at 214 [footnote omitted].
[7] *Ibid*. This summary draws on Robert Leckey and Carol Rogerson, "Marriage, Family, and Federal Concerns" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press 2017) 575 at 576.

been inconceivable for the constitutional drafters that any legislative power – federal or provincial – would recognize the marriage of two individuals of the same sex.

There has been at least some daylight between civil marriage and religious marriages for a long time. The gap is less obvious to members of mainstream Protestant churches than, say, to civilly divorced Roman Catholics who wish to remarry within their church. Prior to Confederation, English law regarding divorce operated in some British North American colonies; it depended on when a colony had received English law. In Quebec, the 1866 civil code affirmed that marriage was dissoluble only by the natural death of one of the parties.[8] In 1930, Parliament received English divorce law as it existed in 1870 into Ontario.[9] It was not until the late 1960s, however, that Parliament enacted a comprehensive national law on divorce.[10] Civil divorce opens the door to civil remarriage, but it may not guarantee the prospect of religious remarriage, notably, for Roman Catholics and Orthodox Jews. The federal legislative drafters sometimes attend, however, to religious dissolution and remarriage. In 1990, in response to activism by Jewish women, Parliament amended its *Divorce Act* to equip judges with tools to prod religious individuals who have not taken steps within their control to allow their ex-spouses to remarry within their faith.[11] Crossing the line between civil and religious marriage, this mechanism imposes consequences in the civil courts for religious conduct.

Meanwhile, the provinces have regulated the celebration of marriage. Today every jurisdiction in Canada recognizes that civil and religious officiants may perform a marriage that has civil effects. That is, in the case of recognized religious officiants, acts within a single ceremony produce the religious marriage and the civil one. In North America, the view of

[8] Art. 185 C.C.L.C.
[9] *The Divorce Act (Ontario), 1930*, 20-21 Geo. V, c. 14.
[10] *Divorce Act*, S.C. 1967-68, c. 24.
[11] R.S.C. 1985, c. 3 (2d Supp.), s. 21.1.

marriage as both a civil and religious act is widespread, reflected in law and popular culture. This approach differs from that in places such as France, where a religious blessing or ceremony is distinct from the civil marriage. Within Canada, Quebec was the last jurisdiction to recognize civil officiants, in 1969.[12] Under provincial law, not every religious figure may celebrate a legally binding marriage. Legislation sets conditions for those religions with which a province will collaborate for executing legally valid marriages. For instance, in Quebec, the religious official's organization must authorize her to solemnize religious marriage and her confession's "existence, rites and ceremonies" must be "of a permanent nature."[13]

The final interaction to signal here concerns efforts to shelter the resolution of family disputes from religious norms. In the early 2000s, the prospect that Muslims would deploy the general regime of Ontario's *Arbitration Act 1991*[14] to resolve family disputes using religious law triggered a crisis.[15] In response, the legislature of Ontario added new constraints to family arbitration. An arbitrator must henceforth conduct a family arbitration in accordance with "the law of Ontario or of another Canadian jurisdiction," on pain of the decision's invalidity.[16] The amendment targets the choice of rules, not the choice to submit a dispute to a religious decision maker. Nevertheless, the legislative intent, highly publicized, was to forestall legally recognized religious arbitration. Meanwhile, for decades Quebec law has effectively limited the scope for binding religious arbitration in family matters. It has done so by shielding family affairs from arbitration as "matters of public order."[17] Indisputably, inequality of bargaining power, wide

[12] S.Q. 1969, c. 74.
[13] Art. 366, para. 2 C.C.Q. From Ontario, see similarly *Marriage Act*, R.S.O. 1990, c. M.3, s. 20(3).
[14] S.O. 1991, c. 17.
[15] Sherene H. Razack, "The 'Sharia Law Debate' in Ontario: The Modernity/Premodernity Distinction in Legal Efforts to Protect Women from Culture" (2007) 15:1 Fem. Legal Stud. 3; Anna Korteweg & Jennifer A. Selby, eds., *Debating Sharia: Islam, Gender Politics, and Family Law Arbitration* (Toronto: University of Toronto Press, 2012).
[16] *Arbitration Act, 1991*, *supra* note 14, ss. 1 "family arbitration," 2.1, 2.2.
[17] Art. 2639, para. 1 C.C.Q.

scope for private agreements, and access-to-justice barriers, including inadequate legal aid, may prevent individuals from receiving the full benefit of the state's law through the institutions of civil justice.[18] Bluntly rejecting religious power risks, however, uncritically holding up the civil law and its institutions as guarantors of women's equality.[19] The state thus telegraphs the worldview by which "to belong to the modern is to belong to secular law, not to religion or a religious normative order."[20] Claims for same-sex marriage entered this landscape of cooperation and tension between state and religious authorities.

3 "Solely about the Legal Institution of Marriage"

Different levels of court have contributed to the prevailing sense that civil marriage opened to same-sex couples with no implications for religious marriage. While an Ontario court adjudicated the first challenge to the different-sex definition of marriage in 1993,[21] the litigation that brought about change got underway in the early 2000s. Claimants argued that restricting marriage to one man and one woman unjustifiably limited the equality right in s. 15(1) of the *Canadian Charter of Rights and Freedoms*,[22] discriminating based on sexual orientation.

Two aspects of the relationship between religion and same-sex marriage are relevant here. One is the contention that religious definitions of marriage as a different-sex institution or sacrament militated in favour of retaining the different-sex requirement in law. Specifically, changing the definition of civil marriage would abridge freedom of religion, protected by s. 2(a)

[18] Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: 2013) (chair: Thomas Cromwell).
[19] Audrey Macklin, "Multiculturalism Meets Privatisation: The Case of Faith-Based Arbitration" (2013) 9:3 Int'l J. L. Context 343.
[20] Benjamin L Berger, "Belonging to Law: Religious Difference, Secularism, and the Conditions of Civic Inclusion" (2015) 24:1 Soc. & Legal Stud. 47 at 53.
[21] *Layland v. Ontario (Minister of Consumer & Commercial Relations)* (1993), 14 O.R. (3d) 658 (Div. Ct.); Greer J., dissenting, would have allowed the claim.
[22] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

of the Charter. Courts rejected this claim. At first instance in *Hendricks*, the court observed that "[n]obody disputes that religions have played an important role in marriage, their beliefs and rites having presided at the institution's establishment."[23] Nevertheless, the secularization of marriage required the legislature to take account of the civil nature of marriage; it "could not be defined solely by religion."[24] In a heterogeneous, multicultural society, the state had a duty to respect each citizen, "but no group could impose its values or define a civil institution."[25] Justice Lemelin emphasized that nobody could require a religious minister to celebrate a marriage contrary to his religious institution's stipulations. She concluded that freedom of religion is not superior to the guarantee of equality; freedom of religion was neither under threat from the claim for same-sex marriage, nor did it justify Parliament in maintaining the traditional definition.[26]

The other aspect of the relationship between religion and same-sex marriage is the contention that denying civil effects to religiously performed same-sex marriages unconstitutionally favoured one religious view of marriage. In *Halpern*,[27] the Metropolitan Community Church of Toronto (MCCT) argued that the common-law definition of marriage derived from Christian values as propounded by the Anglican Church of England. It argued that the prevailing definition of marriage "provide[d] legal recognition and legitimacy to marriage ceremonies that accord with one religious view of marriage," thereby "diminishing the status of other religious marriages."[28] The Ontario Court of Appeal rejected this argument. It held that, while "[m]arriage is a legal institution, as well as a religious and a social institution … [t]his case

[23] *Hendricks c. Québec (Procureur général)*, [2002] R.J.Q. 2506 at para. 164 (Sup. Ct.) [author's translation], varied (*sub nom.*), *Ligue catholique pour les droits de l'homme c. Hendricks*, [2004] R.J.Q. 851 (C.A.).
[24] *Ibid*. [author's translation].
[25] *Ibid*. [author's translation].
[26] *Ibid*. at paras. 167, 168, 170.
[27] *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.).
[28] *Ibid*. at para. 51.

is solely about the legal institution of marriage."[29] The judges insisted that the case did not concern "the religious validity or invalidity of various forms of marriage. We do not view this case as, in any way, dealing or interfering with the religious institution of marriage."[30] The lack of civil recognition of same-sex religious marriages neither prevented MCCT from performing them, nor coerced it to perform only opposite-sex religious marriages.[31]

The Supreme Court of Canada addressed same-sex marriage solely in responding to the federal government's request for advice on the constitutionality of its proposed legislation.[32] Religious groups who intervened divided on the desirability of extending civil marriage to same-sex couples. For example, the Canadian Conference of Catholic Bishops and an "Interfaith Coalition" (the Islamic Society of North America, the Catholic Civil Rights League, and the Evangelical Fellowship of Canada) made submissions against same-sex marriage. The Canadian Coalition of Liberal Rabbis for same-sex marriage, MCCT, the Canadian Unitarian Council, and the United Church of Canada argued for it.

The highest court confirmed the lower courts' view of civil and religious marriage as separate. It characterized the proposed law as "limited in its effect to marriage for civil purposes."[33] In the Court's view, the bill could not "be interpreted as affecting religious marriage or its solemnization."[34] Extending civil marriage to same-sex couples fell within Parliament's power relating to "marriage" and doing so was consistent with the Charter. In contrast, a clause recognizing the freedom of religious officials to refuse to perform marriages incompatible with

[29] *Ibid*. at para. 53.
[30] *Ibid*.
[31] *Ibid*. at para. 56. A further religious dimension is that parties to the Ontario litigation sought civil recognition of religious marriages done at the MCCT after "the ancient Christian tradition of publishing the banns of marriage" (*ibid*. at para. 11).
[32] *Reference re Same-Sex Marriage*, 2004 SCC 79 at para. 55, [2004] 3 S.C.R. 698.
[33] *Ibid*. at para. 55.
[34] *Ibid*.

their religious beliefs would exceed Parliament's competence.[35] In any event, such a clause was unnecessary: state compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would unjustifiably limit their freedom of religion.[36]

These proceedings did not identify an essential, unchangeable core of civil marriage. Instead, the Ontario Court of Appeal in *Halpern* rejected "procreation and childrearing" as marriage's exclusive purposes.[37] They identified "[i]ntimacy, companionship, societal recognition, economic benefits, [and] the blending of two families" as other "reasons why couples choose to marry."[38] In the reference, the Supreme Court rejected the claim that the *Constitution Act, 1867* "effectively entrenches the common law definition of 'marriage' as it stood in 1867."[39] The Court's "progressive"[40] interpretation of "marriage" in s. 91(26) could include same-sex marriage.[41] The lack of a definitional core might prove problematic in a future federalism dispute. It may be difficult to determine whether legislation labelled by Parliament as relating to "marriage" is genuinely about marriage and not, say, about provincially regulated family relations. Moreover, the absence of a core gives no plain means for rejecting an equality claim on the basis that the claimant's situation is incomparably different from marriage. Think of a polygamous union entered for intimacy, companionship, economic benefits, and the blending of families.

The legislation following these judgments continued their insistence on the separateness of civil from religious marriage. The federal law adopted in 2005 targets marriage "for civil

[35] *Ibid*. at para. 37.
[36] *Ibid*. at para. 58.
[37] *Supra* note 27 at para. 94.
[38] *Ibid*.
[39] *Reference re Same-Sex Marriage*, *supra* note 32 at para. 21.
[40] *Ibid*. at para. 23.
[41] *Ibid*. at para. 29.

purposes."[42] It includes the clause characterized by the Supreme Court in the *Reference re Same-Sex Marriage* as beyond Parliament's competence, purporting to "recognize[] that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs."[43] The law states further that "no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada" by reason of exercising freedom of conscience and of religion in respect of same-sex marriage or of expressing beliefs favouring marriage as between one man and one woman.[44] As the next part relates, the scope for expressing religious beliefs about same-sex marriage has arisen most sharply regarding individuals licensed to perform civil marriages.

4 Civil Marriage and Officiants' Beliefs

Once same-sex couples could contract a civil marriage, questions arose about who would marry them. In line with the Supreme Court's pre-emptive discussion on this point, nobody has credibly suggested that a same-sex couple could require a religious official to marry them within the latter's religious institution. Controversies swiftly emerged, however, about whether individuals licensed to perform civil marriages might decline to do so in virtue of a religious

[42] *Civil Marriage Act*, S.C. 2005, c. 33, Preamble, s. 2.
[43] *Ibid*., s. 3.
[44] *Ibid*., s. 3.1. For some observers, the Supreme Court of Canada's judgments respecting Trinity Western University violate the spirit of this provision. *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 [*Law Society of British Columbia*]; *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33. The Court upheld the decisions by provincial regulator of the legal profession to refuse accreditation to a law school proposed by the evangelical Christian private university. The appeals turned on the community covenant, which required students and staff to refrain from sexual activity outside traditional marriage. Although accreditation of law schools flows from provincial laws, not ones of the Parliament of Canada, some will read these decisions as depriving Trinity Western of a benefit in virtue of the expression of religious beliefs about marriage as a man and woman's exclusive union (see e.g. *Law Society of British Columbia*, *ibid*. at para. 340, Côté and Brown JJ., dissenting). On another reading, the covenant goes beyond expressing beliefs about marriage, imposing them on others (see *ibid*. at para. 103, Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ.; *ibid*. at para. 138, McLachlin C.J., concurring; *ibid*. at para. 228, Rowe J., concurring).

belief against same-sex marriage.[45] On the one hand, legislative and judicial pronouncements on this matter have deepened the distinction between civil marriage and religious marriage. On the other, pursuit of the state's ambition to ground civil marriage on a secular footing has forced legal actors to grapple with contested questions about the civil or religious character of elements of marriage.

Following the advent of same-sex marriage, the provinces have used their power over the celebration of marriage differently. Saskatchewan, Newfoundland and Labrador, and Manitoba directed commissioners to perform all marriages or resign.[46] Others, such as Ontario and British Columbia, have informally accommodated those commissioners who objected to marrying same-sex couples. New Brunswick tabled amendments to allow authorized officiants to refuse to solemnize marriages not in accordance with their religious beliefs.[47] Only Prince Edward Island has legislated to that effect.[48]

The fullest judicial consideration of the potential collision between same-sex marriage and the religious freedom of marriage commissioners took place in Saskatchewan.[49] After the refusal of some commissioners to solemnize same-sex marriages gave rise to legal proceedings, the provincial government sought a judicial opinion on the constitutional validity of two approaches. One would grandfather those marriage commissioners appointed before the province had same-sex marriage, allowing them to decline to perform marriages contrary to their religious

[45] Canadian courts have not had high-profile litigation equivalent to the American case of the baker who refused to make a "gay wedding cake" (*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (U.S. Supreme Court, 4 June 2018)). For the decision of a human-rights tribunal that a Roman Catholic organization owed damages for failing reasonably to accommodate a lesbian couple when it refused to honour a contract for renting its hall for the couple's wedding, see *Smith and Chymyshyn v. Knights of Columbus and others*, 2005 BCHRT 544.
[46] *Re Marriage Commissioners Appointed under The Marriage Act*, 2011 SKCA 3 at para. 11, 366 Sask. R. 48 [*Re Marriage Commissioners*]; *Dichmont v. Newfoundland and Labrador (Government Services and Lands)*, 2015 CanLII 4857 at para. 4 (NL SC); *Kisilowsky v Manitoba*, 2018 MBCA 10 at para. 13.
[47] Bill 76, *An Act to Amend the Marriage Act*, 2nd Sess., 55th Leg. (second reading 29 June 2005).
[48] *Marriage Act*, R.S.P.E.I. 1988, c. M-3, s. 11.1, am. by S.P.E.I. 2005, c. 12, s. 7.
[49] *Re Marriage Commissioners*, *supra* note 46.

beliefs. The alternative would allow all commissioners to do so. The Saskatchewan Court of Appeal rejected both options. The justices divided, however, on the degree to which pressuring marriage commissioners to perform civil marriages might abridge their religious freedom and on the implications of allowing religious exemptions from statutorily defined civil duties.

In the majority opinion, Richards J.A. acknowledged that either option would create situations where marriage commissioners would tell same-sex couples that they would not marry them.[50] Treating gay men and lesbians differently from others who wished to marry would base negative differential treatment on sexual orientation, discriminating against them.[51] The majority viewed as "genuinely offensive" hearing "I won't help you because you are gay/lesbian but someone else will."[52] In addition, the majority found that the dilemma confronting a marriage commissioner who wished not to perform a same-sex marriage for reasons of belief would more than trivially limit the latter's freedom of religion. Having identified competing rights, the majority undertook a balancing exercise under s. 1, the Charter's limitation clause.

The majority held that both proposed options failed to limit gay men and lesbians' equality right minimally. For example, it would be possible to accommodate religious objectors behind the scenes.[53] Justice Richards also concluded that the proposals would impose harms disproportionate to their benefits. They risked "undermin[ing] a deeply entrenched and fundamentally important aspect of our system of government," namely, the notion that the state apparatus "serves everyone equally."[54] He characterized as "highly problematic" making marriage services depend on the religious beliefs of commissioners.[55]

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[50] *Ibid*. at para. 38.
[51] *Ibid*. at para. 39.
[52] *Ibid*. at para. 41.
[53] *Ibid*. at paras. 85–88.
[54] *Ibid*. at para. 97.
[55] *Ibid*. at para. 98.

For the concurring judge, it was less clear that performing civil marriages engaged commissioners' religious beliefs. Justice Smith emphasized the "civil and non-religious nature" of the marriages they perform, specifying that performance of a civil marriage "is not a religious rite or practice" and implies no approval of the union.[56] She saw the idea that "religious disapproval of a same-sex lifestyle" permitted distinctions based on sexual orientation when acting under legislation as portending a widespread refusal of services to gay men and lesbians in the full range of government activity.[57]

This example shows that negotiating the relationship between the evolving institution of civil marriage and its religious counterparts has involved the state in recognizing religious elements of marriage. Formal and informal accommodation of marriage commissioners' objections to same-sex marriage inform us that, all along, some civil marriages included a religious component – at least in some officiants' hearts and minds. Some refusals to accommodate acknowledge the potential religious ingredient in a civil marriage ceremony, despite overriding it to honour gay and lesbian couples' equality right. Even to hint that commissioners are wrong to feel a religious dimension in their work requires a judgment about the authentic or legitimate boundaries of the religious in relation to marriage. A final site merits mention where efforts to defend a civil conception of marriage, open to same-sex couples, have required taking distance from religious ones: polygamy.

[56] *Ibid*. at paras. 125, 147, 142.
[57] *Ibid*. at para. 103.

5 Polygamy and Equality

Opponents of same-sex marriage have sometimes contended that legalizing same-sex marriage would open the door to decriminalizing and recognizing polygamy.[58] There are reasons to link these forms of marriage, both of them outside the "traditional," two-person, opposite-sex definition that for so long prevailed in western societies. Sociologically, "[p]olyamorists and lesbigays face many similar challenges – disclosure, stigma, custodial issues, and relationships with families of origin – and use comparable strategies to navigate them."[59] On some readings, the paradigm of vulnerability theory, especially applied to children, may call for recognizing both same-sex and polygamous marriage.[60] Comparative study suggests, though, that "[i]f there is a slippery marital slope … it does not tilt in a singular or expected direction."[61] In the Canadian context, same-sex marriage does not appear to have advanced the case for decriminalizing polygamy. On the contrary, it has bolstered a contemporary narrative of civil marriage as focused on equality.

In 2011, the British Columbia Supreme Court issued an opinion that the federal ban of polygamy respects the Charter. Justice Bauman responded to the slippery-slope arguments by which same-sex marriage opened the door to polygamy. Focusing on "the institution of monogamous marriage," he posited that Canada accepted same-sex marriage "in part, because committed same-sex relationships celebrate all of the values we seek to preserve and advance in monogamous marriage."[62] This reasoning echoes the proposition that "same-sex marriages serve

[58] See e.g. Annie Bunting, "Law and Society Research on the Family" in Austin Sarat and Patricia Ewick, eds., *The Handbook of Law and Society* (Oxford: Wiley Blackwell 2015) 199 at 202.
[59] Elisabeth Sheff, "Polyamorous Families, Same-Sex Marriage, and the Slippery Slope" (2011) 40:5 Journal of Contemporary Ethnography 487 at 489.
[60] Stu Marvel, "The Evolution of Plural Parentage: Applying Vulnerability Theory to Polygamy and Same-Sex Marriage" (2015) 64:6 Emory L.J. 2047.
[61] Judith Stacey & Tey Meadow, "New Slants on the Slippery Slope: The Politics of Polygamy and Gay Family Rights in South Africa and the United States" (2009) 37:2 Politics & Society 167 at 171.
[62] *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 at para. 1041, 279 C.C.C. (3d) 1.

many of the same social, economic and psychological functions as traditional opposite-sex monogamous marriages, and there is no evidence that the legal recognition of these relationships is harmful. Recognition of same-sex marriage has *promoted equality*."[63] For some, it is premature to conclude that legally recognizing same-sex relationships will cause no measurable harm.

Such discourse involves same-sex marriage in the perceived imperative of rejecting polygamy on grounds constitutionally admissible in a pluralist liberal society. Once the state is supposed to act even-handedly between religious groups, it is unacceptable to criminalize polygamy as the result of a nineteenth-century power struggle in which the mainstream Christian definition of marriage prevailed over a Mormon variation. Instead, avoiding harm and advancing equality emerge as constitutionally acceptable bases for outlawing polygamy. The form of marriage that the polygamy ban protects is no longer monogamous Christian marriage, but civil marriage. Extension to same-sex couples becomes an example of changes to marriage – along with reforms to family property in the 1970s and 1980s in wives' favour and the recognition of marital rape – that have advanced equality.[64] In a parallel to how rejecting religious arbitration idealizes the state's rules and institutions of family law, rejecting polygamy idealizes monogamous marriage as a safe, equality-promoting space. The upshot is that it becomes harder to hear the insights of feminist and queer critics of marriage and to imagine that the legal

[63] Nicholas Bala, "Why Canada's Prohibition of Polygamy Is Constitutionally Valid and Sound Social Policy" (2009) 25:2 Can. J. Fam. L. 165 at 178 [emphasis in original].

[64] Relying on the liberal state's recognition of gay rights in order to stigmatize religious groups as backward and illiberal partakes of "homonationalism," producing "narratives of progress and modernity that continue to accord some populations access to citizenship" while delimiting and expelling others. Jasbir Puar, "Rethinking Homonationalism" (2013) 45:2 International Journal of Middle East Studies 336 at 337; see further Jasbir K. Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham, NC: Duke University Press, 2007); see also Katherine Franke, "Dating the State: The Moral Hazards of Winning Gay Rights" (2012) 44:1 Colum. Hum. Rts. L. Rev. 1.

institution may hide, even exacerbate, some individuals' vulnerability.[65] In short, regarding polygamy, the secular state conscripts same-sex marriage into efforts to reshape the relationship between civil and religious marriage.

6 Conclusion

Same-sex marriage arrived in Canada despite religious definitions of marriage to the contrary – and without direct help from its prior embrace by some liberal religious institutions. This chapter has scrutinized judicial and parliamentary assertions that extending civil marriage to same-sex couples has not "affected" religious marriage. Strictly speaking, the judgments and federal law have not directly opened any religious organization's sacrament of matrimony to gay and lesbian couples. Viewed less narrowly, however, the assertions of separation appear misleading. For one thing, change to the definition of civil marriage has intensified the pressure on some religious organizations to grapple with divisive questions about recognizing committed same-sex unions. At minimum, it has altered the social context in which doctrinal debate unfolds.[66] For another, as this chapter has recounted, defining the contours of a civil marriage henceforth open to same-sex couples has involved civil authorities in adjudicating the shifting, contested boundaries of religious marriage's officiants, rites, and sites – even with a view to avoiding them. Objecting marriage commissioners offer the richest example here. Admitting same-sex couples to civil marriage has continued a process by which the latter has taken shape in opposition to its religious counterparts, at times laying contemporary ideas of equality over older

[65] See e.g. Nicola Barker, *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Houndmills: Palgrave Macmillan, 2012); Rosemary Auchmuty, "Same-Sex Marriage Revived: Feminist Critique and Legal Strategy" (2004) 14:1 Feminism & Psychology 101.
[66] See e.g. Gill Henwood, "Is Equal Marriage an Anglican Ideal?" (2015) 13 Journal of Anglican Studies 92.

ones of religion. Despite unsubtle assertions of total separation, then, civil and religious institutions of marriage remain entwined in an "ancient commingling."[67]

[67] Mark D. Jordan, *Blessing Same-Sex Unions: The Perils of Queer Romance and the Confusions of Christian Marriage* (Chicago: University of Chicago Press, 2005) at 4.