

Chasing the Chimera

Review of *Beyond (Straight and Gay) Marriage*

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**Kenneth McK. Norrie,
Law School,
Lord Hope Building,
University of Strathclyde
GLASGOW G4 0LT**

During the 2008 US Presidential election voters in California, as well as choosing a president, were asked to withdraw the right of same-sex couples to marry, the Californian Supreme Court having, six months previously, conferred that right by judicial decision¹. “Proposition 8” aimed to restore the definition of marriage to its historical heterosexual limitations, and it passed, by a fairly narrow margin. The feature most remarkable to an outsider during the Proposition 8 campaign, was the stunningly apocalyptic terms in which the debate was conducted, on both sides of the argument. The same-sex marriage debate in the United States of America conducted in such venomous terms as to leave a European observer quite breathless. Nancy Polikoff’s latest book brings some calm to the discussion. It is a measured and thoughtful contribution to the debate and, though she does not directly address the question of why it is so much more contentious in the US than in other western jurisdictions, her analysis does shed much light on that puzzling question. There are three main explanations that spring out of this engaging book.

¹ *In Re Marriage Cases* 183 P3d 384 (2008).

First, in the US there are very few state and federal rules that give any legal recognition to informal relationships such as unregistered cohabitation. US family law remains to a very large extent a binary “all or nothing” system, with marriage on the one hand being fully recognised and regulated and the repository of all family rights and duties, liabilities and benefits, obligations and preferences, and cohabitation and other forms of family life on the other hand being ignored except when to do so would provide an unwanted incentive to avoid marriage. (Municipal and commercial organisations do mitigate this to some extent). Other western legal systems, in contrast, have over the past 50 years increasingly provided a variety of legal consequences for cohabiting couples, ranging from consequences virtually indistinguishable from marriage in Australia and New Zealand, through extensive consequences but of a value deliberately less than that ascribed to marriage in Scotland, to ad hoc but nevertheless important recognitions in England. The US is very far behind here and there is no political will to change this position. Secondly, the sheer number of consequences flowing from marriage, and therefore the extent of governmental regulation of and control over private and family life, is staggering in the US, and far greater than in most other developed countries. As well as the expected tax and social security consequences, maintenance obligations, claims on divorce and entitlements on death, there is, to European eyes, an astounding array of other matters in the US that are fundamentally affected by an individual’s status as married or unmarried. These include work-based insurance and pensions, residence permits, planning laws entitlements, access to homeless accommodation, and even, bizarrely, eligibility to take state bar exams (on a ‘fitness to practice’ argument). A consequence of overwhelming importance, political, practical and emotional, in the US concerns health care: marriage affects not only access to a partner’s insurance and power to make proxy health care decisions but also, viciously, hospital visitation rights (in some states unmarried fathers are excluded from hospital birthing suites). And thirdly, the same-sex marriage debate provides a virtually impregnable dividing line between the forces of the religious Right and those of the liberal/egalitarian elite and has of late overshadowed that earlier shibboleth,

abortion. The Right has a touching faith (if we take them at their word) in the power of marriage to solve all of society's ills, from poverty through social exclusion and illiteracy, to enforced prostitution, drug addiction, violence and high criminality. The power of the religious Right on the US mindset - even of those who do not subscribe to Rightist tenets - should never be underestimated. There is a conservatism underpinning virtually every aspect of American society, way of life and political thought.

Now, none of these factors applies in Europe or Australasia to anything like the same extent, if at all, and even in Canada their power is far less than in the US. It follows that the context in which Polikoff is writing is effectively alien to her non-US readers. Nevertheless, her message has a far wider resonance and has clear relevance throughout the developed world. She argues powerfully and persuasively that conjugality, as a determinant of rights and obligations, is not just socially useless, it is morally bankrupt.

Polikoff sees the marriage debate as focusing on the wrong issue, even (perhaps) too easy a target, and she argues that LGBT activists have lost their way by being dazzled by that jewel in the crown of heterosexuality (not her word, or even her image) - marriage. But the jewel is false, hollow, an empty dream at best, and a siren luring people to their doom at worst. She traces the history of social reform movements from the mid-20th century onwards to show the dramatic shifts that have taken place in the position of LGBT activists within these movements. In the 1960s and 1970s, social reformers of many ilk tended to see marriage as part of the problem rather than the solution. It was widely recognised that marriage was a patriarchal institution that both inculcated and underpinned a gendered and static view of society. A powerful alliance of social reformers, feminists and civil rights activists achieved notable successes in this era in changing social expectations and norms and as gender equality became more widespread throughout the law, marriage too changed from a relationship of gender-identified support and dependence to one of mutuality and partnership. But marriage was never the only, or even the main, target of this alliance. Radical feminists sought to address issues of power and hierarchy far beyond the

private realm of family life; lesbian feminists saw heterosexuality itself as underpinning the structures of power and hierarchy. In the narrow field of family law, 'the overarching goal', Polikoff says, 'was facilitating social, legal and economic support for diverse family forms outside the patriarchal family; *less marriage*, not *marriage*, was consistent with that view' (p. 48). Feminism never was a single-issue movement and at this period gay rights and the feminist movement were, in Polikoff's view, inextricably and powerfully bound together. The theme running throughout her book is that this link has since melted away, to the detriment of both elements of what she continues to see as the same movement. Worse, by focusing on marriage to the exclusion of wider social reforms, the LGBT agenda has turned its back on its erstwhile allies. The ladder of social justice has in many cases been climbed by gay men and lesbians, but they have then kicked it away.

Paradoxically, it was LGBT success that minded them to do so. The rot set in with *Braschi v. Stahl Associates*², where the Supreme Court of New York was faced with exactly the issue that arose in the English case of *Fitzpatrick v. Sterling Housing Association*³ - whether the same-sex partner of a deceased tenant could inherit the tenancy on the basis of being a member of the tenant's family. The Court held, as the House of Lords was to do ten years later, that the same-sex partnership was indeed a 'family' for the purposes of the law of succession to tenancies. This was a great victory on both an individual basis and for gay rights generally - a worthy and deserving litigant was allowed to stay in his home, and a court of law delivered an important message about the lack of rational justification for denying equality to those of different sexual orientation from the majority. And yet in Polikoff's view this decision took the radical sting out of LGBT strategising. Society itself was shown to need no radical reform: gay men and lesbians could, with little thought and no restructuring of institutions, be accommodated *within existing structures*. LGBT activists started to ask for less, and they limited the beneficiaries of these requests to themselves. In the words of Andrew

² 74 N.Y. 2d 201 (1989).

³ [2001] 1 A.C. 27.

Sullivan, 'a need to rebel has quietly ceded to a desire to belong'⁴. This development was consolidated by the decision of the Supreme Court of Hawaii in *Baehr v. Lewin*⁵, another victory for LGBT rights and at the same time a wedge in the spit between LGBT activists and their allies. For the first time a court held that the exclusion of same-sex couples from the institution of marriage required to be justified by the state and that the justifications traditionally offered - and which would subsequently reappear with tedious regularity - were wholly insufficient. As is well-known, the legislature in Hawaii trumped the Court by changing the state constitution to permit a same-sex marriage ban, while at the same time introducing a comprehensive 'domestic partnership' regime which gave same-sex couples, and others, virtually everything the plaintiff in *Baehr* had been seeking. Nevertheless, the message had been given that marriage might, just might, be obtainable for same-sex couples and organisations and groups that had earlier paid little regard to the marriage debate, concentrating instead on more winnable arguments (which also benefited other family forms than the two-person, registered, model), came to focus their whole attention on this single but ultimately exclusionary issue. The feminist goal of restructuring the whole of society away from a patriarchal mind-set was ditched and gender-neutral patriarchy was embraced instead.

Gay conservatives in the 1990s can even be found arguing that same-sex marriage is necessary to protect marriage from alternatives such as domestic partnership and recognised cohabitation. Interpreted benignly, this could be seen as an attempt to win the gay rights argument by addressing the fears of opponents; interpreted more critically - and in Polikoff's view more realistically - this is buying into the very tenets of conservatism that LGBT activists used to and feminist activists still do deny. A win for gay rights activists in the strategy to open marriage has the effect of consolidating the differences between the married and the unmarried, and this acts to the detriment of non-marital families by giving the comforting but false impression that family law, having rejected discrimination against gay men and lesbians

⁴ Sullivan (1989), quoted by Polikoff at p. 57.

⁵ 852 P. 2d 33 (1993).

and same-sex couples, has now responded sufficiently to the demands for an egalitarian society, and need do no more. But in truth it fails to address the claims to justice of those who cannot or do not want to assimilate into the societal norm - worse, it renders these claims invisible. The gay rights movement is thus positioned on the wrong side of the cultural war over acceptable family structures.

Polikoff has even greater fears. The assumption of LGBT activists and organisations, now increasingly difficult to shift, that marriage is the *übergoal* concedes far too much to the Rightist ideology, for it absolves Government from responsibility for wage-stagnation, unemployment, poor health care, sex and race discrimination as the focus of society's ills. During the Clinton years the conservative Right turned to social science rather than religion for arguments in favour of marriage, pointing out (with a magisterial disregard for what was cause and what was effect) that families suffering marriage breakdown and non-marital births were associated with serious social problems: the solution was to restore lifelong marriage to its proper place⁶. The second Bush presidency was marked by a return to influence of the religious Right. Faith based organisations for social good were preferenced for state funding, in areas like abstinence-only sex education at the expense of sexual health care.

Polikoff's basic argument is that marriage is irrelevant both to the social problems that beset American life and to the social goods that offset them. The Right's focus on marriage as a tool by which responsibility for tackling social ills can be placed on the individual is self-evidently doomed to failure. It should be obvious to all who are not blinded by an ideological commitment to individual responsibility (a.k.a. lower tax bills due to lower social spending by government) that children's education can be improved much more readily by good educational policies rather than by encouraging the marriage of their parents; crime will be reduced by social policies that tackle poverty, unemployment and social exclusion rather than by encouraging everyone to

⁶ See for example, Spaht (2003); Wardle (2008).

marry; racism can be tackled more effectively by state programmes designed to tackle racism rather than by encouraging marriage and hoping thereby to make people better.

Having made a convincing, even unanswerable, case for rejecting the agenda of the Right, Polikoff then offers an agenda of her own. This is to remove marriage, and indeed other manifestations of conjugality, from its role as the mechanism for the allocation of rights and responsibilities and to replace it with what she calls a 'Valuing All Families' approach. Put at its simplest, families in all their different constellations should be entitled to equal respect. LGBT activists should re-establish their alliance with social reformers and radical feminists to achieve goals that bring benefit to all, and not just those gay men and lesbians who model their families on the social norm. Now, she makes a very attractive case for this approach, but it seems to me that there are three objections that can be made and which she does not address adequately.

First, Polikoff is working from the premise that the gay rights agenda ought to be rebellious and transformative, that the LGBT lobby lost its way when it settled for assimilation rather than change. True it is that the assimilation of gay men and lesbians into mainstream society tends to hide the single most important message that the queer gives to the straight - that it is OK to be different. True it also is that society as it stands needs to be transformed into something radically better and that the destruction of patriarchal structures will serve the mutual interests of gay men and lesbians, feminists and women generally. But I am unpersuaded that the very *purpose* of gay rights is to achieve this wider social good, as opposed to the more modest one of furthering the interests of gay people. A wider social justice will doubtless be a step nearer when full equality and respect for gay men, lesbians and their families is achieved, but membership of the gay community cannot be taken to imply subscription to a radical world-view. Being gay is a matter of personhood, not politics. On the other hand, the success of the campaign for same-sex marriage may in fact further, if by a sidewind, a practical transformation of profound significance (at least in the US). The religious

Right in that country have invested such emotional and intellectual capital in opposing same-sex marriage that their defeat on the issue might well signal a terminal decline in their influence. To me, this is the one persuasive argument for supporting same-sex marriage (as opposed to civil partnership).

A second problem that I perceive in Polikoff's argument is her denial of the need for symbolic victories for gay men and lesbians. The practical needs of gay men and lesbians can be met, she argues, without necessarily adopting a gay rights agenda. There is no need to frighten the horses, for it is the end result rather than the process of getting there that is important. What is needed is not results that can be presented as LGBT 'victories', but rather a broader victory for all families which does not have any particular symbolic significance for gay rights. She is probably right that this might be a more effective (or at least quicker) means of achieving good results for gay men and lesbians, because it allows tacticians to by-pass opposition based on anti-gay sentiment - though I wonder if the radical transformation of society that Polikoff seeks is possible without frightening at least a few horses. She gives an interesting example from Salt Lake City - not a natural home for LGBT victories. In 2005 the Mayor of that city wanted a domestic partnership law to provide health insurance for all couples (married and unmarried, opposite-sex and same-sex). Gay rights activists strongly and vocally supported this proposal, perceiving themselves as the major beneficiaries. The City Council, however, opposed the idea on the ground that it created an alternative status which threatened the special place of marriage and the preferred status of 'married couple'. What they imposed instead was a scheme whereby every individual could nominate a 'designated person' as the second beneficiary of their own health insurance scheme. This was ideologically more acceptable to the Right, and indeed more people would be covered than in the Mayor's proposals, including same-sex families. Yet gay organisations were disappointed, notwithstanding that their constituents achieved the benefit, because there was no obvious 'victory' for gay rights. This is the way forward, in Polikoff's view.

Yet I wonder whether the power of symbolism, encapsulated in such victories, can be so readily dismissed as unimportant, or worth ditching to neutralise anti-gay opposition. Symbolism has real and direct effects in the way that gay men and lesbians are treated in society irrespective of their actual legal position. The result of the House of Lords decision in *Fitzpatrick v. Sterling Housing Association*, for example, was in practical legal terms minimal, since the form of tenancy at issue in that case available to ‘family’ members was dying out (and has since been abolished). Yet the case retains immense symbolic importance for the clear message it gives to society: there is no justification for treating same-sex couples less well than opposite-sex couples. The decision paved the way for the UK’s Civil Partnership Act 2004, perhaps even made that legislation inevitable. Few would deny that the symbolism contained in unenforceable legislation such as Section 28 of the Local Government Act 1988 (‘Thou shalt not promote homosexuality as a pretended family relationship’) nevertheless had practical effects on society’s attitudes to homosexuality and the way people treated gay men and lesbians. Some countries, for historical reasons, need symbols far more than others; the United States is a country that thrives on symbolism. Marriage carries an undoubted patriarchal script, but it also declares acceptability, dignity, and worth. The positive symbolism of the word ‘marriage’ and the negative symbolism of the doctrine of ‘separate but equal’ institutions had decisive resonance for courts in Canada, South Africa, Massachusetts, New Jersey, California and Connecticut when they held that ‘marriage’ was demanded by the need for equality notwithstanding that the legal distinctions could be dealt with by a separate institution such as ‘civil union’.

In the United Kingdom, the need for symbol is less and has been satisfied by means other than marriage (which explains why refusing the symbolism of the name ‘marriage’ was held not to interfere with the European Convention on Human Rights in *Wilkinson v. Kitzinger (No 2)*⁷). The Civil Partnership Act 2004 was a hugely significant advancement of the legal position of same-sex couples, but it was also a repository of symbolism of major proportion and this

⁷ [2006] E.W.H.C. 2022.

should not be forgotten. The message is given loud and clear that gay men and lesbians are worthy of the same legal protection (even if structured differently) and therefore of the same social respect as non-gay people: to put the same thought another way, the message is that non-gay people are no better than gay people. Hiding the gay rights agenda behind wider social reform would remove this message entirely, which is exactly why an attempt was made in the House of Lords to do just that as the Civil Partnership Bill was being debated. But the attempt failed, and the opposing Parliamentarians claimed to mourn for spinster sisters everywhere.

Polikoff joins the mourners (though with more honesty than the likes of Baroness O’Caithain and Lord Tebbit), for she would include within her ‘families’ who should be valued the Misses Burden, the spinster sisters in *Burden v. United Kingdom*⁸. She would give these wealthy ladies the tax break granted to spouses and civil partners. Yet it is as well to remember that these women made no complaint when the tax benefit was limited to spouses. It was only when same-sex couples had a means to access it that they asked, ‘if gay people are now as good as married people, why not us too?’ The European Court, of course, answered that question by saying that it was acceptable for states to design their tax regimes in such a way as distinguishes between those who have made a public and official declaration of commitment to each other, and those who have not. But to me, the answer is that the Civil Partnership Act’s message of equality for gay men and lesbians was as socially important as its legal effects. This message remains essential because elements of society continue to deny, from their pulpits and Bishops’ palaces, the moral equivalence of people of different sexual orientation, and the thugs hear this message and feel aggrieved when they are charged with hate crime rather than common assault. The UK Parliament was right to resist attempts to extend the 2004 Act to all couples who wished family benefits, for that would have removed this message even while giving rights and responsibilities to same-sex couples. The message, in other words, has more importance (in my view) than Polikoff allows.

⁸ (2007) 44 E.H.R.R. 51 (Chamber); (2008) 47 E.H.R.R. 38 (Grand Chamber).

The third, and perhaps most critical flaw, in Polikoff's argument is that the line to be drawn requires, for legal purposes, rather more precision than is contained in the word 'family'. Legal rights, obligations, benefits and liabilities need to be clear to their obligees and beneficiaries, and to third parties, not only for efficiency but also for predictability. Administrative efficiency may not on its own justify inequitable treatment, but its benefits do include allowing people to understand their own legal position without judicial determination. Marriage, civil partnership and even conjugally defined cohabitation provide a bright line between those who can access and those who are excluded from family rights and obligations, and the clarity of this line avoids the need for a judicial examination of the minutiae of private lives every time a family right is claimed or a family-based obligation is imposed. Now, drawing this line at marriage/civil partnership is acceptable only when doing so serves rather than hinders the social purpose for which the line is designed. Wrongful death statutes, for example, serve the social purpose of recognising the injury caused to family members when a loved one is wrongfully killed and that purpose is inhibited by a strict cut-off point at marriage. So the solution is to move the line away from marriage, as happened in the United Kingdom with the Administration of Justice Act 1982. But the line itself was not removed, or made flexible or shady. A clear line remains with both the Scottish and the English legislation (somewhat differently) defining with some precision those 'family members' entitled to seek compensation for the wrongful death of their loved one. Polikoff of course would support this but she does not indicate where her lines are to be drawn. She does not define, in other words, 'family'. This cannot be a self-selecting concept, wide enough to include platonic friends who co-own their homes, if for no other reason than that friends - and family - sometimes fall out with each other and their mutual interests in presenting themselves as a unit may turn into a direct conflict of interests. A definition has to be externally imposed upon the unit, and it must be clear. The cost of doing so will always be that some vulnerable individuals will fall on the wrong side of the line, but this is a cost that must be borne if the courts are not to be clogged up with cases disputing not the claim that is made but the nature of the relationship upon which the claim is based. This is already

happening in, for example, Australia, where the definition of 'parent' has been loosened to accommodate lesbian co-parents, and the result has been that separating lesbians in custody disputes with each other deny the very nature of their ex-partner's relationship with the child they were bringing up together⁹. And the early indications from Scotland suggests that introducing cohabitants' property rights leads to denials by ex-cohabitants, and by surviving family members, that there ever was a cohabitation in the first place.

I think it is implicit in Polikoff's argument that 'family' might be defined differently, depending upon the legal consequence at issue, in order to ensure that the purpose of the consequence is achieved but not abused, but she gives no examples. Nor does she tackle the issue of what type of relationship *deserves* legal benefits or legal liabilities. Families based on profound inequalities, such as the polygamous units of fundamentalist Mormons in the south west of the United States may or may not fall within Polikoff's definition, or they may do so for some purposes (protection from violence, say) but not for others (succession rights of a surviving husband). Even in a more benign polygenous environment different rules would have to apply, for example concerning succession rights, financial settlement on separation, and custody of children. And in the world of couples, financial support after separation is available for ex-spouses and, in Australia, New Zealand, Canada and Scotland, for those who satisfy the statutory definitions of 'cohabitant': do these definitions capture all the "families" that Polikoff wishes to support? I suspect that she would prefer to adopt a non-definitional approach, giving, for example, financial support to all those who deserve it. But if so that begs the even more difficult - and political and judgmental - question of desert. So she will have to fall back on a definitional approach to family entitlement, and define which groupings of individuals are 'families' worthy of being 'valued'. Without this, a definitive appraisal of her 'valuing all families' approach is impossible.

⁹ See Millbank (2008).

These problems do not seriously detract from the value of this book, which is that it poses questions that everyone interested in either social policy or LGBT rights should be asking. Her answers are partial, in both senses of the word, but for that reason alone they are thought-provoking. The debate is likely to continue, on both sides of the Atlantic, for some time to come and the terms in which the debate is conducted will reveal much about the nature of the country involved. Whether one agrees with Polikoff or not, this book is invaluable for any European or Australasian trying to understand the context in which this very American *kulturkampf* is being fought.

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