The Gay Man and His Civil Code

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Profondément marqué par son incivilité, [le code civil] n’a plus de civil que le nom.**

—Pierre Legrand

I. INTRODUCTION

The gay man is a would-be happy man. He would be happy if he were to enjoy that happiness that lawmakers are called to promote for each and all.¹ This happiness is the recognition that his personal, close, and intimate relationships have a place in the plan of order of his civil society. This plan of order would be the stuff of his civil

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** See Pierre Legrand, Le droit comparé 54 (Presses Universitaires de France, Paris, 1999). Legrand is addressing the incivility (rudeness, or lack of a good civil culture?) of the Civil Code of Québec. That code, according to Legrand, excludes due consideration of the English-speaking community of Quebec. Id. at 54-56. The same might be said of any civil code that disregards a certain class of citizens. Such a civil code, therefore, would be “civil” in name only.

¹ Portalis tells us: “...finally, it comforts every citizen for sacrifices that political necessity requires him to make for the community by protecting him when necessary in both his person and property, as if he alone were the entire community." Portalis, Preliminary Discourse (M. Shael Herman trans.) reprinted in Alain Levasseur, Code Napoleon or Code Portalis?, 43 Tul. L. Rev. 762, 767 (1969). Levasseur addresses the importance of Portalis to French codification. Alain Levasseur, Code Napoleon or Code Portalis?, 43 Tul. L. Rev. 762 (1969). Portalis speaks to the issue of happiness in his statement on ownership. See Presentation to the Legislative Body for the Proposed Law Pertaining to Ownership (Nicholas Kasirer trans.) in Nicholas Kasirer, Portalis Now, in Le droit civil, avant tout un style? 28 (Nicholas Kasirer ed., 2003).

One cannot love property one owns without loving the laws which protect that property. By consecrating the precepts that are congenial to ownership, you will have inspired the love for law. You will not only have worked to promote the happiness of individuals, or of individual families. You will have created a public spirit. You will have set free the true sources of general prosperity. You will have prepared the happiness of all.

Id. at 46.
code, and his code would describe the private legal order and position his cherished relationships squarely within it. There is, however, no clear expression in most civil codes that his relationships are dignified and that they have civil worth.\(^2\) He is not linked to the community. Thus, the gay citizen is unhappy.\(^3\)

The gay man is a lamb. The encounter of the closely related disciplines of theology and law\(^4\) that informs much of the same-sex marriage debate has not treated him kindly. This is because the official theology of Western Christian ecclesiastical institutions is more than a casual source of legal inspiration. These institutions have overtly provided much of the policy of marriage and family (and the lexical expression of this policy) of civil codes of the Western legal tradition. There is nothing discrete about the influence of these institutions, even in the avowedly secular setting of civil codes. Accordingly, mere acknowledgment of the existence of the gay man, let alone the extension of the rights and duties of various private law institutions to him, depends greatly on the relative

\(^2\) Gay men not only have civil worth, but are also theologically worthy. See Elizabeth Stuart, Gay and Lesbian Theologies—Repetitions with Critical Difference 15–30 (2003). “What both gay and straight people are discovering is that relationship is the essence of the created order.” \textit{Id.} at 16.

The idea that all love has its \textit{telos} (end and fulfillment) in God has been replaced in much contemporary Church teaching on sexuality with the implicit or explicit teaching that all love has its \textit{telos} in heterosexual marriage and, for some, the bringing of new life into the world from it. And the possibility that those who direct their lives in different directions might recognise and enjoy a fellowship based upon a penitent recognition of shared weaknesses and a desire for God seems totally alien to much of the current debate on sexuality in Western Churches. \textit{Id.} at 3.

\(^3\) From a Christian theological perspective, the gay citizen should be happy. See Gareth Moore O.P., A Question of Truth—Christianity and Homosexuality 11–16 (2003).

Gay Christians are very fortunate people. Their life is not vain; they do not go from dust to dust. They are created by the God whose love is the source of all things, and are sustained by that same sure and unalterable love. And God has made them for himself. Their destiny is to return to their origin, to be forever united in bliss with God, gazing on him in ecstasy and wonder, giving love for love. Not only are gay Christians surrounded by this love, not only are they destined for this happiness, they also have the happiness of knowing it. \textit{Id.} at 11.

\(^4\) See Martha Albertson Fineman, The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies 145–76 (1995). “The assumption that there is a sexual-natural family is complexly and intricately implicated in discourses other than law, of course. The natural family populates professional and religious texts and defines what is to be considered both ideal and sacred.” \textit{Id.} at 145. “In other words, there are transdisciplinary assumptions about the optimal structure of the family.” \textit{Id.} at 151.
acceptance of the dignity of his person and the worth of his relationships in the Western Christian theological tradition.\(^5\)

This essay is a tentative inquiry on the place that relationships of gay men might have in civil codes and on the re-visioning of the general plan of order that these relationships might well entail.

II. THE GAY MAN IS ORDERED

The gay man is objectively and intrinsically ordered. He is not depraved.\(^6\) Neither is he gravely deficient or disordered.\(^7\) He is simply gravely gay.\(^8\) He is not out of control.\(^9\) He is lavender and

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6. According to some, homosexuality is gravely depraved. See Catechism of the Catholic Church \(\text{\$} 2357\).


8. At the same time the Congregation took note of the distinction commonly drawn between the homosexual condition or tendency and individual homosexual actions. [Homosexual actions] were described as deprived of their essential and indispensable finality, as being "intrinsically disordered," and able in no case to be approved of. . . . Although the particular inclination of the homosexual person is not a sin, it is a more or less strong tendency ordered toward an intrinsic moral evil; and thus the inclination itself must be seen as an objective disorder.

_id._ This institutional position of the Roman Catholic church to homosexuality is described as "seriously defective." See Moore, _supra_ note 3, at 45. "Regrettably, in this area, the church teaches badly." _Id._ at 282.

9. See the film where the following exchange takes place in a Roman Catholic confessional:

   _Maria Barberini:_ I want him to be cured. I need this miracle. So, in return, I must forgive him.

   _Father Carmignani:_ Is your son gravely ill?

   _Maria Barberini:_ No. He's gravely gay!

_Mambo Italiano_ (Cinémaginaire Inc./Production Mambo Inc. 2003)

more than pink. For the gay man, his sexuality is not only complementary: it is complimentary.

There is a growing understanding in civil societies that his choice of intimacy is as irrefutably ordered an exercise of juridical personality as is the choice of all other citizens. The gay man believes he is entitled to a legal institution for his intimate relationships. Many lawmakers are also now interested in his personal relationships as they revisit the principles and rules of family law and, in particular, marriage as the central institution of a civil code. There is a sincere interest today in arresting the traditionally rife animosity of the private law for his well-being.

In civil law systems, the private law mostly begins with a properly written code. That code can be considered a home. It is a place where citizens are domesticated. A good civil code should be a house full

10. On the symbolic use of the colors blue, pink, violet, lilac, mauve, and lavender, see F. Tamagne, Mauve, in Dictionnaire des cultures Gays et Lesbiennes 317 (Didier Eribon ed., Larousse, 2003).

11. See Jeffrey Epstein, New Guy, Out, April 2004, at 33. Epstein interviewed Mitch Morris, an actor in the Showtime television series "Queer as Folk." Morris is reported as saying: "If people assume I'm gay, I take it as a compliment." Id. at 35.

12. This is so even where he chooses the institution of marriage as the expression of his intimacy. But see Katherine Shaw Spaht, The Last One Hundred Years: The Incredible Retreat of Law from the Regulation of Marriage, describing same-sex marriage as "the most reprehensible of all absolutely null marriages under present law and even more reprehensible than a marriage between an adulterer and his accomplice under earlier provisions of Louisiana law." Katherine Shaw Spaht, The Last One Hundred Years: The Incredible Retreat of Law from the Regulation of Marriage, 63 La. L. Rev. 243, 277 (2003). "As mentioned earlier 'purported' marriages between persons of the same sex are now explicitly prohibited. Such 'purported marriages' are considered by Louisiana law as the most reprehensible of the absolutely null marriages . . ." Id. at 281. It should be noted that a same-sex marriage in Louisiana produces no civil effects whereas any other absolutely null marriage may produce civil effects, especially in favor of a party who has contracted it in good faith. The extreme reprehension of a same-sex marriage is undoubtedly attributable to this legislative proscription.

Moreover, Spaht also considers marriage an instrument for the "acculturation of children" notwithstanding the law's current support for marriage as a "private, sexually intimate, and privileged relationship created for the satisfaction, support, nurturance and fulfillment of the two parties." Id. at 244–245. "Acculturation of children" is perhaps too limited in its meaning. Is not "education of children" better as it may be said to reference the physical, social, cultural, moral and religious education of children? See also Katherine Shaw Spaht, Revolution and Counter-Revolution: The Future of Marriage in the Law, 49 Loy. L. Rev. 1 (2003). "Lack of child centeredness in American culture affects an understanding of the purpose of marriage, that being the procreation and acculturation of children." Id. at 4.

13. See Jonathan Rauch, Gay Marriage—Why It Is Good for Gays, Good for Straights, and Good for America 20 (2004). "We all need domesticking, not in the veterinary sense but in a more literal, human sense: we need a home. We are different people when we have a home: more stable, more productive, more
of welcome and hospitality to traditional and non-traditional families where no one is tar-brushed and where the law is applied, as between heterosexuals and homosexuals, on an orientationally indifferent basis. In the events, a civil code of fundamentalist thought and exclusion is condemned to irrelevance. It must express the law of the family as it truly and vibrantly is, not as this law is falsely and mythically imagined. Any civil code that continues to ignore the contemporary family is reprehensible.

Family law is a system of principles and rules traditionally constructed on the basis of marriage. In Western civil law systems, even those admitting the existence of legal personal relationships other

mature, less self-obsessed, less impatient, less anxious. And marriage is the great domesticator." Id.

14. Unified norms for homosexuals and heterosexuals (droits asexués) constitute the fourth phase in the legal dialectique relating to homosexuality. The first three are: criminalization, tolerance, and creation of innovative solutions. See Flora Leroy-Forgeot, Homosexualité in Dictionnaire de la culture juridique 790 (Denis Alland and Stéphane Rials, eds., Presses universitaires de France, Paris, 2003). It is fair to say that contemporary same-sex rights in North Atlantic legal cultures evidence the following critical path: first, the criminalization of homosexual acts, largely through the sanction of sodomy; second, the decriminalization of the homosexual act; and third, the ‘permission’ of same-sex acts. The first three steps are entirely within the domain of the public law. With the lawfulness of same-sex acts comes the end of de facto discrimination on grounds of sexual orientation, as a fourth step, followed closely by explicit constitutional protection against discrimination on the basis of sexual orientation, as a fifth step. The fourth and fifth steps are public law measures with private law consequences. The sixth step consists of the admission of equivalent status on a selective statutory basis (for example, pensions or the right to state benefits). Seventh, institutional proxies for marriage, such as registered partnerships or civil unions are created. The removal of all distinctions between opposite and same-sex partners in the laws of persons, family, successions, and property follows as an eighth step. Finally, a new institution for close relationships is created.

15. Fundamentalist thought is exclusive and categorical; it neither tolerates nor accepts; it is not complex; there is no reconciliation; there is no middle ground. See the references to fundamentalism in H. Patrick Glenn, Legal Traditions of the World—Sustainable Diversity in Law (2000).


In the law of inheritance it is essential that civil codes recognize the diversity of a population and, on the occasion of a review of these codes or their recodification, either make coherent provisions that reflect contemporary social values and customs by including individuals formerly excluded or expressly exclude these individuals as part of a new social vision. However, in no circumstance should the methodology of codification deny the existence of individuals who form a significant part of the population.

Id. at 143.
than marriage, family law is a grouping of institutions of the law that are foundationally derivative of marriage explicitly or implicitly contemplated as a union of one man and one woman.17 Yet, many consider that the architecture of much of family law is outdated in an age when an increasing diversity of intimate personal relationships is socially evident and is aspiringly good and healthy for the body politic.

Thus, if the civil code is a plan of order, it must be a plan of order not for some, nor must it be some plan of order, nor should it be a plan of some order. The civil code must not be a document of effacement. It must be a plan of order for a civil society in the twenty-first century.18 It must admit that a whole host of legal institutions need to be re-examined with a view to determining whether these institutions are hospitable to non-traditional relationships. Most obviously, this would include an inquiry into topics of marriage and its incidents, marital property, alimentary obligations, filiation, adoption, intestate succession, and spousal rights and duties. This review is necessary now that the family is open to others whose intimate, personal relations may not (and perhaps should not) subscribe to the idea of comprehensive mutual cooperation that characterizes and animates marriage and that provides the basis for almost all of the private law’s institutions. This review is at hand in a number of Western civil law systems where lawmakers have discarded ideas of divisiveness and have extended a message of welcome to gay men.

III. A CIVIL CODE IS ESCHATOLOGICAL

Many lawmakers have come to believe that the us-and-them in the body legal is destructive of the authority and persuasiveness of the law as a device for social and moral integrity.

17. For marriage law as baby law, and baby law as family law, see Maggie Gallagher, What is Marriage For? The Public Purposes of Marriage Law, 62 La. L. Rev 773 (2002). “Marriage law is part of a family system that is designed to reinforce certain key norms necessary for the protection of children and the reproduction of the family system and society across generations.” Id. at 788. An exposition of the content of marriage, from a Roman Catholic perspective, can be found in the Code of Canon Law. The extent to which this perspective, in content and in language, resonates in Western private law is indeed remarkable. See New Commentary on the Code of Canon Law 1234–60, 1393–99 (John P. Beal, James A. Coriden, & Thomas J. Green eds., 2000). The New Commentary is also telling on the duties of parents towards children. Id. at 1357.

18. See Robert Anthony Pascal, Of the Civil Code and Us, 59 La. L. Rev. 301 (1998). “Indeed, a civil code should be so well written—not drafted—that even the layman reader should be able to recognize that the legal regime described there conforms to and reinforces an order consistent with a proper understanding of the relation of human beings to each other in the ontological order and consistent with the culture of the people and the physical environment in which they live.” Id. at 302. Culture is an evolving concept and is by no means static.
Us and them is seemingly the never-ending story of the law. Some would say that it is a necessary story, that "the construction of a 'normal' sexuality through legal discourse requires an excluded 'other'" and that homosexuality, for example, "provides this oppositional 'other' against which heterosexuality is normalized." Thus construed, human rights and freedoms are designed to contain individuals and groups that deviate from the norm. By doing so, they define the norm. Yet, even if it is true that the "other" is necessary for legal discourse, it is equally certain that "all the thick emotionality and convolutions of the heart that attend romantic love are not at all different when the 'other' is of the same sex."

A good civil code should consign all us-and-them principles, rules, and policies to the recycle bin; that bin should be emptied. Indeed, in some way, a good code should have eschatological ambitions. At and beyond death there will be no differentiation, and "... gender, race, sexual orientation, family, nationality and all other culturally constructed identities will not survive the grave; they will pass away." Indefensible differentiation must be codally erased, and the eschatological erasure of a good civil code means that we must learn to live with each other here and today, as we surely will later before the throne.


20. See Lyn Cowan, Homo/Aesthetics, or Romancing the Self, in Same-Sex Love and the Path to Wholeness 125 (Hopcke, Carrington & Wirth eds., 1993) (noting that Jungian psychology tends to speak of romantic love as heterosexual projection).

21. Stuart, supra note 2, at 2. “The ‘I’ that is left, the ‘I am’ that I am is neither, as the popular song would have it, ‘my own special creation’ nor the creation of the human communities. The ‘I am’ that I am is God’s own special creation and that is my only grounds for hope.” Id. The gay man understands this, as others must also.


To be fit to live in the kingdom is to live with others in a particular way or range of ways. If a Christian ethic may be seen as eschatological, it is also social. It is about learning to be with each other. We are not being prepared for a solitary life with God, but for life in God with others. So if we wish to ask ethical questions about our actions, these must cluster around the central questions: How do these actions touch other people, and how do they affect or reflect our relations with them? Christian ethics is not a concern with self-indulgent self-‘perfection’. If it is possible to
In this light, a good civil code must accommodate a diversity of relationships of mushy emotionality.\textsuperscript{24} As the law goes pop, the emotion of everyday life and law is formally echoed and has provided the guiding theme of a discussion paper of the Law Commission of Canada: \textit{Recognizing and Supporting Close Personal Relationships between Adults}.\textsuperscript{25} That discussion paper proposes that “[a] broad diversity of close adult personal relationships is a sign of a vibrant society”; “... physical, psychological, emotional and economic support are key elements of the intimacy and interdependence that one finds in a healthy close relationship between adults.” “The diversity of close personal relationships between adults, and the different experiences of people involved in the same kind of relationship, are positive signs of social pluralism ... Choice in building relationships and the respect of governments for these choices are among the core features of a liberal democracy.”\textsuperscript{26}

The gay man subscribes to this vision of liberal democracy and to this social pluralism. He does not accept that the ideal citizen is heterosexual.\textsuperscript{27} He subscribes to an eschatology of indifferentiation speak of Christian life as the pursuit of some kind of self-perfection, the moulding of oneself, this can never be understood in an isolationist sense: that in which our perfection lies is in the ability to live with others.\textsuperscript{Id. at 3.}

\textsuperscript{24} This diversity embraces the relationship of Pat and Matt. See Patrick Califia-Rice, \textit{Two Dads with a Difference—Neither of Us Was Born Male}, Village Voice (New York), June 27, 2000, available at http://www.villagevoice.com/issues/0025/toc.php (last accessed July 31, 2004). Pat says: “We were generally perceived as a fag/dyke couple rather than two gay/bi men in a daddy/boy relationship, which is how we saw ourselves,” and “We are transgendered men (female-to-male, or FTM). My boyfriend is the mother of my child.” Pat sums up the relationship: “Matt and I are doing something most people take for granted. We are two people in live who live together and raise a child.” \textit{Id.}


\textsuperscript{27} It is commonly postulated that the ideal citizen is ideally heterosexual. That citizen has an ideal sexual expression. See \textit{A New Dictionary of Christian Ethics} (John Macquarrie & James Childress eds., 1967). “The ideal sexual act has been defined as heterosexual, potentially procreative, and expressive of the permanent, monogamous relationship which facilitates nurture of children and
where there is no marginalization, no ignorance and no devaluation.

IV. A CIVIL CODE IS A NEW COVENANT

As a hospitable home for all citizens, a civil code of accueil (Bienvenue!) is a document of co-gloryfication where citizens, together, rejoice in the importance of the person and in the role of social stability.” *Id.* at 579. The idealization of heterosexuality has promoted heterosexism (“gay bashing”) in the imagination of many private law legislators. Some say that, in order to better define heterosexuality, the homosexual had to be invented. See Annamarie Jagose, *Queer Theory — An Introduction* 10–16 (1996). The invention of the term “homosexuality” in 1860 is attributed to the Hungarian physician Karoly Maria Benkert and, between 1870 and 1910, is said to have replaced former terms and expressions, at least in Western psychoanalytic literature. See Elisabeth Roudinesco and Michel Plon, *Dictionnaire de la Psychanalyse* 450 (Fayard, Paris, 1997). In this light, it is noteworthy that the nineteenth century saw both the invention of the homosexual and the advent of civil codes of French inspiration with their central notion of the family. These notions are closely related. It may well be the gay man can be properly accommodated, within the structure of the books of persons and family of civil codes au sens européen, only when these books are overhauled and their sexual furniture rearranged. For the turn of phrase “rearranging the furniture,” see Pickel, *supra* note 19.

28. See the statement of Iacobucci, J., in *Law v. Canada (Minister of Employment and Immigration)*, 1 S.C.R. 497, 530 (1999) [Supreme Court of Canada].

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.

*Id.* Dignity is similarly contemplated in a judgment of the Ontario Court of Appeal. See *Halpern v. Toronto (City)*, 172 O.A.C. 276 (2003), (2003) Ont. C.A. Lexis 271. Through the institution of marriage, individuals can publicly express their love and commitment to each other. Through this institution, society publicly recognizes expressions of love, commitment, between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society’s approbation of the personal hopes, desires, and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual’s sense of self-worth and dignity.

*Id.* The remedy of *Halpern*, reformulating the definition of marriage to include same-sex couples, was concurred with by the Supreme Judicial Court of Massachusetts. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 949 (Mass. 2003).
Throughout a code, citizens are co-resurrected. They are enskied. Although the provisions of most civil codes revolve around things, and how and by whom they are acquired, the civil law tradition of the modern era vouches for the centrality of the person. The near-Utopian code attests the right of everyone's relationships to be treated with equal concern and respect. Equal treatment of the gay man and equal treatment of his relationships are tied realities. It does not seem logical for the State to prohibit discrimination on the grounds of sexual orientation and to ensure equal treatment regardless of orientation, yet fail to protect and indeed foster the exercise of that orientation in intimate relationships. Nonetheless, these two treatments are often separated in time, perhaps because the first is in the public law domain and the second is largely of interest to the private law.

For the gay man, the law must extend its favor beyond the limitations of his homosexual personality, his way of living, or his orientation. In this regard, the law may well in time acknowledge, if only discretely, what some modern psychology has disclosed, that is to say, the ambivalent nature of sexuality. It may also be pushed to acknowledge the constitutional bisexuality of all human beings. However, for the time being it would be best for the law to consciously order and devise a plan that reflects the subjectively experienced realities of all citizens.

The French, who have a reputation of overarching conviction in the world of civil law thought, have devoted serious philosophical, psychological, religious, and juridical scrutiny to the status of the gay man, to the institution of same-sex marriage, to cohabitation, and to the reform of private law institutions, especially those contemplated

29. This is to borrow from the language of Christian theology. Our identification with Christ the Lamb is so complete that God reckons us as having experienced co-crucifixion, co-burial, co-resurrection, co-ascension and co-glorification. The rhetoric of Portalis also underscores the glorification and resurrection of the happy citizen by the enlightened lawmaker. See Portalis, Preliminary Discourse, supra note 1.


31. A modern civil code has Utopian aspirations. See Luis Diez-Picazo y Ponce de León, Codificación, Descodificación y Recodificación, in 45 Anuario de Derecho Civil 473, 474 (Ministerio de Justicia, Madrid, 1992).

32. For an interesting study of Australian "mateship," see David J. Tacey, Homeroeticism and Homophobia in Heterosexual Male Initiation, Same-Sex Love and the Path to Wholeness 246 (Robert Hopcke, Karin Loffthus Carrington, & Scott Wirth eds., 1993). "When Freud speaks of sexuality he means to include all sensual and affectional currents, all the ways we experience bodily pleasure, all our intense emotional attachments." Id. at 247. On human bisexuality, see Roudinesco and Plon, supra note 27, at 122.
under civil codes. Borrillo is perhaps the leading jurist investigating this topic. On the topic of same-sex marriage, his view is that it is not on account of any sound legal reasoning that marriage has not been extended to same-sex couples. Rather, he says that scholars and judges have preferred to argue on religious or moral bases, notwithstanding that the religious, moral and symbolic features of marriage attest more to its canonical past than they heed its lay and secularly contractual present.

If civil codes are to retain their social relevance, they must, in this century, evince a new covenant between the State and citizens, gay and straight alike. Indeed, as the gay man appropriates the institutions of the private law for himself, he should realize that this self-appropriation is misguided. It must be shared. The institutions must be co-appropriated. His arguments are the same arguments of lesbians, de facto spouses, and people in economically supportive

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33. Daniel Borrillo, Homosexualités et droit (Presses Universitaires de France, 1998); Daniel Borrillo, et al., La sexualité a-t-elle un avenir? (Presses Universitaires de France, 1999); Au-delà du PaCS - L'expertise familiale à l'épreuve de l'homosexualité (Daniel Borrillo, Eric Fassin, & Marcela Iacub eds., Presses Universitaires de France, 1999); Daniel Borrillo & Pierre Lascoumes, Amours égales? (La Découverte, 2002) ; Didier Eribon, Réflexions sur la question gay (Fayard, 1999); Didier Eribon, Une morale du minoritaire – Variations sur un thème de Jean Genet (Fayard, 2001). These works summarize recent French thinking on the topics of homosexuality, same-sex marriage, cohabitation, and the rights and obligations of individuals in close personal relationships.


Id. at 40. Borrillo has convincingly countered the perception among French jurists that the notion of family automatically refers to the ménage hétérosexuel. He has assembled the arguments against homosexual marriage under several headings and structured them by noting the frequency by which they appear in legal writing. In descending order, these arguments are: (1) the reproductive objective; (2) natural law; (3) the imminence of danger for children; (4) cultural danger; (5) the award of compensation by the State to those who submit to the discipline of the accepted social order; (6) canon law and tradition; (7) la sensibilité de la France profonde; (8) the economic superiority of homosexual couples; (9) the purely material goal of civil unions (partnerships); (10) fraudulent recourse to social security; and (11) the relatively small number of individuals involved. See Daniel Borrillo, Fantasmes des juristes vs Ratio juris : la doxa des privatistes sur l'union entre personnes de même sexe, in Au-delà du PaCS, supra note 33, at 164–72.
relationships. The new covenant is not just about him; it is about the community at large.

V. THE GRAVE CONTENT OF THE COVENANT

A new covenant will be a serious undertaking and maybe even "a quest for transcendental purity." A social covenant, such as a civil code, can only be relevant when it is written with forethought and not developed as an afterthought. Regrettably, old and new codes alike, even those resulting from intense revision and recodification, are shockingly irrelevant in family law matters. The codes speak to the past. Therefore, it should surprise no one that civil codes have been outpaced by events. This phenomenon has (and continues to have) a deleterious effect on the normative value of codal provisions. Impossible to read, and difficult to handle and consult, codes are increasingly ignored and replaced by judge-made law and extra-codal statutory enactments. A relevant code must be a comprehensive blueprint and must correctly direct the judge and the lawmaker in all private law matters. The gay man’s civil code must be a template for the consideration of all of his, together with all of his fellow citizens’, valid expectations for the recognition of their relationships. Thus, much recent attention has been expended on the extension of marriage to gay men (or on the construction of a para-marital institution, such as a civil union).

35. Even those scholars who polemicize against same-sex legal relationships and root marriage in an almost unreal perfection have studied marriage more seriously, by far, than modern-day legislators and have very correctly emphasized that proper legislative evaluation of the social objectives of the institution is necessary and overdue. See the articles of Spaht, supra note 12, and Gallagher, supra note 17.

36. See Pierre Legrand, Perspectives du dehors sur le civilisme français, in Le droit civil, avant tout un style? 153, 178 (Nicholas Kasirer ed., 2003) (describing one of the characteristics of apodictic truth and attributing this characteristic, in part, to Descartes and Sartre). "[L]a quête d’une pureté transcendante, c’est-à-dire transcendant l’expérience, visant à atteindre à la vérité entendue comme univoque;" Id. Legrand argues that the French civil law tradition has an apodictic style, that is to say, a style denoted by a quest for necessary and established truth.

37. See id. at 183. By reason of its apodictic style, Legrand asks whether the French civil law tradition is a particular vision of the law that is frozen in time and space. "Le droit civil serait-il une vision arrêtée dans le temps et l’espace ?" Id. Some might say that the civil law is incapable of relevance.

38. On codification, revision, and recodification in the modern era, see Michael McAuley, Proposal for a Theory and a Method of Recodification, 49 Loy. L. Rev. 261 (2003). Good codes are characterized by simplicity and plain redaction; certainty, justice and modernity; comprehensiveness, internal coherence; gaplessness; systematization; rationalization; pedagogy; continuity; stability; and popularization of knowledge of the law. Id. at 265–66.
The tedious repetition39 of the canon law of the Catholic Church has provided the direct source for much of Western societies’ earlier notions of legal and lawful sexuality, that is to say, heterosexual, monogamous, indissoluble, and procreative concepts. Why, therefore, do those who are not heterosexual, who may not subscribe to exclusivity, who may assert the right (although, perhaps, not the desirability) to a temporary union, and who promote the emotional aspect of the relationship, so eagerly strive for marriage as the full expression of their human rights? It is often asserted that marriage, as an institution of the law, should be open to everyone because of the imperatives of equality and humanity even though marriage, as an institution of the law, has a recent poor track record. Why not replace the institution of marriage with something that reflects contemporary legal and societal concerns and expectations? It seems to many that the fight for marriage is the fight for civil rights rather than for any of the intrinsic qualities that marriage may bring. Yet, after the march and the dance,40 it is not at all apparent that the gay man is aware of the grave content of marriage.

For example, community property, in civil law systems that have this marital property regime and as an institution spanning the laws of marriage, property, and contract, may be an inappropriately abrupt departure from the notions of living together and all the attendant consequences of vie commune that gay men now know.41 Is the gay

39. For the expression “tedium through repetition” with reference to teaching on homosexuality, see Stuart, supra note 2, at 3–4.
40. Moreover, in the mind of the Québec lawmaker and under the terms of the Civil Code of Québec, marriage (at the time of the redaction of this code, reserved to opposite-sex couples) and civil union (open to same-sex couples) share much of the same festive environment. See Civil Code of Québec art. 521.8 (Jean-Maurice Brisson and Nicholas Kasirer eds., 2003–2004) (hereinafter C.C.Q.). The French text uses the word “célébration.” The English text uses “solemnization.” On the nature of this solemn celebration, see Nicholas Kasirer, Convoiler en justes noces, in L’union civile: Nouveaux modèles de conjugalité et de parentalité au 21ème siècle 29 (Pierre-Claude Lafond and Brigitte Lefebvre eds., Les Éditions Yvon Blais, Cowansville, 2003).

Marital property systems are of no initial interest to future spouses. The focus of their attention is clearly the wedding ceremony, the initial or continued intimacy, social status, legal standing and, in most cases, their participation in procreation. The legal language of marriage confirms this focus. Gay men and women also want a celebration, intimacy, and social status. Some gay men and women want children. Some also want legal standing before the government for purposes of tax and other benefits. It is doubtful, however, whether future spouses or gay cohabitants have a
man prepared to subscribe to all or part of a community property or other marital property system? It may well be that for gay spouses, a community property system of immediate, present undivided interests in a pool of assets and liabilities may not be desirable especially in light of a gay man's traditional and coveted independence of administration, enjoyment and free disposal of property.

A civil code of the new covenant, as a seamless web of family, property, and contract, and as synthetic and syncretic legislation, is likely, at first blush, to assimilate same-sex marriage to opposite-sex marriage and to extend the rights and duties of that institution to married or civil-unionized gay men. The representation of opposite-sex marriage, in civil codes, is distorted and skewed. It is the picture of marriage idealized. It has an almost overpowering theological perfume. That being said, the gay man's marriage code is the marriage of the code.

The resulting marital relationship will evidence features of the mutual obligation of fidelity, support, and assistance and the mutual assumption of the moral and material direction of the family. It is likely that the duties and obligations that condition the life-in-the-law of gay couples will be characterized, again in the first instance, by vie commune (living together, in all colors of meaning) and by a physical and emotional entente that is present in the bed and at the table. Their relationship will resound with notions of stability, continuity, and economic partnership. The spouses will work as a team pooling, in common, their effort, skill, and industry. As a union of wills and as an expression of sexual intimacy and mutual dependence, the gay man's relationships will be indissociably linked to the legal tradition of marriage. This link, however, also has shadows of divorce, child custody disputes, and sometime spousal abuse. Marriage is powerful; its dissolution is painful.

In popular culture, it is all about relationship. Some people say, "We want to live and be together." Others say, "We want to live and be together, and we want children," or "We were together, and we had a child." In the world of the civil code, people say, "We want to have children and educate them and, by the way, we also want to be together." The structure of the books on persons and family propels the reader forward from definition of the institution to the duties of parents. What serious people, like Spaht, are saying is, "Marriage needs to be again what we now say and have always said marriage is

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42. For sources of these characteristics of marriage and community property, see McAuley, supra note 41.
43. See Spaht, supra note 12.
under the code.” This is a position of intellectual integrity, even if somewhat contraindicated by the actions of citizens.

Accordingly, is marriage interesting to the gay man? Moreover, is it interesting to gay men collectively? Many might say that gay men, as a group, have abandoned interest in advocating for the rights, duties and benefits that might derive from civil unions, cohabitation, and other para-marital institutions, for themselves and for their children. Gay men that wish to marry risk scuttling the plans of others whose relationships might find a better home in some other legal environment, such as a civil union.

On this note, the Quebec lawmaker has created this new civil status of civil union. The 2002 amendments to the civil code use manifestly marital language to describe the union. The civil union is described as a commitment of persons who express their free and enlightened consent to live together, to possess and uphold an equality of rights and obligations related to that status, to owe each other respect, fidelity, succor and assistance, and to live together. The effects of the civil union relating to the direction of the family, the exercise of parental authority, the contribution to expenses, the family residence, the civil union, and family patrimonial regimes “are the same as the effects of marriage, with the necessary modifications.” Moreover, “a civil union creates a family connection between each spouse and the relatives of his or her spouse.” On the topic of a property sharing, the Quebec code provides that civil union spouses (“conjoints” (consorts) in the French text, but “spouses” in the English text) are subject to the same rules as are applicable to matrimonial regimes mutatis mutandis. The institutions of marriage and civil union are coequal.

Is it correct to assume, as the Quebec lawmaker has done, that gay men and women, or opposite-sex cohabiting couples, desire the same sort of property arrangements as married couples? “Thus, when the Quebec civil code, for presumed reasons of economy of language, extended the rights and duties of married spouses to civil union spouses, what was intended by the phrase ‘with the necessary modifications’ (compte tenu des adaptations nécessaires)?” If the lawmaker wishes to be attentive to the relationship status of the gay

44. See C.C.Q. art. 521.1, 521.6, and 521.7.
45. See C.C.Q. art. 521.7.
46. “Conjoints” (consorts) in the French text, but “spouses” in the English text. In the French texts on marriage, the word for “spouses” is “époux.”
47. See C.C.Q. art. 521.8.
48. McAuley, supra note 41. See also C.C.Q. art. 521.6 and 521.8. For a somewhat more complete discussion of this civil union, see McAuley, supra note 41, and the collection of essays under the editorship of Lafond and Lefebvre, supra note 40.
man, in all of its political, social and cultural realities, an investigation of "modifications"—more significant than mere syntax—is necessary.

To say that the heterosexual condition is good for everyone is a bad conceit. It is the humanity of all, and not the sexuality of some, that should be the driving force of the law of relationships. There are good reasons why the law should conceive of a new covenant for status and relationship that embraces (and appeals to) the entire community.

VI. CONCLUSION

A civil code is a law-book of considered reflection. It is a plan of order that sets the tone for all other legislation. However, a just law of relationships for gay men might best be developed, first, by the extension of rights, duties and benefits to cohabitants through extra-codal enactments, then, by the creation of a new institution, such as a civil union, and, finally, perhaps, by the extension of marriage to same-sex couples in a civil code. Although this approach is, under the theory of codification, topsy-turvy, it has the advantage of a well-paced and mutual acculturation of us and them and of a gentle habituation of all citizens to the knowledge that a diversity of relationships has a place in the created order and in the legislative expression of that order.

The construction of a new covenant is a work of Job. The gay man ought to know this.

49. Western and, in particular, French gay culture has been examined in dictionary format. See Eribon, ed., supra note 10.

50. The experience of one civil code, Quebec's, is instructive. First, in 1975, there was the recognition of human rights and freedoms, without distinction, exclusion or preference based on sexual orientation. See Charter of Human Rights and Freedoms, R.S.Q., c. C-12 (Quebec). Second, there was the gradual extension of statutory benefits to heterosexual cohabitants, on a piecemeal legislative basis. This assisted in the recognition of extra-marital cohabitation as a relationship with legal consequences. Third, there was a general expansion of provincial and federal benefits to same-sex cohabitants under the terms of the 1999 Quebec legislation, An Act to Amend Various Legislative Provisions Concerning De Facto Spouses, S.Q. 1999, c. 14, 1st Session, 36th Legislature, Bill 32, and the 2000 federal legislation, An Act to Modernize the Statutes of Canada in Relation to Benefits and Obligations, S.C. 2000, c.12 (Bill C-23). Fourth, there was the creation of the civil union under the Quebec civil code in 2002. Finally, there was the judicial reformulation of the federal definition of marriage to encompass same-sex couples in Quebec. See La Ligue Catholique pour les Droits de L'Homme v. Hendricks and Leboeuf, Court of Appeal (Quebec), March 19, 2004 (No. 500-09-012719-027).