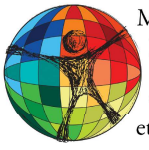
Martine Roy Colloquium

Working Paper Series

VOL. 1 | NO. 1 | SUMMER 2022
MARTINE ROY COLLOQUIUM | WORKING PAPER SERIES



McGill Centre for Human Rights and Legal Pluralism

Centre sur les droits de la personne et le pluralisme juridique de McGill

imk avocats · advocates

McGill Faculty of Law | Faculté de droit

ABOUT CHRLP

Established in September 2005, the Centre for Human Rights and Legal Pluralism (CHRLP) was formed to provide students, professors and the larger community with a locus of intellectual and physical resources for engaging critically with the ways in which law affects some of the most compelling social problems of our modern era, most notably human rights issues. Since then, the Centre has distinguished itself by its innovative legal and interdisciplinary approach, and its diverse and vibrant community of scholars, students and practitioners working at the intersection of human rights and legal pluralism.

CHRLP is a focal point for innovative legal and interdisciplinary research, dialogue and outreach on issues of human rights and legal pluralism. The Centre's mission is to provide students, professors and the wider community with a locus of intellectual and physical resources for engaging critically with how law impacts upon some of the compelling social problems of our modern era.

A key objective of the Centre is to deepen transdisciplinary collaboration on the complex social, ethical, political and philosophical dimensions of human rights. The current Centre initiative builds upon the human rights legacy and enormous scholarly engagement found in the Universal Declaration of Human Rights.

ABOUT THE SERIES

The Centre for Human Rights and Legal Pluralism (CHRLP) Martine Roy Colloquium Working Paper Series enables the dissemination of papers by students who have presented at the Martine Roy Colloquium. Held in conjunction with the Michelle Douglas Lecture, the Colloquium aims to encourage student scholarship and enhance public engagement around issues related to equality and justice for LGBTI communities. The Lecture and Colloquium are made possible by the generous contribution of IMK Advocates.

The papers in this series are distributed free of charge and are available in PDF format on the CHRLP's website. Papers may be downloaded for personal use only. The opinions expressed in these papers remain solely those of the author(s). They should not be attributed to the CHRLP or McGill University. The papers in this series are intended to elicit feedback and to encourage debate on important public policy challenges. Papers in this series may be published in either French or in English. Copyright belongs to the author(s).

The WPS aims to meaningfully contribute to human rights discourses and encourage debate on important public policy challenges. To connect with the authors or to provide feedback, please contact human.rights@mcgill.ca.

Thank you to B.C.L./J.D. student Shona Moreau for organising and editing this series.

THE PAPERS

Article

Family is a Drag: Extra-Legal Formations of the White-Picket Dream

Andie Hoàng-Lefranc

VOL. 1 | NO. 1 | SUMMER 2022
MARTINE ROY COLLOQUIUM | WORKING PAPER SERIES

McGill Centre for Human Rights and Legal Pluralism
Centre sur les droits de la personne et le pluralisme juridique de McGill

imk avocats · advocates

McGill Faculty of Law | Faculté de droit

ABSTRACT

In the Western World, perhaps no image is more revered than that of the “nuclear family”. The heterosexual churchgoing unit composed of a father and mother with two and a half kids nested in an all-American suburban prefab has been central to the political and legal organization of western society. The term ‘nuclear’ not only limits the extent of what can be considered a family, characterising this formation as the ‘core’, but by extension defines what is the ‘norm’. This norm is then propagated by lawmakers, jurists, and advocates in shaping policy and laws that encourage public adherence via the reward of economic and social mobility. However, what happens to this norm when it is co-opted by those who are excluded from it, namely by queer individuals and queer communities? From lesbian mothers to gay adoptions, queer families have always challenged and pushed the boundaries of the family. This article on queer appropriations of family structures argues that conceptions of the nuclear family unit have never been as universal as it perpetrates itself to be. Through the exploitation of legal loopholes and the re-appropriation of nuclear familial titles, family has always been a drag.

CONTENTS

Introduction

In the American imagination, "the nuclear family, with a father, mother, and children, is seen as the basic unit of society."[1] This unit has been central to the political and legal organization of American society. This conception of the family was further disseminated through the "TV sitcom families of the 1950s, most notably the Nelsons of 'Ozzie and Harriet' and the Cleavers of 'Leave It to Beaver'"[2] which has further solidified this configuration as the ultimate familial standard in the collective American imagination. This norm has also been propagated by lawmakers, jurists, and advocates in shaping public policy and laws to encourage public adherence to this model via the rewards of economic and social mobility. In granting certain rights such as property and inheritance rights, insurance benefits, recovery in tort, and default power-of-attorney exclusively to the nuclear family, individuals are forced to either conform or lose out on these advantages.

This nuclear family model, by design, has always excluded LGBTQ individuals. Even if queer individuals deny their identities in conforming to the roles of the nuclear family, they put themselves at risk of violence, both domestically and from the state.[3] What happens, though, to the nuclear family when its structure is co-opted by those who are excluded from it? From lesbian mothers to same-sex adult adoptions, queer families have always challenged and pushed the boundaries of the family. Queer individuals, through various appropriations (or in this case *misappropriations*) of the nuclear family's structure, demonstrate that the nuclear family model has never been as universal as it perpetrates itself to be.

This article therefore has three aims: 1) to put the privileged position of the nuclear family as the default unit of legal mobility and rights under scrutiny, 2) to suggest that queer misappropriations of the nuclear family's structure have demonstrated that the idea of the family has always been in drag, and 3) to explore what if any restitution regime can be implemented to not only rectify the historical discrimination faced by LGBTQ individuals but its associated economic impacts.

Context will first be provided as to how the nuclear family was a contemporary invention that sought to reinforce patriarchal gender norms and how it is undeserving of

---

[1] See Emiko Ochiai, "Introduction: Reconstruction of Intimate and Public Spheres in Asian Modernity" in Emiko Ochiai & Leo Aoi Hosoya, eds, *Transformation of the Intimate and the Public in Asian Modernity* (Leiden: Brill, 2014) 1 at 20.

[2] See John Woods, "'Leave to Beaver Was Not a Documentary': What Educators Need to Know About the American Family" (1995) 24:1 American Secondary Education 2 at 2.

[3] For further discussion surrounding the dynamics of LGBTQ concepts of "coming out", "the closet", "outing" and their potential for violence see David H. Pollack, "Forced Out of the Closet: Sexual Orientation and the Legal Dilemma of 'Outing'" (1992) 46 U Miami L Rev 711; Kae Greenberg, "Still Hidden in the Closet: Trans Women and Domestic Violence" (2012) 27:2 Berkeley J Gender L & Just 198; Jordan Blair Woods, "LGBT Identity and Crime" (2017) 105:3 Cal L Rev 667; Elizabeth McDermott, "Avoiding Shame: Young LGBT People, Homophobia and Self-Destructive Behaviours" (2008) 10:8 Culture, Health & Sexuality 815; Thomas M. Keck, "Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights" (2009) 43:1 Law & Soc'y Rev 151; Mary Lou Rasmussen "The Problem of Coming Out" (2004) 43:2 Theory Into Practice 144.

its reputation as the default familial model. This will be followed by an explanation of how queer misappropriations of the nuclear family structure parallel the destabilizing effect drag performance has on the gender binary, as described by Judith Butler. Examples of both non-legal and legal queer misappropriations of the nuclear family's structure will be explored.

This article will then explore, in the context of post-legalization of same-sex marriage North America, what, if anything, has been done to address the economic effects experienced by LGBTQ individuals who have been denied from familial benefits. A comparison of the historical development surrounding the establishment of (or in the Canadian case the failure to establish) restitution regimes will showcase two arguments. The first argument will discuss how the formal legislation of same-sex marriage has stalled developments in rectifying the economic impact suffered by LGBTQ individuals. The second argument will outline why achieving meaningful equality and justice for LGBTQ individuals requires addressing economic impact in addition to achieving formal legal equality.

The Unravelling of the Nuclear Family

The nuclear family unit is routinely "characterized by common residence, economic cooperation, and reproduction. It contains adults of both sexes, at least two of whom maintain a socially approved (read as: heterosexual) sexual relationship, and one or more children, own or adopted, of the sexually cohabiting adults."[4] This formation of the nuclear family was popularized in the 1950s, coinciding with rise of the post-WWII atomic age. The *nuclear* in nuclear family however is figurative, coming from the scientific usage of the term, meaning "a basic or essential part."[5] This characterisation then denotes this configuration of the family unit not merely as the "core" of what a family is but also defines it as the expected "norm."

This norm has been further promoted by anthropologists such as Bronislaw Malinowski, who deemed the nuclear family as universal because it fulfilled the basic biological need to care for infants and young children.[6] Malinowski further argued that no culture could persist unless children were legally linked in parenthood through the nuclear family. George P. Murdock continued this essentialization of the nuclear family describing it as "a universal human social grouping. [Arguing that, e]ither as the sole prevailing form of the family or as the basic unit from which more complex familial forms are compounded, it [(the nuclear family)] exists as a distinct and strongly functional group in every known society."[7] Further attempts to reinforce the nuclear family as the universal familial model, through the efforts of lawmakers and the application of social

---

[4] See George Peter Murdock, *Social Structure* (New York: The Free Press – A Division of the Macmillan Company, 1949) at 1.
[5] See "The History of the 'Nuclear Family'", online: *Miriam Webster* <https://www.merriam-webster.com/words-at-play/nuclear-family-history-origin>.
[6] See Bronislaw Malinowski, *The Family Among the Australian Aborigines* (London: University of London Press, 1913), online (pdf): <https://www.berose.fr/IMG/pdf/malinowski_1913-the_family_among_the_australian.pdf>.
[7] See Murdock, *supra* note 4 at 2.

pressure through media,[8] have created the false assumption that the nuclear family represents how families have always been structured. However, this primordial status is not warranted: "Not only was the 1950s [nuclear] family a new invention; it was also a historical fluke, based on a unique and temporary conjuncture of economic, social and political factors."[9]

The Second World War fundamentally upended social order. As the U.S. joined the war effort and men were drafted, the family unit was dismantled. Fathers, who were now overseas, left behind factory and manufacturing jobs in industries necessary to the war effort. To keep the war going, mothers were asked to leave their domestic confines to fill this labour shortage, becoming the family unit's breadwinner.[10] The war effort not only demonstrated that women need not confirm to the roles assigned to them by their gender, but it had opened up new possibilities of economic and social mobility to them. However, as men returned home from the war, women were once again relegated to working in the home, creating a sense of social restlessness.[11] This fear of social unrest sparked calls for women to return to "normal", to curtail the novel opportunities women had been given in favour of a patriarchal expectation of how society should be organized.

This new social norm, the "nuclear family", saw "the female as full-time housewife and the male as primary provider and ultimate authority"[12] within the home. Media played a large role in maintaining a sense of social pressure to conform to this new norm, classifying sitcoms like 'Leave It to Beaver' as didactic efforts at resetting social relations. They aimed to convince viewers that adherence to the gendered expectations of the nuclear family offered the ultimate potential for societal stability. The U.S. government also seized upon societal fears as an opportunity to recreate the family unit based on patriarchal gender norms. In calling on women to "return to normalcy,"[13] when there was no accepted standard family model to return to, the U.S. government gave themselves the authority to retroactively define the social norm of the family and to enforce it with the weight of an artificial history.

By examining the deliberate framing of the newly afforded opportunities for women as a threat to society's ability to return to a sense of post-war normalcy, we understand that the promotion of the nuclear family was never about defending the supposed sanctity of the family institution. Instead, through its own short artificial history, the nuclear family subverts its own status as the default family model.

---

[8] See Woods, *supra* note 2 at 6.
[9] See Stephanie Coontz, *The Way We Never Were: American Families and The Nostalgia Trap* (New York: Basic Books, 1992) at 28.
[10] See Ernest W. Burgess, "The Effect of War on the American Family" (1942) 48:3 American Journal of Sociology 343.
[11] See Woods, *supra* note 2 at 6.
[12] See David Popenoe, "Breakup of the family: Can we reverse the trend?" in K. Finsterbusch & G. McKenna, eds, *Taking Sides: Clashing Views of Controversial Social Issues* (Guilford, CT: Dushkin, 1992) at 106.
[13] See "Rosie the Riveter" in Lynne E. Ford, ed, *Encyclopedia of Women and American Politics* (New York: Facts On File, Inc. – An imprint of Infobase Publishing, 2008) 397–98.

Act 1: Gender, Act: 2 The Family

In understanding that the formation of the nuclear family was based on upholding patriarchal gender norms, we begin to understand why the nuclear family does not deserve its status as the primordial family model. To interrogate gender norms and the gender binary, I borrow from Judith Butler's discussion surrounding the effects of both queer and gender performativity towards the institution of the family.

Butler describes queer performativity as an act that "is always a reiteration of a norm or set of norms."[14] Speaking in the context of reclaiming the term "queer" (from its hetero-patriarchal usage as a slur) by members of the LGBTQ community, Butler outlines that the act of reclamation does not divorce the term from its history as a slur, but rather acts to establish "a set of constraints on the past and the future that mark at once the *limits* of agency and its most *enabling conditions*."[15] The result, as Terry Hoople frames it, is that;

> queer performances are misarticulations [(or in this case what I have deemed as misappropriations)] … of hetero-patriarchal norms which pervert the normalizing aims of hetero-patriarchal relations of power, thus operating, even if only in a limited, site-specific way, to undermine these relations by exposing their contingency, among other things.[16]

This undermining of patriarchal norms through their misappropriation via queer performativity (or performance) can be further extended towards the gender binary through drag performance.

Butler argues that "[i]n imitating gender, drag implicitly reveals the imitative structure of gender itself—as well as its contingency."[17] "The giddiness of the performance is in the recognition of a radical contingency in the relation between sex and gender in the face of cultural configurations of causal unities that are regularly assumed to be natural and necessary."[18] Drag queens and kings through adopting and performing, in an exaggerated caricature, the expected fashion and attributes of the 'other gender' reveal gender as simply a cultural code that relies on imitation and reappearance, lacking any essential truth. The act of drag performance, in demonstrating how permeable the gender binary is, destabilizes the supposed necessity of the gender binary's rigid expectations, upending the mandatory nature of the expected roles that our assigned gender relegates us to. This misappropriation of gender as parody through drag does not assume that there is an original which the

---

[14] See Judith Butler, *Bodies That Matter: On the Discursive Limits of ''Sex"*, (New York: Routledge, 1993) at 12.
[15] See *ibid* at 228.
[16] See Terry Hoople, "Conflicting Visions: SM, Feminism, and the Law. A Problem of Representation" (1996) 11:1 CJLS 117 at 209.
[17] See Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity,* (New York: Routledge, 1999) at 175.
[18] See *ibid.*

parody intimates. Rather "the parody is of the very notion of an original; just as the psychoanalytic notion of gender identification is constituted by a fantasy of a fantasy … so [to does] gender parody reveals that the original identity after which gender fashions itself is an imitation without an origin."[19]

In having the nuclear family be the medium through which cisgender heterosexual gender norms are reinforced, the nuclear family itself becomes susceptible to queer misappropriation. Queer performances of the nuclear family's structure are then able to destabilize its supposed status as the essential formation of the family by suggesting that, like gender roles, the nuclear family is merely an imitation of a concept without an essential origin.

Queer Misappropriations: Varying Approaches in Framing the Extra-Legal Family

Queer misappropriations of the nuclear family creates the idea of the "chosen family." Though it is not an exclusively queer phenomenon, the chosen family is a hallmark of queer culture and through its formation we are introduced to the idea of performing family. Unlike one's family of origin, defined as the family system one is born into[20], the chosen family is comprised of individuals that have chosen to be in relation to each other[21] to substitute for the role of the family as an intimate support system. It is the ability to chose one's most intimate relations instead of defaulting to the system one is born into that classifies queer misappropriations of the nuclear family's structure as performance. Like gender, the nuclear family unit is then revealed to merely be an expression of cultural codes, an imitation of the institution that is the family for which there is no original identity. I argue that there are three types of queer misappropriation of the nuclear family's structure which facilitate the destabilization of the nuclear family's primordial status as the familial norm: cosmetic, structural, and corruptive.

Cosmetic

Cosmetic misappropriation is a non-legal method through which the nuclear family is performed by queer individuals. One of the most culturally impactful cosmetic misappropriations is ball culture.

Ball culture emerged in the early 20th century, comprising of events where LGBTQ individuals "walked" (competed) for prizes in competitions that mixed performance, dance, lip-syncing, drag and modelling.[22] At its emergence, the ball scene was marked by racial discrimination. Most ball participants during the culture's early

---

[19] See *ibid*.
[20] See Alex Stitt, *ACT for Gender Identity: The Comprehensive Guide*, (London: Jessica Kingsley Publishers, 2020), 363.
[21] See Catherine B. Roland & Larry D. Burlew, eds, "Counseling LGBTQ Adults Throughout the Life Span" (2017) at 17, 81, online (pdf): *American Counseling Association* <https://www.counseling.org/docs/default-source/default-document-library/counseling-lgbtq-adults-throughout-the-life-span-final.pdf?sfvrsn=2>.
[22] See Gregory Phillips II et al, "House/Ball Culture and Adolescent African-American Transgender Persons and Men Who Have Sex with Men: A Synthesis of the Literature" (2011) 23:4 AIDS Care 515.

years were white gay men with Black LGBTQ individuals rarely participating. If they did participate, Black individuals were expected to lighten their faces and mimic Eurocentric features through their drag makeup.[23] Already subject to racial discrimination and homophobia within general society and now facing racist treatment from within the LGBTQ community, Black and Latinx LGBTQ individuals established their own balls. These spaces aimed to present an alternative community where queer youth of colour could express themselves freely[24] outside of the white gaze. This alternative ball culture, created by and for Black and Latinx LGBTQ people, became the mainstream ball culture of the 1980s and onward, which is the era of ball culture that is the most widely recognized in the contemporary imagination.

Outside of the ball's competitive setting, participants typically could not openly express their sexuality and gender with their biological families. To fill the need of intimate familial support, ball participants formed "houses", where participants chose to live together as an alternative family unit. These chosen families were often the only family structure available for its members[25] and aimed to provide shelter, solace, and safety for those often rejected from their nuclear families. In acting as alternative families, house members adopted the traditional titles of the nuclear family.

> These alternative families were led by "mothers," who were mostly butch queens (gay men) or femme queens (transgender women) and "fathers," who were mostly butch queens or butches (transgender men). Houseparents provided guidance and life skills for their "children" of various ages who were diverse in their cultural backgrounds, genders, and sexualities, and from cities and regions throughout North America.[26]

Though ball houses provided the intimate support that members lack from their biological families, the resulting unit was only a cosmetic misappropriation of the nuclear family's structure. The formation of ball houses did not grant the legal rights that are reserved by the state for legally recognized family units. Even so, the existence of ball houses reveals "both the conditions under which its members live and their use of performance as a way of surviving such conditions."[27] Ball houses, in co-opting the structure of the nuclear family, demonstrated the possibility of the creation and sustainability of alternate family structures in response to exclusion from the legally accepted norm. The ball house family in essence utilized "performance to create an alternative discursive terrain and a kinship structure that critiques and revises dominant notions of gender, sexuality, family, and community."[28]

Structural

---

[23] See Michael Cunningham, "The Slap of Love", online: *Open City Magazine & Books* <https://opencity.org/archive/issue-6/the-slap-of-love>.
[24] See *Paris Is Burning*, 1990, (Off-White Productions).
[25] See Marlon M. Bailey, "Gender/Racial Realness: Theorizing the Gender System in Ballroom Culture" (2011) 37:2 Feminist Studies: Race and Transgender Studies 365.
[26] See *ibid* at 367.
[27] See *ibid.*
[28] See *ibid.*

Structural misappropriation characterizes strategies where queer individuals began to co-opt the legal regimes that animate the nuclear family to their benefit. These strategies, as in the case of lesbian mothers, reveal the ineffectiveness of the intended exclusion of queer individuals from the legal rights afforded to the nuclear family.

Under the institutionally entrenched nuclear family model, when a child is born the mother and her husband (as a married couple) will be listed on their birth certificate as the parents, automatically granting them legal parental rights via biological relation to the child. This leaves lesbian couples in a conundrum as, "the use of artificial reproductive technology by lesbians has resulted in many children being raised in families where there are "two mothers and no father."[29] This raises the question of the extent to which the partner who is not biologically related to the child will be able to assume parental rights and obligations.[30]

A common solution that emerged within the American context was the refusal to list a father (or in this case the sperm donor) on the birth certificate of the child. This refusal then allowed the partner who did not give birth to adopt the child through what is known as second parent adoption. Often used by stepparents within a heterosexual relationship to create legal ties to their new partner's child(ren), this is a "legal procedure by which a co-parent adopts [their] partner's child without terminating the partner's parental rights, regardless of marital status. As a result of the adoption, the child has two legal parents, and both partners have equal legal status in terms of their relationship to the child."[31]

Even though *Obergefell v. Hodges* granted same-sex couples the right to marry,[32] with the US Supreme Court arguing that "[w]ithout the recognition, stability, and predictability marriage offers, [children with same-sex parents would] suffer the stigma of knowing their families are somehow lesser,"[33] parental rights and responsibilities were not extended towards same-sex couples under this grant of marriage. [34] In application to the example provided here, even with the legalization of same-sex marriage, the same-sex spouse who did not give birth could not claim automatic parental rights. Therefore, second parent adoption was and is still required to reclassify the partner in same-sex relationships who did not give birth from *legal stranger* to *legal parent*, resolving the "legal status ambiguity" [35] of the spouse.

---

[29] See Nicholas Bala & Megan Thomas, "Who is a Parent'? 'Standing in the Place of a Parent' & Canada's Child Support Guidelines S.5" (2007) Queen's University Legal Studies Paper No. 07-11 1 at 3.
[30] See *ibid*.
[31] See "Legal Recognition of LGBT Families" (2019) at 2, online (pdf): *National Center for Lesbian Rights* <https://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf>.
[32] See *Obergefell v Hodges*, 135 S. Ct. 2584, 2604-05 (2015) [*Obergefell*].
[33] See *ibid* at 2600–01.
[34] See Maia Labrie, "Two Legal Mothers: Cementing Parental Rights for Lesbian Parents in Colorado" (2020) 91:4 U Colo L Rev 1247 at 1256.
[35] See Alison Gash & Judith Raiskin, "Parenting without Protection: How Legal Status Ambiguity Affects Lesbian and Gay Parenthood" (2018) 43:1 Law & Soc Inquiry 82.

This structural misappropriation recreates the stereotypical nuclear family structure, characterized at a macro level as two parents with full legal rights to the child. The only difference in this case is that the nuclear family's structure is performed by a homosexual couple rather than the requisite heterosexual pairing of mother and father. The result is that those who were once excluded from claiming the rights accorded to the legal family unit have found a way to claim them through utilizing the legal processes that were meant to protect the nuclear family's revered status.

Corruptive

Structural misappropriations, though they disrupt the associated image of the nuclear family of a heterosexual couple and their children, maintain the overarching configuration of the nuclear family model. This was affirmed through *Pavan v. Smith*[36] in 2017 which further "[legitimized] same-sex [led] families and reinforce[d] *Obergefell*'s holding that all couples must be treated equally"[37] in ensuring that same-sex couples would have the same parental rights as heterosexual couples.[38] This effectively solved the issue of being able to have two same-sex partners listed on a child's birth certificate, allowing both partners to gain automatic parental rights at the child's birth regardless of their gender (even though many American states still refuse to follow the Supreme Court's ruling).[39] To truly destabilise the "essential" characteristic of the nuclear family however, the legal processes that aimed to uphold the nuclear family's position must be corrupted, as in the case of same-sex adult adoption.

During the AIDS pandemic of the 1970s and 1980s, gay couples routinely faced the issue that if one of them passed away, the surviving partner would have no legal right to claim any familial relationship to the deceased. This left any inheritance rights and estate plans of the deceased to their biological relatives, who often would not fulfill the wishes of the deceased due to prejudice. To compensate, same-sex couples "used adult adoption to create family relationships and to ensure inheritance and property rights from the early 1980s"[40] until the ruling in *Obergefell*. Through the adoption of each other, the same-sex couple were granted "benefits such as creating heirs, 'next of kin' rights, and related estate-planning strategies; securing insurance benefits; creating a sort of "pseudo-marriage" for homosexuals; allowing recovery in tort; and circumventing housing restrictions"[41] to form a legally recognized family unit.

---

[36] See *Pavan v Smith*, 137 S. Ct. 2075, 2079 (2017) [*Pavan*].
[37] See Labrie, *supra* note 34 at 1459.
[38] See *Pavan*, *supra* note 36.
[39] See e.g. *Roe v. Patton*, 2015 WL 4476734, *3 (D. Utah 2015); *McLaughlin v Jones*, 243 Ariz. 29 (2017) (holding that Arizona's gendered marital presumption had to be applied in a gender neutral manner); *Strickland v Day*, 239 So.3d 486 (Miss. 2018); *Hunter v Rose*, 463 Mass. 488 (2012).
[40] See Robert Keefe, "Sweet Child O' Mine: Adult Adoption & Same-Sex Marriage in the Post-Obergefell Era" (2017) 69:6 Fla L Rev 1477 at 1478.
[41] See Mandi Rae Urban, "The History of Adult Adoption in California" (2000) 11:1 J Contemp Legal Issues 612 at 612. See also Gwendolyn L. Snodgrass, "Creating Family without Marriage: The Advantages and Disadvantages of Adult Adoption among Gay and Lesbian Partners" (1997) 36:1 Brandeis J Fam L 75; Walter Wadlington, "Adoption of Adults: A Family Law Anomaly" (1969) 54:4 Cornell L Rev 566.

Through the misappropriation of the regime of adoption, which sought to preserve the nuclear family unit,[42] the relationships of certain same-sex couples successfully managed to legally corrupt the idea of the nuclear family to their benefit. However, this created a moral dilemma for the state, who through their administration of adoption as a creature of statute,[43] had enabled the misappropriation of its purpose into facilitating "legalized incest."[44] This legal conundrum was a direct result of the state's own refusal to recognize families that did not conform to the heterosexual characterization of the nuclear family.[45] Though same-sex adult adoption was widespread in the 20th century,[46] with most American states authorising the procedure,[47] American states were now faced with a dramatic increase in cases of legal incest as more same-sex couples began to apply for such an adoption in the 1980s. In response, states and their judiciaries began denying applications for such adoptions and re-writing their laws.

In the case of *Re Adoption of Robert Paul P* the Court ruled against the attempted same-sex adult adoption, citing the lack of a true child-parent relation[48] between the two partners. This was a legal indication of the state's concern that same-sex couples were attempting to use adult adoption for the purposes of marriage. In another case, *Re Adoption of Swanson*, the Court rejected the application for adoption, arguing that resulting relationship would be in direct "violation to Delaware's incest statute."[49] This case once again demonstrates the concern of the American judiciary towards the broader moral effects of this queer misappropriation of the family on society. Interestingly, until the late 20th century there were no statutes in the U.S. which deemed sexual relations between adult adopted children to be incest.[50] It was only when same-sex couples begin to co-opt the regime of adoption to claim familial rights in the wake of the AIDS pandemic did many states rewrite their statutes surrounding adoption to include the relationship formed through adult adoption to be classified as incest.[51]

This corruption of the nuclear family from within and the resulting panic from lawmakers and the judiciary clearly parallels the effect that drag performance has towards gender. In performing the family via same-sex adult adoption through utilizing the legal regimes that sought to preserve the nuclear family, corruptive

---

[42] See Wadlington, *supra* note 41 at 567–70.
[43] See Urban, *supra* note 41 at 612.
[44] See Elon Green, "The Lost History of Gay Adult Adoption" (19 October 2015), online: *The New York Times Magazine* <http://www.nytimes.com/2015/10/19/magazine/the-lost-history-of-gay-adult-adoption.html>.
[45] See Peter N. Fowler, "Adult Adoption: A New Legal Tool for Lesbians and Gay Men" (1984) 14:3 Golden Gate U L Rev 667 at 669.
[46] See Wadlington, *supra* note 41.
[47] See Fowler, *supra* note 45.
[48] See *In Re Adoption of Robert Paul P.*, 471 N.E.2d 424, 426 (N.Y. 1984).
[49] See *In Re Adoption of Swanson*, 623 A.2d 1095, 1098-99, (Del. 1993).
[50] See Terry L. Turnipseed, "Adult Adoption of Lovers and Spouses to Help Ensure Their Inheritance: Fair or Foul?" in Robin Paul Malloy & Michael Diamond, eds, *The Public Nature of Private Property* (Burlington, VT: Ashgate, 2011) 209.
[51] See *ibid*.

misappropriations demonstrate that the nuclear family's status as the infallible primordial family model is unreliable. Through its vulnerability to queer performance, the nuclear family is shown to be merely a parody of the concept that is the family, a concept for which there is no original.

Restitution For Families That Could Not Be

The preceding section has detailed how LGBTQ individuals and families have effectively managed to subvert and co-opt the legal barriers they faced in claiming familial rights reserved for those who conformed to the heterosexual imagining of what the family should be. It is undeniable then that the legal developments surrounding same-sex marriage and the granting of parental rights for same-sex couples and LGBTQ individuals have acted to extend the equal, even if imperfectly so, application of familial rights towards all regardless of one's sexuality. However, formal legal equality fails to address the economic impact faced by LGBTQ individuals and their partners due their historical denial from default familial economic rights such as: inheritance, social security and insurance benefits, and spousal tax benefits, to name a few.

The following section will offer a comparison of Canadian and American efforts to go beyond legal equality for LGBTQ individuals and towards justice. This comparison will seek to demonstrate the reasoning behind why the attainment of legal equality is often framed as sufficient enough to right the historical discrimination and resultant economic impact experienced by LGBTQ individuals in the North American context. Though I recognize that the analysis offered in this article has focussed on the American context in discussing the legal effects that results from the privileged position the nuclear family holds within society, a look northward is necessary. Beginning with Canada, we will see how the judiciary has historically denied the existence of the economic and structural impact that LGBTQ individuals have experienced through being denied familial benefits under the law and how the fight for justice to rectify such impact has stalled with the legalization of same-sex marriage. Moving into the American context, we will see that while historical judicial attitudes on the topic of same-sex relations and familial rights reflect similar rationales as their Canadian counterparts, the fight for justice did not stop with the legalization of same-sex marriage. In fact, the American state has recently demonstrated a shift towards rectifying the systematic and economic barriers faced by LGBTQ individuals in a manner that seeks to provide restitution that goes beyond formal legal equality. Before proceeding into this analysis, I would like to highlight one concern that must be kept in mind when approaching the call towards achieving legal equality, and by extension restitution, for LGBTQ individuals who have been denied legal rights.

The institutions through which legal equality and restitution would be achieved have also been the same venue where discrimination against LGBTQ individuals has been upheld and legalised. It should not be surprising then to learn that alongside the legalization of same-sex marriage in the American context emerged a very vocal dissent against its legalization from within the LGBTQ community. The following list summarises

the major concerns of multiple American LGBTQ NGOs regarding the legalization of same-sex marriage:

1. On a cultural level, marriage means adopting heterosexual forms of family and giving up distinctively gay family forms and perhaps even gay and lesbian culture.
2. On a political level, winning marriage equality means either compromises that edit out noncouple family forms or the risk of political backlash that will delay changes that would benefit many other family structures.
3. On an ethical level, having and exercising the option to marry means creating a hierarchy of relationships within the GLBT community that will marginalize and stigmatize some families.[52]

Though these worries encompass three separate areas of culture, politics, and ethics, they share a common concern – that the assimilation of queer conceptions of family and relationships into a system dictated by cisgender heterosexual norms will contribute to the erasure of queer identity and culture.[53] Through the acceptance of queer relations via institutions, the ability to define and shape what queer relational configurations look like will be taken away from the queer community. In seeking to dismantle the master's house using the master's tools, one should be mindful of the possibility of contributing to one's continued subservience.

Canada – Stalled Justice

The case of *Egan v Canada* recognized "that lesbians and gay men were protected by the Charter of Rights, [however,] the [Supreme C]ourt simultaneously eviscerated that protection by saying the government had the right to discriminate anyway."[54] Jim Egan and his partner John Norris "Jack" Nesbit were a gay couple who had "had lived together since 1948 in a relationship marked by commitment and interdependence similar to that which one expects to find in a marriage."[55] Jim Egan, when he reached the age of 65 became eligible to receive old-age security and guaranteed income supplements under the *Old Age security Act*. However, when Jack applied, upon turning 60, for a spousal allowance under s. 19(1) of the *Act*[56] his application was denied because the relationship between the two men did not fall under the definition of "spouse" under s. 2 of the *Act*. Though the couple met every criterion for benefits in being common-law couple, s. 2 of the *Old Age security Act* limited the definition of a spouse to "a person of the opposite sex who is living with that person,

[52] See M. V. Lee Badgett, *When Gay People Get Married: What Happens When Societies Legalize Same-Sex Marriage* (New York: New York University Press, 2009) at 130.
[53] See *ibid* at 131–36.
[54] See barbara findlay, "Remembering the impact of Egan v. Canada" (16 June 2018), online: *Toronto Star* <www.thestar.com/news/insight/opinion/2018/06/16/remembering-the-impact-of-egan-v-canada.html>.
[55] See *Egan v Canada*, [1995] 2 SCR 513, headnote (the court obviously means heterosexual here) [*Egan*].
[56] See *Old Age Security Act*, 1985, c O-9, s 19(1).

having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife".[57]

In short, a majority of the court found that the denial of benefits to same-sex couples under s. 2 of the *Old Age Security Act* was constitutional and that it did not violate s. 15 of the *Charter of Rights and Freedoms*, which provided for "equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[58] La Forest J, writing for the majority, recognized the objective of the *Old Age Security Act* was to support and protect the legal institution of marriage which he described as:

> firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage.[59]

In arguing that the objective of the *Act* was for Parliament to promote heterosexual couples because they have the "capacity to procreate children and [who] generally cares for their upbringing [in society], and as such warrants support by Parliament to meet its needs,"[60] La Forest J made sexual orientation a moot point. Even though there was a clear denial of spousal benefits between Egan and Nesbit due to their sexual orientation, it was argued that the issue at hand was not their sexual orientation but rather that they were not able to serve the social purpose of procreation towards the replication of the nuclear family in which the legislature sought to uphold through the *Old Age Security Act.*[61] This made a *s. 15* analysis moot as the distinction made to exclude everyone but heterosexual couples was necessary to achieve the objective of the legislation, rendering it not discriminatory. However, it is evident that the focus on procreation shielded an underlying motivation of seeking to uphold heterosexuality as the default characterization of marriage. It is just too convenient that the *Old Age Security Act* sought to merely promote the social utility of procreation, an act that only individuals in a heterosexual relationship (whether it be in marriage or common-law marriage) could fulfil.

Though Jack Nesbit did not get the spousal benefits he deserved, this case has been described as losing the battle but winning the war with every subsequent case dealing with LGBTQ rights since relying on the majority opinion which set the precedent

---

[57] See *ibid*, s 2.
[58] See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15(1).
[59] See *Egan*, *supra* note 55 at 515.
[60] See *ibid* at 537.
[61] See *ibid* at 539.

that discrimination based on sexual orientation was contrary to the Charter.[62] Take for example the case of *M v H* in 1999 where the Supreme Court of Canada ruled that same-sex families have the same rights as opposite-sex families.[63]

In this case, two women who had been in a common-law relationship had split. M proceeded to seek spousal support from H, in turn challenging that the exclusion of same-sex couples from the definition of common-law spouse under s. 29 of the *Ontario Family Law Act*.[64] The court in applying *Egan* found that the Family Law Act was discriminatory writing that:

> The exclusion of same-sex partners from the benefits of s. 29 promotes the view that M., and individuals in same-sex relationships generally, are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances. Such exclusion perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence.[65]

"This important decision found that it was constitutionally imperative under the Canadian Charter for laws to provide equal treatment of same-sex common-law couples and opposite-sex common-law couples"[66] with the Supreme Court of Canada calling "upon the lawmakers of Canada to rectify all Canadian laws, rather than force gays and lesbians to resort to the Court."[67]

Lawmakers would respond to this call six year later, passing the *Civil Marriage Act* in 2005 and legalizing same-sex marriage across the country. [68] It is unfortunate then, even with this illustrious judicial and legislative history leading up the legalization of same-sex marriage (which has by default granted familial benefits to LGBTQ individuals), there has been little development in rectifying the economic impact experienced by LGBTQ individuals who were historically excluded from accessing familial benefits afforded to heterosexual couples.

I argue that the legalization of same-sex marriage and its associated familial benefits through the legislative route was the nail in the coffin for the struggle towards rectifying the economic impact experienced LGBTQ individuals. In responding to the Supreme Court's call to rectify all Canadian laws that sought to discriminate against LGBTQ individuals, lawmakers, through passing the *Civil Marriage Act*, ended the potential for future discussion surrounding the topic of LGBTQ rights. With the call put

---

[62] See findlay, *supra* note 54; *Egan*, *supra* note 55.
[63] See *M v H*, [1999] 2 SCR 3 [*M v H*].
[64] See *Family Law Act*, RSO 1990, c F.3, s 29.
[65] See *M v H*, *supra* note 63 at 7.
[66] See R. Douglas Elliott, "The Canadian Earthquake: Same-Sex Marriage in Canada" (2003) 38:3 New Eng L Rev 591 at 608.
[67] See *ibid* at 610.
[68] See *Civil Marriage Act*, SC 2005, c 33.

forth by the Supreme Court in *M v H* effectively recognized and fulfilled, the issue of achieving equality for LGBTQ individuals was framed as effectively put to rest, including the question of any potential restitution for the lasting economic impact stemming from historical discrimination. There would be no more need for dialogue between the Courts and the legislature on the matter since there would be no more need for LGBTQ individuals to go to court to claim their rights as they were now enshrined in law.

Hogg and Bushell (now Bushell Thornton) argued that "[w]here a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue."[69] It is this lack of dialogue in the Canadian context surrounding the topic of LGBTQ rights that makes it difficult for LGBTQ individuals to advocate for restitution in response to the economic impact they have experienced through being denied familial rights. Since there is supposedly no more need for LGBTQ individuals to challenge for equal treatment under the law through the courts, there is a false belief that any further development on the issue would be gratuitous.

However, being granted legal equality in no way makes up for the lasting impact caused by the inability to rely on economic resources that heterosexual individuals were able to benefit from.

Though the Canadian Federal Government has apologized for their historical mistreatment towards LGBTQ individuals, passing the *Expungement of Historically Unjust Convictions Act*, little else has been done to rectify the structural and economic damage that stemmed from this history. The *Expungement of Historically Unjust Convictions Act* allowed for individuals who were convicted of homosexual acts to have their criminal records expunged while "destroy[ing] or remov[ing] any judicial record of the conviction,"[70] but the economic impact of those convictions and other legalized acts of discrimination does not address the fact that though M was able to claim spousal benefits, most Canadian LGBTQ individuals find themselves in Jack Nesbit's shoes instead. This leads us into examining why the struggle for equality LGBTQ individuals did not end at the altar.

United States of America – Restitution Towards Justice

A year after *Egan v Canada*, the United States Congress passed the *Defense of Marriage Act* (DOMA), defining marriage for federal purposes as a union between one woman and one man while permitting states to refuse recognition of same-sex marriage granted in other states.[71] In a manner even bolder than that of Canada's Parliament, the American Congress clearly sought to uphold the "supposed fundamental" heterosexual

---

[69] See Peter W. Hogg and Allison A. Bushell, "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)" (1997) 35:1 Osgoode Hall LJ 75 at 79. See also Jeff King, "Dialogue, Finality and Legality" (2018), online (pdf): *University of Oxford* <www.law.ox.ac.uk/sites/files/oxlaw/j_king_dialogue_finality_and_legality.pdf>.
[70] See *Expungement of Historically Unjust Convictions Act*, SC 2018, c 11, s 17.
[71] See *Defense of Marriage Act (DOMA)*, 1 USC § 7 (1996) [*DOMA*].

character of marriage. Though there were social and political calls for its repeal and amendment, the political will against same-sex marriages became even more resolute under George W. Bush's presidential administration. In 2004, Bush had proposed to amend to the United States Constitution to legally define marriage as a union between a woman and a man.[72] Fortunately for the cause of same-sex marriage, this never came to pass. By 2011, the Attorney General of the United States Eric Holder announced that s. 3 of DOMA (which defined marriage, for federal purposes, as a "legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."[73]) would no longer be defended in court due to its unconstitutional nature as deemed by then President Barack Obama.[74] However, even with this welcomed news, s. 3 of DOMA would still be upheld and enforced as law by his administration.[75] Though the debate around same-sex marriages in the American context is more nuanced and political charged than this article can provide an analysis for, what I want to highlight is that legislative attitudes surrounding the issue within the Canadian and American context belong in the same camp.

Like with the case of *M v H*, the tide against the restrictive definition of marriage as union between a woman and a man in the United States also began within the courts. In the case of *United States v. Windsor*, Edith Windsor sought to claim the federal estate tax exemption for surviving spouses as her wife, Thea Spyer, had left her entire estate to Windsor. However, she was barred from doing so by s. 3 of DOMA.[76] Akin to what *M* had experienced, Windsor was denied the benefit of a legislative regime on the basis that the state would not recognize the validity of their union due to their sexuality.

As if to mirror aspects of the Supreme Court of Canada's decision in *M v H*, the Supreme Court of the United State echoed the sentiment of how the exclusion of same-sex partners under the DOMA was a "deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution."[77] In not extending this protection to those in same-sex unions, it effectively relegated them as less worthy of recognition and protection than other citizens who choose to be in opposite-sex unions, infringing upon the individual's right to liberty. Anthony Kennedy J, for the majority, wrote that s. 3 of DOMA was "invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."[78] This meant that s. 3 of DOMA was now unconstitutional.

---

[72] See US, SJ Res 40, *Proposing an Amendment to the Constitution of the United States Relating to Marriage*, 108th Cong, 2004 (not enacted).
[73] See *DOMA*, *supra* note 71 at § 3.
[74] See Office of the Attorney General, "Statement of the Attorney General on Litigation Involving the Defense of Marriage Act" (23 February 2011), online: *The United States Department of Justice* <www.justice.gov/opa/pr/statement-attorney-general-litigation-involving-defense-marriage-act>.
[75] See *ibid*.
[76] See *United States v. Windsor*, 570 U.S. 744 (2013) [*Windsor*].
[77] See *ibid* at 25
[78] See *ibid* at 25–26.

However, unlike their Canadian counterparts, the United States Supreme Court did not call on American lawmakers to rectify their laws so that LGBTQ individuals would stop relying on the court system. Instead, as previously mentioned, the right to marry for same-sex couples only came as a creation of the United States Supreme Court itself, where they affirmed in *Obergefell v Hodges* that same-sex couples had the right to marry through the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in 2015.[79] Yet, though same-sex couples could now marry, it was not until 2016 that they were afforded full familial benefit associated with marriage, when the Supreme Court of the United States, in the case of *Pavan v Smith*, upheld that same-sex couples were entitled to the "constellation of benefits that the Stat[e] ha[s] linked to marriage."[80]

Though American lawmakers did not take up the call to legislate formal legal equality as their Canadian counterparts did through legalizing same-sex marriage, recent developments have demonstrated that they instead have gone beyond their neighbours to the north in addressing the structural challenges that LGBTQ individuals experience in being historically denied the economic benefits afforded by legal familial classification. Going beyond mere implementation of legal equality, the United States, under President Joe Biden, has laid the framework for a restitution regime for the families that could not be. Before exploring the intricacies of this novel framework, it is useful to highlight the legal history surrounding its emergence.

During Donald's Trump presidency, two class action suits were filed that challenged the Social Security Administration's denial of survivor's benefits to those affected by same-sex marriage bans. The first case of *Thornton v. Commissioner of Social Security* was filed on behalf of surviving partners who could never marry because their partner died before same-sex marriages were legalized in 2015.[81] The second case of *Ely v. Commissioner of Social Security Administration* was filed on behalf of surviving partners who were married for less than nine months before their partner died.[82] Though "survivor's benefits are only available if the marriage lasted more than nine months,"[83] Lambda Legal, who filed the lawsuits of behalf of the plaintiffs in each case, argued that "if an unconstitutional law prevented the couple from marrying until the end of one partner's life … the government had an obligation to alter this rule."[84] In summary, both cases were resolved when federal judges agreed that the denial of survivors' benefits was unconstitutional and ordered immediate payouts to the plaintiffs[85] while certifying "nationwide class actions on behalf of every other LGBTQ

[79] See *Obergefell*, *supra* note 32.
[80] See *Pavan*, *supra* note 36.
[81] See *Thornton v. Commissioner of Social Security Administration*, No. 18-cv-1409 (W.D. Wash. Nov. 25, 2020) [*Thornton*].
[82] See *Ely v. Commissioner of Social Security Administration*, No. 18-cv-557 (D. Ariz. May 27, 2020) [*Ely*].
[83] See Mark Joseph Stern, "The Biden Administration Is Paying Out Thousands to Victims of Anti-Gay Discrimination" (31 January 2022), online: *Slate* <slate.com/news-and-politics/2022/01/social-security-survivors-benefits-biden-marriage.html>.
[84] See *ibid.*
[85] See *Thornton*, *supra* note 81; *Ely*, *supra* note 82.

person injured by this exclusionary policy."[86] Though Trump's administration was slow to pay out these benefits and appealed these decisions in order to delay payment,[87] under Joe Biden's administration these appeals were swiftly dismissed.[88]

Beyond these dismissals, the Biden administration, in January 2022, proceeded to announce that Social Security benefits would now be opened to survivors of same-sex couples who could not marry.[89] In addition to the administration's plans to rectify the historical denial of tax refunds from LGBTQ individuals, permitting individuals to claim tax benefits dating back to 2004,[90] this expansion of Social Security benefits towards LGBTQ individuals who could not marry marks a distinct shift towards meaningful equality. Through directly addressing the economic effects that LGBTQ individuals face from being historically denied familial benefits, we begin to move beyond the idea that mere legal equality is sufficient towards rectifying the injustices of the past. Framing legal equality as the ultimate panacea often ignores the fact that the lived challenges LGBTQ individuals face do not disappear once they are considered equal under the eyes of the law.

Helen Thornton, the plaintiff in *Thornton v. Saul*, now receives $1,849 every month, which is twice what she received prior to being paid survivors benefits while also receiving a one-time $72,000 payment for the years that she was denied benefits.[91] "Anthony Gonzales, a gay man whose experience was cited in the Ely case, now receives $1,800 every month, in addition to a one-time payment of $90,000."[92] For these individuals, these payments represent more than what they were owed;

> [B]oth Johnson[93] and Gonzales describe having been in economically precarious situations prior to receiving surivor's benefits. Gonzales lost his job soon after his partner died and had trouble finding another, while Johnson "turned to pet-sitting" to supplement her benefits, living "frugally" and being unable to visit family often. They both fit into the broader

---

[86] See Stern, *supra* note 83.
[87] See *Ely v. Commissioner of Social Security Administration*, No. 20-16427 (9th Cir.) (appeal); *Thornton v. Commissioner of Social Security Administration*, Nos. 21-35067 & 21-35068 (9th Cir.) (appeal).
[88] See *Ely v. Commissioner of Social Security Administration*, No. 20-16427 (9th Cir.) (Stipulation for Voluntary Dismissal); *Thornton v. Commissioner of Social Security Administration*, Nos. 21-35067 & 21-35068 (9th Cir.) (Stipulation for Voluntary Dismissal); Brian H. Fletcher, "U.S. Department of Justice Office of the Solicitor General to The Honorable Nancy Pelosi" (2021), online (pdf): *U.S. Department of Justice Office of the Solicitor General* <www.justice.gov/oip/foia-library/osg-530d-letters/530d_letter/download>.
[89] See Paula Span, "Social Security Opens to Survivors of Same-Sex Couples Who Could Not Marry" (23 January 2022), online: *The New York Times* <www.nytimes.com/2022/01/23/health/social-security-same-sex.html>.
[90] See "LGBTQ Nation: Joe Biden's Build Back Better Act will give tax refunds to some same-sex couples" (18 November 2021), online: *Institute on Taxation and Economic Policy* <itep.org/lgbtq-nation-joe-bidens-build-back-better-act-will-give-tax-refunds-to-some-same-sex-couples/>.
[91] See Span, *supra* note 89; James Factora, "The Biden Administration Is Paying Survivors Benefits to LGBTQ+ Elders" (1 February 2022), online: *them* <www.them.us/story/biden-administration-survivors-benefits-lgbtq-seniors>.
[92] See Factora, *supra* note 91.
[93] Note: Johnson was Anthony Gonzales' spouse.

demographic of LGBTQ+ elders, who are disproportionately more likely to experience financial hardship.[94]

Within the American context, nearly a third of LGBTQ individuals aged 65 and older live "at or below 200% of the federal poverty level,"[95] in no small part due to their historical exclusion from the legislative economic benefits afforded by default to heterosexual individuals. It is this economic precocity faced by older LGBTQ individuals which makes the Biden's administration plans so monumental. In institutionalizing, in a legal sense, meaningful equality through restitution that actively seeks to rectify the structural and economic challenges LGBTQ individuals face due to historical discrimination, we can move beyond equality and towards justice.

The American example demonstrates that true equality necessitates justice for the families that could not be, offering a model for what a restitution regime can look like for other countries which have legalized same-sex marriage. It also provides an example as to the scale of positive impact such a regime could have. However, what determines why such a regime has emerged in the United States and not in Canada? I argue that the difference lies in the path same-sex marriage took to become recognized in each context. Unlike in Canada, in the United States same-sex marriage was a creation of the courts, allowing the judiciary and state to remain in dialogue over the general issue of advancing LGBTQ rights. To reiterate Hogg's and Bushell's scholarship, since the judicial decision to legalize same-sex marriage remains open to legislative scrutiny within the United States, the narrative of advancing LGBTQ rights remains unfinished.[96] A sense of finality via the legislature on the topic same-sex marriage has never occurred.

Though arguments can be made that by Biden's administration, in response to the Supreme Court of the United States ruling, attempting to rectify the economic impact felt by LGBTQ individuals from being denied Social Security benefits would end the dialogue as well, this would be a mistaken assumption. The regime set up by the administration merely concerns itself with Social Security and tax benefits within the context of same-sex marriage, not the matter of same-sex marriage itself. It is this limited scope of concern that keeps the dialogue between the judiciary and legislature on the topic of same-sex marriage ongoing and why further advocacy on issues associated with same-sex marriage continues in the United States, even if it is piecemeal.

Whether this is the ideal way forward for the further attainment of rights for LGBTQ individuals is not a judgment that this section seeks to make. This section merely seeks to emphasize that restitution is both possible and required to work towards meaningful justice for the historical discrimination experienced by LGBTQ

---

[94] See Factora, *supra* note 91.
[95] See Movement Advancement Project and SAGE Advocacy & services for LGBT Elders, "Understanding Issues Facing LGBT Older Adults" (2017) at 2, online (pdf): *Movement Advancement Project* <www.lgbtmap.org/file/understanding-issues-facing-lgbt-older-adults.pdf>.
[96] See Hogg & Bushell, *supra* note 69.

individuals. I also argue that further development surrounding restitution for the economic impact experienced by LGBTQ individuals is possible within the Canadian context, if there is a recognition from the state that legal formal equality is merely the first step towards justice. In reframing the attainment of legal equality as only such, rather than as a final chapter, the conversation surrounding what meaningful justice for LGBTQ individuals should look like can be resurrected, hopefully with an eye towards restitution.

Conclusion

This article has identified three forms of queer misappropriations of the nuclear family in seeking to interrogate the nuclear family's privilege position as the default united of legal mobility and rights. In doing so, it has explored how LGBTQ individuals have utilized features of the very same discriminatory legislative regimes to access, at least in part, the legal and economic familial benefits that these regimes sought to deny them from.

This article has also advanced how even with the legalization of same-sex marriage in the North American context, which in theory has granted the equal application of familial benefits to all, the economic impact suffered by LGBTQ individuals as result of historical discrimination remains. From this, the article has tried to explore what if anything can be done to rectify this impact.

In analysing the history surrounding the legalization of same-sex marriage in the Canadian and American context it has attempted to recognize the limiting effect of legalization via legislation. This comparison has also highlighted what a potential model of state-led restitution can look like, arguing for a model that not only seeks to right the historical discrimination experienced by LGBTQ individuals but that also addresses its associated economic effects. In doing so, I aimed to demonstrate that the fight for equality for LGBTQ individuals who have been denied familial benefits does not end with the bang of the gavel, the ratification of an act, or at the altar. Rather, it merely signals the beginning of the greater task of achieving justice, which requires rectifying the structural and economic challenges that LGBTQ individuals continue to face as a result of being historically denied familial rights.

In summary, I would like to invite the reader to challenge their own perceptions of the family and to fully embrace the possible uncomfortable realization that the idea of family has always been in flux. By being confronted with the idea that one's own family is merely one of many performances of what a family can be, and in recognizing the possibility of what a family can be, one can seize the opportunity to truly reflect on whether one is happy with what's on stage.

Bibliography

LEGISLATION (CANADA)

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
Civil Marriage Act, SC 2005, c 33.
Expungement of Historically Unjust Convictions Act, SC 2018, c 11.
Family Law Act, RSO 1990, c F.3.
Old Age Security Act, 1985, c O-9.

LEGISLATION (UNITED STATES OF AMERICA)

Defense of Marriage Act (DOMA), 1 USC § 7 (1996).
US, SJ Res 40, *Proposing an Amendment to the Constitution of the United States Relating to Marriage*, 108th Cong, 2004.

JURISPRUDENCE (CANADA)

Egan v Canada, [1995] 2 SCR 513.
M v H, [1999] 2 SCR 3.

JURISPRUDENCE (UNITED STATES OF AMERICA)

Ely v. Commissioner of Social Security Administration, No. 18-cv-557 (D. Ariz. May 27, 2020).
Ely v. Commissioner of Social Security Administration, No. 20-16427 (9th Cir.) (appeal).
Ely v. Commissioner of Social Security Administration, No. 20-16427 (9th Cir.) (Stipulation for Voluntary Dismissal).
Hunter v Rose, 463 Mass. 488 (2012).
In Re Adoption of Robert Paul P., 471 N.E.2d 424, 426 (N.Y. 1984).
In Re Adoption of Swanson, 623 A.2d 1095, 1098-99 (Del. 1993).
McLaughlin v Jones, 243 Ariz. 29 (2017).
Obergefell v Hodges, 135 S. Ct. 2584, 2604-05 (2015).
Pavan v Smith, 137 S. Ct. 2075, 2079 (2017).
Roe v Patton, 2015 WL 4476734, *3 (D. Utah 2015).
Strickland v Day, 239 So.3d 486 (Miss. 2018).
Thornton v. Commissioner of Social Security Administration, No. 18-cv-1409 (W.D. Wash. Nov. 25, 2020).
Thornton v. Commissioner of Social Security Administration, Nos. 21-35067 & 21-35068 (9th Cir.) (appeal).
Thornton v. Commissioner of Social Security Administration, Nos. 21-35067 & 21-35068 (9th Cir.) (Stipulation for Voluntary Dismissal).
United States v. Windsor, 570 U.S. 744 (2013).

MONOGRAPHS

Bailey, Marlon M., "Gender/Racial Realness: Theorizing the Gender System in Ballroom Culture" (2011) 37:2 Feminist Studies: Race and Transgender Studies 365.
Bala, Nicholas & Megan Thomas, "Who is a Parent'? 'Standing in the Place of a Parent' & Canada's Child Support Guidelines S.5" (2007) Queen's University Legal Studies Paper No. 07-11.
Badgett, M. V. Lee, *When Gay People Get Married: What Happens When Societies Legalize Same-Sex Marriage* (New York: New York University Press, 2009).
Burgess, Ernest W., "The Effect of War on the American Family" (1942) 48:3 American Journal of Sociology 343.
Butler, Judith, *Bodies That Matter: On the Discursive Limits of "Sex"*, (New York: Routledge, 1993).
Butler, Judith, *Gender Trouble: Feminism and the Subversion of Identity*, (New York: Routledge, 1999).
Coontz, Stephanie, *The Way We Never Were: American Families and The NostalgiaTrap* (New

York: Basic Books, 1992).
Elliott, R. Douglas, “The Canadian Earthquake: Same-Sex Marriage in Canada” (2003) 38:3 New Eng L Rev 591.
Fowler, Peter N., "Adult Adoption: A New Legal Tool for Lesbians and Gay Men" (1984) 14:3 Golden Gate U L Rev 667.
Gash, Alison & Judith Raiskin, “Parenting without Protection: How Legal Status Ambiguity Affects Lesbian and Gay Parenthood” (2018) 43:1 Law & Soc Inquiry 82.
Greenberg, Kae, “Still Hidden in the Closet: Trans Women and Domestic Violence” (2012) 27:2 Berkeley J Gender L & Just 198.
Hogg, Peter W., and Allison A. Bushell, “The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)” (1997) 35:1 Osgoode Hall LJ 75 at 79.
Hoople, Terry, “Conflicting Visions: SM, Feminism, and the Law. A Problem of Representation” (1996) 11:1 CJLS 117.
Keck, Thomas M., “Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights” (2009) 43:1 Law & Soc’y Rev 151.
Keefe, Robert, “Sweet Child O' Mine: Adult Adoption & Same-Sex Marriage in the Post Obergefell Era” (2017) 69:6 Fla L Rev 1477.
Labrie, Maia, “Two Legal Mothers: Cementing Parental Rights for Lesbian Parents in Colorado” (2020) 91:4 U Colo L Rev 1247.
McDermott, Elizabeth, “Avoiding Shame: Young LGBT People, Homophobia and Self Destructive Behaviours” (2008) 10:8 Culture, Health & Sexuality 815.
Murdock, George Peter, *Social Structure* (New York: The Free Press – A Division of the Macmillan Company, 1949).
Ochiai, Emiko, “Introduction: Reconstruction of Intimate and Public Spheres in Asian Modernity” in Emiko Ochiai & Leo Aoi Hosoya, eds, *Transformation of the Intimate and the Public in Asian Modernity* (Leiden: Brill, 2014) 1.
Phillips II, Gregory et al, “House/Ball Culture and Adolescent African-American Transgender Persons and Men Who Have Sex with Men: A Synthesis of the Literature” (2011) 23:4 AIDS Care 515.
Pollack, David H., “Forced Out of the Closet: Sexual Orientation and the Legal Dilemma of ‘Outing’” (1992) 46 U Miami L Rev 711.
Popenoe, David, “Breakup of the family: Can we reverse the trend?” in K. Finsterbusch & G. McKenna, eds, *Taking Sides: Clashing Views of Controversial Social Issues* (Guilford, CT: Dushkin, 1992) at 106.
Rasmussen, Mary Lou, “The Problem of Coming Out” (2004) 43:2 Theory Into Practice 144.
“Rosie the Riveter” in Lynne E. Ford, ed, *Encyclopedia of Women and American Politics* (New York: Facts On File, Inc. – An imprint of Infobase Publishing, 2008).
Snodgrass, Gwendolyn L., "Creating Family without Marriage: The Advantages and Disadvantages of Adult Adoption among Gay and Lesbian Partners" (1997) 36:1 Brandeis J Fam L 75.
Stitt, Alex, *ACT for Gender Identity: The Comprehensive Guide*, (London: Jessica Kingsley Publishers, 2020).
Turnipseed, Terry L., “Adult Adoption of Lovers and Spouses to Help Ensure Their Inheritance: Fair or Foul?" in Robin Paul Malloy & Michael Diamond, eds, *The Public Nature of Private Property* (Burlington, VT: Ashgate, 2011) 209.
Urban, Mandi Rae, "The History of Adult Adoption in California" (2000) 11:1 J Contemp Legal Issues 612.
Wadlington, Walter, “Adoption of Adults: A Family Law Anomaly” (1969) 54:4 Cornell L Rev 566.
Woods, John, “’Leave to Beaver Was Not a Documentary’: What Educators Need to Know About the American Family” (1995) 24:1 American Secondary Education 2.
Woods, Jordan Blair, “LGBT Identity and Crime” (2017) 105:3 Cal L Rev 667.

ONLINE SOURCES

Cunningham, Michael, "The Slap of Love", online: *Open City Magazine & Books* <https://opencity.org/archive/issue-6/the-slap-of-love>.

Factora, James, "The Biden Administration Is Paying Survivors Benefits to LGBTQ+ Elders" (1 February 2022), online: *them* <www.them.us/story/biden-administration-survivors-benefits-lgbtq-seniors>.

Findlay, Barbara, "Remembering the impact of Egan v. Canada" (16 June 2018), online: *Toronto Star* <www.thestar.com/news/insight/opinion/2018/06/16/remembering-the-impact-of-egan-v-canada.html>.

Fletcher, Brian H., "U.S. Department of Justice Office of the Solicitor General to The Honorable Nancy Pelosi" (2021), online (pdf): *U.S. Department of Justice Office of the Solicitor General* <www.justice.gov/oip/foia-library/osg-530d-letters/530d_letter/download>.

Green, Elon, "The Lost History of Gay Adult Adoption" (19 October 2015), online: *The New York Times Magazine* <http://www.nytimes.com/2015/10/19/magazine/the-lost-history- of-gay-adult-adoption.html>.

King, Jeff "Dialogue, Finality and Legality" (2018), online (pdf): *University of Oxford* <www.law.ox.ac.uk/sites/files/oxlaw/j_king_dialogue_finality_and_legality.pdf>.

"Legal Recognition of LGBT Families" (2019) at 2, online (pdf): *National Center for Lesbian Rights* <https://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf>.

"LGBTQ Nation: Joe Biden's Build Back Better Act will give tax refunds to some same-sex couples" (18 November 2021), online: *Institute on Taxation and Economic Policy* <itep.org/lgbtq-nation-joe-bidens-build-back-better-act-will-give-tax-refunds-to-some-same-sex-couples/>.

Malinowski, Bronislaw, *The Family Among the Australian Aborigines* (London: University of London Press, 1913), online (pdf): <https://www.berose.fr/IMG/pdf/malinowski_1913 the_family_among_the_australian.pdf>.

Movement Advancement Project and SAGE Advocacy & services for LGBT Elders, "Understanding Issues Facing LGBT Older Adults" (2017) at 2, online (pdf): *Movement Advancement Project* <www.lgbtmap.org/file/understanding-issues-facing-lgbt-older-adults.pdf>.

Office of the Attorney General, "Statement of the Attorney General on Litigation Involving the Defense of Marriage Act" (23 February 2011), online: *The United States Department of Justice* <www.justice.gov/opa/pr/statement-attorney-general-litigation-involving- defense-marriage-act>.

Roland, Catherine B. & Larry D. Burlew, eds, "Counseling LGBTQ Adults Throughout the Life Span" (2017) at 17, 81, online (pdf): *American Counseling Association* <https://www.counseling.org/docs/default-source/default-document library/counseling-lgbtq-adults-throughout-the-life-span-final.pdf?sfvrsn=2>.

Span, Paula, "Social Security Opens to Survivors of Same-Sex Couples Who Could Not Marry" (23 January 2022), online: *The New York Times* <www.nytimes.com/2022/01/23/health/social-security-same-sex.html>.

Stern, Mark Joseph, "The Biden Administration Is Paying Out Thousands to Victims of Anti-Gay Discrimination" (31 January 2022), online: *Slate* <slate.com/news-and- politics/2022/01/social-security-survivors-benefits-biden-marriage.html>.

"The History of the 'Nuclear Family'", online: *Miriam Webster* <https://www.merriamwebster.com/words-at-play/nuclear-family-history-origin>.

MEDIA SOURCES (FILM)

Paris Is Burning, 1990, (Off-White Productions).