

Nonmarital Equality in a New Light

Author : Chao-Ju Chen

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Nausica Palazzo, *Marriage Apostates: Why Heterosexuals Seek Same-Sex Registered Partnerships*, __ **Colum. J. Gender & L.** __ (forthcoming, 2022), available at [SSRN](#).

The classic story of marriage equality figures same-sex couples' various maneuvers to enter the legal institution of marriage through the courts, claiming the right to be treated the same as opposite-sex couples and repudiating the counter-claim that same-sex couples ought to be treated differently. Its narratives are dominated by the first part of Aristotle's equality axiom "likes alike," yet haunted by the second part of the axiom: "unlikes unlike." Its counter-stories embrace diverse demands for nonmarriage equality, arguing for alternative forms and mechanisms of relationship recognition based on the objection to the supremacy of marriage and the Aristotelian axiom.

A UK couple, Steinfeld and Jidan, and an Austrian couple, Ratzenböck and Seydl, went to courts seeking legal recognition of their relationships in forms other than marriage. They are opposite-sex couples seeking to register for same-sex civil partnerships. Their court challenges reverse the equation in the classic marriage equality model. Here are opposite-sex couples demanding to be treated like same-sex couples, not the other way around. Their stories became part of the emerging case law in Europe that is the subject of Nausica Palazzo's article *Marriage Apostates: Why Heterosexuals Seek Same-Sex Registered Partnerships*.

Marriage Apostates stands out in the scholarship of nonmarriage equality for its choice of subject and its pragmatic proposal for incremental change. Shedding light on this under-noticed development across Europe, Palazzo gives it meaning that eases the assimilation concerns about the Aristotelian axiom, provides a systematic analysis of mobilization strategy, and demonstrates how litigations seemingly upholding the "likes alike" equation bear the potential of being a driving force to challenge the very same equation.

Palazzo's article engages with nonmarriage equality on empirical and normative levels, focusing on the fate and role of nonmarital statuses. Her core claim is simple and clear: nonmarital statuses ought not to become ashes along with the birth of same-sex marriage; instead, nonmarital statuses can and should assume the role of promoting a more pluralist model of relationship recognition and offering protection for "apostates" of the archetypical marital family. Rather than pursuing "[transitional equality](#)" to address vulnerabilities that may arise in the process of transitioning from a nonmarital status to marriage, Palazzo's goal can be understood as advocacy for another kind of transitional equality: a framework for identifying the possibilities and necessities of retaining or creating nonmarital statuses during and after the transition to a world with same-sex marriage. This, in other words, is a request to resist the transition to a marriage-only world. Her particular emphasis in this article is nevertheless not same-sex couples' refusal to transit their nonmarital status to marriage but opposite-sex couples' demand to access nonmarital statuses.

Defined in this article as "all recognition models whereby two persons take affirmative steps to register their relationship and gain a bundle of legal benefits, rights, and obligations" (P. 3), nonmarital statuses can be distinguished into the "strong" and "weak" models in accordance with their proximity with marriage. The "strong" model resembles marriage except its label, exemplified by US civil unions, UK civil partnership, and registered partnership in the Netherlands. The "weak" model equips partners with some, but not all, of the rights and duties of the marriage package, exemplified by the *pacte civil de solidarite?* (Pacs) in France and *cohabitation le?gale* in Belgium. Conventional wisdom has it that nonmarital statuses under both strong and weak models were historically designed and enacted to offer a temporary, transitional, and second-class protection for same-sex couples as compromises in lieu of "full" marriage equality, i.e., equality as the same treatment of opposite-sex and same-sex couples concerning

marriage.

Understood as a manifestation of what Palazzo calls “the incrementalist paradigm or theory of small change” (P. 13), nonmarital statuses are often deemed useless, redundant, or even odious after the legalization of same-sex marriage. Their destiny, as what has happened in some US state laws, Ireland, Germany and Nordic countries, is to be phased out. (Pp. 15-16.) Echoing scholars who dissent from this conventional wisdom through alternative historical accounts of nonmarital statuses (initially pursued to embrace family pluralism) and normative arguments against [marital supremacy](#), Palazzo questions the erasure of nonmarital statuses and further argues for their expansion in a world with same-sex marriage. Her adventure begins with an empirical account, followed by a normative account, and ends with a philosophical and legal analysis of three approaches to expand same-sex partnerships.

Palazzo’s empirical account directs our attention to the growing interest of modern families in nonmarital statuses, evidenced by the increase of Pacs created by opposite-sex couples in France, *cohabitation le?gale* declared by opposite-sex couples in Belgium, and opposite-sex registered partnerships in the Netherlands after the legalization of same-sex marriage in these countries. Her elaboration of this phenomenon concentrates on the attractiveness of nonmarital statuses for couples qualitatively different from the archetypical marital couple. As evidence from France has suggested, *pacse?s* couples tend to be more liberal in terms of sexual practices, more egalitarian about gender norms, and more inclined to seek material benefits (e.g., keeping their finances separate, entering in to a less “traditional” financial arrangements) than symbolic recognition. (Pp. 20-22.) Couples who hold genuine objections to marriage (what Anne Barlow and Janet Smithson have dubbed the Ideologue couples) might prefer a strong model of nonmarital statuses over marriage when the major difference between the two is their symbolic labels. (P. 56.) This empirical account corresponds to Palazzo’s normative proposition that “nonmarital statuses are more attuned to the values of modern couples.” (P. 22.) Palazzo claims that in modern societies with egalitarian, secularizing, and individualism-driven trends, marriage does not pass muster: as an institution, it has roots in patriarchy and is not fully secularized; as a legal framework, it lacks flexibility; as an ideology, it is too “committing.”

The empirical facts and normative claims lay the ground for Palazzo’s core argument: nonmarital statuses deserve a fruitful future rather than a death knell. Again, she limits her deliberation to the availability of same-sex partnerships to opposite-sex couples. If this has not seemed to be a primary concern for American opposite-sex couples, it has begun to attract attention in Europe, where heterosexual couples have brought legal challenges in international and domestic courts. Palazzo identifies three main approaches: (1) a status recognition approach, which addresses the harms to opposite-sex couples as a group; (2) a utilitarian approach, which asserts the utilitarian values of the flexibility provided by nonmarital statuses; and (3) a legal-pluralistic approach, which claims the choice of nonmarital status itself is a value per se (“more is good”).

The status recognition approach concerns status recognition and the cultural harms of denying heterosexuals recognition through nonmarital statuses. The utilitarian approach emphasizes opposite-sex couples’ right to access nonmarital statuses due to their legally-relevant “need” for a more flexible legal regime other than marriage, whereas the legal-pluralistic approach celebrates legal pluralism and demands that “choices” or options in the menu of family regimes be made available to both same-sex and opposite-sex couples. Each approach has its upsides and downsides, which Palazzo carefully examines one by one, discussing their applicability in different institutional contexts. She acknowledges each approach’s advantages and limits, and comes to the conclusion that “there is no one-size-fits-all approach because nonmarital statuses differ in terms of their content, personal scope, or historical context in which they were enacted.” (P. 53.)

[Steinfeld and Keidan v. Secretary of State for Education](#) demonstrates the pros and cons of the status recognition and legal pluralistic approaches. The UK Supreme Court’s ruling adopts the legal-pluralistic approach and finds it discriminatory to grant same-sex couples two choices (marriage and civil partnership) while leaving opposite-sex couples with only one choice (marriage). Opposite-sex couples’ lack of choice is plain and simple discrimination in the form of different treatment, which proves the upsides of the legal-pluralistic approach. This view is, however, a partial reading of the case. Palazzo tracks down the original complaint and lower court decisions and finds signposts of the

status recognition approach. The parties expressed their opposition to marriage and argued for the right to establish a family under a regime that would reflect and recognize the equal nature of their relationship.

The High Court and Court of Appeal accepted the discrimination argument and recognized that exclusion *per se* is the problem. The status-recognition approach has a clear advantage of stressing status-based harms, which nevertheless invite the question of whether discrimination law should be symmetrical (protecting a universal class of persons belonging to a specific category) or asymmetrical (protecting only the subordinate groups). In a world of heterosexual normativity, a heterosexual couple's status-recognition claim may survive under the symmetrical discrimination theory but would be hard to sell under an asymmetrical one.

[Ratzenbo?ck and Seydl v. Austria](#), the 2017 European Court of Human Rights (ECtHR) case that was brought about by an Austrian heterosexual couple who sought to register for a civil partnership (the so-called Eingetragene Partnerschaft) in Austria when same-sex marriage was not legal, illustrates the utilitarian and the legal-pluralistic approaches. The couple expressed their opposition to marriage and demanded access to civil partnership, which, at the time when the case was before domestic courts, offered a more modern and "lighter" form of legal recognition (the weak model) that more aligned with their material interests. However, by the time the case reached the ECtHR, the legislature had significantly narrowed the gap between marriage and civil partnership, despite the remaining differences that made the civil partnership regime slightly more flexible compared to marriage. This change of law weakened the couple's argument for a different and suitable option. In response to the applicants' claim of discrimination based on sexual orientation, the Court conducted a comparative assessment, concluding that heterosexual couples were not in a comparable or relevantly similar situation to same-sex couples because the institutions of marriage and civil partnership were complementary in Austria law: opposite-sex couples could access marriage whereas same-sex couples were ineligible to marry and hence needed the recognition of civil partnership. Both the utilitarian approach and the legal-pluralistic approach failed in *Ratzenbo?ck*. The Court identified no comparable similarity between heterosexual and same-sex couples, finding no "need" for the couple to access civil partnerships for legal recognition because they could access marriage. The Court's claim that any formalized partnership will satisfy the European Convention on Human Rights (ECHR) also rendered the legal-pluralist approach unworkable under the ECHR framework.

Despite suggesting that there is no one-size-fits-all approach to expanding nonmarital statuses through litigation, Palazzo strives to produce guidelines for litigation strategies that can be applied in different settings. The work contains a particularly useful table classifying approaches to claiming equal partnerships. (P. 55.) She argues that the suitability of an approach in a particular context can be assessed according to the content of the nonmarital regime (whether it has distinct content or "mimics" marriage) and the approach's elasticity/inelasticity to difference between marriage and the nonmarital status. Under a "weak" model of nonmarital statuses, all approaches can potentially apply. Under a "strong" model, the utilitarian approach can hardly work due to the similarity between marriage and nonmarital statutes, but the status-based and the legal-pluralistic approaches can be pressed by stressing a couple's objection to marriage or arguing against the lack of "choice."

Palazzo goes beyond litigation strategies to argue for the role of litigation as a vehicle for legal reform (exemplified by the widening of nonmarital legal status to all couples in UK and Austria in the aftermath of heterosexual couples' litigation), stressing the need for creating nonmarital statuses that are meaningfully different from marriage to attract a large number of people, who might be driven by ideology, utilitarian ideals, or material interests. In a nutshell, heterosexual "marriage apostates" have a role in a post same-sex marriage world: bringing court challenges to disrupt the entrenchment of marital supremacy.

By identifying opposite-sex couples' potential as an important vector for change through strategic litigation to expand nonmarital statuses, Palazzo sheds light on the path toward nonmarital equality [after marriage equality](#). She demonstrates how a "likes alike" argument can facilitate the parties' success in *Steinfeld*, and an "unlikes unlike" argument can lead to the parties' defeat in *Ratzenbo?ck*. Her work also suggests how opposite-sex couples' demand for equal access to nonmarital statuses can be framed in ways other than embracing the "likes alike" equation and can

express objections to the equation of marriage to equal citizenship (to be equal is to have the same right to marry) even when it appears to echo the sameness equation.

Indeed, an argument for same treatment may produce asymmetrical consequences: same-sex couples' demand for the same right as heterosexual couples to marry risks conforming to heterosexual marital normativity despite its potential to transform marriage, whereas heterosexual couples' request for the same right as same-sex couples to register for civil partnerships bears the potential of weakening marital supremacy and equalizing nonmarital statuses. For future thoughts, the status recognition approach may gain strength from [the hierarchy-centered substantive equality theory](#) if it can identify the role of marriage in the dynamics of hierarchy, and, in turn, claim the harms that the legal institution of marriage imposes on nonmarital people as a group despite marriage's expansion to same-sex couples. So constructed, it would become an equality-based approach with a norm-challenging "[risky argument](#)" that can call attention to deeper problems underlining the legal institution of marriage and advocate a radical future for nonmarital equality.

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