Legal Struggles and Political Resistance: Same-Sex Marriage in Canada and the USA

Nancy Nicol and Miriam Smith

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Article

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Abstract This article explores the nature of legal struggles surrounding same-sex marriage in the USA and Canada, focusing specifically on the ways in which the cultural power of law is used to frame claims of injustice and to develop strategies of political resistance. Drawing on theoretical perspectives from the literatures on 'law and social movements' and 'legal consciousness', the article compares the claims-making discourse and strategies of same-sex couples seeking access to legal civil marriage in the USA and Canada. Based in part on interviews with same-sex couples, lawyers and political activists, the article demonstrates the ways in which the claims of law have been used to frame political strategies in places where same-sex marriage is 'illegal', the ways in which claims of legal equality are enacted, produced and explained by same-sex couples, and the ways in which equality discourse is deployed as a strategic political resource in the struggle over same-sex marriage.

Keywords Canada, lesbian and gay politics, same-sex marriage, social movements and law, USA

Nancy Nicol and Miriam Smith
York University, Canada

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Courts have played an important role in the evolution of same-sex marriage policies in the USA and Canada. Since the rise of the lesbian and gay movement in the 1970s, lesbians and gays in both the USA and Canada have used the courts to protect the right of freedom of association and expression of lesbian and gay organizations, to push for freedom from discrimination and exclusion and, most recently, to argue for the legal recognition of same-sex relationships, including the right to same-sex marriage. In the USA, these efforts occurred in a context in which social movements have a long history of using litigation as a strategic political resource to achieve social and political change. The African

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American civil rights movement is the most striking case and the landmark decision in *Brown* v. *Board of Education*[1] was a potent symbol of the power of law to legitimate the goals of a social movement, even though the actual effects of the *Brown* decision have been hotly debated in the scholarly literature (see Rosenberg, 1991). In Canada, political litigation also has a long history but, particularly since the advent of Canada's new bill of rights in 1982 (the Canadian Charter of Rights and Freedoms, hereafter, the Charter), courts have been increasingly empowered as policy actors and the legal arena has become entwined in political struggles.

This article explores the role of litigation in the struggle over same-sex marriage in the USA and Canada, focusing on the agency of same-sex couples and their allies in the marriage struggle. Drawing on interview material, the article provides a selective overview of key moments in recent same-sex marriage struggles, focusing on the role of law not only as an instrument for the achievement of change, but also as a cultural and political resource for claims-making by same-sex couples. The article contributes to debates on the legitimacy of same-sex marriage as a goal for the lesbian and gay movement (Beyond Marriage, 2006) and on the neoliberal implications of the current drive for legal relationship recognition (e.g. Richardson, 2005) by bringing in the voices of the litigants and lawyers who have undertaken the legal campaign in the most recent period. Building on the recent insights of scholars of 'legal consciousness', we show how same-sex couples in the USA and Canada create alternative forms of legality by getting married, even when it is not 'legal' to do so in the eyes of the state, how same-sex couples deliberately challenge their exclusion from marriage by using civil disobedience, media strategies and religious ceremonies to assert their right to marry, and how same-sex couples draw on the cultural power of law to make political claims about the equality and worth of their relationships.

The deliberate deployment of litigation as a political strategy to achieve social change has a long history in both the USA and Canada. In the modern era, the African American civil rights movement is a dominant exemplar of the perils and pitfalls of legal strategies as a means of effecting change. While the decision of the Supreme Court in *Brown* struck down the constitutional basis of legal segregation, it would be 20 more years before desegregation would be achieved, and today, many would argue that de facto if no longer de jure social and economic segregation continues in some sectors in the USA. Gerald Rosenberg (1991) famously asked if courts could act as effective vehicles of social change and concluded that litigation offered a 'hollow hope' to movements seeking change in the USA. In reply, others have argued that, although Rosenberg was right to point to the serious problems in the implementation and effectiveness of the *Brown* decision, the struggle for justice before the

courts can animate a social movement, give legitimacy to its claims and mobilize its followers. Therefore, although the 'hope' of legal change through the courts directly may be 'hollow', the indirect effects of legal mobilization may spur the building of a strong social movement and community institutions which, in the long run, may be the best progenitors and guarantors of social change and effective policy (Scheingold, 1989; for other views, see Hunt, 1990).

Recent work in the sociology of law broadens and deepens the consideration of the way in which social movements and activists are involved with law. Rather than viewing law as a strategic and instrumental resource that can assist social movements in wresting change from the state, the legal consciousness approach views law as bound up with the lived practices of everyday life. Law is understood as extending into the life of the everyday through its impact on 'consciousness' and the effect of law must be measured not simply in the content of official law but also in the ways in which social actors think, act and live with law beyond the official arena of legal engagement. Ewick and Silbey's pioneering (1998) work on legal consciousness explores the ways in which people approach law in different ways in everyday situations while Engel and Munger's (2003) work on disability in the USA assesses the effect of the Americans with Disabilities Act (ADA) for disabled Americans by exploring the meaning of the Act in the lives of disabled people. Kathleen Hull's (2006) study of same-sex marriage and commitment in the USA similarly used qualitative interviewing to demonstrate how same-sex couples draw on the power of law to legitimate their relationships, to change social attitudes and to create alternative forms of legality that challenge official law. Although the legal consciousness literature focuses on a wide range of practices of everyday life, it does not specifically examine the everyday life of political organizing. Ewick and Silbey provide a threefold schema of the ways in which people position themselves in relation to law in everyday life, such as the idea that people may position themselves 'with the law' by 'playing the game of law' (1998: 48), that they may position themselves 'before the law' (1998: 47) (reifying law) or that they may position themselves 'against the law' (1998: 48) (resisting law).

The insights of the legal consciousness approach can be readily applied to the exploration of social movement activism in the courts. In a range of examples drawn from recent same-sex marriage struggles in the USA and Canada from 2001 to 2004, this article builds on work in the legal consciousness tradition to provide an initial foray into an approach that asks how law informs the terrain of social movement activism, how concepts of 'legality' and 'illegality' are given meaning by actors seeking social change, how claims-making and acts of 'illegality' constitute political resistance and how alternative legal forms at the grass-roots level are

connected to other forms of social legitimation. Recent discussions of legal pluralism (Tamanaha, 2000) have recognized the importance of empirical evaluations of what is gained by the use of law by political and social claimants. This approach complements the social movement approach, based in sociology and as we hope to show, an understanding of the complexities of social movement engagement with plural forms of legality sheds new light on the sometimes polarized debates on the legitimacy of the struggle for same-sex marriage (Boyd and Young, 2003; Auchmuty, 2004; Beyond Marriage, 2006).

Methodological note

Our account of the same-sex marriage movement in the USA and Canada during this period is based on interviews conducted with the goal of creating a historical account. We did not sample the couples who were engaged in the same-sex marriage struggle; in the case of Canada, the group of couples involved in Charter-based litigation leading to same-sex marriage was relatively manageable in size and nearly all couples were interviewed for this project. In the case of the USA, fewer couples were interviewed relative to the total number of couples who were involved in litigation in different sites over this period. In addition, we also interviewed many of the lawyers on the Canadian side who were responsible for the cases, as well as the leaders of advocacy groups and religious organizations in both Canada and the USA. All interview subjects were identified through their public participation in the movement or in the legal challenges. Over 96 interviews were conducted in Canada and 26 in New York State and Massachusetts by Nancy Nicol. In addition some 38 rallies and events were documented on video and the material incorporated into documentary films (Nicol, 2005, 2006, 2008). Interview subjects consented to the publication of their names and, in all cases, to their appearing on film. Moreover, almost all of the Canadian interview subjects were already publicly identified with the same-sex marriage movement and many of the US interview subjects identified themselves in media reports of the events described later in this article.

'The summer of love': 2004 in New Paltz and beyond

In the USA, the most recent wave of litigation on same-sex marriage began in 1991 with the filing of a same-sex marriage case in Hawai'i by Ninia Baehr, her partner Genora Dancel and other same-sex couples. The Hawai'i marriage litigation eventually led to the *Baehr*[2] decisions of 1993 and 1996, rulings that had an important impact on the same-sex marriage

movement in the USA and Canada because they showed that courts in at least one jurisdiction were open to the recognition of same-sex marriage. The Hawai'i litigation was followed by same-sex marriage litigation in Alaska, Vermont and Massachusetts. In each case, courts ruled that the exclusion of same-sex couples from the benefits of marriage was unconstitutional under the state constitution, although the rulings differed in the remedy they offered for this constitutional problem. In Hawai'i and Alaska, the response to these rulings was the organization of anti-same-sex marriage campaigns by the religious right, which ended in the passage of state constitutional amendments to ban same-sex marriage, although Hawai'i passed a weak domestic partner benefit plan at the same time. In Vermont, the legislature responded by passing civil unions for same-sex couples in 1999 and, finally, in Massachusetts in 2003, same-sex marriage was legalized by court ruling, although opposition continues in that state and may yet result in the passage of a state constitutional amendment to ban same-sex marriage (see Pinello, 2006).

At the federal level, anti-same-sex marriage forces also organized to forestall the recognition of same-sex marriage and its 'spread' from one state to another. In 1996, Congress passed the Defense of Marriage Act (DOMA), which prohibits the recognition of same-sex marriages performed in the states from recognition in federal law, meaning that same-sex couples cannot access the benefits and obligations of marriage in US federal law. DOMA also provided that states did not have to recognize same-sex marriages which are legal in other states, although the constitutionality of DOMA has not yet been fully tested in the courts (see Strasser, 1997). In reaction to the legalization of marriage in Massachusetts in the wake of the *Goodridge*[3] decision in 2003, once again, same-sex marriage opponents organized same-sex marriage bans in many states, as well as 'mini-DOMAs' which prevent the recognition of same-sex marriages or civil union from other states by another state (Soule, 2004). At the federal level, same-sex marriage opponents organized for the Federal Marriage Amendment (FMA), which would enshrine the heterosexual definition of marriage in the US constitution. In his State of the Union address in January 2004, George Bush affirmed his support for 'traditional' marriage.

George Bush's statement galvanized a small-scale movement of civil disobedience across the USA during 2004 (Pinello, 2006). Gavin Newsom, the mayor of San Francisco, ordered City Hall to issue marriage licenses to same-sex couples, even though it was very far from clear that he had the legal right to do so or that the marriages performed would have any formal legal recognition. When asked why the straight mayor of San Francisco would undertake this action, Newsom explained that 'While some may believe that separate and unequal institutions are acceptable,

we will oppose intolerance and discrimination every step of the way. San Francisco is a city of tolerance and mutual respect and we will accept nothing less than full civil rights for all our residents' (San Francisco, 2004). Hundreds of couples lined up to obtain a marriage license, and people from across the USA sent flowers to same-sex newlyweds, even though the legal status of their unions was not certain. In reaction to Newsom's actions, in late February 2004, Bush indicated his support for the Federal Marriage Amendment and stated that marriage was 'the most fundamental institution of civilization' (Sandalow, 2004).

In response to these events, Jason West, the 26 year old mayor of New Paltz, New York, put his small town on the map of the same-sex marriage struggle in the USA by deciding to use his power as mayor to marry same-sex couples in February 2004, and was immediately inundated with same-sex couples who sought him out to perform the wedding ceremony. Working with lawyers from the American Civil Liberties Union (ACLU) and other groups, West decided that there was nothing in New York law that prohibited same-sex couples from marrying; in fact, the marriage law in New York made no mention of gender as a requirement for marriage and the state constitution required equal protection under the law. On 27 February, he performed 25 same-sex marriages on the steps of the New Paltz village hall. He describes the first day of the weddings:

> We didn't know if I was going to be arrested for doing this right off the bat, so my lawyer and myself and the ACLU lawyers were there kind of watching the police, seeing what they were going to do. We actually had a notary public and all the paperwork there for that first couple, because we figured by the time the cops make it through the crowd, we can at least get one set of paperwork signed and notarized and done, so we have at least one finished wedding . . . And so, we did that. As soon as I was done, I said, 'By the power invested in me by the State of New York, I declare you legally wed'. The crowd just went nuts and . . . the first couple hugged each other. Immediately the lawyers jump up on the podium with the paperwork and the notaries and frantically get everything signed, watching for the police to be shoving their way through the crowd . . . My lawyer leaned into me and said, 'They're not doing anything. I think they're going to let you do it. So, go; you're fine. Go do it'. So, we ended up marrying twenty-five couples. (West, 2004)

On 2 March 2004, West was arrested and charged with 19 counts of solemnizing a marriage without a license (later increased to 24 counts), forcing him to discontinue the marriages. But the political momentum was such that the marriages continued to be performed, first by two local Unitarian Universalist ministers, the Reverends Kay Greenleaf and Dawn Sangrey, and later by 20 different clergy who converged on the village of New Paltz from across the state. The New Paltz Equality Initiative, composed of townspeople and students from the local campus, sprang up

overnight to continue the marriages and support the mayor, dubbing the movement in New Paltz 'The Summer of Love' (Clement and Zinken, 2004).

The move to enact same-sex marriage in the absence of state recognition created an alternative form of legality from San Francisco to New Paltz, one that recognized and legitimated same-sex relationships and that challenged their exclusion from the existing formal-legal regime of marriage in the USA. By marrying couples even though it was illegal in the eyes of the state, West, Newsom and other straight allies engaged in a form of civil disobedience that has a long history in the USA. The move by straight leaders to challenge legal authority occurred in the context of the broader struggle by same-sex couples for legal recognition of their relationship, partnership and parenting rights. In every part of the USA, same-sex couples flooded in to take advantage of the possibilities of such marriages, lining the steps of churches and municipal offices, receiving flowers by well wishers sent from around the country, arranging hasty purchases of rings, flowers, and dress wear and spontaneously celebrating these newly legal partnerships, even though they were not formally legal.

In terms of Hull's (2006) analysis of same-sex couples, these acts demonstrated the cultural power of law in signifying the acceptance (or non-acceptance) of same-sex relationships and the political power of resistance to legal exclusion, expressed through the act of conducting an 'illegal' wedding ceremony. Existing social movement organizations in the USA that had long worked on the marriage issue, such as Lambda Legal and GLAD, sought to strategically exploit the political, legal and media opportunities that were generated by civil disobedience and new grass-roots organizations and networks, such as the New Paltz Equality Initiative, arose to maintain the momentum created by the initial actions of leaders. The Reverends Kay Greenleaf and Dawn Sangrey, who continued the marriages after West had been charged, explained how the holy unions performed in the Unitarian Universalist church for many years between same-sex couples morphed into a legal claim to marriage over this period:

Kay Greenleaf: What we had been calling holy unions (in the Unitarian Universalist Church), we're now calling marriages. [With holy unions], we didn't give the couple any documentation afterwards, any affidavit. [With these couples, we gave] an affidavit saying that the reason we were giving them this was because they couldn't get a license because the county or the town clerk wouldn't give them one. Now, we could have been giving affidavits all along.

Dawn Sangrey: Right! But we never made the claim before that the marriages were legal. And so, these were civil ceremonies. And following in Jason's lead, [where] they had been giving

> affidavits the first weekend, we just picked up with that. So the couples all have a piece of paper that's the closest we can come to a legal document. It's notarized. It has their name on it. It has our name on it, and so on . . . . And I guess our hope is that these are going to hold up in the end, that these are going to be legal documents that say that these people are truly married. We give them a contract which specifies things like who their witnesses are and whether or not they've ever been married before, and where they work; all the questions that are on the New York State Marriage License are in this contract. (Greenleaf and Sangrey, 2004)

Sangrey describes how she asserted the legality of the marriages as a deliberate challenge to the exclusion of same-sex couples from marriage when she was questioned by the District Attorney:

> Dawn Sangrey: [I]t was very clear to us that he (the District Attorney) did not want to charge us (with solemnizing a marriage without a license). He was uncomfortable. He tried very hard to get us to say we didn't mean it, basically. He said, you know, 'These were really just religious services, right? You didn't really mean to do this civil law thing'. . . . [We said] 'Oh, yes, indeed. We meant for this to be a legal wedding. That was the whole idea'. So, then I think, he felt as if he had no choice but to charge us. (Greenleaf and Sangrey, 2004)

For many of the same-sex couples who participated in the weddings in New Paltz, the desire to participate in a legal marriage, even though the marriage was not recognized by the state, stemmed from the desire to assert the dignity, worth and equality of same-sex relationships, a drive which, as Hull (2006) rightly emphasizes, must be read as an act of political resistance.

Inspired by the New Paltz example, the mayor in the nearby town of Nyack initiated a legal suit for the right to perform same-sex marriages (Shields and Streams, 2004) and a rally in New York City (NYC) was organized in part to protest the charges against West, Greenleaf and Sangrey. Clergy from various denominations conducted three same-sex marriages on the steps of New York City Hall, after being refused marriage licenses and organized other clergy to join with them in making a statement to do the same. In calling for solidarity among clergy on the same-sex marriage issue, Reverend Pat Bumgardner (senior pastor Metropolitan Community Church, NYC) and Rabbi Ayelet Cohen (Beth Shimchat-Torah) emphasized that, as clergy, they refused to be party to discrimination against lesbian and gay couples and linked this refusal to their own religious freedom (Bumgardner, 2004; Cohen, 2004). In making this

refusal, a range of clergy representing different faith communities rejected official legality and appealed to a higher morality:

> Rabbi Ayelet Cohen (Beth Shimchat-Torah): We clergy have performed and/or will perform religious weddings for same-sex couples. Any law or person who would prohibit us from doing so would deny us our religious freedom. Any law that denies same-sex couples the same right to civil marriage available to heterosexual couples discriminates against gay men and lesbians. We will not be complicit in this discrimination. Even if legislators and city clerks in this state interpret this law to deny marriage licenses to same-sex couples, we will continue to perform same-sex weddings. (Cohen, 2004)

In New York City, same-sex couples were camping out to obtain marriage licenses. The close proximity of Massachusetts meant that many New Yorkers could easily have gotten married in Massachusetts. However, the Republican governor of Massachusetts, Mitt Romney, declared that he would not permit out of state couples to marry in his state and that he had the right to prevent these marriages under a 1913 statute that had been designed to prevent interracial couples from other parts of the USA from marrying in Massachusetts. In the classic fashion of counter movements, many of the participants in New York City reacted very strongly to George Bush's endorsement of the constitutional amendment to ban same-sex marriage as well as to the arrests in New Paltz. Participants clearly saw a link between the opposition to same-sex marriage and the politics of the Bush administration. As Montel and Michelle Cherry-Slack, an African-American couple who were married on the steps of New York City Hall by Reverend Pat Bumgardner, explain:

> Michelle Cherry-Slack: [W]hen Bush came out with his proposal to amend the constitution, I think that really made people stand up and think that if he can say something like this so publicly, we need to get on the bandwagon. We need to do what we can do, as quickly as we can do it, recognizing at the same time that I think there are quite a few things that Bush doesn't want to talk about. So fine, we'll scapegoat the queer folks, we'll talk about same-sex marriage, we'll oppose same-sex marriage; when in fact, he should probably be talking about our economy. He should be talking about why so many people have died in Iraq after the cease-fire. These are things that he should be talking about, but instead, he's diverting attention. (Cherry-Slack and Cherry-Slack, 2004)

Frances King Stage and Michelle Thompson, an interracial couple, who married two months later as participants in the on-going marriages

organized by the New Paltz Equality Initiative, emphasized the links between marriage laws in Massachusetts and USA laws on interracial marriage:

> Michelle Thompson: [Mitt Romney] relied on a nineteenth-century law that would ban interracial marriages in the State of Massachusetts . . . So, you know, when the press was actually putting in context this notion of the historical connection of not allowing interracial marriages in the State of Massachusetts, I'm going, okay wait a minute, so you're going to rely on something that was slavery-based, that had a very clear agenda about the role of black people in society vis-à-vis white people and what that meant for our labor and our relationships and our bodies and our very being, to nullify gay marriage! What?! . . . I think gay marriage, for once I could go, well, maybe this is really radical. We are two people of the same gender, in our case we're interracial, and we're saying, that's not going to be acceptable to defend any of that. (Stage and Thompson, 2004)

The existence of anti-miscegenation laws in the USA is important to the legal recognition of same-sex marriage at the state level. Because jurisdiction over marriage in the USA belongs to the states while, in Canada, determination of capacity to marry is assigned to federal jurisdiction, state recognition of the changing marriage laws of other states as well as federal recognition of state laws is critically important for the same-sex marriage movement in the USA. While same-sex marriage had been permitted in Massachusetts, this recognition meant nothing in other states or in federal law, especially under the terms of the 1996 federal DOMA. The 1913 law cited by Governor Mitt Romney to block same-sex couples from out-of-state from marrying in Massachusetts was originally passed for the purpose of blocking interracial couples from marrying in Massachusetts. In other words, while Massachusetts permitted interracial marriage in 1913 (as it permits same-sex marriage today), the 1913 law prohibits couples from other states from marrying in Massachusetts unless their home states also permit such marriages. Today, the same law bans same-sex couples from states that do not recognize such marriages from coming to Massachusetts to get married (Koppelman, 2006). A lively debate continues in Massachusetts on the need to do away with the 1913 law (LeBlanc, 2007). Furthermore, anti-miscegenation laws remain on the books in some states, even though they have not been enforced since the US Supreme Court's decision in *Loving* (1967)[4], which ruled that such enforcement was a violation of the equal protection provisions of the Bill of Rights (Kennedy, 2004).

Hence, the alternative form of legality claimed by Newsom, West, other leaders and same-sex couples through civil disobedience was not simply the right to perform marriage ceremonies. Rather, the actions deliberately drew upon the power of official law to sanction its subversion. The couples not only sought out ministers and other religious officials to perform ceremonies, but also sought legal status for their ceremonies. The actions of Newsom and West meant that those officially charged by the state with the performance of the act of civil marriage had decided to interpret their legal right of sanctioning marriages on behalf of the state to include people who, as they very well knew, were not included. This was a deliberate challenge to same-sex marriage opponents and especially to George W. Bush's statement that he wished to permanently bar same-sex couples from marriage by way of a constitutional amendment. As in Hull's (2006) study, the couples who chose to get married, even though they knew that state and federal governments would not recognize such marriages were drawing on the power of law to assert the legitimacy of their relationships, to 'take a stand' and to help change social attitudes. As Dorann Cannon explains:

> I'm hoping in our life-time that people will definitely be more accepting, and, you know, legalize it. I think right now, it's just more ignorance for the fact of exactly what the relationship is all about. You know, too many stereotypes. But, I'm excited too. From what I'm told, hopefully within a year, New York is going to be legalizing it, which would be nice. If not, then [we] drive to Massachusetts in July. (Cannon, 2004)

Lisa Jackson, Nancy Passarella and their three children, Matthew, Amanda and Blake, a white family, also talked about making a stand:

> Lisa Jackson: It's validating that we can have a family, and that we can have the same traditional values that anybody else can have. That I can share love with anybody I want, and my children can have two parents and can be loved and be healthy and normal and well-adjusted. And making a stand for being who we are.
>
> Nancy Passarella: I don't know how quickly it will happen, but I think if more and more people see that this is just another part of life for people. It might take a year; it might take ten years; it might take twenty years, but it's the same as anything else I think. Whether it was voting, or slavery, or civil rights; it all took many years and a lot of time, but somebody has to start. (Jackson and Passarella, 2004)

In this way, the same-sex marriage movement in the USA in 2004 used direct challenges to law in the tradition of civil disobedience, directly challenging the exclusion of same-sex couples from the regime of official legal

recognition of conjugal status. By asserting that their relationships were equal to those of opposite sex couples, same-sex couples and their allies drew on the power of law as a cultural sanction, as a sign of social worth and approval while, at the same time, they subverted law through the performance of marriage ceremonies which were not accepted as strictly legal. While same-sex partnering ceremonies had been performed in many denominations for many years, these ceremonies and the actions of leaders such as Newsom and West, entailed a more direct confrontation with law's exclusion. By issuing marriage licenses, Newsom, West, and other leaders such as the Unitarian Universalist ministers asserted their right to directly participate in the creation of law, asserting that law rests on the community's consent to it (or rejection of it) and shifting the question of legal legitimacy away from the courts and toward the grass roots of the community.

Toronto: The MCCT marriages

In Canada, challenges to the legality of the marriage law also sought to establish alternative forms of legality as a strategy to provoke legal cases that would have a reasonable chance of success in the courts. In this section, we focus specifically on the marriages that occurred on 14 January 2001 in the Metropolitan Community Church of Toronto (MCCT). These marriages were 'illegal' in the sense that the law did not permit same-sex marriage at the time yet they did not involve the same spontaneous protests, demonstrations and civil disobedience as in the US case. Like MCC and Unitarian Universalists in the USA, MCCT had been conducting commitment ceremonies for many years. In 1999, following successful litigation by the Canadian lesbian and gay movement in the case of *M* v *H*[5] on the recognition of spousal rights and obligations for same-sex couples living together, the federal government passed legislation to recognize spousal rights for same-sex couples in federal jurisdiction. By the spring of 2000 same-sex marriage challenges representing different groups of couples had been launched in British Columbia and Ontario. These cases, along with an earlier case filed in Quebec, represented a multi-pronged legal attack on the heterosexual definition of marriage (Smith, 2005; Nicol, 2006).

An older case from the 1970s provided the legal strategy for same-sex marriage litigation in the 2000s, demonstrating the extent to which same-sex marriage has been a goal for some lesbians and gay men since the gay liberation movement emerged. Inspired by examples of same-sex marriages and commitment ceremonies reported in the *Advocate* in the early 1970s, Chris Vogel and Richard North, gay activists in Winnipeg, Manitoba, had applied for a marriage license in 1973. As North recounts:

> [M]arriage is about relationships, and, in those days, people tended to think of homosexuality as being about sex . . . The idea that homosexuals could fall in love and establish long-term stable relationships was something that was . . . foreign to the person in the street . . . [I]t was a very good issue because it focused specifically on same-sex relationships. Human rights were of course, the other big issue in those days. But that didn't focus on the core of homosexuality. Human rights were about a minority that just happened to be identified by sexual orientation, whereas, with marriage, obviously, homosexuality was central . . . So that was a great issue for public education. And that was our principal concern in those days – trying to change public attitudes about homosexuality. (North and Vogel, 2004)

In December 1973, Chris and Richard applied for a marriage license. An incredulous clerk laughed at them, asking them if their request was a prank. When they insisted that they were serious about their application, they were told it was not possible. At that stage, the minister of the local Unitarian Church agreed to marry Chris and Richard by proclaiming the banns, a process recognized in Manitoba, which permitted an accredited church to issue a marriage license after reading the banns for three successive weeks. In 1974, Chris Vogel and Richard North were married in the Unitarian Church in Winnipeg. However, as in similar American legal challenges of the 1970s, the province of Manitoba refused to register their marriage and Vogel and North's legal challenge was dismissed by the courts.[6]

The strategy of using the banns re-emerged early in this century as Queen's University law professor Kathy Lahey (2004) approached MCCT's minister, Reverend Dr Brent Hawkes, and MCCT's lawyer, Douglas Elliott, with the idea of performing same-sex marriages using the banns, thus using the ancient practices of the church to create an alternative form of legality for same-sex marriage, to draw public and media attention to same-sex spousal relationships, to use the power of the religion on the side of same-sex couples, rather than against same-sex couples and to spark a legal challenge that would test the state's reaction.

As Elliott pointed out:

> [we] wouldn't be attacking a Church. Normally the Church is attacking the gays, the gays are attacking the Church. It's the gays versus God. But in this case, it would highlight so beautifully that it's not about gays versus God, that there are different views on the issue. And people would have this wonderful image of people getting married. (Elliott, 2004)

As in the case of Newsom, West and others in the USA in 2004, the MCCT wedding in 2001 deliberately drew upon the power of official law to sanction its subversion. Hawkes believed that the public performative aspect of the marriage ceremony had the potential to have a broad social impact, especially on religious organizations opposed to same-sex marriage. As Hawkes explained:

> I think that the weddings have the potential to be a huge tool for changing attitudes . . . [T]he religious right knows that and that's why they are fighting this so hard. [T]hose battles when people have to choose between their fundamentalist church or their Catholic church and their son or daughter, we'll win. (Hawkes, 2004)

Moreover, Hawkes and Elliott consciously drew upon the status of the church to demonstrate that religious freedom also included the right to perform same-sex marriage, in contrast to the religious-based arguments that maintained that same-sex marriage was an affront to religious values. MCCT's case was particularly interesting from the standpoint of religious freedom.

> I thought that . . . Metropolitan Community Church [should] point out that the old definition of marriage was enforcing one Christian view of marriage on another group of people who didn't share that view . . . [W]e don't permit the Catholic Church to enforce its divorce view on people who don't share that view. And I thought this engaged . . . freedom of religion . . . [I]n addition to being a good platform to argue for equal marriage, it seemed to me that even if it was unsuccessful it would completely cut the legs out from under our religious opposition, because they couldn't say that we were attacking a religious institution. It would make it very plain to the court that this was a religious debate. And they would be forced to either say that we were right that it discriminated against us either on the basis of freedom of religion or that freedom of religion wasn't involved in the issue at all, that the people who complained that their religious freedom was being interfered with had to be wrong, because it had nothing to do with religion. (Elliott, 2004)

The next step was to find couples from the MCCT congregation who would be willing to step forward. Elaine and Ann Vautour and Joe Varnell and Kevin Bourassa agreed to be the representative couples. In seeking the right to marry, the couples' goal was to overcome the stigma of exclusion, and to overcome the legal barriers to equality as a precondition to overcoming social inequality. As Kevin and Joe explain, despite the fact that many of the 'tangible' benefits of marriage were available to same-sex couples in Canada at this time, the symbolic message of full legal civil marriage was of key importance:

> Kevin Bourassa: We saw a need to ensure that our government was not passing on the message that we were second-class citizens.
>
> Joe Varnell: Because same-sex couples that are not married have varying degrees of recognition already, equivalent to common law heterosexual couples who have chosen not to marry, some of the practical differences didn't seem huge. We had been together for the requisite time in Ontario, we had almost all of the same rights. We could adopt, we . . .

Kevin Bourassa: We had common-law status, which Bill C-23 delivered in Canada.

Joe Varnell: It's not just the tangible goods and goals. Those are the things that are easily remedied by statute, but resorting to remedy by statute alone sends the message that Kevin talked about [that] these relationships are inferior. They are of a different nature, because marriage is reserved for those privileged heterosexual unions. And as long as that stigmatization and difference existed, we were never going to get where we needed to go, which was beyond tolerance to acceptance. When we eventually have in all provinces and territories in this country the right to go to your City Hall, the right to get married, that will not end the ostracism in the community. It's cold comfort for a couple out in [small-town Alberta] . . . 'Oh great, we can go get married now. Does that mean our neighbors are going to treat us any differently and not have our windows smashed?' No, that's not going to end that. But until that legal barrier falls, we can't start to work on the second piece. (Bourassa and Varnell, 2004)

Douglas Elliott met with the couples and explained to them that their 'job was to be the "human" in human rights' and to 'talk over the heads of parliament, politicians and bishops, and convey from the heart how they were impacted by discrimination' (Bourassa in Bourassa and Varnell, 2004).

On the first Sunday in December of 2000 (International Human Rights Day), MCCT announced that they would be reading the banns and marrying two couples in the new year, on 14 January 2001. In proceeding with the reading of the banns and the marriages, MCCT interpreted the Ontario Marriage Act so as to override any objections to the marriages that were not specified in the Act, thus drawing upon the power of the law to subvert the barriers to legal recognition of same-sex marriage. Hawkes, describing his response to an objection said:

> He [someone in attendance] objects because [he says]: 'the Bible and every world religion condemns homosexuality and the historical and legal definition of marriage is a man and a woman and that's the way it should remain' . . . And so after [this objection] I said: 'The Ontario Marriage Act is clear and it is my duty to determine if this is a lawful objection or not and I rule that it isn't. And so having done the third reading of the banns, we'll be doing the weddings on the 14th of January. And again the place went nuts and there was a real celebration. It was a wonderful moment. (Hawkes, 2004)

Strategically, MCCT 'leaked [the announcement] to the CBC, and so the CBC were present for the announcement that we were going to publish the banns and it got a huge amount of attention immediately'

(Hawkes, 2004). The spacing out of the three readings of the banns and the actual marriages provided a strategy to mobilize support, build awareness and garner media attention. Elliott and Hawkes both believed strongly that, while there would undoubtedly be opposition and even the threat of physical violence, conducting the marriages would in itself act as a catalyst to public debate and that the image of two same-sex couples getting married would swing public opinion in favor of same-sex marriage. Their assessment was based in years of debates and activism in advancing LGBT rights. As Hawkes describes:

> When we announced in December 2000 that we were reading the banns, the media said to us, 'Something's happening in the public, something's shifting out there'. And I've been told in that six-week period from when we announced the banns until we did the wedding, was the biggest shift in public opinion on a social issue in Canada, in that short period of time. And part of it was it was the topic of discussion, it couldn't be avoided, there was a concentration of media attention. That's another example of how a shifting public opinion affects the Courts, they don't act in a vacuum. The political movement created the atmosphere where political action could occur. (Hawkes, 2004)

By the day of the marriages, 80 international news media were in attendance, including 22 television crews, still photographers, press journalists and newsmagazines. MCCT pulled out the first four rows of a section of pews to accommodate the cameras. The church and Reverend Hawkes had received threats of violence, and enlisted the support of Toronto police to act as security. Reverend Hawkes wore a bullet-proof vest under his clerical robes and undercover police were stationed throughout the church.

Despite the fact that the ceremonies conformed to the letter of the law as laid out in the Ontario statutes, the Ontario government and the federal government refused to register the marriages. That outcome had been anticipated by the couples, their lawyer and the Metropolitan Community Church of Toronto, and they launched a legal challenge against the federal and provincial governments to force the registration of the marriages. Elliott:

> We were very, very conscious that we were making history. And of course, the government of Ontario said, 'We're not going to register the documents. We're not going to accept that this was a valid wedding'. And so, we had anticipated that this might happen. Although interestingly they didn't try to stop the wedding, but they said they wouldn't accept the documents to be registered afterwards. And so, this was our cue to launch our lawsuit, which we did shortly thereafter, against the government of Canada and the government of Ontario to force the recognition of these marriages. (Elliott, 2004)

The MCCT lawsuit, along with the suit from other plaintiffs in Ontario, was joined in the *Halpern* case which, in June 2003, led to a decision from

the Ontario Court of Appeal in favor of the applicant same-sex couples and in favor of the immediate issuing of marriage licenses by Toronto City Hall. The decision also recognized the MCCT marriages retroactively to January 2001. This case was the key step in the evolution of the Canadian litigation on same-sex marriage. Following a reference case in the Supreme Court of Canada in which the court upheld the federal power to change the definition of marriage, same-sex civil marriage was fully legalized by the federal government in June, 2005 (see Smith, 2008).

Conclusions

In the USA and Canada, the same-sex marriage movement has used the courts as a critically important lever for the achievement of policy change. While there is a lively normative debate on the legitimacy of same-sex marriage as a goal for queer political movements in different national contexts (e.g. Auchmuty, 2004) and on the potential effects of same-sex marriage on gender relations (Polikoff, 1993) and neoliberalism (Boyd and Young, 2003; Richardson, 2005), this article has not engaged directly with that normative debate. Rather, our concern is with the ways in which litigants, lawyers and advocacy groups in different sites in Canada and the USA have engaged with law in pursuit of their goals.

In political science, sociology and socio-legal studies, courts and law are often viewed as instruments for the achievement of legal and policy goals. The work of scholars in the legal consciousness tradition suggests a different take on the relationship between social movements and legal change. In the view of legal consciousness scholars, law is constituted and produced at least in part through everyday engagement (Ewick and Silbey, 1998). This study of the political and legal struggles over same-sex marriage builds on Hull's (2006) work on legal consciousness and same-sex marriage, showing how same-sex couples draw on the power of law to assert the value of their relationships and their right to the duties and obligations of conjugal citizenship. Straight allies such as Gavin Newsom and Jason West, religious leaders of all denominations but, especially, liberal Protestants such as the Unitarian Universalists and Metropolitan Community Church and Jewish leaders from Reform congregations, grass-roots social movement organizations such as the New Paltz Equality Initiative, and activist lawyers and academics all formed part of what might be termed a same-sex marriage movement. This movement created new forms of legality through performing same-sex marriages outside the law, deployed classic social movement tactics such as using the media to create symbols and to attract public attention, and used law as a potent lever of political resistance.

As Hull's (2006) study emphasizes, in liberal democracies such as the USA, law is a powerful legitimating force and by claiming the power of

law – as when the Reverend Brent Hawkes declared his reading of the banns to be 'legal' or when Jason West and Gavin Newsom decided on their own to perform same-sex marriages – the same-sex marriage movement contributed to producing an alternative meaning of law. While, in the USA, this did not lead to policy and legal change recognizing same-sex marriage, the movement opened up a new space and a new debate over 'legality' in the recognition of same-sex relationship. In Canada, as we have seen, state authorities moved from a position of 'this is a prank, right?' in reaction to North and Vogel's marriage claim in 1973 to a position of recognizing the legitimacy of the legal and political claim of same-sex couples. This shows how the engagement of same-sex couples and their allies (both straight and LGBT) contributed to producing new sets of meanings around the concept of legal marriage over this period. The same-sex marriage movement uses the power and legitimacy of law to engage in political resistance and civil disobedience.

Although this study did not include a representative sample of same-sex couples, the claims of the litigating couples in this study and their views of social and political change resonate with the long-standing tactics of the lesbian and gay movement in the USA and Canada and their engagement with law in several key respects. The litigating couples in this study as well as the couples who married outside the official law saw their actions as contributing to public education and changing social attitudes. They saw changes in official law not as ends in themselves but as part of a broader set of social and attitudinal changes towards their families, personal relationships and their children. Leaders of the marriage movement in the USA as well as many of the litigating couples who were interviewed made explicit links between the same-sex marriage issue and the broader politics of the Bush administration as well as the example of the African American civil rights struggle. The issue of recognizing same-sex marriage across state lines and of banning certain types of marriages directly recalled the bans on interracial marriage in the USA and linked the movement for same-sex marriage to civil rights struggles for some couples as well as for some religious and community leaders. Furthermore, the couples in both countries echoed the findings of a recent British study of lesbian and gay attitudes toward marriage in claiming full equality with heterosexual couples as a right of citizenship (Harding, 2006). Through undertaking same-sex marriages outside official law as a tactic of civil disobedience, political resistance and litigation, the couples and their allies in this study exemplify the complex realities of the current same-sex marriage debate, calling our attention to the lived realities of same-sex couples who have engaged in myriad political challenges to their exclusion from official legal marriage.

By considering same-sex marriage as a social movement, rather than as a legal or theoretical construction, this article suggests the complex uses

of law and legal claims in the everyday life of social movements. In these movements in Canada and the USA, we find litigants, lawyers and advocacy groups who exemplify each of the three sides of legal consciousness as originally formulated by Ewick and Silbey (1998). Some advocates saw themselves as engaged in acts of resistance and civil disobedience (against the law), others saw themselves as making claims 'before the law' while others defined themselves as 'playing the game of law'. The complex positionings of these different forms of political action and claims-making add an additional layer to critiques of same-sex marriage. By drawing on the voices of the couples engaged in same-sex marriage litigation, we gain a grass-roots view of the forms of consciousness that are in play in this social movement and the ways in which agents themselves interpret their own actions. The understandings and interpretations of social actors as they construct their own meanings in legal claims-making must form part of our analysis of same-sex marriage, lest the voices of theorists completely drown out the voices of diverse and differently-situated same-sex couples who are creating and claiming new legal orders in everyday social movement activism.

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Notes

1. Brown v. Board of Education, 347 US 483 (1954)
2. *Baehr* v. *Lewin*, 852 P.2d 44 (1993) and *Baehr* v. *Miike*, Civ. No. 91–1394 (Haw. Cir. Ct. Dec. 3, 1996)
3. *Goodridge* v. *Dept. of Public Health*, 798 N.E.2d 941 (2003)
4. *Loving* v. *Virginia*, 388 US 1 (1967)
5. *M* v. *H* [1999] S. C. J. No. 23
6. *North* v. *Matheson* [1974] 20 R.F.L. 112 (Man. Co. Ct.) at 114

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Biographical Note

Nancy Nicol is a professor in the Visual Arts Department, York University, Canada. *Address*: Visual Arts Department, 237 Joan and Martin Goldfarb Centre for Fine Arts, York University, 4700 Keele St, Toronto, ON M3J 1P3 Canada. [email: nnicol@yorku.ca]

Miriam Smith is a professor in the School of Public Policy and Administration, York University, Canada. *Address*: School of Public Policy and Administration, York University, 4700 Keele St, Toronto, ON M3J 1P3 Canada. [email: mcsmith@yorku.ca]