Gay Is Good: The Moral Case for Marriage Equality and More

Chai R. Feldblum[†]

I. INTRODUCTION[1]

The struggle for marriage equality in this country is ripe for an intervention. If the effort continues along in the manner in which it has been headed, gay couples may or may not succeed in gaining access to civil marriage. But even if gay couples succeed in "getting marriage," the gay rights movement may have missed a critical opportunity—a chance to make a positive moral case for gay sex and gay couples. In other words, it will have missed the opportunity to argue that "gay is good."

Moreover, to the extent that the struggle for marriage equality focuses solely on achieving the right to *marry* because that is what a pure equality discourse calls for, the movement will also miss the chance to make a moral case for supporting the range of other creative ways in which we currently construct our intimate relations outside of marriage. And that would be as

---

[†] Professor of Law, Georgetown University Law Center. This Article began in 1996 and has gone through many revisions since that time. Early research assistants on this Article included Mason Emnett and John Gutierrez. Later research assistants included Michael Boucai, Lisa Gerson and Travis Ribar. Michael Boucai deserves particular credit for helping with this Article. I have been blessed with the insights of colleagues and friends—Robin West, Nan Hunter, Lama Abu-Odeh, Milton Regan, David Luban, Louis Michael Seidman, Sheila Kuehl, Matt Coles, Carrie Menkel-Meadow, William Rubenstein, Sharon Kleinbaum, Maggie Wenig, Urvashi Vaid, Miriam Feldblum, Anne Lewis, Paula Rubin, Mary Reed, Nan Mathis and Janlori Goldman. I benefited significantly in presenting the latest version of this piece at the Yale Law School symposium Breaking with Tradition: New Frontiers for Same Sex Marriage, where I learned additionally from William Eskridge, Ariela Dubler, Reva Siegal, Robert Post, Jon Davidson, Michael Bronski, Kate Kendell, Serena Mayeri, Mari Matsuda, and Katherine Franke.

1. This Article began when I participated in a symposium at Temple Law School entitled *Constructing Family, Constructing Change: Shifting Legal Perspective on Same-Sex Relationship.* My speech was published as an essay in the symposium volume. *See* Chai R. Feldblum, *A Progressive Moral Case for Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 485 (1998) [hereinafter *Progressive Moral Case*]. I later published an analysis of the 1997 congressional debate on the Defense of Marriage Act (DOMA). *See* Chai R. Feldblum, *The Limitations of Liberal Neutrality Arguments in Favor of Same-Sex Marriage*, in MADS ANDENAS ET AL., THE LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW (2002) [hereinafter *Liberal Neutrality Arguments*].

much of a missed opportunity as would be the lost opportunity of convincing the general public of the moral equivalence of gay and heterosexual sex.

Justice Antonin Scalia berated the Court majority in *Lawrence v. Texas* for having "signed on" to a "homosexual agenda"—by which Justice Scalia meant an agenda "directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct."[2] Justice Scalia's formulation correctly articulates, to my mind, what should be one of the top priorities on the "gay agenda." But is it? Though challenging prevailing moral conceptions of homosexuality may well be *implicit* in our so-called "agenda," Justice Scalia would be wrong to suggest that, if such a tract literally existed today, it would focus on or even mention morality.

Indeed, a possible gay "agenda" could be the recent statement of twenty two prominent organizations setting forth some shared goals of the lesbian, gay, bisexual and transgender (LGBT) movement. The closest that agenda comes to articulating a moral project is its promise to "continue to transform understanding of our lives and our relationships."[3]

Direct engagement with the issues of morality surrounding either gay sex or gender identity is thus not at the forefront of either our political or legal advocacy for LGBT people. Nor is it highlighted in our theoretical

---

2. Lawrence v. Texas, 539 U.S. 558, 602 (2003).

3. *See* ACLU, *Civil Rights. Community. Movement.* (Jan. 13, 2005) *available at* http://www.aclu.org/LesbianGayRights/LesbianGayRights.cfm?ID=17305&c=23 (last visited Apr. 6, 2005). The statement was issued in response to widespread speculation that the LGBT movement was floundering, in fact and in spirit, after eleven "Defense of Marriage" state constitutional amendments passed in the November 2004 elections. It articulated eight major goals:

- We must fight for equal employment opportunity, benefits and protections – and the federal and state laws that safeguard them.
- We must fight against anti-LGBT violence and for the inclusion of sexual orientation and gender identity in federal hate crimes law that already protects Americans based on race, religion and national origin.
- We must fight – in both the private and public sectors – for better access to health care and insurance. We must advocate for HIV/AIDS policies – including age-appropriate, LGBT-inclusive comprehensive sexuality education – that effectively address this epidemic at home and abroad.
- We must insist on safe schools, where youth can learn free from bullying, harassment and discrimination.
- We must fight for family laws that give our children strong legal ties to their parents.
- We must work to overturn the military's discriminatory anti-LGBT ban, which dishonors service members who serve their country with valor and distinction.
- We must continue to expose the radical right's efforts to advance a culture of prejudice and intolerance, and we must fight their attempts to enshrine anti-gay bigotry in our state and federal laws and constitutions.
- And we must continue our vigorous fight for the freedom to marry and the equal protections, rights and responsibilities that safeguard our families, strengthen our commitments, and continue to transform understanding of our lives and our relationships.

Kate Clinton, a lesbian comedian, has a comedy routine in which she describes a new religion she plans to establish, whose revival meetings would include loud pronouncements of "Gay is Good, Gay is Good," echoing Frank Kameny's creation of the phrase in the 1960s. Although audiences appear to respond favorably to Clinton's routine, one of my goals in this Article is to demonstrate how Clinton's rallying cry of "gay is good" is not what currently drives our legal or political movement strategy in the struggle for gay equality.

understandings of LGBT rights. This is both unfortunate and short-sighted. As a practical matter, changing the public's perception of the morality of gay sex and of changing one's gender may ultimately be necessary to achieve true equality for LGBT people. As a theoretical matter, our lack of engagement with moral questions represents a serious deficiency in our articulation of the justification for LGBT equality.

My claim is simple: advocates and scholars would do well to focus on advancing the "gay agenda" precisely as articulated by Justice Scalia. And the debate around whether same-sex couples should be permitted to marry is as good a place as any to start.[4]

The normative good of marriage and the inherent incapacity of gay couples to embody that good are the theoretical, emotional, and, most importantly, rhetorical bases of opposition to marriage for same-sex couples. During early congressional debates on marriage, opponents of marriage equality contended that marriage for same-sex couples would result in condoning gay sexual coupling and would thereby radically redefine and irrevocably shatter the moral foundations of both marriage and society.[5] In later congressional debates, opponents shifted their argument to the claim that having a "mom and a dad" represented the optimal environment for passing on moral and social values to children.[6]

Most political liberal advocates of marriage for same-sex couples never directly refute these claims about morality. Such advocates never argue that gay couples embody a moral good identical to straight couples, and rarely argue that same-sex parents are as optimal as different-sex parents. Indeed, in the congressional debates, opponents of the Defense of Marriage Act (DOMA) and the Federal Marriage Amendment (FMA) mostly eschewed substantive

---

4. While this debate does not directly engage with the questions of the morality of changing one's gender from the one assigned at birth, the mode of argumentation I call for in this Article would be relevant to achieving true equality for transgender people as well.

5. *See, e.g.*, 142 CONG. REC. H7482 (daily ed. July 12, 1996) (statement of Rep. Barr):

> [A]s Rome burned, Nero fiddled, and that is exactly what the gentlewoman and others on her side [opposing the Defense of Marriage Act] . . . would have us do. Mr. Chairman, we ain't going to be fooled. The very foundations of our society are in danger of being burned. The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society: the family unit.

See also 142 CONG. REC. S10114 (daily ed. Sept. 10, 1996) (statement of Sen. Coats) ("It is amazing to me . . . and disturbing that this debate should even be necessary. I think it is a sign of our times and an indication of a deep moral confusion in our Nation.") *See generally Liberal Neutrality Arguments, supra* note 1 (describing and analyzing the congressional debate on DOMA).

6. *See, e.g.*, 150 CONG. REC. S7884 (daily ed. July 9, 2004) (statement of Sen. Cornyn) ("I worry that the American family will not be able to sustain itself against this continued attempt to marginalize the importance of . . . every child having a loving and supportive mother and father, which . . . is the optimal situation for a child to . . . grow up in."). The entire debate on the Federal Marriage Amendment in the Senate, from July 9, 2004 until July 14, 2004, focused primarily on the argument that a traditional family, with a husband and a wife, was the optimal setting for raising children. The significant shift in rhetoric from the 1997 debate on DOMA to the 2004 debate on the Federal Marriage Amendment (FMA) is worth an analysis of its own.

arguments completely and simply charged that supporters of the legislation wanted to create a wedge issue during an election year.[7]

Liberal gay rights advocates for marriage for same-sex couples generally respond to conservative moral rhetoric by invoking a counter moral rhetoric of equality and rights: marriage is a "right" that should be made available to same-sex couples on the same grounds as it is made available to opposite-sex couples. Espousing the liberal ideal of government neutrality toward "private" morality, these advocates generally—and quite deliberately—steer clear of arguments about the normative good of gay sexuality, the normative good of gay coupling (with or without state sanction), the normative good of gay parenting—and sometimes, the normative good of civil marriage itself.

There are tenable reasons, both historically contingent and theoretically based, for the avoidance of moral questions by those seeking formal equality under law. I hope to explore in this Article, however, why those reasons are ultimately unpersuasive and counterproductive.

There *is* a conversation that is happening regarding visions of normative good in the struggle for marriage equality—but it is largely an "internal movement" debate about whether marriage is a good institution and whether it is one into which gay couples should seek entry. Radical feminists, queer theorists, and others argue that marriage, as historically and currently constructed, constitutes a normative harm that should be dismantled by society overall rather than embraced by gay couples.[8] On the opposite end of the spectrum, socially conservative gay rights advocates argue that extending a traditional expectation of marriage to gay couples will help solidify an appropriate social norm of sexual restraint and care-giving within the family.[9] In these discussions, the moral merits of fitting (or condensing) gay coupling into the marital institution are interrogated, while the moral good of gay sexual coupling is at least implicitly uncontested or assumed by all discussants.

I, for one, am not sure whether marriage is a normatively good institution. I have moved away from the belief that marriage is clearly the *best* normative way to structure intimate relationships, such that government should be actively

---

7. *See, e.g.*, 142 CONG. REC. H7272 (statement of Rep. Moakley) ("This issue . . . divides our country when we should be brought together; and frankly, it appears to be a political attempt to sling arrows at President Clinton."); *id.* at H7277 (statement of Rep. Woolsey) ("Mr. Speaker, welcome to the campaign headquarters of the radical right . . . [K]nowing that the American people overwhelmingly rejected their deep cuts in Medicare and education, their antifamily agenda and their assault on our environment, the radical right went mucking around in search of an election year ploy [DOMA] to divide our country."); 150 CONG. REC. S8076 (daily ed. July 14, 2004) (statement of Sen. Leahy) ("Obviously, the Senate leadership has decided that forcing a vote in relation to the FMA will benefit the Republican Party politically . . . [T]his debate is not about preserving the sanctity of marriage. It is about preserving a Republican White House and Senate."). DOMA and FMA were both brought to votes in Presidential election years, September 1996 and July 2004, respectively.

8. *See infra* Part II.B.

9. *See infra* Part III.B.

supporting this social arrangement above all others.[10] I currently believe that marriage is a normatively "good" framework for most people to aspire to (I think), because it serves some very deep and legitimate human needs. But I also believe all of us are harmed, as members of a society seeking a common good, when society fails to acknowledge the wide array of non-marital intimate social structures that we as humans have ingeniously constructed to negotiate and make sense of the world.

Thus, my goal in this Article is to interrogate the normative moral good of gay sex, the normative moral good of marriage, and the normative moral good of other intimate social structures that we have crafted. In my heavy emphasis on morality, I situate myself with some strange bed-fellows (for me) in terms of political philosophy, ranging from Robert George to Jonathan Rauch. But my goal is to move the argumentation we are using in the marriage equality struggle from traditional liberal moral argumentation (which focuses on the explicitly non-judgmental moral values of "equality" and "fairness") to the (more) judgmental moral argumentation of individuals such as George and Rauch. Unlike those individuals, however, I hope to present a distinctly progressive, feminist—albeit still moral—case for marriage equality. Moreover, I hope to demonstrate how the (more) judgmental moral argumentation that leads one to the conclusion that government has an affirmative obligation to recognize marriage for same-sex couples leads one equally to the conclusion that government has an affirmative obligation to recognize important social relationships outside of marriage.

II. LIBERAL MORALITY ARGUMENTS ABOUT MARRIAGE FOR SAME-SEX COUPLES

A. Liberalism's Advocates

> Because marriage is a basic human right and an individual choice, Resolved: the State should not interfere with same-gender couples who

10. This was the position I held in 1996, when I first started writing this Article. At the time, I was heavily influenced by Milton C. Regan's eloquent and persuasive book, FAMILY LAW AND THE PURSUIT OF INTIMACY (1993). For various reasons that I hope to explain in this Article, I no longer adhere strictly to that position. Regan, by contrast, has remained consistent in his views. *See* Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435 (2001); Milton C. Regan, Jr., *Law, Marriage and Intimate Commitment*, 9 VA. J. SOC. POL'Y & L. 16 (2001).

> choose to marry and share fully and equally in the rights, responsibilities, and commitment of marriage.[11]

The most common way that gay rights political advocates talk about the effort to achieve marriage for same-sex couples is to talk about equality, fairness, and the simple "right to marry." While advocates do not necessarily cast these terms as moral terms, they are indeed moral; they are about the explicitly non-judgmental moral values of equality, fairness and choice.[12]

Thus, in an early advocacy piece entitled "Why Gay People Should Seek the Right to Marry," Tom Stoddard wrote:

> First, and most basically, the issue is not the desirability of marriage, but rather the desirability of the *right* to marry. That I think two lesbians or two gay men should be entitled to a marriage license does not mean that I think all gay people should find appropriate partners and exercise the right, should it eventually exist.[13]

As William Eskridge, a tireless advocate for equal marriage rights, explains, "formal equality" is "the most important" reason why marriage, though "not for everyone, . . . should be an option" for anyone: "Gay couples should have the same rights that straight couples have."[14]

Gay advocates' emphasis on "equality pure-and-simple" explains why Freedom to Marry, styled as "the gay and non-gay partnership working together to win marriage equality nationwide,"[15] voices a decided antipathy to the "separate-but-equal" compromise called civil union. The organization's website declares, "By ending sex discrimination in marriage, much as we ended

---

11. The Marriage Resolution (first circulated by Lambda Legal's Marriage Project, and now by any number of organizations, most prominently Freedom to Marry), *at* http://www.freedomtomarry.org/marriage_resolution.asp (last visited Apr. 4, 2005).

12. For this reason, I refer to this type of argumentation as "liberal morality" arguments throughout this Article. I have previously referred to such arguments as "liberal neutrality" arguments. *See, e.g.*, *Progressive Moral Case*, *supra* note 1.

13. Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, *in* SEXUAL ORIENTATION AND THE LAW 716, 720 (William B. Rubenstein ed., 2d ed. 1997). Stoddard's piece, and a companion rebuttal piece by Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, *id.* at 721, started a heated round of advocacy writings with regard to marriage for same-sex couples in the 1980s. The issue of seeking marriage for same-sex couples had been discussed within the gay community since the 1950s, and had been litigated within the judicial system since the 1970s. *See, e.g.*, DONN TEAL, THE GAY MILITANTS 282-93 (1971); Samuel T. Perkins & Arthur J. Silverstein, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573 (1973); *see also* Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974). All the cases in the 1970s were unsuccessful. *See generally* WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 52-60 (1996) [*hereinafter* ESKRIDGE, SAME-SEX MARRIAGE] (describing history of the debate on same-sex marriage in the gay community).

14. ESKRIDGE, SAME-SEX MARRIAGE, *supra* note 13, at 15-50. Advocates who invoke liberal morality arguments may also invoke normative goods arguments. For example, Bill Eskridge has invoked both forms of argumentation in his support for same-sex marriage. *Id.* at 51-52, 88 (noting the equality argument and the argument that marriage fosters interpersonal commitment).

15. Freedom to Marry, *at* http://www.freedomtomarry.org (last visited Apr. 4, 2005).

race discrimination in marriage a generation ago, we are building a better America . . . ."[16]

Advocates who emphasize equality as a basis of marriage for same-sex couples are not unaware of the tremendous impact that winning the freedom to marry could have on the institution of marriage and on the status of gay people. Evan Wolfson, founder and director of Freedom to Marry, appreciates "marriage's central symbolic importance in our society and culture,"[17] and not only recognizes but applauds the "transformational potential of gay people's inclusion . . . in marriage."[18]

One potential transformation that presumably could occur if marriages for same-sex couples were recognized would be the implicit message that gay people and gay sexual conduct are morally legitimate. Certainly, those who seek to restrict marriage to only different-sex couples express concern that failure to do so would condone gay sexual relationships. In *Baehr v. Lewin*, for example, the state of Hawaii argued that "'allowing same-sex couples to marry conveys in socially, psychologically, and otherwise important ways approval of non-heterosexual orientations and behaviors.'"[19] And as Representative

---

16. About Us, *at* http://www.freedomtomarry.org/document.asp?doc_id=1005&page=2 (last visited Apr. 9, 2005). Another key component of the equality argument is its emphasis on marriage's myriad functional benefits to heterosexual couples, and the concomitant denial of those benefits to similarly situated gay couples. For example, David Chambers has documented the extensive economic and social benefits that accrue through the status of marriage. *See* Memorandum of American Law Division, *Compilation of Selected Federal Programs That Could Be Affected by the Legalization of Same-Sex Marriage*, Congressional Research Service, Library of Congress (June 25, 1996); David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 452-85 (1996). Advocates recount the range of benefits dependent on marriage to emphasize the unfairness of denying gay people the *choice* to become a lawful husband or wife; *see also* ESKRIDGE, SAME-SEX MARRIAGE, *supra* note 13, at 67 ("[W]hen the state denies lesbian and gay couples a marriage license, it is not just denying them a simple, one-shot right to marry. Rather, the state is also denying those couples dozens of ongoing rights and privileges that are by law associated with marriage."); Evan Wolfson, *Introduction: Marriage, Equality and America: Committed Couples, Committed Lives*, 13 WIDENER L.J. 691, 693 (2004) ("Denied marriage and its myriad tangible and intangible protections, same-sex couples and their kids are deprived of important safety-nets and obligations, including 'access to health care and medical decision making for a partner and children, parenting and immigration rights, inheritance, taxation, Social Security and other government benefits, rules for ending a relationship while protecting both parties and the ability to pool resources to buy or transfer property without adverse tax consequences.'"). Presumably, advocates of marriage for same-sex couples believe that tallying the substantive privileges that marriage conveys will dramatize the substantive importance of formal equality.

17. Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights For Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV L. & SOC. CHANGE 567, 580 (1995).

18. *Id.* at 597. One aspect of the transformative p ıtential, to which Wolfson refers, is the dramatic challenge same-gender marriages pose to the strict gender roles and power differentials that often occur within opposite-gender marriages. *See* Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 L. & SEXUALITY 9 (1991).

19. Wolfson, *supra* note 17, at 610 (quoting Defendant's Response to Plaintiffs' First Request for Answers to Interrogatories at 7, Baehr v. Lewin, 852 P.2d 44 (Haw. 1993)(No. 15689)). Senator Mark Anderson made a similar argument to Arizona's Court of Appeals: "'Conventional marriage laws reasonably advance' [the government's interest in] . . . safeguarding public morality . . . [and] not

Charles Canady explained clearly during the debate on DOMA, the moral message sent by the state in granting marriage licenses lay at the core of his opposition to marriage for same-sex couples:

> All of this [anti-DOMA] rhetoric is simply designed to divert attention from what is really at stake here[,] an attempt to evade the basic question of whether the law of this country should treat homosexual relationships as morally equivalent to heterosexual relationships. That is what is at stake here. . . .
>
> Should the law express its neutrality between homosexual and heterosexual relationships? . . . Should this Congress tell the children of America that it is a matter of indifference whether they establish families with a partner of the opposite sex or cohabit with someone of the same sex? Should this Congress tell the children of America that we as a society believe there is no moral difference between homosexual relationships and heterosexual relationships? Should this Congress tell the children of America that in the eyes of the law the parties to a homosexual union are entitled to all the rights and privileges that have always been reserved for a man and a woman united in marriage?[20]

Representative Canady believed that congressional opponents of DOMA were answering all of his questions with "a resounding yes."[21] In fact, a resounding silence on these questions is a more accurate depiction of the rhetoric of opponents to DOMA—all of whom found a myriad of reasons to vote against the bill that had nothing to do with sending a message to the children of America that gay conduct and heterosexual conduct were morally equivalent.[22]

But even gay legal advocates, who presumably believe they are morally equivalent to heterosexual people, rarely respond to Canady-type questions with a resounding yes. That is, these advocates do not argue—either in the courts of justice or in those of public opinion—that the *reason* government should provide marriage licenses to same-sex couples is *in order* to convey approval of gay relationships and gay sexual conduct.

---

placing society's 'stamp of approval' on homosexual relationships . . . ." Response to Special Action Petition by Intervenor-Respondent Senator Mark Anderson at 18-19, Stanhardt v. Superior Court (Ariz. Ct. App. 2003) (No. 1 CA SA-03-0150) (quoting Richard F. Duncan, *The Narrow and Shallow Bite of* Romer *and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman*, 6 WM. & MARY BILL RTS. J. 147, 158-65 (1997)), *available at* http://www.domawatch.org/cases/arizona/StanhardtADFResponsetoSpecialAction.pdf (last visited Apr. 3, 2005).

20. 142 CONG. REC. H7491 (daily ed. July 12, 1996) (statement of Rep. Charles Canady).

21. *Id.* ("To all these questions the opponents of this bill say yes. They say a resounding yes. They support homosexual marriage. They believe that it is a good thing. They believe that opposition to same-sex marriage is immoral.")

22. *See Liberal Neutrality Arguments*, *supra* note 1 (demonstrating that opponents to DOMA argued that the legislation was legally unnecessary and was unconstitutional; that Congress could pass better laws if it really wanted to support families; and that the legislation was politically motivated).

Gay rights advocates do directly counter the argument that recognizing marriage for same-sex couples will be harmful to children and society. In their briefs to the courts, such advocates proffer evidence that marriage for same-sex couples is normatively good for both the couples involved and their children.[23] But this is a far cry from asserting that government should recognize marriage for same-sex couples in order to signal approval of same-sex relationships and in order to signal approval of children being raised by gay parents. Rather, it is simply a variant on the classic liberal argument that individual autonomy should be respected as long as harm does not arise from respecting such autonomy.

And, indeed, these advocates are not being disingenuous when they personally believe that gay people are morally equivalent to heterosexual people, but do not rely on such moral equivalence in making their arguments for equality. The analysis of these political and legal advocates comports with a widely accepted and often sincerely felt belief derived from a major strand of liberal political theory: that public and especially legal discourse should be concerned with "rights" and not with conceptions of the "good." According to this view, individuals living in a pluralist society will inevitably hold divergent normative and moral beliefs, and the role of law and government is to equally and adequately safeguard the rights necessary for each individual to pursue his or her own normative view of "the good life"—not to affirmatively advance one moral, normative view of "the good" over others.[24] Thus "bad people," so long as they are not criminally bad (and very often even then), have the same rights as "good people." The morality to be advanced by the state is thus the morality of pluralism—that is, the explicitly non-judgmental moral values of equality, freedom, and choice.

This particular discourse of liberal morality is agnostic both on whether marriage is a normative good and on whether gay sexual coupling is normatively good. Such assessments are irrelevant in this discourse. The very basis of liberal theory assumes that members of the public, and the legislators

---

23. *See, e.g.*, Baehr v. Miike, 1996 WL 694235, at *9-12 (Haw. Cir. 1996) (summarizing testimony of plaintiffs' witnesses that "same-sex couples can, and do, have successful, loving and committed relationships" and that "gay and lesbian parents and same-sex couples are as fit and loving parents as non-gay persons and different-sex couples," and noting the opinion of one of plaintiff's witnesses that "allowing same-sex couples to marry would have a positive impact on society and the institution of marriage").

24. *See* JOHN RAWLS, POLITICAL LIBERALISM 173-211 (1971); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 90-100 (1977); BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 349-78 (1980). Several commentators have analyzed political liberal theory in the context of marriage for same-sex couples. *See, e.g.*, Carlos Ball, *Moral Foundations for a Discourse on Marriage for Same-Sex Couples: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871 (1997) (analyzing theories of political liberalism offered by Rawls and Dworkin); Milton C. Regan, *Reason, Tradition, and Family Law: A Comment on Social Constructionism*, 79 VA. L. REV. 1515, 1518 (1993) (noting that "neutrality liberalism" requires the state to be "neutral among different conceptions of the good life") (footnote omitted).

they elect, may well view gay couples and gay sex with disgust, repulsion, or simple discomfort. But that is all of no matter, since granting a marriage license to a same-sex couple signals no more approval by the state of gay sex or gay couples than granting a marriage license to a convicted rapist signals approval by the state of rape or rapists.[25]

There is a variant of liberal morality discourse that is not agnostic on the moral good of marriage, but *is* agnostic on the moral good of gay sexual coupling. This type of discourse is most common on the part of politicians who assume their constituents view marriage as a "good" institution that government should support, but who also assume their constituents do not favor "gay bashing." The debate on the FMA in 2004 epitomized this variant of liberal morality discourse—and ironically, both opponents and *supporters* of the FMA engage in this discourse to some degree. That is, both supporters and opponents of the FMA took pains to state their agreement with the general societal view that marriage is a normatively good social arrangement for couples and children that government should support.[26] Supporters of the FMA then emphasized how their support for traditional marriage should not be interpreted as passing judgment on gay people who—as these politicians put it—have "the right to live as they choose."[27] And opponents of the FMA

25. Thus, for example, Bill Eskridge rejects as "fanciful" the "stamp-of-approval argument," observing that, unlike many religious denominations, "the state is not a bit choosy about who can marry," and that anyone from convicted rapists to child molesters to deadbeat dads are routinely given marriage licenses by government clerks. *See* ESKRIDGE, SAME-SEX MARRIAGE, *supra* note 13, at 106. Eskridge notes that "[t]here are few statutory prerequisites for obtaining a marriage license. Many former prerequisites have been pruned away by Supreme Court decisions enforcing the right to marry . . . ." *Id.*

26. *See, e.g.*, 150 CONG. REC. S7922 (daily ed. July 12, 2004) (statement of Sen. Cornyn) (supporting FMA) ("Here in America we made the decision we ought to particularly encourage and support those who marry and have children. . . . [We help] children in every community every time we affirm and reinforce the importance of traditional marriage . . . Government should not be neutral . . . when it comes to children and families."); *Id.* at S7926 (statement of Sen. Brownback) (supporting FMA) ("Marriage is at the center of the family and the family is the basis of society itself. . . . [T]he reason it treats heterosexual unions in a manner unlike all other relationships, is . . . in order to ensure a stable environment for the raising and nurturing of children."); 150 CONG. REC. S7994 (daily ed. July 13, 2004) (statement of Sen. Clinton) (opposing FMA) ("I believe marriage is not just a bond but a sacred bond between a man and a woman. I have had occasion in my life to defend marriage . . . [s]o I take umbrage at anyone who might suggest that those of us who worry about amending the Constitution are less committed to the sanctity of marriage or to the fundamental bedrock principle that exists between a man and a woman . . . ."); *Id.* at 7972 (statement of Sen. Durbin) (opposing FMA) ("Virtually every one of our colleagues on both sides of the aisle, for that matter, support traditional marriage between a man and a woman . . . I respect this institution and have committed my life to it with my wife.").

27. 150 CONG. REC. S7925 (daily ed. July 12, 2004) (statement of Sen. Brownback) ("Most Americans believe homosexuals have a right to live as they choose. They do not believe [they] have a right to redefine marriage . . . ."). *See also* 150 CONG. REC. S7872 (daily ed. July 9, 2004) (statement of Sen. Allard) ("Gays and lesbians are entitled to the same legal protections as anyone else. Gays and lesbians have the right to live the way they want to. But they do not have the right to redefine marriage."); 150 CONG. REC. S7962 (daily ed. July 13, 2004) (statement of Sen. Hutchinson) ("This is not about being anti-homosexual. . . . I think everyone believes gays and lesbians should have the ability to lead their lives as they choose, as should all consenting adults. But we don't want to tear down

mostly voiced tolerance for gay people, without making any affirmative statements about the moral goodness of homosexuality.[28] Where supporters and opponents of the FMA then diverged was on whether passage of the FMA constituted "gay bashing" or whether it was simply an affirmation of the importance of marriage that had nothing to do with passing judgment on gay couples or taking away any of their rights.[29]

---

traditional marriage and the American family."). The most common way in which this position was conveyed was the often-repeated statement by supporters of the FMA that "two fundamental points" governed their position—first, "that every person in America . . . has worth and dignity and we should respect them, irrespective of the choices they make in their lives . . .[as] [t]his is not a debate about questioning the value or worth of an individual," and second, that the debate was simply and solely about "the fundamental importance to our society of preserving, protecting, and promoting marriage as a union between one man and one woman." 150 CONG. REC. S7906 (daily ed. July 12, 2004) (statement of Sen. Santorum); *see also id.* at S7922 (statement of Sen. Cornyn) (same, referring to "two simple propositions").

28. *See, e.g.*, 150 CONG. REC. S7972 (daily ed. July 13, 2004) at S7972 (statement of Sen. Durbin) ("People have had the courage to come forward and say: I have a different sexual orientation. . . . I think more and more families are accepting of that fact, as they should be. . . . All we have said. . . is though we may not support gay marriage . . . we ask for tolerance and understanding."); 150 CONG. REC. S8072 (daily ed. July 14, 2004) (statement of Sen. Lieberman ("Gay and lesbian couples exist. They are not going away. . . . To say these couples and their children should be denied any legal protections . . . would, in my opinion, be unfair and inconsistent with the principles that were at the basis of the founding of our country."). One of the most fascinating differences between the 1996 DOMA debate and the 2004 FMA debate was the convergence of rhetoric between congressional opponents and supporters to the mantra of: "marriage is good; we're not bashing gay people."

29. Opponents of the FMA believed that the amendment constituted "gay bashing." *See, e.g.*, 150 CONG. REC. S7979 (daily ed. July 13, 2004) (statement of Sen. Lautenberg) ("I believe this amendment would create a permanent class of second-class citizens with fewer rights than the rest of the population. . . . I will not support this mean-spirited proposal. . . . This is gay-bashing, plain and simple."); 150 CONG. REC. S8079 (daily ed. July 14, 2004) (statement of Sen. Corzine) ("This body should consider the unique challenges faced by gay and lesbian Americans, rather than toss them around like a political football."); 150 CONG. REC. S7958 (daily ed. July 13, 2004) (statement of Sen. Boxer) ("I don't know what message the people who are bringing this to you want to convey. Is it to send a message that certain Americans are inferior? I hope not. But that is a message that is being sent to a lot of people who are hurting right now."); 150 CONG. REC. H7908 (daily ed. Sept. 30, 2004) (statement of Rep. Frank) ("[This amendment] demonizes same-sex couples. . . . You say, we do not have anything against these people. Then why do you change my love into a weapon? Why if I have the same feelings that you do towards another human being does that somehow become the only weapon of mass destruction that you have ever been able to find?").

Supporters of the FMA were vehement in their response to such allegations. *See, e.g.*, 150 CONG. REC. S7908 (daily ed. July 12, 2004) (statement of Sen. Santorum) ("What this [amendment] does is promote a public good. It does not limit rights. It simply promotes . . . the union of a man and a woman for the purpose of forming that union and providing for the next generation."); 150 CONG. REC. S7980 (daily ed. July 13, 2004) (statement of Sen. Santorum) ("All of a sudden, now something that is . . . a truth of every major religion . . . is now seen as pure animus, hatred. But it is not. This constitutional amendment is based on a sincere caring for children, for family, for the future of this country."); 150 CONG. REC. S7880 (daily ed. July 9, 2004) (statement of Sen. Hatch) ("[T]his amendment is not about discrimination. It is not about prejudice. It is about safeguarding the best environment for our children."); 150 CONG. REC. H7908 (daily ed. Sept. 30, 2004) (statement of Rep. Delay) ("No one is attacking [Congressman Frank's] feelings or his relationships. There are many loving relationships between adults. But, Mr. Speaker, what we are saying and what this amendment is about is children, having children, raising children, and the ideal of marriage between one man and one woman raising those children.").

In any event, liberal morality discourse remains the favorite mode for political and legal advocates who urge the recognition of marriage for same-sex couples. A 1994 editorial in the Honolulu Star Bulletin, appearing in the midst of the controversy that swept Hawaii following the ruling in *Baehr v. Lewin*, marvelously captures the essence and the power of this form of argumentation:

> Homosexuality is condemned in some religions. To their adherents, same-sex marriage is a desecration of a holy rite. These people are of course free to hold such an opinion, but when they and other opponents lobby against government recognition of same-sex marriage they are trying to impose their private values on the law. Homosexuality is a moral and religious issue. It should not become a political one.
>
> Government must remain neutral on such intimate questions and focus on the need to protect the rights of the individual to equal treatment. Government recognition of same-sex marriage should not be confused with moral approval—which the state cannot give in any case. Dropping the ban would merely accept the rights of homosexuals to the same legal protection according heterosexuals, impairing no one's rights and conferring important financial and legal benefits that should not be withheld . . . .[30]

Seven years later, editorial boards were reciting the very same arguments to defend recognition of marriage for same-sex couples in Massachusetts:

> [T]he "live and let live" philosophy isn't just a good idea; it's the law. So it goes with gay marriage. *That opinions about its morality are divided is beyond doubt, and beyond the consideration of lawmakers.* . . . [T]he right to marriage isn't properly governed by public sentiment or history or moral scruple—but by the constitutional demand for equality under the law. . . . [S]ympathy for th[e] traditional view [of marriage] can't trump the constitutional declaration—in Massachusetts and every other U.S. jurisdiction—that all citizens should be able to enjoy the "protections and benefits" of any civil entitlement.[31]

B. Liberalism's Skeptics

Why would we want to question the use of liberal morality argumentation? It seems so powerful. The editorial boards that could write in favor of marriage in Hawaii or Massachusetts drew on the power of such argumentation. So did Congressman John Lewis, writing a moving and eloquent op-ed in the *Boston*

---

30. *State Should Drop Ban on Same-Sex Marriage*, HONOLULU STAR-BULLETIN, Feb. 4, 1994, at A12, *quoted in* Wolfson, *supra* note 17, at 614-15.

31. Editorial, *Gay Marriage: An Advance for Equality*, MINNEAPOLIS STAR TRIBUNE, Nov. 21, 2003, *available at* http://www.glad.org/marriage/Minneapolis_Star_Tribune_Editorial_11-21-03.shtml (last visited Apr. 6, 2005) (emphasis added).

Globe in the fall of 2003. Pronouncing that we are at "a crossroads" on the question of same-sex marriage, Congressman Lewis argued: "Some say they are uncomfortable with the thought of gays and lesbians marrying. But our rights as Americans do not depend on the approval of others. Our rights depend on us being Americans."[32]

As Congressman Lewis knows well from his days as a young leader of the black civil rights movement in the 1950s and 1960s, arguments based on liberal morality resonate deeply with the American people when confronted with a minority's struggle to gain rights from a dominant majority. There is an inchoate yet real sense in this country that ours is a land of freedom, equality, and fairness. Many Americans believe (or want to believe, or seem to want to believe) that an essential element of our country's history, integrity, and even legacy is our commitment to fairness and equality for all our citizens, despite our differences and diversity. Thus, the morality of these nonjudgmental commitments to equality, choice, and fairness is compelling and powerful.[33]

Raising the flag for fairness has thus been a major element in the civil rights struggles of all minority groups and women in this country.[34] Gay men, lesbians, bisexuals, and transgender people are no exception. The resonating power of such arguments can be heard from editorial rooms,[35] to the floors of Congress,[36] to mainstream television and print media.[37]

---

32. John Lewis, *At a Crossroads on Gay Unions*, BOSTON GLOBE, Oct. 24, 2003, *available at* http://www.boston.com/news/globe/editorial_opinion/oped/articles/2003/10/25/at_a_crossroads_on_gay_unions/ (last visited Apr. 6, 2005).

33. *See* J.R. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 1-97 (1993); ROBERT J. HARRIS, THE QUEST FOR EQUALITY 1-23 (1960). *See also* Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 298-304 (1996) (discussing reasons why people use equality arguments) [hereinafter *Devlin Revisited*].

34. *See, e.g.*, TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63 (1988) (discussing civil rights movement for equality based on race); DAVID GARROW, BEARING THE CROSS (1986) (same); Wendy Williams, *Notes from a First Generation*, 1989 U. CHI. LEGAL F. 99 (1989) (describing equality advances for women).

35. *See supra* notes 30-32 and accompanying text.

36. Members of Congress articulated fairness arguments in the debate surrounding the Employment Non-Discrimination Act (ENDA), a bill prohibiting workplace discrimination based on sexual orientation. *See, e.g.*, 142 CONG. REC. S10103 (daily ed. Sept. 10, 1996) (statement of Sen. Wellstone) ("[ENDA] is a matter of simple justice. . . . It is just not right that a man or a woman, because of sexual orientation, should be in a situation where he or she could lose a job or not be able to obtain employment because of their sexual orientation. This is a basic civil rights issue."); *id.* at S10105 (statement of Sen. Moseley-Braun) ("[ENDA] is a step in the . . . direction of extending the equal protection of the laws to Americans without regard to their sexual orientation.").

37. *See, e.g.*, Rick Kushman, *At Long Last, "Ellen" Comes Out Swinging*, SACRAMENTO BEE, Apr. 30, 1997, at D1 ("Television is the common carrier of American culture and norms, and every time TV treats people equally and fairly, it's another step toward a decent, truly free society."); Anne Underwood et al., *Do You, Tom, Take Harry*, NEWSWEEK, Dec. 11, 1995, at 82. (reporting that "big business . . . is leading the way, in the interest of . . . elementary fairness" by extending spousal benefits to gay employees' partners); Bill Hewitt, *Fighting for Tyler*, PEOPLE, Sept. 27, 1993, at 71 (portraying unfairness of court ruling denying lesbian mother custody of her child).

So who opposes the use of liberal morality arguments in the fight for marriage equality? One group consists of those who do not contest the use of liberal morality arguments generally, but who believe such arguments in a marriage equality context necessarily privileges marriage over other forms of social arrangements and will thereby lead to a substantively bad outcome. For example, as early as 1989, Paula Ettelbrick argued:

> [P]ursuing the legalization of same-sex marriage would be leading [the gay rights] movement into a trap; we would be demanding access to the very institution which, in its current form, would undermine *our* movement to recognize many different kinds of relationships. We would be perpetuating the elevation of married relationships and of "couples" in general, and further eclipsing other relationships of choice.[38]

Of course, many gay liberal advocates of marriage for same-sex couples go out of their way not to explicitly valorize marriage over other forms of relationships. They do not assert that people who are married are in a "better" status than those who are unmarried or who are in other forms of family relationships, such as domestic partnerships.[39] And they take pains to assert that securing the right to marry will not and should not adversely affect other efforts to achieve alternative forms of family recognition, and some even engage in such work.[40] As Evan Wolfson often argues:

---

38. Ettelbrick, *supra* note 13, at 723. A similar concern was echoed several years later by Nancy Polikoff:

> I believe that an effort to legalize lesbian and gay marriage would make a public critique of the institution of marriage impossible. Long-term, monogamous couples would almost certainly be the exemplars of the movement, sharing stories of adversity resulting from their unmarried status . . . . Marriage would be touted as the solution to these couples' problems; the limitations of marriage, and of a social system valuing one form of human relationship above all others, would be downplayed.

Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"*, 79 VA. L. REV. 1535, 1546 (1993) [hereinafter Polikoff]. Family law scholar Martha Fineman was an early leader in calling for marriage to be abolished as a civil institution to which benefits are attached, and many have followed in her wake. *See* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 229-30 (1995); Nancy D. Polikoff, *Conference on Marriage, Families, and Democracy: Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201 (2003); Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U. J. GENDER SOC. POL'Y & L. 167 (2000); Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239 (2001).

39. The term "domestic partnership" refers to a committed relationship between people who either cannot or choose not to marry. *See* MATTHEW A. COLES, TRY THIS AT HOME! 21 (1996); *see also* Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1164 n.3 ("Domestic partnership generally refers to two people living together in a committed, mutually interdependent relationship."). Paula Ettelbrick notes that "[t]he term was developed and is primarily used to designate the non-spousal relationships that are appropriate for receiving employer-provided health benefits." Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J. L. & POL'Y 107, 111 n.7 (1996).

40. *See* Wolfson, *supra* note 17, at 605 n.167 ("Because I believe there is no inconsistency among these demands [for marriage and for domestic partnership], I have pressed for our right to marry at the same time as I have worked to win equal health benefits for the unmarried partners of gay and non-gay

> [W]e can, and should, advocate for universal health care alongside marriage, as well as alongside domestic partnership. It is not antithetical to believe that gay people should be able to exercise the equal right to marry, and at the same time believe that other family forms—including perhaps, but not limited to, domestic partnerships—are valuable and should be treated fairly.[41]

Despite marriage equality advocates' ongoing reassurance that they do not intend to glorify marriage above all other arrangements, to coerce gay couples into marriage, or to foreclose the possibility of multiple forms of legal relationship recognition, one can well understand why such reassurances ring hollow to some skeptics. Liberal morality advocates never need to explicitly argue that being married is better than not being married—because *society* has already made that background normative judgment for them. The reality today is that society expects that men and women will get married, and those who do not are viewed with pity and in many cases disfavor when they fail to "achieve" this "goal."[42] Indeed, it is precisely because society believes that the married

---

New York City employees."). In response to Polikoff's concern that legalization of marriage for same-sex couples would lead to the marginalization and silencing of larger criticisms of marriage as an institution of social ordering, Wolfson argues that marriage equality "advocates' choice of rhetoric and tactics is more fairly characterized as 'prioritizing' rather than as 'marginalizing' or 'silencing' other or later tactics or critiques. No one vehicle or voice can or must do it all." *Id.* at 600.

41. *Id.* at 605 (footnote omitted). Of course, these advocates also emphasize that success in recognizing domestic partnership efforts will still achieve only second-class citizenship for gay people. As Wolfson and other advocates observe, domestic partnership "fails to equalize access to benefits because it is hampered by legal obstacles and itself still excludes people who do not meet criteria set forth in the ordinances, even though they may be in committed, interdependent, or caretaking relationships." *Id.* at 607. Nor does domestic partnership provide "the symbolism and substance of marriage," or "the emotional, declarative, and often religious power most people feel inheres in marriage." *Id.* The underlying incoherence of political liberalism can be observed in stances of this kind. Wolfson and others argue the state has no business conferring approval or disapproval of any particular relationship, yet they reject domestic partnerships as an adequate alternative for same-gender couples precisely because such partnerships fail to confer the societal approval they believe inheres in marriage.

42. This reality exists despite social and economic changes that have created opportunities for women who do not wish to get married to remain independent, and despite a significant amount of feminist scholarship on the harms marriage has wrought for women. *See, e.g.*, SHULAMITH FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION 141-42 (rev. ed. 1971); Sheila Cronan, *Marriage*, *in* RADICAL FEMINISM 213-21 (Anne Koedt et al. eds., 1973); MICHÈLE BARRETT & MARY MCINSTOSH, THE ANTI-SOCIAL FAMILY 57-65 (2d ed. 1991). Moreover, "moral" coercion toward marriage is reinforced by the range of benefits tied solely to marriage. While some non-marital family arrangements have received benefits through the mechanisms of contract, or through judicial or legislative recognition of functional families, those types of recognition are still the exception, not the rule, in our society. For an example of judicial recognition of same-sex families, see Braschi v. Stahl Assocs. Co., 543 N.E.2d 49 (N.Y. 1989) (holding gay male couple falls within regulatory definition of "family" for rent control purposes). For examples of legislative recognition, see generally Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164 (1992) (reviewing domestic partnership benefits extended by localities).

state is normatively better than the unmarried state that so many practical, economic, and social benefits have been attached to marriage.[43]

Thus, unless advocates of marriage for same-sex couples affirmatively *distance* themselves from the normative judgment that being married constitutes a better status than being unmarried, the simple act of seeking the right to enter the married status can well be understood as *acquiescing* in the normative judgment that marriage is better than other relationships.[44]

Liberal morality advocates of marriage equality who might wish to distance themselves affirmatively from a normative societal judgment about the desirability of marriage would, of course, face two problems (at a minimum). The first is a practical, strategic problem. If an advocate is trying to gain for her constituents access to a particular institution that society considers a normative good—marriage or, say, the military—it is not politically pragmatic for her to denigrate that institution. If access is the goal, the most effective approach is to demonstrate the *similarity* of those whom she represents to others already part of the institution, and then to show the irrelevance of whatever differences exist to the basic goals and necessities of the institution as presently constructed. A reasonable implication of this approach, even without any explicit statement on the part of the advocate, is that entry into the institution by her constituents will not alter the institution in any way that will undermine its normative good as currently understood by society.[45]

---

43. As Eskridge has noted, "The state not only recognizes marriage, it encourages marriage. Being married is a legal status that entails a broad range of associated rights and benefits for the couple." ESKRIDGE, SAME-SEX MARRIAGE, *supra* note 13, at 66 (footnote omitted).

44. A similar critique along these lines is made by Nancy Polikoff against those who engaged in the effort to lift the ban against the service of gay individuals in the military by forming a group called the Campaign for Military Service (CMS), of which I was the Legal Director during its six-month existence. Polikoff, *supra* note 38, at 1544-45. Polikoff argues the name adopted by CMS was "not an arbitrary or random choice," and that "the emphasis is on military service, the willingness to enter the revered institution that is charged with this country's defense." *Id.* at 1544. She observes that the strategy pursued by the gay activists was "filled with rhetoric professing respect for the armed services," and that, although several individuals working for CMS were "themselves antimilitaristic," those sentiments were "subjugated to the imperative of ending the military exclusion." *Id.* at 1544-45. Although I disagreed with Polikoff at the time of her writing, thinking that neither I nor my colleagues within CMS either valorized or denigrated military service, I have since come to recognize how liberal argumentation dominated my thoughts and actions as CMS Legal Director and how, more importantly, my silent neutrality regarding the normative good or harm of military service was at best compromised by (and at worst consented to and reinforced) the *background* societal views that the military, in its present form, is a normatively good institution and that military service is a normatively good pursuit. While I believe Polikoff goes too far in stating that "[t]here is no way to publicly critique the military and simultaneously ask to be let into it," *id.* at 1545, I also acknowledge that engaging in both activities is a poor strategic move if an advocate wishes to win. To put it mildly, subtleties in message are looked upon with significant disfavor by political strategists.

45. The fact that entry of a previously-excluded group into an institution can be perceived as harming the institution itself is the only way to make sense of Justice Kennedy's pronouncement in *Lawrence v. Texas* that "as a general rule, [liberty interests] should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries *absent* injury to a person or *abuse of an institution* the law protects." Lawrence v. Texas, 539 U.S. 558, 567 (2003) (emphasis

There is a second, related problem for any liberal morality advocate of marriage equality who might consider distancing herself from the normative good of marriage, as currently constructed. Simply engaging in a discussion of normative goods could legitimately be viewed by such advocates as both irrelevant to, and distracting from, their core non-judgmental moral messages of choice and equality. It should not *matter*, these advocates would assert, whether marriage is a normative good or not, just as it does not matter whether gay sexual conduct is a normative good or not. Under a liberal morality theory, government has no legitimate right to expect people to claim the marital status for the sole reason that government believes marriage to be a normative good. Government's role is not to advance any one view of "the good"—its role is simply to ensure equality and fairness for all.

A slightly different critique of liberal morality arguments comes from queer theorists who reject much of liberal moral argumentation in general, not just in the context of the marriage debate. Like the writers discussed above, these theorists share a strong dislike for the gay rights struggle to achieve marriage equality. Their critique, however, focuses directly on the adverse ramifications of reifying the state's power to recognize certain relationships. Handing such power to the state, they argue, will necessarily retard the goal of *sexual liberation* by ensuring that other relationships remain outside the scope of state recognition.

For example, after eloquently recounting the injuries that same-sex couples suffer by not having the state recognize their relationships,[46] Judith Butler explains:

> [T]o pursue state legitimation in order to repair these injuries brings with it a host of new problems, if not new heartaches. The failure to secure state recognition for one's intimate arrangements can only be experienced as a form of derealization if the terms of state legitimation are those that maintain hegemonic control over the norms of recognition—in other words, if the state monopolizes the resources of recognition. Are there not other ways of feeling possible, intelligible, even real, apart from the sphere of state recognition? . . . [T]his of course brings me back to the question, a question poised poignantly by Michael Warner . . . of whether the drive to become recognizable

---

added). How, exactly, does one *abuse* an institution? It can only be because entry of a group into an institution is perceived to demean the institution itself.

46. *See* Judith Butler, *Isn't Kinship Always Already Heterosexual?*, 13 DIFFERENCES 14, 25 (2002) ("It means that when you arrive at the hospital to see your lover, you may not. It means that when your lover falls into a coma, you may not assume certain executorial rights. It means that when your lover dies, you may not be able to be the one to receive the body. It means that when the child is left with the non-biological parent, that parent may not be able to counter the claims of biological relatives in court and that you lose custody and even access. It means you may not be able to provide health care benefits for one another. These are all very significant forms of disenfrachisement, ones that are made all the worse by the personal effacements that occur in daily life and that invariably take a toll on a relationship.").

> within the existing norms of legitimacy requires that we subscribe to a practice that delegitimates those sexual lives structured outside the bonds of marriage and the presumptions of monogamy.[47]

According to Butler and other queer theorists, the only legitimate way to think about recognition is "to institute a critical challenge to the very norms of recognition supplied and required by state legitimation."[48] Otherwise, when we make "a bid to the state for recognition, we effectively restrict the domain of what will become recognizable as legitimate sexual arrangements, thus fortifying the state as the source for norms of recognition and eclipsing other possibilities in civil society and cultural life."[49]

I, too, am skeptical of liberal moral argumentation. But my skepticism is different from the feminist and queer theory concerns noted above. My skepticism derives from my personal experiences engaging in federal legislative and political work for almost twenty years. My experiences in that arena have led me to believe that liberal morality arguments may simply be "missing the boat." Framing the debate as a fight for "equal marriage rights" or "equal employment rights," rather than as one for endorsement or approval of gay sex and gay couples, certainly allows supporters of gay equality to sidestep the difficult and contentious questions that arise regarding the morality of gay sex.

But what if a majority of governmental actors do *not* agree that normative assessments about the morality of gay sex are *irrelevant*? It seems to me that a significant number of lawmakers are basing their decisions on their own and their constituents' *substantive* normative and moral assessments of heterosexuality and homosexuality (and not just on the non-judgmental moral values of equality and freedom). If that is the case, then gay rights advocates' moral squeamishness may simply be a fateful retreat from the battlefield on which the real war is being waged.[50]

---

47. *Id.* at 26. See also Michael Warner, Beyond Gay Marriage, in LEFT LEGALISM/LEFT CRITIQUE (Wendy Brown & Janet Halley eds., 2002); Janet Halley, Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW (Robert Wintemute & Mads Andenaes eds., 2001).

48. Butler, *supra* note 46, at 26.

49. *Id.* at 26-27.

50. I assume that most advocates who employ such arguments presumably believe, on some level, that these are the appropriate arguments to use in our democratic republic. Suzanne Goldberg, for example, has long argued against the legal legitimacy of purely moral justifications. *See, e.g.*, Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233 (2004). But one has to wonder how much political advocates are driven by principle rather than expediency. That is, these advocates certainly do not seem dismayed by the fact that the political discourse they use (and which they think everyone else is or should be using) allows—indeed requires—governmental actors to sidestep normative assessments about gay people and gay sex. Thus, one has to wonder whether gay-rights advocates are actually committed to liberal morality principles as a matter of theory, or whether they are avoiding more substantive moral argumentation primarily because they do not think they will win with such arguments.

I first explored the possible limitations of liberal morality discourse for achieving full equality for gay men and lesbians after drafting an *amicus* brief in the case of *Romer v. Evans*.[51] Challenged by the insights of Michael Sandel,[52] I wondered whether my strenuous and at times contorted effort in that brief to avoid the question of morality's role in state decision-making was useful, or, in fact, self-defeating.[53] I then subjected my work on the Employment Non-Discrimination Act to the same critical lens, questioning my own and other proponents' efforts to avoid the morality question about that legislation.[54] In a recent piece, I concluded that issues of moral worth would necessarily govern the decision of whether to provide accommodations to those for whom societal norms were disadvantageous.[55]

In these various enterprises, I highlighted the simple reality I had observed in my work with Congress—namely, that legislators often invoked substantive moral values to explain their policy positions and, thus, a principled liberal avoidance of morality seemed to have some practical shortcomings. To a large extent, therefore, I framed my discomfort with liberal moral argumentation as largely a tactical concern.

As a matter of theoretical soundness, of course, the liberal "neutrality" of equality arguably rests on an incoherent principle—i.e., that it is possible for the government to *be* neutral. One could argue that whenever the state chooses to act, or chooses *not* to act, in an area of socially contested views, it is taking a position on behalf of one view over another. For example, if the state chooses *not* to issue marriage licenses to same-sex couples, it is not acting neutrally with regard to a socially contested view of marriage.

51. *See* Brief of Amici Curiae Human Rights Campaign Fund et al., Romer v. Evans, 517 U.S. 620 (1995) (No. 94-1039).

52. *See* Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521 (1989).

53. *See Devlin Revisited*, *supra* note 33, at 304-06, 311-12 (analyzing the "[p]itfalls in avoiding morality" in judicial arguments). After the Supreme Court released its decision in *Romer v. Evans*, I critiqued the majority's (unsurprising) avoidance of the same question. *See* Chai R. Feldblum, *Based on a Moral Vision*, LEGAL TIMES, July 29, 1996, at S31 (noting that "any deeper analysis [by the Court] would have required it to engage more directly with the question of the people's right to legislate based on private morality"). While the *Romer* Court's invocation of the opening quote from Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), clearly signaled a vision of justice and morality, "the majority seemed acutely uncomfortable in owning and articulating this moral vision." *Id.*

54. ENDA would prohibit discrimination based on sexual orientation in employment. H.R. 3285, 108th Cong. (2003); S. 1705, 108th Cong. (2003). As a legal consultant first to the Human Rights Campaign (HRC) and then to the National Gay & Lesbian Task Force (NGLTF), both political and lobbying groups advancing the rights of LGBT people, I have been an active participant in the drafting of ENDA from January 1993 forward. For comments on the avoidance of morality in the work on ENDA, see *Devlin Revisited*, *supra* note 33, at 306-12 (describing the "classic example of the avoidance of moral issues that occurs in the political arena and the positive and negative ramifications of such avoidance for advocates of gay rights"); *see also* Chai R. Feldblum, *Keep the Sex in Same-Sex Marriage*, HARV. GAY & LESBIAN REV., Fall 1997, at 23 ("And I have an instinctive feeling that unless we deal positively with the moral legitimacy of desiring and engaging in [gay] sex, we may win a few battles along the way to gay equality, but we will lose the ultimate war of complete and true equality."); Chai R. Feldblum, *The Moral Rhetoric of Legislation*, 72 N.Y.U. L. REV. 992, 995-1008 (1997).

55. Chai R. Feldblum, Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation and Transgender, 54 ME. L. REV. 159, 185-87 (2002).

But I also believe—as a matter of political philosophy—that an affirmative case can be made that morality legitimately plays a role in the development of law. This requires, first, an understanding that progressives can, and should, adopt the power and persuasion of moral justice in determining what constitutes a legitimate, democratic society. My lodestar, in this regard, has been the writings of Robin West. In 1999, West set forth a progressive theory of constitutionalism that drew its eloquence and power significantly from a moral vision of a society.[56] In this vision, the state has a moral obligation to ensure that its citizens have the opportunity to fulfill their basic human capabilities – include capabilities for love and intimacy.[57] Under this approach, "rights" have a much deeper and complex content than a traditional liberal view of letting autonomous beings live their lives without interference by the state. As West puts it:

> Briefly, if justice and goodness require that liberal states have an obligation to secure the minimal preconditions of our fundamentally human capabilities . . . and also require that states respect citizens' rights . . . then doesn't it follow that citizens in liberal states have a right to enjoy those capabilities, *and a right to a state obligated to commit itself to ensuring them*?[58]

The writer who has explored and applied this moral vision of the state in the area of gay rights most extensively is Carlos Ball. In *The Morality of Gay*

---

56. West began her 1999 article with the following pronouncement: "Progressivism is in part a particular moral and political response to the sadness of lesser lives, lives unnecessarily diminished by economic, psychic and physical insecurity in the midst of a society or world that offers plenty. This insecurity is unjust and should end; the suffering should be alleviated, and those lives should be enriched. To do so must be one of the goals of a morally just or justifiable state." Robin West, *Is Progressive Constitutionalism Possible*, 4 SPG WIDENER L. SYMP. J. 1 (1999).

57. Martha Nussbaum and Amartya Sen are two theorists who have advocated a rich vision of the state in this regard. West summarizes their argument as follows:

> A decent and liberal state in a good society must ensure that citizens achieve and enjoy certain fundamental human capabilities (thereby leaving to the citizens the choice whether or not to avail themselves of those capabilities)—including the capability to live a safe, well-nourished, productive, educated, social, and politically and culturally participatory life of normal length.

Robin L. West, *Rights, Capabilities, and the Good Society*, 69 Fordham L. Rev. 1901, 1902 (2001) (citing MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT 75-83 (2000) [hereinafter West, *Rights, Capabilities*]; Amartya Sen, *Rights as Goals*, *in* EQUALITY AND DISCRIMINATION: ESSAYS IN FREEDOM AND JUSTICE 16 (Stephen Guest & Alan Milne eds., 1985)).

58. West, *Rights, Capabilities, supra* note 57, at 1901, 1903. In 1998, West offered a "friendly amendment to liberalism's core convictions" in her essay, *Universalism, Liberal Theory, and the Problem of Gay Marriage*, 25 FLA. ST. U. L. REV. 705 (1998) [hereinafter West, *Universalism*]. The "mid-way correction, rather than rejection, of liberalism," that West offered, was designed "to meet at least some of the objections posed by identity theorists and communitarians respectively." *Id.* at 710. As West observes: "[A] friendly amendment to liberalism's core convictions is needed. While we share a universal nature, some traits differentiate some of us from the rest of us. While we are in some aspects of our lives individuals first and foremost, we are also interconnected in comparably profound ways to and with others." *Id.* West further explored ways of rethinking rights, the rule of law, and formal equality in ROBIN L. WEST, RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW (2003).

Rights: An Exploration of Political Philosophy, Ball argues "in favor of the proposition that the state has positive obligations to recognize and support good and valuable intimate relationships and concomitantly against the idea that the state *only* has obligations of non-interference vis-à-vis those relationships." [59] And the moral justification for the state's affirmative obligation to its citizens is at the center of the argument for Ball:

> [I]ntimate human relationships raise fundamental issues about basic human needs and capabilities, issues that are moral at their core because they are about the attributes and potentialities of individuals, as well as the social conditions and policies meant to account and provide for them, that are necessary for the leading of lives that are fully human.[60]

So what happens if decisions about law are legitimately based on substantive moral assessments? Is it possible for the outcome of such an approach to be both progressive and feminist? If we believe in such a political philosophy, have we necessarily gone over to the dark side? Certainly, many of the writers in this field—Robin West, Martha Nussbaum, Carlos Ball—are both progressive and feminist. But it cannot be said that most theorists and writers who advocate a political philosophy of public morality do not advocate a type of society that incorporates feminist and progressive ideals. This is particularly the case with regard to those who have been writing on the subject of marriage for same-sex couples.

But perhaps that is because they have not had enough people playing on their turf. My goal is to join them in their sandbox and see what can be built there. And although I have some sympathy with the queer theorists' suspicion of (and rejection of) the state, this sandbox rests on and embraces a "thick" version of the state that queer theorists will understandably recoil from with some horror. But I believe it is both a real sandbox and the one where the real game is being played.[61]

III. (MORE) JUDGMENTAL MORAL ARGUMENTS ABOUT MARRIAGE FOR SAME-SEX COUPLES

Two groups of people, broadly speaking, populate the arena of moral normative assessments about same-sex marriage: the gay rights social conservatives who support marriage equality and the natural law theorists who

---

59. CARLOS BALL, THE MORALITY OF GAY RIGHTS: AN EXPLORATION OF POLITICAL PHILOSOPHY 17 (2003).

60. *Id.* at 29.

61. I hope to further explore these questions of political philosophy in a forthcoming project, tentatively titled *Gay Sex is Good: The Moral Values Project.*

oppose marriage equality. Understanding the former requires some understanding of the latter.

Gay rights social conservatives agree with marriage skeptics, such as Polikoff and Ettlebrick, who argue that the availability of marriage for same-sex couples will reinforce society's nuptial norm and coerce same-sex couples to conform to that norm. But that is where the agreement ends. Writers like Stephen Macedo[62] and Jonathan Rauch[63] believe a marriage license is significantly better, as a normative moral matter, than sexual license. Thus they argue that marriage should be for gay couples what it is for straight couples—both a right and an expectation.

These advocates perceive an erroneous mainstream view that equality and acceptance of gay people must necessarily entail a radical revision of social norms generally, and sexual norms in particular.[64] As Rauch explains it, gay people themselves generally reject this interpretation of their movement, but the movement is divided about whether what is currently an inaccurate empirical claim should be an accurate normative one:

> [T]here's a tension between bourgeois homosexuals like me, who buy into the standard notion of American life and want to be a part of it, and the radical homosexuals who see their sexuality as implicitly rejecting bourgeois American values. It's not yet clear whether this is a movement about social liberation and egalitarianism or whether this is merely a movement about integrating homosexuals into the standard model of American life.[65]

To understand the view of advocates like Rauch, it is necessary to briefly explore the "new natural law" theorists who perceive a normative *harm* in recognizing marriage for same-sex couples. We can then see how socially conservative gay rights advocates counter these natural law claims by positing that marriage for same-sex couples is a normative *good* for both different-sex couples and same-sex couples. What is particularly striking in both groups is the shared obliviousness to the experiences of women and the lessons of feminism. Thus, the vision of the normative good that emerges from these analyses ignores the needs of women seeking equal status in society; moreover, it also ignores other disadvantaged individuals and groups whose subordination is explicitly or implicitly challenged, and whose liberation is implicitly or explicitly advocated, by feminist ideology.

---

62. Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 263 (1995).

63. JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA (2004) [hereinafter RAUCH, GAY MARRIAGE]. *See also* Jonathan Rauch, *Who Needs Marriage?*, *in* BEYOND QUEER: CHALLENGING GAY LEFT ORTHODOXY 296 (Bruce Bawer ed., 1996) [hereinafter BEYOND QUEER]. *See generally* BEYOND QUEER 249-313 (excerpted articles on gay marriage and family).

64. *See* Bruce Bawer, *Introduction* to BEYOND QUEER, *supra* note 63, at ix-xv.

65. Carolyn Lochhead, *The Third Way*, *in* BEYOND QUEER, *supra* note 63, at 57.

A. Natural Law Theorists

When members of Congress talk about marriage, they simply assume, and do not bother to substantiate, the normative goodness of opposite-sex marriage as compared to marriage between a same-sex couple. The belief that heterosexual marriage and the nuclear family form the cornerstones of a strong society is pronounced, in both senses of the word, but it is hardly explicated. But there are academic scholars who have devoted significant attention and time to explicating the normative good of heterosexual relationships and the normative harm of homosexual ones. Theorists and philosophers like John Finnis, Germain Grisez, Robert George, and Gerard Bradley enunciate basic principles and values that are inherently good and necessary for human flourishing,[66] and they argue that homosexual conduct affirmatively rejects those values and principles.[67]

Robert George and Gerard Bradley, for example, begin with the premise that some things, like knowledge and marriage, are "basic" or "intrinsic" human goods.[68] That is to say, these goods are valuable not because they have instrumental value, but because they are valuable in and of themselves.[69] Although these authors acknowledge that marriage may have instrumental value as a means to procreation, companionship, or parenting, the institution is an inherently—"intrinsically"—good institution.[70] George and Bradley readily admit that "[i]ntrinsic value cannot, strictly speaking, be demonstrated,"[71] but

---

66. *See, e.g.*, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980); ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY (1993); Germain G. Grisez et al., *Practical Principles, Moral Truth, and Ultimate Ends*, 32 AM. J. JURIS. 99 (1987). *See generally* Mark Strasser, *Natural Law and Same-Sex Marriage*, 48 DEPAUL L. REV. 51 (1998) (describing natural law theory).

67. *See, e.g.*, John M. Finnis, *Law, Morality, and "Sexual Orientation"*, 69 NOTRE DAME L. REV. 1049, 1064-69 (1994). There is an established school of "new natural lawyers" who have focused recently on the moral and societal harms of homosexuality. *See generally* Robert George, Contemporary Natural Law Theory and Homosexuality, Address at the American Public Philosophy Institute Conference on Homosexuality and American Public Life (June 19, 1997) (audio tape on file with author). *See generally* Macedo, *supra* note 62, at 272-85; Carlos Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*," 85 GEO L. J. 1871, 1909-19 (1997) (describing "new natural lawyers" and homosexuality).

68. Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 303-07 (1995) [hereinafter George & Bradley, *Marriage*]. This article represents the fullest version of George and Bradley's argument against marriage for same-sex couples. Later articles by both George and Bradley draw on the arguments set forth in this substantive piece. *See* Gerard V. Bradley, *Law and the Culture of Marriage*, 18 NOTRE DAME J. L. ETHICS & PUB. POL'Y 189 (2004); Gerard V. Bradley, *Same-Sex Marriage: Our Final Answer?*, 14 NOTRE DAME J. L. ETHICS & PUB. POL'Y 729 (2000) [hereinafter Bradley, *Same-Sex Marriage*]; Robert P. George, *Forum on Public Morality: The Concept of Public Morality*, 45 AM. J. JURIS. 17 (2000); Robert P. George, *Judicial Usurpation and Sexual Liberation: Courts and the Abolition of Marriage*, 17 REGENT U.L. REV. 21 (2004).

69. *See* George & Bradley, *Marriage*, *supra* note 68, at 306-07.

70. *Id.* at 304-07.

71. *Id.* at 307. *See also* FINNIS, *supra* note 66, at 33-34 (construing the natural law theory of Thomas Aquinas to mean that moral principles are self-evident and "indemonstrable" and "are not

through so-called "noninferential acts of understanding,"[72] acts whose dubious legitimacy I will not contest here, they have apparently come to perceive the basic good of marriage as "a two-in-one flesh communion of persons that is consummated and actualized by acts of the reproductive type."[73] The basic good of marriage is thus reflected solely in one man and one woman, who unite in flesh, through uncontracepted penile-vaginal intercourse within a monogamous marriage.

Whenever sex is instrumentalized within marriage (used for pleasure, procreation, or any other value), the "marital quality" of such sex is necessarily "vitiated."[74] Under this view, other goods that marriage can provide—such as friendship, emotional support, nurturance, pleasure, and parenting—are not irrelevant, but they do not constitute the essential, intrinsic good that *is* marriage. These instrumental values of marriage are "compatible with marital love," but do not constitute its essence.[75] Thus, presumably, even if some of these goods were missing from a particular marriage, the marriage would still constitute an intrinsic, normative good, as long as there was still the "two-in-one-flesh communion of persons that is consummated and actualized."[76]

George and Bradley posit that some individuals' inability to understand the "special significance" of "spousal genital inter-course" derives from their rejection of person-body unity:[77]

> People who reject traditional standards of sexual morality tend to understand human beings dualistically, . . . as nonbodily persons who inhabit nonpersonal bodies. [They efface] . . . the distinction (which is strictly maintained in the natural law tradition) between human goods on the one hand, and good human feelings on the other.[78]

Natural law's rejection of person-body dualism is essential to its assertion that homosexual conduct (and indeed any "instrumental" sex) can never embody a moral good:

> To treat one's own body, or the body of another, as a pleasure-inducing machine, for example, or as a mere instrument of procreation, is to alienate one part of the self, namely, one's consciously

---

inferred from facts"); Robert P. George, *Recent Criticism of Natural Law Theory*, 55 U. CHI. L. REV. 1371, 1388-89 (1988) (noting that the most basic precepts of natural law, those referring to "basic human goods," are self-evident and "cannot be deduced or inferred").

72. Such acts "require imaginative reflection on data provided by inclination and experience, as well as knowledge of empirical patterns, which underlie possibilities of action and achievement." *Id.*

73. George & Bradley, *Marriage*, *supra* note 68, at 305.

74. *Id.* at 305 n.19.

75. *Id.* at 305 n.20 ("Marriage, like other basic human goods, has important instrumental as well as intrinsic value. Goals compatible with marital love—playfulness, cheer ups, distractions from grief, etc.—may properly be integrated with the intrinsic good of marital union without reducing that basic good to the status of a mere means.").

76. *Id.* at 301.

77. *Id.* at 309.

78. George & Bradley, *Marriage*, *supra* note 68, at 309 n.29.

> experiencing (and desiring) self, from another, namely, one's bodily self. But these parts are, in truth, metaphysically inseparable parts of the person as a whole.[79]

Given their definition of marriage's normative good as a "two-in-one-flesh communion," George and Bradley deduce that any sex outside of marriage, and any sexual act other than uncontracepted intercourse within marriage, will necessarily result in personal disintegrity and is, therefore, immoral.

I do not intend to engage here with the question of mind-body dualism, on which there is a substantial literature.[80] But I want to observe that the intrinsic marital good proffered by these natural law theorists is strikingly male-centered. It does not seem to even cross their minds that women might experience the intrinsic good of the marital relationship, and the intrinsic good of marital *sex*, differently from men.

Consider that the "two-in-one-flesh consummation" these theorists valorize will almost always entail the consent, the desire, and the sexual gratification of the male partner. Marital peno-vaginal intercourse presumes that the man has consented to sex. By contrast, the same cannot be assumed for women. A wife's consent is by no means a given. As Robin West has said of marital rape, "Heterosexuality within marriage—*particularly*, paradigmatically, quintessentially, *within marriage*—for most of our history has been through and through non-consensual. Until only very recently, rape has been something which *by definition* could only occur outside of marriage . . . ."[81] So too with desire—peno-vaginal sex necessitates an erect penis, but it emphatically does not require a female equivalent. And so too, to a lesser extent, with

---

79. *Id.* at 314. The importance to the natural lawyers of rejecting mind-body dualism is apparent in their response to Macedo's analogy to the pleasures gained by sex and eating. *See* Macedo, *supra* note 62, at 282-83.

80. *See, e.g.*, JOHN FINNIS, FUNDAMENTALS OF ETHICS (1983); DAVID BRAINE, THE HUMAN PERSON: ANIMAL AND SPIRIT (1992). I must say, however, that I personally find it hard to believe that a major explosion of personal disintegrity occurs whenever a person uses his or her body solely for the purpose of experiencing pleasure—be it through activities of sex or eating. A critique on the internal consistency of new natural law theory with regard to homosexuality has been done especially well by Gary Chartier, *Natural Law, Same-Sex Marriage, and the Politics of Virtue*, 48 UCLA L. Rev. 1593 (2001); *see also* Macedo, *supra* note 62, at 278-300; Ball, *supra* note 24, at 1909-19. Ball articulates well one of the most significant flaws, to my mind, of new natural law theory: the fact that the very *definition* of "homosexual conduct" used by these theorists incorporates a false assumption. "Homosexual activity" and "homosexual conduct" are defined by these theorists as "bodily acts, on the body of a person of the same sex, which are engaged in with a view to securing orgasmic sexual satisfaction for one or more of the parties." Ball, *supra* note 24, at 1912 (quoting Finnis, *supra* note 67, at 1055). Given this definition, and given the natural law lawyers' belief that any sexual activity undertaken for instrumental purposes (such as achieving sexual satisfaction) disintegrates personal integrity, it should come as no surprise that homosexual conduct is condemned as always and inherently immoral. But as Ball observes, "[t]his definition ignores that homosexual acts, like their heterosexual counterparts, are often based on affectional feelings and on a concept often overlooked in debates about homosexuality, namely 'love.'" *Id.* at 1912-13.

81. Robin L. West, *Integrity and Universality: A Comment on Ronald Dworkin's* Freedom's Law, 65 FORDHAM L.REV. 1313, 1329-30 (1997) [hereinafter West, *Integrity*].

gratification—husbands usually achieve orgasm, while wives notoriously often do not via such a form of intercourse.[82]

Does the natural law really mandate a "two-in-one-flesh-consummation" that is so inherently pleasurable for men and so questionably pleasurable for women? Given that intrinsic goods are grasped through "noninferential acts of understanding," there is a dubious and dangerous correlation between true unitive and moral value and a sex act that definitionally incorporates male—and only male—consent, desire, and gratification.[83]

B. Socially Conservative Gay Rights Advocates

The writings of the new natural lawyers establish a male-centered discourse on marriage, one that is answered in kind by those who perceive a normative good in marriage for same-sex couples. For socially conservative gay rights advocates, the normative good of marriage for gay couples looks almost identical to the normative good of marriage for heterosexual couples, as currently understood. Stephen Macedo articulates this vision quite well—in direct rebuttal to the normative good of heterosexual marriage articulated by theorists such as John Finnis and Robert George.[84]

Macedo believes that "with the conservatives, that public moral judgment has a legitimate role to play in even the most personal aspects of our lives."[85] And he does not disagree with the new natural lawyers that intrinsic goods exist, or even that there is a "*uniquely unitive* nature of marital intercourse."[86] Macedo simply believes that Bradley and George "fail . . . to perceive the real goods that can be embodied in *homosexual relations at their best.*"[87]

---

82. *See* Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L. J. 81 (1987); Robin L. West, *The Harms of Consensual Sex*, 94 AM. PHIL. ASS'N NEWSL. 52 (Spring 1995); Mary Becker, *Women, Morality, and Sexual Orientation*, 8 UCLA WOMEN'S L.J. 165 (1998). There is no reason, of course, to assume that George and Bradley would valorize unconsented sex within a heterosexual, monogamous marriage. It is notable, however, that their justification for the normative good does not even set consent as a precondition.

83. Mary Becker offers a similar observation on the work of the new natural lawyers, and provides a fascinating twist on George and Bradley's mind-body dualism. She suggests we should "assess the morality of sex acts in terms of women's experiences of the disassociation [between mind and body]" that George and Bradley correctly describe as dehumanizing, but observes that George and Bradley have missed what causes disassociation for women. Becker, *supra* note 82, at 191. She notes that "[w]omen's accounts of alienating sex (causing disassociation of conscious and physical selves)" tend not to be about acts of uncontracepted intercourse in marriage, but rather about acts of *unwanted* sex. *Id.*

84. Macedo, *supra* note 62, at 293-300. Macedo observes that some readers will be "unhappy with the concessions [he] make[s] to conservatives." *Id.* at 264 n.14. His hope, however, is that readers will allow "that there might be value in showing that equal rights for gays and lesbians need not depend upon the acceptance of more radical goals . . . ." *Id.*

85. *Id.* at 263 (citing GEORGE, *supra* note 66).

86. Stephen Macedo, *Reply to Critics*, 84 Geo. L.J. 329, 330 (1995) [hereinafter Macedo, *Reply*].

87. *Id.* In response to Macedo's article, *Homosexuality and the Conservative Mind, supra* note 62, George and Bradley had postulated:

In Macedo's view, "homosexual relations at their best"[88] mimic almost exactly heterosexual marital life as envisioned by the new natural lawyers. Macedo agrees that promiscuity and sexual license are problems in society and he shares the concerns of conservatives who worry about "the excesses of sexual permissiveness and promiscuity and the liberationist ideals that condemn all traditional restraints indiscriminately."[89] His principal contribution to the debate, other than to offer a comprehensive critique of the internal inconsistencies of the new natural law theory with regard to homosexuality,[90] is to explain how the "reasonable core of the conservative sexual teaching [which] is opposition to promiscuity and sexual license,"[91] can be met in a more comprehensive and internally consistent manner by recognizing marital relationships between gay couples: "If promiscuity and sexual license are problems, why not co-opt the part of the populace most in need of bourgeois domestication . . . ? [I]f we take seriously the good of all, why disparage institutions that encourage better and healthier forms of life among those denied the best form by nature?"[92]

The normative good that Macedo thus believes society should support and encourage is long-term, monogamous marriage—for fertile and infertile heterosexuals, and for homosexuals—as a means of restraining sexual license. Although both homosexual couples and infertile couples will, in Macedo's view, be unable to experience the complete normative good of marriage because they are unable to procreate, they can experience the other goods of marriage.[93]

> Criticisms of our view along the lines of those advanced by Macedo seem compelling to liberals because they cannot imagine that the point and value of sexual relations, inside or outside of marriage, can be anything other than instrumental. They presuppose that the sexual relationship of partners in marriage, if it has any point and value at all, *must be instrumental* either to pleasure, the expression of feelings, and the like on the one hand, or to procreation on the other.

George & Bradley, *Marriage*, *supra* note 68, at 306. Macedo, in his reply, was thus making clear that he did not reject the theoretical concept of "intrinsic" goods, including the intrinsic good of marital intercourse.

88. Macedo, *Reply*, *supra* note 86, at 330.

89. *Id.* at 263 (noting his sympathy with Germain Grisez's challenge to the "libertarianism that certainly characterizes an extreme form of liberalism that came to the fore in the 1960s").

90. *See* Macedo, *supra* note 62, at 279-85.

91. *Id.* at 286.

92. *Id.* at 287. Although Macedo does not explain why gay people are denied "the best form by nature," such a belief is presumably related to Macedo's belief that homosexuality is a misfortune by virtue of the fact that gay people cannot procreate. *Id.* at 269.

93. With regard to procreation, Macedo observes:

> [Harvey] Mansfeld is undoubtedly right to emphasize the great goods of procreation and child rearing, and their central place in at least one extremely important version of a complete or perfect human life. This is one reason why he is correct, I think, to regard homosexuality as a misfortune: for homosexual as for sterile heterosexual couples (though in somewhat different ways), certain important features of this version of 'the good life' are unavailable.

Id.

Macedo's "social norms" approach thus depends explicitly on society identifying one normative good of sexual and personal relationship (the marital relationship) as "better" than any other personal relationship, and using all forms of public policy to encourage people to adopt this relationship. The right of same-sex couples to marry must not be sought simply as a means of expanding the *choice* of such couples to adopt the *option* of marriage, but rather as a means of constricting or at least coercing that choice:

> [E]ven those conservative homosexuals who call for extending marriage rights to gays and lesbians do not really express the right sort of support for the *norm* of marriage. They typically fail to see that the point of making marriage more widely available should not simply be to distribute opportunities and options fairly to all. Rather, *the point is to extend a moral norm that carries with it an expectation that one will get married, and a social judgment that one should get married* . . . .[94]

Macedo notes his debt to a conversation with Jonathan Rauch for the idea that marriage for same-sex couples must be a norm, and not an option.[95] In a 1996 *New Republic* article, Rauch argued that marriage must be "privileged," and not simply considered a "lifestyle option"; it must be "understood to be better, on average, than other ways of living. Not mandatory, not good where everything else is bad, but better: a general norm, rather than a personal taste."[96] Rauch embraced coercion toward the altar: "If gay marriage is recognized, single gay people over a certain age should not be surprised when they are disapproved of or pitied. That is a vital part of what makes marriage work."[97]

Rauch's take on society's interest in marriage, revolving around the trope of "rogue males and ailing mates,"[98] dismisses love as important to marriage from the point of view of social policy.[99] Instead, Rauch postulates the two strongest reasons for society to support marriage are to ensure that (1) young males are civilized by being bound into a couple,[100] and (2) there is always

---

94. Macedo, *supra* note 62, at 297 (emphasis added).

95. *Id.* at 297 n.140.

96. Jonathan Rauch, *For Better or Worse?*, NEW REPUBLIC, May 6, 1996, *reprinted as Who Needs Marriage? in* BEYOND QUEER, *supra* note 63, at 312-13.

97. *Id.* Rauch has expanded on these ideas in his book on marriage, RAUCH, GAY MARRIAGE, *supra* note 63.

98. Rauch, *supra* note 96, at 306.

99. While love is certainly "a desirable element of marriage," Rauch also observes:

> [Love cannot be] the defining element in society's eyes. You may or may not love your husband, but the two of you are just as married either way. . . . Love helps make sense of marriage from an emotional point of view, but it is not terribly important . . . in making sense of marriage from the point of view of social policy.

Id. at 298.

100. Rauch proposes:

> [I]t is probably fair to say that civilizing young males is one of society's two or three biggest problems. . . . For taming males, marriage is unmatched. . . . If marriage—that is, the binding of men into couples—did nothing else, its power to settle men, to keep them at home and out of trouble, would be ample justification for its special status.

someone "whose 'job' is to drop everything" and help out a mate in emotional or physical need.[101] As far as society is concerned, Rauch argues, both of these goods apply equally to gay couples and, therefore, gay couples should be allowed to marry.[102] And "marry" is the key word here. Given the unique social position and ideological underpinnings of marriage, Rauch insists that it is *solely* marriage, and not domestic partnership, that can achieve the domestication of husbands and the care of both partners:

> The promise of one-to-one lifetime commitment is very hard to keep. The magic of marriage is that it wraps a dense ribbon of social approval around each partnership, then reinforces commitment with a hundred informal mechanisms from everyday greetings . . . to gossipy sneers . . . . The power of marriage is not just legal but social.[103]

The normative good of marriage for same-sex couples, as set forth by these advocates and others,[104] is thus a life-long, monogamous commitment between two people that will serve as the best means for restraining harmful sexual license and/or for ensuring economic and social stability. This relationship must be privileged and valued over other forms of constructing a family, and, of key importance, all members of society must be expected and pressured to adopt this form of personal relationship.

Writers such as Andrew Sullivan and William Eskridge share many similarities, and some differences, with Rauch and Macedo.[105] Both Sullivan and Eskridge are concerned with sexual promiscuity on the part of gay men, and both believe marriage can help restrain harmful sexual license.[106] Both also add to the debate by describing additional social and interpersonal goods

---

Id. at 307.

101. *Id.* at 307-08. Rauch postulates on the meaning of marriage: "[W]hen you collapse from a stroke, there will be at least one other person whose 'job' is to drop everything and come to your aid . . . . [M]arriage is society's first and, often, second and third line of support for the troubled individual." *Id.*

102. Rauch, *supra* note 96, at 308-09.

103. *Id.* at 310.

104. *See* Bruce Bawer, *Lecture at Saint John's Cathedral*, *in* BEYOND QUEER, *supra* note 63, at 226; John W. Berresford, *A Gay Right Agenda*, WASH. POST, June 11, 1995, at C5, *reprinted in* BEYOND QUEER, *supra* note 63, at 107; John G. Culhane, *Uprooting the Arguments against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1189 (1999); Rabbi Yaakov Levado, *Gayness and God*, TIKKUN (1993), *reprinted in* BEYOND QUEER, *supra* note 63, at 194.

105. One piece by Andrew Sullivan is included in the BEYOND QUEER anthology. *See* Andrew Sullivan, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, NEW REPUBLIC, Aug. 28, 1989, at 20, *reprinted in* BEYOND QUEER, *supra* note 63, at 252.

106. *See* ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 182 (1995) ("Marriage provides an anchor, if an arbitrary and often weak one, in the maelstrom of sex and relationships to which we are all prone . . . . We rig the law in its favor . . . because we recognize that not to promote marriage would be to ask too much of human virtue."); ESKRIDGE, SAME-SEX MARRIAGE, *supra* note 13, at 10 ("[S]exual variety has not been liberating to gay men. In addition to the disease costs, promiscuity has . . . contributed to the stereotype of homosexuals as people who lack a serious approach to life." Thus, a "self-reflective gay community ought to embrace marriage for its potentially civilizing effect on young and old alike.").

that marriage can provide for same-sex couples. For example, Sullivan highlights the "unqualified social good" that marriage for same-sex couples will provide to gay youth who will be able to see gay couples identified not in terms of "sex or sexual practices," but in terms of "constructive happiness."[107] And Eskridge notes that his "normative argument will be that the dominant goal of marriage is and should be *unitive*, the spiritual and personal union of the committed couple . . . ."[108]

Like Macedo and Rauch, the view of marriage for same-sex couples shared by Sullivan and Eskridge resonates with an essentially traditional view of marriage: a monogamous relationship that includes assurances of economic and emotional support between partners.[109] But Eskridge and Sullivan diverge significantly from Macedo and Rauch in their repeated adherence, at least in theory, to a vision of the state as a neutral arbiter of different normative goods among its citizens.[110] Their insistence on using equality arguments, as well as normative arguments, leads them to assert that individuals should be allowed to structure their personal relationships as they wish. Thus, both writers believe gay couples (and presumably, heterosexual couples) should be permitted by the

---

107. SULLIVAN, *supra* note 106, at 184 ("For them, at last, there would be some kind of future; some older faces to apply to their unfolding lives, some language in which their identity could be properly discussed . . . their eventual chance at some kind of constructive happiness.").

108. ESKRIDGE, SAME-SEX MARRIAGE, *supra* note 13, at 91. Eskridge credits Milton Regan's work for explicating that "the status of spousehood protects people's capacity for intimacy and thereby fosters a stable sense of self over time." *Id.* at 72 (*citing* REGAN, FAMILY LAW AND THE PURSUIT OF INTIMACY, *supra* note 10).

109. *See* ESKRIDGE, SAME-SEX MARRIAGE, *supra* note 13, at 70-74; SULLIVAN, *supra* note 106, at 181-85, 220-21.

110. In the final pages of his book, Eskridge observes that the state, like parents in a family with many children, must have a regime of rules in which "every child is valued and no child is treated as more valuable than the others." ESKRIDGE, SAME-SEX MARRIAGE, *supra* note 13, at 190 (using an analogy first suggested by Justice Scalia in *The Rule of Law as a Law of Rules*, 56 UNIV. CHI. L. REV. 1775 (1989)). If a few of the children strongly dislike a gay sibling, Eskridge explains, "good parents" will "not side with the homophobic children," but will try to have each child "understand the viewpoint of the others and to instill in them a 'live and let live' attitude." *Id.* at 190-91. Eskridge's view must assume either a *true* liberal neutrality on the part of the parent/state (such that a gay child/citizen is to be valued equally by the parent/state *even* if the majority of siblings/citizens believe such a child/citizen to be morally evil and harmful), or it must allow a role for normative assessments in family/state decision making and assert that the gay child/citizen is *not* morally evil and harmful. Eskridge does not clarify precisely where he stands with regard to these two views, as he makes both equality and normative arguments in his book.

Andrew Sullivan, who also uses both forms of argumentation, explicitly acknowledges the tension in his approach:

> [M]y central argument . . . is torn—clearly—between sympathy for both the liberal and conservative traditions. And the case for public neutrality is—equally clearly—very different from that for social stability. . . . But in so far as they do conflict, it is clear that my argument for public neutrality and private difference is the essential one; and that it is essentially liberal. Its conservative overtones adorn, rather than supplant, its underlying liberalism. It shows that complete bracketing [of questions of the 'good life'] is not possible; but that the endeavor is still a critically important one.

SULLIVAN, *supra* note 106, at 214.

state not to get married, should they so desire.[111] But Eskridge is also comfortable with the government providing greater benefits to those in a marital relationship, as compared to, for example, those in domestic partnership relationships.[112] Similarly, Sullivan indicates no discomfort with the current societal regime that privileges marriage over other relationships in terms of according social and economic benefits to spouses, and not to domestic partners.[113]

So what is the picture of the normative good of marriage that emerges from these advocates? Unfortunately, the picture is relatively traditional and restrictive. Marriage for same-sex couples looks just like marriage for opposite-sex couples.[114] The current societal pressures and expectations that encourage or subtly coerce people into marriage are either celebrated or not directly challenged. And any changes that the recognition of marriage for same-sex couples could bring to the understanding or practice of marriage on the part of opposite-sex couples are largely ignored, although Eskridge is a notable exception to that tendency.[115]

---

111. *See* ESKRIDGE, SAME-SEX MARRIAGE, *supra* note 13, at 78-79; SULLIVAN, *supra* note 106, at 190, 211-12.

112. *See* ESKRIDGE, SAME-SEX MARRIAGE, *supra* note 13, at 78 (suggesting the American legal system offer a "menu of choices" to couples for their unions, with marriage including *all* the existing "accompanying benefits and obligations," and domestic partnerships entitled to "some economic benefits (such as health care)," but "not limited by the rules of divorce and sexual exclusivity"). Eskridge's rationale for favoring marriage is that marriage entails greater obligations of fidelity and support between the partners and that two individuals in a marriage face greater difficulty extracting themselves from the marriage. *Id.*

113. *See* SULLIVAN, *supra* note 106, at 180-85. Neither Eskridge nor Sullivan explain why—if the state is a *neutral* arbiter among normative goods—it is legitimately providing *greater* economic and social benefits to married couples than to domestic partners. Eskridge's two rationales, *supra* note 112, seem less than compelling given the extreme disparity in benefits between marriage and domestic partnership. And on what basis would Eskridge decide *which* benefits should be given to domestic partners and which benefits should not?

114. Marriage advocate Evan Wolfson insists, I think rightly, that those of us who believe same-sex couples should have the right to marry would do well to avoid the expression "same-sex marriage" and refer instead to what we're actually fighting for – namely, "marriage," plain and simple. Evan Wolfson, *Why Should I Be For 'Gay Marriage'?*, December 3, 2003, *at* http://freedom.agora.com/document.asp?doc_id=1000 (last visited Apr. 11, 2005) ("We are asking for marriage, not 'gay marriage'—that's the short-hand term that our opponents use to make gay people's families seem different or lesser."). For that reason, I consistently use the phrase "marriage for same-sex couples" or "marriage equality" throughout this Article, and not the phrase "gay marriage" or "same-sex marriage." But as the examples of Rauch and Eskridge demonstrate, there are real costs in insisting that, as I describe their view above, "marriage of same-sex couples looks just like marriage for opposite sex couples."

115. Eskridge, for one, welcomes the trend, caused largely by the push for same-sex relationship recognition, toward a "menu" of state-recognized family and couple configurations. *See* William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 MCGEORGE L. REV. 641, 662 (2000). And he laments that "the tactics of some progressive critics of same-sex marriage may make their prophecies self-fulfilling. By insisting that same-sex marriage will domesticate gay radicalism and marginalize unpartnered lesbians, gay men, and bisexuals, these critics [ignore] . . . the new opportunities opened up by the menu of options" he sees appearing worldwide. *Id.*

Writers who adhere to a socially conservative ideology regarding marriage for same-sex couples seem, like the new natural lawyers, somewhat oblivious to the lessons and insights of feminism.[116] For example, Macedo offers a general attack on "sexual liberationism" and extols marriage as the best mechanism for ensuring "sexual restraint" on the part of all members of society. But certain aspects of the previous decades' openness to sexual freedom have been beneficial for women. Indeed, the affirmation of women's sexual lives lies at the core of much theory and practice regarding feminism and full equality for women.[117] Conferences have been held, books and articles have been written, and lives have been changed—all based on valuing women's independence in sexual matters as a means of truly empowering women in society.[118]

Sexual freedom for women has also meant they no longer must construct their lives in a way that *depends* on marriage. This is not a minor matter. Feminist scholars have documented and analyzed the myriad ways in which marriage has discriminated against, disempowered, and harmed women.[119] The exception for marital rape is only one of the more extreme examples of such harms.[120] Moreover, while the legal rules governing women's status in marriage now adhere to a system of formal equality, in practice, women are still often trapped in strict gender-defined roles that limit their full potential.[121]

---

116. William Eskridge would not fall into this category, as the casebook he co-authored with Nan Hunter reflects a significant awareness of the presence and impact of feminism. *See generally* WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW (1997). And Eskridge's arguments for marriage equality encompass the widest array of rationales, including Nan Hunter's feminist argument for changing marriage from within—to the limited extent Eskridge believes law can effect this beneficial change. *See* ESKRIDGE, SAME-SEX MARRIAGE, *supra note* 13, at 76.

117. *See generally* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY (Carole S. Vance ed., 1989); JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA (1988).

118. *See* DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* (1994); LISA DUGGAN & NAN D. HUNTER, SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE (1995); Robin L. West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 702 (1990); Carole S. Vance, *Introduction* to PLEASURE AND DANGER, *supra* note 113, at xvi; Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641 (2003).

119. *See, e.g.*, Dianne Post, *Why Marriage Should be Abolished*, 18 WOMEN'S RIGHTS L. RPTR 283, 306 (1997) ("Marriage promotes the cause of the patriarchy, political faith in the patriarchal state, and the commercial and social exploitation of women."). *See generally* CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987).

120. *See generally* Robin L. West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45 (1990) [*hereinafter* West, *Equality Theory*]; Lisa R. Eskow, Note, *The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution*, 48 STAN. L. REV. 677 (1996).

121. *See* Hunter, *supra* note 18, at 17 ("Marriage enforces and reinforces the linkage of gender with power by husband/wife categories, which are synonymous with the social power imbalance between men and women."); Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 UTAH L. REV. 387 (challenging traditional family structures and their construction of gender roles); West, *Equality Theory*, *supra* note 120, at 67-68 (arguing that gender-neutral marital rape statutes are nonetheless biased given gender-based marital roles).

So endorsement of a society where all people are expected to marry, and are pressured to marry, raises the hairs on the back of my feminist neck. There are dark shadows that come with such pressures. During many centuries, such pressures forced women to marry while marriage was a discriminatory and disempowering institution for women.[122] Today, such pressures and expectations seem to translate into a message to many women that their lives do not really *begin* until they get married.[123] A striking example of the enduring power of such messages was apparent in the film, "In & Out." Emily Montgomery (Joan Cusack) delivers a passionate monologue after she is stood up at the altar by Howard Brackett (Kevin Kline), who realizes he is gay shortly before the wedding. The basic message of the monologue is that Emily's life was going to *begin* when she married Howard; her life had no meaning until then.[124]

In addition, both of Rauch's instrumental rationales for marriage—while cast as concerns for society at large—seem, in a practical sense, to be more concerned with the needs of men than with those of women. First, the "taming of men" by yoking them to women does not evoke a picture of equal partners joining together for mutual benefit, love, and companionship. Rather, it portrays women as performing a necessary service for society— that of domesticating men—even at the cost of women's own independence and liberation. Under this view, women are presumed to benefit from providing domesticating services because that will reduce the number of men who, presumably, would and could attack them (in effect, women and not the police state are to bear the responsibility of restraining male violence). In reality, though, women suffer physical and sexual abuse more often at the hands of their spouses, boyfriends and acquaintances than they do at the hands of strangers.[125]

Thus, while there is a normative good to be achieved in protecting women from physical and sexual abuse by men, contrary to an argument that has been

---

122. *See, e.g.*, Jane E. Larson, *"Even a Worm Will Turn at Last": Rape Reform in Late Nineteenth-Century America*, 9 YALE J. L. & HUMAN. 1, 31 (1997) (noting the economic and social pressure on women to marry in early America); Joyce Davis, *Enhanced Earning Capacity/Human Capital: The Reluctance to Call It Property*, 17 WOMEN'S RTS. L. REP. 109, 144 (1996) (arguing that women's historical legal dependence on men was exacerbated by "economic realities and social pressures which forced women into marriage").

123. It has been argued that even the dominant liberal strand of feminism has assumed women want to and will marry. *See* Rachel F. Moran, *How Second Wave Feminism Forgot the Single Woman*, 33 HOFSTRA L. REV. 223 (2004).

124. *See* IN & OUT (Paramount Pictures 1997).

125. *See* Myrna S. Raeder, *The Double-Edged Sword: Admissibility of Battered Woman Syndrome By and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789, 793 (1996) ("Women suffering violent victimizations are almost twice as likely to be injured if the offender was an intimate rather than a stranger.").

unconvincingly deployed to keep same-sex couples unwed,[126] the institution of marriage has *not* been the primary mechanism for achieving such a good. To the contrary, the institution of marriage has often shielded men who abuse women within the sheltering veil of the institution.[127]

Second, family care-giving has been carried out disproportionately by women throughout history. Women tend to outlive their male spouses, and thus most married women care for their husbands until the husbands' deaths—and then end up without caregivers of their own within the marriage.[128] Intergenerationally, women provide a disproportionate amount of the unpaid home health care in the country—both to their own parents and to their *husbands'* parents.[129]

Moreover, women's disproportionate unpaid care work—for children, spouses, and parents—has had significant costs for their careers and for gender equity more generally. As Phyllis Moen and Patricia Roehling point out in *The Career Mystique: Cracks in the American Dream*, the "culture of occupational and educational equality among men and women coexists [today] with the continued gendered expectation that women should do the bulk of unpaid family-care work. But doing this second shift of family care means moving in and out of the workforce, working part-time or not at all."[130]

The concept of the family as society's key "back-up care giver"—while certainly true—has thus both historically, and to this day, included significant drawbacks for women. It is disconcerting, therefore, to find modern-day theorists using the care-giving function of marriage as a source of its normative good, without any acknowledgment of the manner in which such functions have historically oppressed women and continue to disproportionably make

---

126. *See, e.g.*, David M. Wagner, *Marriage: An Achievement of Centuries for the Protection of Women and Children*, 38 NEW ENG. L. REV. 683 (2004).

127. *See* West, *Equality Theory, supra* note 120.

128. *See, e.g.*, Chai R. Feldblum, Note, *Home Health Care for the Elderly: Programs, Problems, and Potential*, 22 HARV. J. ON LEGIS. 193, 195 (1983) ("Women are 57% of all persons aged 65 to 74, 63% of persons aged 75 to 84, and 70% of persons aged 85 or older. Thus, in the 75 and older group, there are one hundred women for every fifty-one men." (footnotes omitted)).

129. *Id.* at 213-15. *See also* Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1579-85 (1996) (analyzing gender differences in household labor); JO VANEVERY, HETEROSEXUAL WOMEN CHANGING THE FAMILY: REFUSING TO BE A WIFE! (1995).

130. PHYLLIS MOEN & PATRICIA ROEHLING, THE CAREER MYSTIQUE: CRACKS IN THE AMERICAN DREAM 17 (2005) (footnotes omitted). As Moen and Roehling explain, "This perpetuates gender discrimination in the types of jobs available to women, with employers presuming women lack long-term job commitment given that their checkered career patterns are at odds with the career mystique." *Id.* at 17-18. The unpaid caregiving work of women, and its impact on women's careers, has been well analyzed in several studies. *See, e.g.*, MONA HARRINGTON, CARE AND EQUALITY: INVENTING A NEW FAMILY POLITICS (1999); JOAN WILLIAMS, UNBENDING GENDER: WHY WORK AND FAMILY CONFLICT AND WHAT TO DO ABOUT IT (2000); EILEEN APPLEBAUM ET AL., SHARED WORK, VALUED CARE: NEW NORMS FOR ORGANIZING MARKET WORK AND UNPAID CARE (2002). For some fascinating legal and philosophical analyses of caregiving work, see ANNE ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS (2004); and EVE FEDER KITTAY, LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY (1999).

demands on women's time and energy.[131] Moreover, this view of the family reinforces an unfortunate notion that individuals—rather than society at large—have the primary responsibility for balancing work and family needs.[132]

As a general matter, the various rationales proffered for the normative good of marriage by socially conservative writers tend to reflect marriage as it has traditionally been understood. Thus, such rationales ignore the new perspective on the normative good of marriage that recognition of marriages by same-sex couples could perhaps bring. A marriage between two men or two women necessarily takes place within a framework that does not include centuries of gender-role expectations and oppression. Given that framework, there may be lessons about the normative good of marriage that will be easier to perceive in such relationships.[133] But such lessons will not be learned if the rationales proffered for the normative good of marriage are solely backward-looking, rather than forward-looking.

Looking forward, therefore, *is* the right framework for the enterprise of determining whether there is a particular moral good to marriage—and if so, what the content of that moral good is. Natural law theorists, such as George

---

131. A reliance on the private sector of the family, instead of on the public sector of the government, was also quite evident during the congressional debate on the FMA. *See. e.g.*, 150 CONG. REC. S7928 (daily ed. July 12, 2004) (statement of Sen. Brownback):

> Traditional marriage is a boon to society in a variety of ways . . . Marriage has economic benefits not only for the spouses but for the economy at large. Even in advanced industrial societies such as ours, economists tell us that the uncounted but real value of home activities such as child care, senior care, home carpentry, and food preparation is still almost as large as the 'official' economy.

Most members of Congress who supported the FMA relied, at some point, on Stanley Kurtz' article published in the Weekly Standard, *The End of Marriage in Scandinavia: The 'Conservative Case' for Same-Sex Marriage Collapses* (*reprinted in* 150 CONG. REC. S8003-07 (daily ed. July 13, 2004)). A key argument made by Kurtz is that the "welfare state" poses a significant threat to the family. As Kurtz put it, a positive aspect of American culture was its resistance to the welfare state: "In comparison to Europe, Americans are more religious and more likely to turn to the family than the state for a wide array of needs—from child care, to financial support, to care for the elderly." *Id.* at S8006.

132. For a new political effort to re-imagine careers and workplaces, for both men and women over a life span, that better advance gender equity, nurtured children and cared-for elderly parents, and a "whole person" approach to life, see www.workplaceflexibility2010.org (last visited Apr. 6, 2005).

133. *See, e.g.*, Hunter, *supra* note 18, at 16-17 ("Same-sex marriage could create the model in law for an egalitarian kind of interpersonal relation, outside the gendered terms of power, for many marriages."); Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy, and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1613 (1997) ("[E]xtension of marriage to same-sex partners will serve to erase the importance of biological sex as a determiner of individual roles and, thereby, erode patriarchy. This suggests that same-sex marriage may well be founded on beliefs that could be described as anti-patriarchal or non-patriarchal.") (footnotes omitted); Louis Michael Seidman, Romer*'s Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 119 (asking readers to reflect on "the argument that gay sex presents a model of what heterosexual sex could become if only it were freed from gender hierarchy"); West, *Universalism, supra* note 58, at 72 ("[S]ame-sex marriage, between two individuals committed to the care of each other and no less committed than their heterosexual counterparts to the possibility of raising children, presents a model of caring that, precisely because it does not embed the giving of physical care in a genetic replication, is less constrained by egoism.").

and Bradley, correctly state—in my view—a role for law in supporting marriage:

> Law supports certain institutions of civil society for the sake of the common good. The common good is that ensemble of social conditions which make it more or less easy for persons to perfect themselves, to live worthwhile lives. Law supports these institutions for the sake of genuine human flourishing. For the sake of genuine human flourishing, then, the law must shape its "version" of marriage around the truth about marriage.[134]

The question then becomes: what *is* the truth about marriage? Bradley is quite aware of the stakes that hang on that question:

> Most people believe and mean to say that same-sex marriage is simply wrong for everyone, that it is objectively and categorically immoral. *This view could be false. If it is, its falsity is sufficient reason to discard it.* Then doctrines about political "neutrality" or unjust imposition are unnecessary. If the view is true, then such doctrines are either inapposite, or require argument in their favor.[135]

So, with due apologies to queer theory as I move further into a deep engagement between the state and personal relationships, I offer the following section that describes a number of personal relationships I believe the law should support "for the sake of human flourishing."

C. A Feminist Moral Case for Marriage and More

The first question is: should the state support marriage at all? I think the answer is yes. In *Family Law and the Pursuit of Intimacy*, Milton Regan offers a framework for understanding at least part of the normative good of marriage, as well as the state's role in supporting it.[136] To provide a concrete setting for his arguments, Regan suggests a person named Tom, who is a divorced father and a corporate litigation law partner. Regan takes us through Tom's day, describing his persona and emotions as he deals in the morning with corporate

---

134. Gerard V. Bradley, *Law and the Culture of Marriage*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 189, 194 (2004).

135. Bradley, *Same-Sex Marriage*, *supra* note 68, at 733 (emphasis added). Bradley repeats this point later in his article:

> Some arguments for legal recognition of same-sex marriage, though phrased in terms of equality, actually depend upon the validity of (presupposed) neutrality claims. Stephen Macedo says that the law of marriage denies "fundamental aspects of equality" by embodying the moral judgment that marriage is inherently heterosexual. *But this is sound only if it is false that marriage is inherently heterosexual. If that view is false, the reason for recognizing same-sex marriages is that such unions are as a matter of moral fact indistinguishable from marriages of the traditional type.* If the moral judgment is true, then Macedo's claim that the recognition of this truth by government "denies fundamental aspects of equality" is simply mistaken.

Id. at 737 (emphasis added). Hence, contesting the moral truth of what marriage means is the name of the game here.

136. *See* REGAN, *supra* note 10, at 89-117.

and pro bono legal matters at the office, meets a friend for lunch who has helped him pursue an artistic avocation, talks to his mother in the afternoon and promises to fly out and visit her, works out at a health club after work, talks to his minister upon arriving home and agrees to attend a religious retreat for Sunday school instructors, has dinner with his daughter, brags to a friend in a phone conversation after dinner about the number of women he has met in a singles bar, and then hosts a evening meeting of his men's discussion group.[137] After offering us this description of Tom's day, Regan observes: "Tom could be described in terms of a variety of 'selves in the course of the day, depending on the context in which he found himself. Each is part of a relationship with others, which contains its own perspectives and values."[138]

Drawing on the work of postmodern scholars such as Kenneth Gergen and Fredric Jameson,[139] Regan emphasizes a *relational* view of the self: as "the number and intensity of our relationships with others increases . . . we become 'populated' with their voices and perspectives."[140] Because a person begins to "acquire a variety of possible identities that can be evoked in different situations,"[141] the notion of a stable, wholly individualistic self existing over time begins to dissolve: "Identity becomes a fluid concept, not so much a 'core' narrative that organizes experiences as much as an aggregation of narratives, each of which speaks to a distinct dimension of one's relation with others."[142]

Given this view of the self, Regan argues, the companionate model of marriage is one of our culture's most forceful images of the relational self in action. Regan believes that marital status, like other kinds of legal and social status, are important and, in our alienated postmodern world, increasingly important ways to maintain a coherent sense of both self *and* connectedness:[143] marital status, like other statuses, "offers a model of identity defined in terms of communal norms, which can root the self in context."[144] Entering into a marriage, becoming a husband or wife, should thus be seen as forming "a partnership that creates a structure of meaning within which the individual can make sense of her experience."[145]

---

137. *Id.* at 70-72. I am skipping over other aspects of the day, as described by Regan. The description is worth reading in its entirety.

138. *Id.* at 72.

139. KENNETH J. GERGEN, THE SATURATED SELF: DILEMMAS OF IDENTITY IN CONTEMPORARY LIFE (1991); Fredric Jameson, *Postmodernism and Consumer Society*, *in* The ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE 111 (Hal Foster ed., 1983).

140. REGAN, *supra* note 10, at 72.

141. *Id.*

142. *Id.* at 72-73.

143. Status "foster[s] a stable sense of self over time," and it "creates a 'public' identity that is social in nature—a self defined in terms of its relationships with others." REGAN, *supra* note 10, at 97, 102.

144. *Id.* at 89.

145. *Id.* at 94 (citing Peter Berger & Hansfried Kellner, *Marriage and the Construction of Reality*, 46 DIOGENES 1, 11 (1964)). This view of marriage stands in contrast to the assumption of the

When two individuals get married, they are agreeing to "participate in the creation of a shared reality in which each person's identity is dependent in part on interaction with the other."[146] But their dependency does not and should not end with "identity." Marital status gives rise to important obligations of care and support. Family law makes mandatory some of those expectations, providing a minimum for "how the relational [married] self should interact with others."[147] And while family forms can and do change over time, Regan insists that what makes the law governing family relationships essential is the existence of "*some* distinctive social form that is seen as embodying [familial] attitudes."[148]

Thus, in Regan's theoretical framework, there is a normative good in having society characterize a particular type of personal relationship as family, and in designating for individuals within such a family a status. Marriage and the status of individuals as spouses and parents become critical components in supporting a self that is able to maintain commitments over time and to enjoy a sense of intimacy that is long-term and deep, rather than ephemeral and fractured.[149]

---

acontexual self, which envisions marriage "as an encounter between two separate people, who lend each other support in their efforts to fashion authentic identities." *Id.* One can understand why liberal morality advocates avoid talking about, or even perceiving the right to marry, in the terms Regan uses to describe human and especially family life. In the importance he attaches to the relational conception of the self, Regan disputes the real-life accuracy of the autonomous self-interested individual subject who has been the hero of liberal theory since the Enlightenment. *See* MILTON C. REGAN, JR., ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE 15-22 (1999) [hereinafter REGAN, ALONE TOGETHER]. Significantly, liberalism's utter "abstraction of the individual from her relationships" does not cause Regan to reject individualism entirely. *Id.* at 17. Rather, Regan understands that both the communitarian/relational model and the liberal/individualist model tell important truths about human existence and experience, and he sees family law as negotiating and trying to strike a livable, sensible balance between them. *See generally* REGAN, ALONE TOGETHER, *supra.* Nonetheless, Regan has argued that both the law and discourse around the family has been too quick to "embrace in an unqualified fashion a framework of individualism," *id.* at viii, and that it has done so in the still-powerful, and perhaps increasing, vision of marriage as "the paradigm of intimate commitment." *Id.* at 7.

146. REGAN, *supra* note 10, at 94-95.

147. *Id.*

148. *Id.* at 116 (emphasis in original).

149. One could argue that what makes marriage vibrant and good is precisely the fact that it is a choice and not a status. As Louis Seidman puts it, "What makes the commitment real and vibrant is the very possibility of betrayal that exists at every moment. In the absence of choice, the thing that makes it a commitment drops out. To see this, imagine that there were a legal remedy to enforce the commitment. It would then not *be* a commitment." E-mail from Louis Michael Seidman, Professor of Law, Georgetown University, to author (Dec. 9, 1997) (on file with author). In response, Milton Regan agrees that "a sense of both trust and meaningful commitment must encompass some possibility of betrayal," and that if the law operated to prevent any form of betrayal, "it would be hard to think of marriage as a genuine commitment." E-mail from Milton C. Regan, Jr., Professor of Law, Georgetown University, to author (Dec. 11, 1997) (on file with author). Nevertheless, as Regan points out, "*some* degree of assurance and protection is important to induce someone to take the risk of trusting in the first place." *Id.* Thus, since "both complete protection from and complete vulnerability to betrayal seem inimical to trust and commitment," the question becomes "what kind of intermediate position we should adopt." It seems to me that the status of spouse, as currently understood in our society, occupies the appropriate intermediate position: we *expect* spouses to be faithful to each other, and yet we all know

Of course, there is no reason why acknowledging the relational good of marriage should entail that those institutions must conform to any particular model, traditional or otherwise. Thus, Regan argues, based on his theoretical framework, that the state should not foreclose this important relational good to gay couples:[150] "If we appreciate the role of marriage in promoting a relational sense of identity, then we should make that institution available to same-sex couples who aspire to live according to such an ethic."[151]

That the relational, communitarian good of marriage is an important moral reason for allowing same-sex couples to become spouses has been echoed and elaborated by scholars such as Mary Becker[152] and Carlos Ball. In his book, *The Morality of Gay Rights*, Ball articulates a vision of marriage that resonates powerfully with Regan's:

> Through the institution of marriage, society encourages us to be less egoistic, to live for another person at the same time that we live for ourselves. . . . When a person loves another, she begins to see that other as an extension of herself. The object of love does not prioritize the welfare of the subject over her own as much as she sees it as an extension of her welfare.[153]

Ball thus affirms, as does Regan, marriage's foremost importance as a relational good. If this is the moral reason for and the moral purpose of marriage, then the question of marriage for same-sex couples turns, at least in large part, on whether those couples are able to accede to those same ideals. Ball thinks so, and he rightly and emphatically argues that gay couples can and do indeed experience the love, the mutuality, and the non-egoistic development of self that compels—and, for Ball, compels is indeed the word—the state to support marriage:

> When lesbians and gay men seek physical and emotional intimacy with others of the same gender . . . they are doing nothing more and nothing less than pursuing their human needs and capabilities for sex, care, and affection. The needs and capabilities of lesbians and gay men to love and care for one another in a sexually intimate relationship are defining traits of their humanity, and as such merit moral respect.[154]

---

spouses who have not been faithful. Thus, there is a measure of stability provided by the status of spouse, and yet not a complete vulnerability from betrayal.

150. Regan, *supra* note 10, at 119-22.

151. *Id.* at 121. *See also id.* at 120 ("[T]he moral aspiration that marriage has expressed is not heterosexual intimacy per se, but the more general vision of responsibility based on the cultivation of a relational sense of identity. . . . My conception of status, then, invites an imaginative reconstruction of the traditional values promoted by marriage that supports legal recognition of same-sex relationships.").

152. *See* Mary Becker, *Family Law in the Secular State and Restrictions on Same-Sex Marriage: Two Are Better Than One*, 2001 U. ILL. L. REV. 1 (2001).

153. BALL, *supra* note 59, at 109.

154. *Id.* at 105. Ball agrees with the philosophy espoused by Martha Nussbaum and Joseph Raz that the state has an affirmative duty to "provide the necessary support and conditions that make it

What Ball brings to this argument, which I wholeheartedly endorse, is an affirmative case for the morality of gay sex.[155] He does this by arguing for the value of sexual satisfaction generally as a human need[156] and for the logical corollary that—for *gay* people—sexual satisfaction is found with a person of the same gender.[157] Thus, while gay people are not just about sex, sex is as important in their human existence as it is for heterosexual people.[158]

And since sex is an important component of our human capacity for intimacy, whether we are gay or straight, Ball argues for the state's affirmative support of the development of our capacities:

> In the context of sexually intimate relationships, the principal way . . . through which our society seeks to provide the necessary support and conditions [for preserving long-term intimate relationships] is through the institution of companionate marriage. It is primarily through that institution that our society encourages us to construct our lives around love for and commitment to another human being in order to meet the needs and provide for the well-being (emotional, physical, and material) of ourselves and of that other.[159]

As a general matter, I am sympathetic to the view of marriage painted by Regan and Ball. I believe the thick interdependence that marriage both anticipates and demands of two participants forces such individuals to grow and develop in a way that anything less than that level of interdependence will simply not support. As Robin West correctly observes: "Marriage just is, through and through, anti-individualistic. That is precisely its moral strength, and to no small measure the source of its immense appeal."[160]

It is precisely because such an interdependent framework helps sustain an individual's sense of self and stability that the state has a moral responsibility to support such frameworks.

---

possible for individuals to love and care for others in long-term intimate relationships in an atmosphere of stability, safety, and continuity." *Id.* at 108.

155. As Ball notes: "Given the constant barrage of accusations made by opponents of gay rights about the supposed immorality of gay and lesbian sexuality . . . it is normatively acceptable and politically necessary to explore the substantive elements of a gay and lesbian sexual ethic." *Id.* at 207.

156. "It is impossible . . . to conceive of a human life as a full one if the holder of that life does not have at least some opportunities for sexual satisfaction. As a result, human needs for sexual satisfaction are in and of themselves worthy of moral respect." *Id.* at 103-04.

157. "A necessary element of this moral respect is the recognition that, in order for the satisfaction of sexual needs to be meaningful, there must be some correspondence between attraction and sexual acts. In sexual relationships, as in all intimate relationships, the identity and attributes of the other *matter*." BALL, *supra* note 59, at 104 (emphasis in original).

158. Later in his book, Ball posits that a gay and lesbian sexual ethic includes values of openness, mutuality and pleasure—values that are equally applicable to people who engage in heterosexual sex. *Id.* at 207-17.

159. *Id.* at 108-109.

160. West, *Universalism*, *supra* note 58, at 729.

But why should the state support *just* marriage partners—and not other intimate partnerships that equally support the development of the self?[161] A fair review of the ingenious relationships we have managed to construct for ourselves to create sense and sensibility in the world would, I believe, reveal three types of intimate relationships: marriage relationships; sexual and committed non-marital relationships; and non-sexual and committed relationships.[162]

Each of these relationships serves to support the self as it relates to the world around it. Each would benefit by receiving recognition and acknowledgement by the state. These intimate structures currently exist as a reality—and their forced invisibility by the state is a moral harm.[163]

People who choose to be marriage partners can be said to seek the thick interdependence that Regan asserts as necessary for the stability of the self.[164] But I part ways with Regan in believing that this is the optimal status for the development of the self and hence, the state should give preference to marriage over other forms of social intimacy.[165] I do not believe that privileging marriage through the provision of additional benefits is necessary to protect our sense of self. While religious denominations are certainly free to privilege marriage, there is no compelling need for the *state* to provide a similar privileging of the institution. Rather, because marriage is—for many people—a critical structure through which they experience their full human potential, we

---

161. Ball himself appropriately notes that marriage need not be the only, or even principal, way in which society structures intimate relationships. *See* BALL, *supra* note 59, at 108, 111-12. Nevertheless, Ball devotes the bulk of his analysis to marriage, given that it is the primary manner in which society currently supports intimate relationships and it is the current subject of debate. One of my goals in this Article is to suggest that we should make an affirmative effort to resist the fact that the debate has centered around marriage, and to use moral argumentation to support the claim for state recognition of other forms of intimate relationships.

162. Sexual, but non-committed, relationships exist as well. While these relationships often serve important needs with regard to pleasure, I am not including them in the same category as these three other intimate relationships that serve more ongoing needs for care and support.

163. In the context of recognizing marriage for same-sex couples, Carlos Ball draws on Joseph Raz as follows: "Human relationships do not exist in a social and cultural vacuum; as Joseph Raz puts it, '[m]arriage, friendships, parenthood,' among other relationships, 'are all molded and patterned by the common culture which determines to a very considerable degree the bounds of possible options available to individuals." BALL, *supra* note 59, at 108 (citing Joseph Raz, *Liberalism, Skepticism, and Democracy*, 74 IOWA L. REV. 761, 783 (1989)). My argument is that the options supported by the state need to be explicitly expanded beyond marriage—because that reflects both the reality of peoples' lives and their needs.

164. Of course, given that we are all shaped by (and, in fact, are in constant dialectic with) the social forces around us, it is fair to question how "free" a "choice" this is (that, at least, is what I understand to be the insight Michael Foucault offers – a reality that seems obvious once we are made aware of it). *See* MICHAEL FOUCAULT, THE HISTORY OF SEXUALITY: VOLUME 1 - AN INTRODUCTION (1990). But even if it is "false consciousness" that makes many people yearn for the "thick interdependence" that marriage offers, there it is. *See id.*

165. *See* Milton C. Regan, Jr., *Law, Marriage and Intimate Commitment*, 9 VA. J. SOC. POL'Y & L. 116 (2001); Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435 (2001).

should appropriately demand that government recognize, support, and nurture this "moral unit" of society.[166] But more than that is not required for the marital unit.

There are some people who are not interested in being marriage partners, but would like to be in a sexual, non-marital relationship that includes various aspects of commitment. These couples (or individuals) desire some of the interdependence of marriage, but also affirmatively value the independence that comes from structuring a relationship that does not mimic all the same characteristics as marriage. For these individuals, the idea of "becoming a husband or wife" and thus forming the partnership that "creates a structure of meaning within which the individual can make sense of her experience"[167] may well be experienced as both frightening and suffocating. To put it in Regan's theoretical terms: such individuals place a higher premium on having the subjective self be given the chance to grow and change continually through exposure to different stimuli, rather than having an objective self whose definition through status (here marital status) places constraints on the subjective self's openness to all possible stimuli.[168]

Indeed, the early development of domestic partnership structures were explicitly designed to create—for both gay and non-gay couples—a state-recognized relationship that would not encompass all the rights and responsibilities of marriage.[169] While it can be argued that a minimum set of responsibilities should attach once a couple chooses to have a child,[170] it does not seem to be necessary for the state to force individuals into a set framework of intimate relationships.[171]

---

166. The number of commentators who have called the family a "moral unit" of society must be legion. I owe my debt to this phrase to Professor Elinor Ochs who runs the Center for the Everyday Lives of Families (CELF) at UCLA. See http://www.celf.ucla.edu/.

167. REGAN, *supra* note 10, at 94.

168. Obviously, this situation works best when both individuals in a couple share the same view on the extent of interdependence that is optimal in a relationship. This is not always the case. But, presumably, people can choose to find someone who does share their view of relationships. As an empirical matter, it would be interesting to study whether there would be gender differences with regard to choice of optimal forms of relationships. It is impossible to measure that difference in our current social framework, however, because marital relationships are so heavily preferred by society.

169. *See* Matthew Coles, Speech at Yale Law School symposium, Breaking with Tradition: New Frontiers for Same Sex Marriage (Mar. 4, 2005) (videotape on file with the Yale Journal of Law and Feminism). Coles explains that California's original domestic partnership was specifically intended to encompass fewer of the rights and responsibilities of marriage. Coles further notes that this original impetus has been lost with the transformation of domestic partnership in California to a status exactly identical to marriage without the name.

170. Nan Hunter has contemplated making such an argument. Personal conversation with author, March 2005.

171. Monogamy can be an assumed component of a marital relationship, just as it can be a component of a sexual, non-marital intimate relationship. In either case, however, it would depend on whether a commitment to monogamy is beneficial to the selves involved in the partnership. *See* LAURA KIPNIS, AGAINST LOVE (2003); Marilyn Charles, *Monogamy and Its Discontents: On Winning the Oedipal War*, AM. J. PSYCHOANALYSIS 62:2 (2002) (arguing that cultural prescriptions enforcing monogamy obfuscate individual needs and impede self-definition, thereby interfering with real intimacy

Finally, there are numerous intimate social arrangements that exist today among individuals for purposes of support and connection which include no sex at all. I call these individuals "non-sexual domestic partners" (NSDPs). I do not use the term "domestic" here to mean that such individuals necessarily share the same abode. That may or may not be the case. A NSDP can be a daughter caring for a mother, two sisters living together, or four older women retiring together. The term "domestic" is used here to denote a level of caring and commitment for the other person(s) in the relationship. What these relationships share is intimacy, but it is not the type of intimacy arrived at or maintained through sex.

NSDPs exist everywhere and are recognized almost nowhere. Indeed, often such relationships are provided with no name or acknowledgement other than "friend," even by the participants themselves. But that is unfortunate. Friendships are key for human development. But there are different levels of commitment along the spectrum of friends, and we would do well, as a society, to recognize that continuum.

The same moral duty that requires the state to support marriage relationships and non-marital sexual relationships should be extended to support NSDPs. NSDPs should determine their own level of interdependence; the state should provide the logistical support that would reflect that level of interdependence. For example, I am in a NSDP with three other women. One of the women is raising a child as a single parent and the rest of us help with childcare as necessary. We take each other to the doctor; we take each other to the airport; we leave work early when someone needs help. There is no sexual relationship among the four of us, but there is an explicit and acknowledged commitment to *care* among the four of us.

Especially in an era when couples and single parents are trying to cope with the overwhelming demands of both family obligations and work obligations, and when increasing number of people will be aging and retiring in our society, state recognition of intimate forms of *nonsexual* partnerships could be of significant assistance to family and retirement units. This is not to argue that the private sector of family and relationships should be solely responsible for caretaking, instead of the public sector of the state. Rather, it is simply to acknowledge that there are rich webs of interdependences that often exist *outside* of the framework of sexuality. (Indeed, the gay community has pioneered in developing such relationships and non-gay individuals could learn and benefit from developing similar relationships.) My argument is not that such relationships should supplant the appropriate role that the public sector

---

and satisfaction in love relationships); Elizabeth Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 NYU REV. LAW & SOC. CHANGE 277 (2004). A separate question, of course, is whether Regan's theory—which presumes that the establishment of an objective self through the assumption of the "status" as a spouse is *effective* in deflecting certain stimuli—is actually correct.

should play in supporting families and retirees. It is simply that the state has an obligation to recognize and support these non-sexual domestic partnerships—these "moral units" of society—as well as sexual relationships that offer care and support.

IV. CONCLUSION

The battle that gay men, lesbians, bisexuals, transgender people, and their allies are fighting for equality and acceptance is exactly that—a battle. There are many pieces to this battle: the ability to go to work, rent an apartment, and use the goods and services of businesses without fear of discrimination based on one's sexual orientation or gender identity; the ability to live in a secure relationship with the partner one loves; the ability to adopt children.

Of all aspects of the battle, those that pertain to marriage and family raise the most difficult questions of theory and practice for advocates of gay equality. Liberal morality principles—which assume a neutral state that has no business advancing specific normative goods—dominate the discourse for achieving rights in the area of marriage and family, just as these principles dominate other aspects of the battle for gay rights. And yet, liberal morality discourse seems singularly unsuited to addressing the main concern that opponents of gay equality raise: that granting rights to gay people will necessarily imply governmental endorsement and approval of homosexual conduct, while the state has an obligation to convey moral *disapproval* of gay conduct in order to maintain the moral fiber of the nation. Indeed, this concern is articulated with particular fervor, and absorbed with particular resonance, in the areas of marriage and family.

The traditional response by political liberals to this concern regarding government and morality has been to discount it as simply irrelevant to legitimate state decision-making. While such an approach has theoretical clarity, and hence a certain attraction, concern about the moral messages sent by government continues to dominate political decision-making in the area of marriage for same-sex couples. Thus, ignoring concerns regarding morality—rather than engaging them head-on—may ultimately prove ineffective in the battle for marriage for same-sex couples.

Ignoring an assessment of normative goods and seeking access to marriage for same-sex couples solely as an issue of "equality" also has practical ramifications. A liberal morality discourse allows advocates of marriage for same-sex couples to remain agnostic on the question of whether marriage itself is a normative good. But society sends many messages today that marriage *is* a good and deserves a range of benefits not provided to other functional family arrangements. Thus, silence on the part of advocates regarding the normative

good of marriage is understandably construed as acquiescing in the current societal normative judgment of marriage and in existing social policies that restrict most social and economic benefits to married couples.

Finally, there are costs when lessons that could be learned from same-sex couples, who have built relationships and families outside historical structures of gender roles and oppression, are squelched in order to emphasize a claim of "sameness" so as to give greater force to a demand for equality. While gay couples (and gay sex) have more in common with heterosexual couples (and heterosexual sex) than most people think, the differences that do exist could help inform heterosexual relationships and society for the better.

There is a way to address the moral concerns and normative assessments of opponents head-on. That approach would assume a political theory framework in which the state legitimately acts to advance normative, moral goods on behalf of its citizens. In the area of marriage, this approach would argue there is a normative good to marriage for a large number of individuals (be they gay or straight) and that the state should therefore value and support marriage (for both different-sex couples and same-sex couples) through its social policies.

Most advocates of marriage for same-sex couples who do engage in a discussion of normative goods paint a picture of marriage that is almost identical to marriage as currently constructed in society. And their primary rationale for the normative good of marriage is often grounded in conservative fears regarding the excesses of sexual license in society and the need for caregiving by the family. Their ultimate picture of marriage and its normative good seems to ignore decades of feminist experience and insight.

There is an alternative moral case that could be made for supporting the moral units of marital relationships, sexual, non-marital relationships, and non-sexual domestic relationships. This case rests on the theory that marriage— for many individuals— provides for the development of a stable sense of self over time and helps individuals experience long-term commitment and intimacy. It rests equally on the theory that other individuals experience intimacy and connection more effectively in a sexual non-marital relationship, and that such partnerships are equally essential relationship units for many people in today's society. Finally, it rests on the premise that friendships operate along a continuum, including some friendships that include heightened levels of commitment that should be nurtured and supported by the state.

It is difficult, in the heat of battle, for advocates of LGBT rights to stop and consider whether they are using the best shield and the best sword for achieving their desired goals. Battle does not lend itself to reflective moments; one's focus must be on retaining the ground one has achieved thus far and then advancing with strategic and pragmatic moves to the next battleground. Moreover, the available weapons are limited to those which one's champions in battle are willing to use.

But reflection serves important purposes. Thus, my goal in this piece has been two-fold: to discuss some theoretical limitations and practical ramifications inherent in using the sword and shield of liberal morality discourse and to add a feminist voice to those who wish to use the sword and shield of (more) judgmental moral discourse.

In the end, I hope we discover that if we can engage directly in moral argumentation, we will find a majority consensus on the normative value of supporting individuals in the range of social structures that we have created for ourselves for purposes of connection and support. And as more and more people in this country gain first-hand knowledge of LGBT people who are living open and honest lives based on values of love and connection, I believe we will win the battle for LGBT equality. We will win it through simple acts of living and individual acts of understanding.