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## Against Marriage

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## AGAINST MARRIAGE

What is marriage? In the debate surrounding same-sex marriage, the central term has gone undefined. Using the Hawaii Supreme Court's decision in *Baehr v. Lewin*<sup>1</sup> as a starting point, this Note argues that marriage lacks legal as well as experiential coherence. A series of legal and social moves intended, on the one hand, to preserve the dominance of heterosexuality over gays and lesbians and, on the other, to allow heterosexuals to escape the dominance of heterosexuality over themselves, has left little conceptual space for marriage. That is, to speak of "extending marriage" to same-sex couples creates the illusion that marriage is a stable, unitary entity. If we look instead to the social and legal pressures by which marriage is simultaneously made and unmade, it becomes clear that marriage is a place-holder for a series of idealized value judgments about our intimate lives.

This Note, then, is a polemic "against" that. When I say I am against marriage, I do not also say that I am against companionship, or affection, or mutual support, or, for that matter, sex. Quite the contrary. I am, however, against a reifying discourse of marriage that consumes the opportunity to question the purposes and value of marriage. The time gays and lesbians have spent creating our relationships from scratch has taught us something about love. It seems a shame to discard this knowledge for the increasingly out-moded logic of marriage. In the question of same-sex marriage lies more than the question of *who* can marry. In same-sex marriage lies the more profound question of whether *anyone* can or should marry, which in turn creates the opportunity to re-think "marriage" in ways that are at once radical and mundane. Radical, because they go to the very structure of state intervention in intimate affairs, and mundane because they ask whether this state intervention approximates the needs of the daily experience of intimacy.

I start with a discussion of *Baehr v. Lewin*. Having opened the door to same-sex marriage, *Baehr* has, for obvious reasons, been embraced as an advance for the rights of gay men and lesbians, but it is far less a gay rights case than a gender equality case. Although *Baehr* does not fully explore the interplay between the ban on same-sex marriage and the role marriage has played in creating and maintaining systems of gender subordination, it provides all the cases and arguments necessary for an exploration of the question of what marriage is.

I then examine the duality of marriage jurisprudence in order to show its legal incoherence. This jurisprudence, in which marriage appears to gain the status of a fundamental right, characterizes marriage both as a

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<sup>1</sup> 852 P.2d 44 (Haw. 1993).

bundle of state-created and state-dependent benefits and as an essentialized, pre-state relationship. I conclude that, at best, the former is a complete constitutional anomaly and the latter an expression of structural heterosexism. As an implicit critique of tradition-based fundamental rights tests, I look at marriage and divorce rates and related statistics, and conclude that as it lacks theoretical coherence, marriage also has no experiential coherence. Whatever tradition of marriage heterosexuals have created, it bears little resemblance to the traditional marriage heterosexuals envision when they deny marriage to us. Simultaneously, I explore briefly the various ways in which same-sex couples and their loved ones have structured their relationships in the absence of affirming state intervention. Although it is problematic to characterize as "marriage" relationships that exist outside marriage, they give the lie to the implicit absence of a tradition of same-sex relationships in a tradition-oriented test.

The larger point of these two sections is that the incoherence of marriage law means marriage is no magic wand to cure the legal inequality of gay men and lesbians. It may very well create whole new levels of legal inequality, both among gay men and lesbians, and between gays and heterosexuals: the benefits associated with marriage are likely to come in a piecemeal fashion because, more basically, marriage does not create social approval but merely stands in for it. The experience of gay and lesbian relationships suggests that marriage, as part of a larger political strategy, is a questionable strategy. It is unclear whether same-sex marriage will successfully assimilate us into the mainstream of American life (whatever that is), and it is unclear whether that assimilation represents political success.

The work of deciding how—and why—the state will regulate our intimate relationships is upon us, and insistence on "marriage" will not help. While it is true that the denial of same-sex marriage is intended to discriminate against gays and lesbians (and does), we should be wary about imposing a perfect symmetry on that dynamic. *Baehr* advances us in the right direction, but it goes only so far, and the arguments we rely on to argue for same-sex marriage often implicitly take heterosexism at face value. We can and should adopt a more critical stance with respect to both our desire for marriage and the rhetoric by which it is denied to us.

### I. *Baehr v. Lewin*

In December 1990, three same-sex couples—Ninia Baehr and Genora Dancel, Tammy Rodrigues and Antoinette Pregil, and Pat Lagon and Joseph Melilio—applied to Hawaii's Department of Health for marriage licenses.<sup>2</sup> The Department of Health denied their applications because

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<sup>2</sup> *Baehr v. Lewin*, 852 P.2d 44, 49 (Haw. 1993).

“the law of Hawaii does not treat a union between members of the same sex as a valid marriage.”<sup>3</sup>

The couples brought suit in state court, claiming violations of their rights to privacy and to equal protection under Article I, Sections 6<sup>4</sup> and 5,<sup>5</sup> respectively, of the Hawaii Constitution. John Lewin, Director of the Department of Health, moved for judgment on the pleadings,<sup>6</sup> which the Hawaii circuit court granted.<sup>7</sup> The couples appealed, and the Hawaii Supreme Court reversed.<sup>8</sup>

A plurality of the court<sup>9</sup> held that although same-sex couples do not have a fundamental privacy right to marry under the Hawaii Constitution,<sup>10</sup> the Hawaii marriage law<sup>11</sup> is presumptively unconstitutional because it creates a sex-based classification.<sup>12</sup> A majority of the court agreed that “any [s]tate action that discriminates against a person because of his or her ‘sex’ is subject to strict scrutiny,”<sup>13</sup> and remanded the case to the trial court for a showing by the state that the marriage statute “furtheres

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<sup>3</sup> *Id.* at 49–50 & n.3.

<sup>4</sup> “The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.” HAW. CONST. art. I, § 6.

<sup>5</sup> “No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person’s civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.” *Id.* art. I, § 5. Several other states’ constitutions have similar provisions, making it possible that in at least some of them similar challenges are possible: CAL. CONST. art. I, § 8; COLO. CONST. art. II, § 29; CONN. CONST. art. I, § 20; ILL. CONST. art. I, §§ 17, 18; LA. CONST. art. I, §§ 3, 12; MASS. CONST. art. CVI; MONT. CONST. art. II, § 4; N.H. CONST. art. I, § 2; N.M. CONST. art. II, § 18; TEX. CONST. art. I, § 3a; VA. CONST. art. I, § 11; WYO. CONST. art. I, § 3.

<sup>6</sup> *Baehr*, 852 P.2d at 51.

<sup>7</sup> *Id.* at 52.

<sup>8</sup> *Id.* at 68.

<sup>9</sup> Only two justices of the Hawaii Supreme Court heard the case from start to finish. The case was heard by Acting Chief Justice Moon, Justice Levinson, Chief Judge Burns of the Intermediate Court of Appeals (who replaced Chief Justice Lum, who was recused), Judge Heen of the Intermediate Court of Appeals (who replaced Justice Klein, who was also recused), and Retired Justice Hayashi (who was assigned by reason of a vacancy). *Id.* at 48. Justice Levinson wrote the plurality opinion, in which Acting Chief Justice Moon joined. Chief Judge Burns concurred in the result and wrote a separate opinion. Judge Heen dissented; Retired Justice Hayashi, whose temporary appointment expired before the opinions were filed, would have joined Judge Heen’s dissenting opinion. *Id.*

When the court granted Lewin’s motion for clarification, Acting Chief Justice Moon had become Chief Justice on the retirement of former Chief Justice Lum, who retired before the opinion was issued. Retired Justice Hayashi had been replaced by Justice Nakayama. Thus, Chief Justice Moon, Justices Levinson and Nakayama and Chief Judge Burns of the Intermediate Court of Appeals issued the clarification, with Chief Judge Burns also concurring separately. *Id.* at 74–75. Judge Heen of the Intermediate Court of Appeals, who had dissented originally, did not join the grant of clarification. *Id.* at 75.

<sup>10</sup> *Id.* at 57.

<sup>11</sup> HAW. REV. STAT. § 572-1 (Michie 1993).

<sup>12</sup> *Baehr*, 852 P.2d at 67.

<sup>13</sup> *Id.* at 69 (Burns, J., concurring) (Chief Judge, Intermediate Court of Appeals, sitting by designation); *id.* at 67 (plurality).

compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights.”<sup>14</sup>

Because the strict scrutiny test is a demanding standard—at the United States Supreme Court level, for example, it has been met in the context of racial discrimination only in the case in which it was developed<sup>15</sup>—it is possible that *Baehr*, ultimately, will make Hawaii the first state to marry same-sex couples.<sup>16</sup>

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<sup>14</sup>*Id.* at 68. Chief Judge Burns, concurring, would have held that the marriage statute constituted invidious discrimination only if a factual determination showed that heterosexuality, homosexuality, bisexuality, and asexuality are “aspect[s] of a person’s ‘sex’ that [are] ‘biologically fated.’” *Id.* at 69–70. Lewin moved for, and a majority of the court issued, *see supra* note 9, a clarifying opinion indicating that on remand the sole question would be whether the statute could meet the strict scrutiny test. *Id.* at 74. Chief Judge Burns concurred in the grant of the motion with respect to the plurality opinion and denied the motion with respect to his own opinion, in effect withdrawing it. *Id.* at 75.

<sup>15</sup>*Korematsu v. United States*, 323 U.S. 214, 216 (1944) (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.”).

<sup>16</sup>Because each state’s conflict of laws doctrine determines whether it will recognize Hawaii same-sex marriages, the best that can be given here is an overview of the relevant analysis: “[a] marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage,” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971). This aspect of *Baehr* makes it threatening to some commentators.

The pressure to ease the ban on gays in the military is getting all of the attention, while the real, dramatic change is brewing in a small state thousands of miles away. Hawaii may be the first state to legalize same-sex marriages, but it won’t be the last one. Nor can we prevent its effects from being felt in Pennsylvania.

Patricia G. Miller, *Hawaiian Courts’ Rulings on Constitutionality of Gay Marriage Ban Could Affect Other States*, PITTS. POST-GAZETTE, Nov. 21, 1993, at F5.

However, the “strong public policy” exception will be a difficult hurdle. Courts have been quite willing to equate homosexuality with the commission of sodomy in contexts in which the crime of sodomy would be a disqualification. *See, e.g.*, *Padula v. Webster*, 822 F.2d 97, 102 (D.C. Cir. 1987) (employment with F.B.I.); *In re Opinion of the Justices*, 530 A.2d 21, 24 (N.H. 1987) (adoption). *Cf. also* cases cited *infra* note 111. Thus, after *Bowers v. Hardwick*, 478 U.S. 186 (1986), every state that has a same-sex sodomy law can plausibly argue that it need not recognize a Hawaii same-sex marriage because it has a constitutionally sound public policy against sodomy, an act likely to be committed in a same-sex marriage.

Alternatively, courts decline to recognize a marriage when it was performed out of state to avoid the state’s ban on that particular form of marriage. *E.g.*, *Wilkins v. Zelichowski*, 140 A.2d 65, 69 (N.J. 1958) (annulling marriage of under-age couple performed in Indiana on grounds that they were married in Indiana to avoid New Jersey law). Same-sex marriages of non-Hawaii residents performed in Hawaii would, by definition, constitute such marriages.

Given that *Baehr* disavows a gay rights position, Hawaii’s interest in the recognition elsewhere of a same-sex marriage performed in-state could be characterized as weak. Hawaii would permit same-sex marriages, not because it has adopted a public policy endorsing homosexual marriages, but rather because they are a necessary incident to its public policy against sex discrimination.

## A. Baehr as a Gay Rights Case

No court, including the *Baehr* court, has yet found a right to same-sex marriage *per se*;<sup>17</sup> rather, all except for *Baehr* have held that only opposite-sex couples can, and therefore have a right to, marry. The *Baehr* court had to distinguish a formidable body of precedent simply to establish the possibility that same-sex couples could marry. The court distinguished *De Santo v. Barnsley*<sup>18</sup> as a common-law marriage case.<sup>19</sup> It rejected the reasoning of *Jones v. Hallahan*<sup>20</sup> and *Singer v. Hara*<sup>21</sup> as "tortured and conclusory sophistry."<sup>22</sup> *Baker v. Nelson*<sup>23</sup> it distinguished as having raised no state constitutional question.<sup>24</sup> However, the chief distinction between *De Santo*, *Hallahan*, *Singer*, and *Baker*, on the one hand, and *Baehr*, on the other, is this: *Baehr* is the first case in which a court imagines that same-sex couples *could* marry.

The *Baehr* court anchored its privacy analysis in the United States Supreme Court's marriage jurisprudence. The Hawaii Supreme Court noted that "article I, section 6 of the Hawaii Constitution encompasses all of the fundamental rights expressly recognized as being subsumed within the privacy protections of the United States Constitution."<sup>25</sup> Since the Supreme Court found a right to marry in the right to privacy,<sup>26</sup> the *Baehr* court found a right to marry in the Hawaii Constitution's right to privacy.

The Hawaii Supreme Court was initially uncertain whether or not the Supreme Court's "right to marriage" constituted a single right encompassing both marriage and procreation.<sup>27</sup> The Court decided that the discussion

<sup>17</sup> E.g., *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973) (persons of same sex are "incapable" of entering marital state, and no constitutional issue is implicated by this definitional barrier); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (United States Constitution does not require the recognition of same-sex marriage), *appeal dismissed*, 409 U.S. 810 (1972); *De Santo v. Barnsley*, 476 A.2d 952, 957 (Pa. Super. Ct. 1984) (state law did not recognize same-sex common-law marriages); *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) (Washington Constitution's Equal Rights Amendment does not require same-sex marriage).

Additionally, the attorneys-general of several states have interpreted their marriage laws to provide only for opposite-sex marriage: 190 Ala. Op. Att'y Gen. 30 (1983); 93 Idaho Op. Att'y Gen. 11 (1993); 77 Kan. Op. Att'y Gen. 248 (1977); 92 La. Op. Att'y Gen. 699(A) (1992); 84 Me. Op. Att'y Gen. 28 (1984); 1978 Miss. Op. Att'y Gen. 684 (1978); 1977 Neb. Op. Att'y Gen. 170 (1977); 1983 S.C. Op. Att'y Gen. 85 (1983); 1976 S.C. Op. Att'y Gen. 423 (1976); 88 Tenn. Op. Att'y Gen. 43 (1988); 1977-78 Va. Rep. Att'y Gen. 154 (1977).

<sup>18</sup> 476 A.2d 952 (Pa. Super. Ct. 1984).

<sup>19</sup> *Baehr v. Lewin*, 852 P.2d 44, 61 (Haw. 1993).

<sup>20</sup> 501 S.W.2d 588 (Ky. Ct. App. 1973).

<sup>21</sup> 522 P.2d 1187 (Wash. Ct. App. 1974).

<sup>22</sup> *Baehr*, 852 P.2d at 63.

<sup>23</sup> 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

<sup>24</sup> *Baehr*, 852 P.2d at 61.

<sup>25</sup> *Id.* at 55.

<sup>26</sup> *Id.* at 55-56 (citing *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)).

<sup>27</sup> *Id.* at 56. The Supreme Court's decision in *Eisenstadt v. Baird*, 405 U.S. 438 (1972)

in *Zablocki v. Redhail*<sup>28</sup> and *Skinner v. Oklahoma ex rel. Williamson*<sup>29</sup> of marriage in the context of procreation could only mean the two were inextricably linked in the federal context, and therefore "the federal construct of the fundamental right to marry . . . presently contemplates unions between men and women."<sup>30</sup>

Although the Hawaii Supreme Court noted its freedom to interpret rights protected by the Hawaii Constitution more broadly than the United States Supreme Court interprets those protected under the federal Constitution,<sup>31</sup> it also noted that its privacy doctrine follows federal privacy doctrine.<sup>32</sup> Relying on the standard developed by the United States Supreme Court in *Palko v. Connecticut*,<sup>33</sup> the *Baehr* court held that

a right to same-sex marriage is [not] so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed.<sup>34</sup>

The *Baehr* court carefully distinguished the gender composition of a couple from their sexuality: "parties to 'a union between a man and a woman' may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals."<sup>35</sup> The court's rhetorical move takes gay men and lesbians out of the discussion, which may make the ultimate result more palatable, but it obscures the extent to which homophobia motivates the ban on same-sex marriage.

This distinction is undercut by the conflation of marriage and procreation that informs the plurality's privacy holding. If the *Baehr* court

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(overturning law prohibiting use of contraceptives by unmarried persons), does, however, offer some instruction in this regard: "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453. *Eisenstadt* establishes that procreative decisions are constitutionally divorced, so to speak, from marriage.

<sup>28</sup> 434 U.S. 374 (1978) (overturning law preventing fathers with unmet child support obligations from marrying).

<sup>29</sup> 316 U.S. 535 (1942) (overturning law calling for sterilization of persons convicted of certain crimes).

<sup>30</sup> *Baehr*, 852 P.2d at 56.

<sup>31</sup> *Id.* at 57.

<sup>32</sup> *Id.*

<sup>33</sup> 302 U.S. 319 (1937).

<sup>34</sup> *Baehr*, 852 P.2d at 57.

<sup>35</sup> *Id.* at 51 n.11. This was apparently also the strategy of the plaintiffs, who did not allege that they were gay or lesbian. *Id.* at 52 n.12.

really believed that the sexualities of the parties to a marriage need not necessarily correspond to the gender composition of the couple, then the presence of procreation as an expression of that sexuality in the Supreme Court's marriage jurisprudence is immaterial, because then the privacy right to marry would include, but *not* be limited to, procreation for purposes of privacy right analysis. If, on the other hand, procreation means that the sexual orientation of the parties does bear a legally significant relation to the gender composition of the couple, then *Baehr's* distinction dodges the central question: whether a privacy right to marry a person of the opposite sex means much (or anything) to gays and lesbians.

### B. Baehr as a Gender Equality Case

The *Baehr* plurality rejected the dissent's argument that the Hawaii marriage statute "treats everyone alike and applies equally to both sexes."<sup>36</sup> Since the statute's terms are gender-specific, the court found that on its face Hawaii's marriage law created a sex-based classification.<sup>37</sup>

The dissent relied on *Philips v. Wisconsin Personnel Commission*,<sup>38</sup> in which a lesbian state employee argued that the state's failure to extend benefits to her female partner, whom she could not marry, constituted sex discrimination.<sup>39</sup> The *Philips* court disagreed,<sup>40</sup> in effect finding that the relevant statute created a distinction between married heterosexuals and unmarried persons.<sup>41</sup> *Philips* and *Singer v. Hara*,<sup>42</sup> upon which the dissent also relied, adopted an analysis the United States Supreme Court rejected at least with respect to antimiscegenation laws in *Loving v. Virginia*,<sup>43</sup> when it dismissed Virginia's argument that punishing whites and blacks equally under its antimiscegenation statute was not racial discrimination.<sup>44</sup>

Courts have heretofore uniformly rejected analogies to *Loving* in same-sex marriage cases:<sup>45</sup> "in commonsense and in a constitutional sense,

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<sup>36</sup> *Id.* at 71 (Heen, J., dissenting) (Judge, Intermediate Court of Appeals, sitting by designation).

<sup>37</sup> *Id.* at 60.

<sup>38</sup> 482 N.W.2d 121 (Wis. Ct. App. 1992).

<sup>39</sup> *Cf. Hinman v. Department of Personnel Admin.*, 213 Cal. Rptr. 410 (Ct. App. 1985) (upholding government employer's denial of benefits to plaintiff's same-sex partner over sexual orientation discrimination argument).

<sup>40</sup> *Philips*, 482 N.W.2d at 127-28.

<sup>41</sup> *Id.* at 127. Other courts have also made this kind of question-begging distinction. *E.g., Geduldig v. Aiello*, 417 U.S. 484, 497 n.20 (1974) (California's disability insurance program, which excluded pregnancy, did not discriminate on the basis of sex because it "divide[d] potential recipients into two groups—pregnant women and nonpregnant persons").

<sup>42</sup> 522 P.2d 1187 (Wash. Ct. App. 1974).

<sup>43</sup> 388 U.S. 1 (1966); *see also Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993) (drawing analogy to *Loving*).

<sup>44</sup> *See Loving*, 388 U.S. at 13-15.

<sup>45</sup> This Note will not discuss the antimiscegenation analogy directly, as others have



there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."<sup>46</sup> Yet surely those who originally enacted the antimiscegenation laws believed they based their marital restrictions not "merely" upon race but upon a difference more "fundamental." In declining to follow the circularity of the argument in *Jones v. Hallahan*<sup>47</sup> that same-sex couples cannot marry because they are same-sex couples,<sup>48</sup> the Hawaii Supreme Court accepted the analogy to *Loving*.<sup>49</sup> *Loving* at least in theory represented a victory for African-Americans, but since *Baehr* does not reject the necessity of opposite-sex couples, it does not reject heterosexist supremacy in the way that *Loving* rejected white supremacy.<sup>50</sup>

*Baehr*'s core holding is that gender classifications are "suspect" classifications subject to strict scrutiny under the Hawaii Constitution's Equal Protection doctrine.<sup>51</sup> I do not, however, take the Hawaii Supreme Court's acceptance of the sex discrimination argument to be a real challenge to the construction of marriage around stereotyped gender roles. "Legalization of lesbian and gay marriage poses a threat to gender systems, not simply to antilebian and antigay bigotry."<sup>52</sup> Indeed, the *Baehr* court found that there is no fundamental right to same-sex marriage *per se* precisely because of the salience of a particular gender system (procreation in an opposite-sex marriage) in its understanding of federal marriage doctrine.

Even if the State of Hawaii is able to meet its burden on the specific question of same-sex marriage, *Baehr* is a substantial legal advance for sex-discrimination plaintiffs in Hawaii, given the outcome-determinative effect of the strict scrutiny test. However, for gays and lesbians as such, *Baehr*'s interstitial approach to gay rights removes homosexuality from the discussion of same-sex marriage at a level deeper than rhetoric. Para-

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already developed it. E.g., Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988); Mark Strasser, *Family, Definitions, and the Constitution: On The Antimiscegenation Analogy*, 25 SUFFOLK U. L. REV. 981 (1991); James Trosino, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93 (1993).

<sup>46</sup>Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971). *Accord* Singer, 522 P.2d at 1191.

<sup>47</sup>501 S.W.2d 588 (Ky. Ct. App. 1973).

<sup>48</sup>*Id.* at 589.

<sup>49</sup>Baehr v. Lewin, 852 P.2d 44, 63 (Haw. 1993).

<sup>50</sup>See *Loving v. Virginia*, 388 U.S. 1, 11 (1967); see also William N. Eskridge, A *History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1506 (1993) ("What *Loving* was rejecting . . . was not an abstract claim of state power but an ideology of white supremacy.").

<sup>51</sup>*Baehr*, 852 P.2d at 67. In contrast to its privacy analysis, here the court felt free to go beyond federal doctrine. Compare *id.* with *Frontiero v. Richardson*, 411 U.S. 677 (1973) (Powell, J., concurring in judgment) (declining to vote with plurality to hold gender a suspect classification).

<sup>52</sup>Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 18 (1991) (footnote omitted).

doxically, the linkage between heterosexuality and heterosexual practice on which *Baehr* relies to reach its privacy holding lays the groundwork here for a de-linkage of same-sex marriage from same-sex sex.

States with same-sex sodomy laws may recognize same-sex marriages performed in Hawaii, but only to the extent necessary to vindicate a shared public policy against sex discrimination. However, they may not recognize such marriages to the extent of altering the ban on sodomy, out of deference to that public policy. The sex discrimination argument can of course be applied to same-sex sodomy laws, but establishing whether a legally married same-sex couple can legally be sexually intimate becomes another, and precedentially difficult,<sup>53</sup> lawsuit. Even if same-sex married couples succeed in gaining a right to have sex, it may easily turn on the married-unmarried distinction, leaving unmarried gays and lesbians with no sexual privacy. This would introduce into gay culture, for the first time, the concept of pre-marital sex.

## II. The Jurisprudence of Marriage

The United States Supreme Court has stated that "liberty," as used in the Due Process Clause of the Fourteenth Amendment "denotes not merely freedom from bodily restraint but also the right . . . to marry . . . ."<sup>54</sup> In a string of dicta, it has described marriage as "fundamental,"<sup>55</sup> as "basic to the perpetuation of a race,"<sup>56</sup> as "the foundation of . . . society,"<sup>57</sup> as a "vital personal right,"<sup>58</sup> and as a "fundamental freedom."<sup>59</sup> These cases suggest that marriage has a constitutional aspect, perhaps rising to the level of a fundamental right to marry.<sup>60</sup>

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<sup>53</sup> *E.g.*, *Bowers v. Hardwick*, 478 U.S. 186 (1986). The distinction may seem nonsensical, but as *Bowers* itself shows, absurdity is an accepted mode of legal analysis where gays and lesbians are concerned. The fact pattern of *Bowers*, in which Michael Hardwick was arrested in his bedroom while engaged in consensual oral sex with another adult male, see PETER IRONS, *Michael Hardwick v. Michael Bowers, in THE COURAGE OF THEIR CONVICTIONS* 379, 395 (1988), was the nightmare the Supreme Court feared in *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."). Yet far from horrifying the *Bowers* Court, the police officer's presence seemed fully warranted, if not required. This juxtaposition shows that for lesbians and gay men, privacy is not a shield against the state, delimiting its province, but rather a zone that exists (if at all) by leave of the state.

<sup>54</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>55</sup> *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

<sup>56</sup> *Id.* at 536.

<sup>57</sup> *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

<sup>58</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>59</sup> *Id.*

<sup>60</sup> See *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) ("[O]ur past decisions make clear that the right to marry is of fundamental importance.").

In the same opinions, however, the Court has characterized marriage as a creature of state law and subject to the states' control.<sup>61</sup> The Court has been careful to say that "[not] every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny."<sup>62</sup> Furthermore, though courts have been solicitous of the right to enter into marriage,<sup>63</sup> they have not required absolute access to marriage<sup>64</sup> and they have not invalidated every burden on the right.<sup>65</sup>

This gives marriage, as a legal entity, a dual character. On the one hand, it is a fundamental relationship that precedes the state, and around which the state is organized. One state court suggested that the state does not create marriage but merely recognizes a pre-existing status: "[m]arriage was a custom long before the state commenced to issue licenses for that purpose."<sup>66</sup> On the other hand, as the *Baehr* court noted, "marriage is a state-conferred legal status"<sup>67</sup> that does not exist apart from the state.<sup>68</sup> Thus, at a general level, this jurisprudence reveals little of what, exactly, marriage is, and the duality of marriage jurisprudence presents a series of interlocking questions. Does marriage have a stable, essential character, independent of the state-conferred benefits that are associated with it? If

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<sup>61</sup> See *Loving*, 388 U.S. at 7 (marriage is "a social relation subject to the State's police power"); *Maynard*, 125 U.S. at 205 (marriage "has always been subject to the control of the legislature").

<sup>62</sup> *Zablocki*, 434 U.S. at 386.

<sup>63</sup> See, e.g., *Turner v. Safley*, 482 U.S. 78, 97 (1987) (overturning prison regulation requiring warden's permission before inmates could marry); *Langone v. Coughlin*, 712 F. Supp. 1061, 1069 (N.D.N.Y. 1989) (overturning prison regulation barring life prisoners from marrying until parole).

<sup>64</sup> See, e.g., *Moe v. Dinkins*, 533 F. Supp. 623, 630 (S.D.N.Y. 1981) (requirement that minors receive parental consent before marriage does not infringe their right to marry because it represents only delay, not denial). Cf. *Doe v. Coughlin*, 518 N.E.2d 536, 540 (1987) (*Turner v. Safley*, 482 U.S. 78 (1987) does not imply a right to conjugal visits).

<sup>65</sup> See, e.g., *Califano v. Jobst*, 434 U.S. 47, 102 (1977) (upholding Social Security provision that cut off benefits to disabled recipients who married non-recipients while continuing benefits to those who married other disabled recipients); *Mapes v. United States*, 576 F.2d 896, 901 (Ct. Cl. 1978) (upholding differential tax rates for married and unmarried persons), *cert. denied*, 439 U.S. 1046 (1978); *Drucker v. Commissioner*, 697 F.2d 46, 50-51 (2d Cir. 1982) (same); *Rappaport v. Katz*, 380 F. Supp. 808, 811 (S.D.N.Y. 1974) (dismissing claim that state requirement that rings be exchanged burdened right to marry).

<sup>66</sup> *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973). See also *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (marriage is "a right of privacy older than the Bill of Rights").

<sup>67</sup> *Baehr v. Lewin*, 852 P.2d 44, 58 (Haw. 1993).

<sup>68</sup> See *Hunter*, *supra* note 52, at 13:

Marriage is, after all, a complete creation of the law, secular or ecclesiastical. Like the derivative concept of illegitimacy, for example, and unlike parenthood, it did not and does not exist without the power of the state (or some comparable social authority) to establish, define, regulate, and restrict it. Beyond such social constructs, individuals may couple, but they do not "marry."

so, does a state satisfy the Constitution's mandate merely by "recognizing" a marriage? If marriage has no pre-state core, does the Constitution then require the states to extend certain benefits in order to make a couple married, and if so, which benefits?

### *A. Marriage as Meta-Right: The Bundle of Marital Benefits*

If marriage is a set of state-conferred entitlements, then the right to marry consists of a cluster of benefits that might be called a "meta-right." The insistence on marriage as a state-law creation necessarily means that the entitlements that accrue upon marriage will vary from state to state. At the same time, however, if marriage is a bundle of rights and if the Constitution protects marriage, then this suggests a federal interest in the uniformity of the minimal benefits states must give in order to make couples married. However, constitutional concerns of federalism might well make any federalized system either of marital recognition or of specific benefits unconstitutional.<sup>69</sup> This suggests that marriage is not a right-in-itself; the Constitution requires the states to give a right to a constellation of entitlements, not to any specific entitlement.<sup>70</sup>

The benefits most states grant upon marriage provide practical incentives to marry. Married persons enjoy a wide range of benefits, including pension benefits, immigration preferences, tax preferences, health insurance benefits, tort rights in each other, intestate succession preferences, and conjugal visits, to name a few.<sup>71</sup> In Hawaii, for example, a married couple becomes entitled to state income tax preferences, public assistance for spouses, community property rights, inheritance rights, child custody

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<sup>69</sup> The Court has at least paid lip service to the idea that a state has an "absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877).

<sup>70</sup> Such an implication appears to be at odds with the Court's discussion of similar matters in *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 (1989): "Our cases have recognized that the Due Process Clauses [of the Fifth and Fourteenth Amendments] generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Id.* at 196. *See also* *Harris v. McRae*, 448 U.S. 297, 317-18 (1980) ("Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference . . . , it does not confer an entitlement to such [government aid] as may be necessary to realize all the advantages of that freedom."); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (Due Process Clause of Fourteenth Amendment imposes no obligation on states to provide adequate housing).

<sup>71</sup> *See, e.g.*, Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 *LAW & SEXUALITY* 31, 52-54 (1991) (listing benefits); Martha Minow, *All in the Family & In all Families: Membership, Loving, and Owing*, 95 *W. VA. L. REV.* 275, 282-83 (1992-93) (same). It is worth noting that an institution that needs to entice people so heavily to enter it may be seriously flawed. My thanks to Tanya Herrera for this insight.

and support awards in divorce proceedings and other post-divorce rights, change of name, and various property and tort rights.<sup>72</sup>

At least one commentator has argued that, as all of the economic benefits associated with marriage vary by state and are state-created, married persons cannot have a fundamental right to these benefits.<sup>73</sup> Ordinarily the denial of economic benefits is not constitutionally significant, and receives only rational basis review.<sup>74</sup> If the denial of these benefits triggers merely rational basis review, then surely no entitlement to them arises from a "fundamental right."<sup>75</sup>

If marriage is a bundle of benefits and entitlements, and if no fundamental right exists to any particular component of the bundle, then gaining legal benefits for same-sex married couples is likely to be a case-by-case struggle in which

lesbian and gay marriages could easily come to occupy one of the lower tiers of an already hierarchical social marriage system . . . [F]or some lesbians and gay men, gaining legal recognition of their relationships will not address the most significant reasons for their experiences of inequality and oppression.<sup>76</sup>

Opposite-sex couples receive marriage as a unitary bundle of benefits and entitlements, but that unitariness can be turned inside-out and its lack of coherence used against same-sex married couples.

Each benefit associated with marriage is susceptible to an analysis of the public policy that underlies it. Thus, to the extent that a court can find that a particular benefit does not belong to the class of benefits that make a couple married but rather reflects state recognition of the idiosyncracies of heterosexuality, that benefit can be denied to same-sex couples. At every point at which same-sex married couples would be seeking the recognition that their marriages imply, they would be vulnerable to a distinction between them and heterosexuals and thereby be vulnerable to devaluation.

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<sup>72</sup> Baehr v. Lewin, 852 P.2d 44, 59 (Haw. 1993).

<sup>73</sup> See Earl M. Maltz, *Constitutional Protection for the Right to Marry: A Dissenting View*, 60 GEO. WASH. L. REV. 949, 957 (1992).

<sup>74</sup> See *id.* at 958 (citing *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980) (retirement benefits); *Jefferson v. Hackney*, 406 U.S. 535 (1972) (AFDC); *Dandridge v. Williams*, 397 U.S. 471 (1970) (same)).

<sup>75</sup> *Id.* See also *Mathews v. De Castro*, 429 U.S. 181, 189 (1976) (upholding, on rational basis analysis, denial to ex-wife of disability allowance due to ex-husband's disability).

<sup>76</sup> See Duclos, *supra* note 71, at 51 (footnotes omitted); see also *id.* at 55-56 (noting that a marriage license does not guarantee a grant of custody of children, especially in the face of a homophobic judiciary).

*B. Marriage as Essence: The Fundamental Right to Heterosexuality*

If the "marriage" that is of constitutional magnitude is not the collection of rights and responsibilities that accrue to the married couple, then perhaps it consists of a right to determine one's long-term, intimate associations. The theory that marriage has an essential core, one that precedes the state, has a different tenor: marriage is not so much a service that the state must provide, but an essentialized entity around which the state must conform. Yet if that is true, the only "essence" of marriage that accounts for state-support of opposite-sex couples without including same-sex couples is the gender composition of the couple. At that moment, however, the definition of marriage ceases to have any justificatory power. It cannot be as sparse as the gender composition of its members and yet rise to the level of a fundamental right, unless one assumes such a couple is heterosexuality *tout court*.

Whatever heterosexuality is, it is more than the physical proximity of two bodies. Alternatively, then, one can say "X—companionship, affection, support, sex—is marriage when opposite-sex couples have it, but not when same-sex couples do." This, however, defines marriage by contrast to what it is not, rather than by what it is. What it *is*, quite apart from what any given couple is or does, is the expression in law of heterosexism and homophobia.

The obvious candidate for the essence of marriage that the Constitution protects is being in love; or, since not even the Constitution can protect love, it would seem that the essence of being married that makes it so important to opposite-sex couples lies in the profoundly personal choice such intimacy represents.<sup>77</sup> If that is true, it is true only to the extent that one's "choice" is a heterosexual one. When the Constitution protects but one choice, the act of making that choice is emptied of its value.<sup>78</sup>

The Supreme Court has not spoken to this issue directly but its opinion in *Bowers v. Hardwick* is suggestive: "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."<sup>79</sup> *Bowers* underscores the heterosex-

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<sup>77</sup> Cf. *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting) ("[W]e protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households.").

<sup>78</sup> Cf. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *THE LESBIAN AND GAY STUDIES READER* 227, 238–39 (Henry Abelove et al. eds., 1993):

[T]o acknowledge that for women heterosexuality may not be a "preference" at all but something that has had to be imposed, managed, organized, propagandized, and maintained by force is an immense step to take if you consider yourself freely and "innately" heterosexual.

<sup>79</sup> 478 U.S. 186, 191 (1986).

ism latent in the Court's conception of marriage, but, ironically, it does so at the expense of putting marriage that much farther from whatever neutral constitutional moorings it may have had. Marriage, as an individual's personal statement about her intimate relations, no longer exists, constitutionally.<sup>80</sup> In its place is a constitutionally protected right—if not also a state mandate<sup>81</sup>—to be a heterosexual.

Indeed, the courts that have had the chance to define the essence of marriage have consistently chosen a single common denominator: heterosexuality. For example, in response to a challenge brought by two women to Kentucky's refusal to issue them a marriage license, the Court of Appeals of Kentucky denied that the state had anything to do with their failure to receive a marriage license.<sup>82</sup> The two women were

prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined.<sup>83</sup>

The Kentucky court, apparently nonplussed by the case, reached this conclusion based upon its consultation with, among other sources, *Webster's New International Dictionary* and *Black's Law Dictionary*.<sup>84</sup> It was, of course, the definition of marriage under Kentucky law that the appellants challenged, so the court's reasoning is profoundly circular: their challenge to the definition of marriage failed because it proposed a new definition.<sup>85</sup>

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<sup>80</sup> Cf. *Michael H. v. Gerald D.*, 491 U.S. 110, 123 n.3 (1989) (the concept of family can be expanded, "but it will bear no resemblance to traditionally respected relationships—and will thus cease to have any constitutional significance—if it is stretched so far as to include the relationship established between a married woman, her lover, and their child").

<sup>81</sup> See *S. v. S.*, 608 S.W.2d 64, 66 (Ky. Ct. App. 1980) (granting custody of child to lesbian mother not in child's best interest because child "may have difficulties in achieving a fulfilling heterosexual identity of her own in the future"); *In re Opinion of the Justices*, 530 A.2d 21, 25 (N.H. 1987) (exclusion of gays and lesbians from eligibility to serve as adoptive or foster parents because, *inter alia*, they would not be good role models does not violate equal protection).

<sup>82</sup> *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973).

<sup>83</sup> *Id.* at 589. See also *Singer v. Hara*, 522 P.2d 1187, 1192 (Wash. Ct. App. 1974) (two men denied marriage license not because of their sex but "because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex").

<sup>84</sup> *Hallahan*, 501 S.W.2d at 589.

<sup>85</sup> Nan Hunter has observed that judges "seem somewhat astonished at even having to consider the question of whether the limitation of marriage to opposite-sex couples is constitutionally flawed. These cases tell us nothing about equality or privacy doctrine. Instead, their holdings are grounded in statements about what the courts believe marriage is." Hunter, *supra* note 52, at 13 (footnote omitted).

The *Hallahan* court argued that “[a] license to enter into a status or a relationship which the parties are incapable of achieving is a nullity.”<sup>86</sup> This raises an obvious question: a nullity to whom? If the parties themselves were willing to overlook or even embrace the fact that they were of the same sex—if they felt that they could “achieve” the relationship with respect to each other—why should the state care?<sup>87</sup> Their relationship may well have included companionship, affection, support, or sex. The court concluded, however, that a marriage license must be denied “because what they propose is not a marriage,”<sup>88</sup> because what they *were* was not an opposite-sex couple.

### III. The Marital “Tradition”

The tradition of marriage to which *Baehr* referred in determining whether same-sex couples have a right to marry<sup>89</sup> is, among other things, a tradition of heterosexist hegemony. The history of marriage is not well-documented,<sup>90</sup> and it is difficult for any court to “know” what marriage is and what it is not, unless that knowledge is not experiential but idealistic; that is, unless the case is decided not based on what marriage has been, but rather on what the judge would like marriage to be.

After all, the sentencing court in *Loving* offered the opinion that

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.<sup>91</sup>

It is difficult to go further back into time than the placement of people on the planet by “Almighty God,” but the United States Supreme Court was not swayed by that tradition, however dispositive it may have seemed to Virginia on the question whether “marriage” included interracial mar-

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<sup>86</sup> *Hallahan*, 501 S.W.2d at 589.

<sup>87</sup> Cf. *Graham v. Graham*, 33 F. Supp. 936, 938 (E.D. Mich. 1940) (“[M]arriage is not merely a private contract between the parties, but creates a status in which the state is vitally interested and under which certain rights and duties incident to the relationship come into being, irrespective of the wishes of the parties.”).

<sup>88</sup> *Hallahan*, 501 S.W.2d at 590.

<sup>89</sup> *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993).

<sup>90</sup> See Eskridge, *supra* note 50, at 1435 & nn.44–45.

<sup>91</sup> *Loving v. Virginia*, 388 U.S. 1, 3 (1966). Compare *id.* with *Bowers v. Hardwick*, 478 U.S. 186, 210 n.5 (Blackmun, J., dissenting) (“The parallel between *Loving* and this case is almost uncanny. There, too, the State relied on a religious justification for its law.”).



riage. Heterosexuals rely heavily on an idealized marital tradition when they deny marriage to us, though it reflects neither their experience nor ours.

### A. Heterosexual "Traditions" of Marriage

It is unclear whether traditional marriage actually is a tradition for most opposite-sex couples. Opposite-sex marriages now last an average of only 9.6 years,<sup>92</sup> and one-third of all marriages are re-marriages.<sup>93</sup> A considerable number of marriages will end in divorce.<sup>94</sup> Couples with access to legal services and enough property to make it worthwhile are able to contract around statutory property allocations.<sup>95</sup> Many opposite-sex couples choose not to marry at all<sup>96</sup> and often arrange their relationships through non-marital contracts.<sup>97</sup> For a variety of reasons, a significant number of unmarried women have children.<sup>98</sup> American men and

<sup>92</sup> Hunter, *supra* note 52, at 20 (citing National Center for Health Statistics, *Advance Report for Final Divorce Statistics, 1987*, in MONTHLY VITAL STATISTICS REP. NO. 12, SUPP. 2, 38 (1990)).

<sup>93</sup> *Id.* (citing AMERICAN PSYCHIATRIC ASSOCIATION, CHANGING FAMILY PATTERNS IN THE UNITED STATES 9 (1986)).

<sup>94</sup> See Barbara Vobejda, *Baby-Boom Women Setting Divorce Record: Census Data Underscore Dramatic Social Change in Last 2 Decades*, WASH. POST, Dec. 9, 1992, at A1; see also Desiree French, *Second Marriages: Some Work Better, But More Than Half End in Re-Divorces*, BOSTON GLOBE, Sept. 19, 1989, at 61; Kathleen Doheny, *Parents Divorced—Will You Too?*, L.A. TIMES, Sept. 6, 1993, at E1.

<sup>95</sup> See, e.g., *Posner v. Posner*, 233 So.2d 381, 385 (Fla. 1970) (reversing prior ruling to hold prenuptial agreements enforceable); *accord Scherer v. Scherer*, 292 S.E.2d 662, 666 (Ga. 1982); *Edwardson v. Edwardson*, 798 S.W.2d 941, 945 (Ky. 1990); *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990). See also, e.g., Margaret K. Webb, *For Richer, for Poorer: Couples Should Talk Money Before Wedding*, WASH. POST, Oct. 10, 1993, at H1.

<sup>96</sup> See Ellen Willis, *Say It Loud: Out of Wedlock and Proud*, NEWSDAY (New York), Feb. 11, 1994, at 70 (noting that she and her opposite-sex partner have "resisted marrying, partly in symbolic protest against the relentless drumbeat for 'family values,' partly because we feel no need to get the state involved in our relationship, and no irresistible economic or social pressure to do so."). See also Kenneth Eskey, *Fewer Saying "I Do"; Marriage Rate Falling Off in the '90s*, HOUSTON CHRON., Dec. 9, 1992, at A5; Martha Shirk, *Missourians Saying "I Do" At Slow Rate*, ST. LOUIS POST-DISPATCH, Aug. 23, 1992, at 1A; Barbara Vobejda, *Americans Spending Less Time Married; Rates Are Lowest in 2 Decades While Cohabitation Is Common*, WASH. POST, Aug. 26, 1991, at A1.

<sup>97</sup> E.g., *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976).

<sup>98</sup> Here, too, courts have blurred the married-unmarried distinction. E.g., *Stanley v. Illinois*, 405 U.S. 645, 657–58 (1972) (recognizing unwed father's right to custody of his children when he and their deceased mother had lived together for 18 years). See also Robert Pear, *Larger Number of New Mothers Are Unmarried*, N.Y. TIMES, Dec. 4, 1991, at A20:

[N]early one of every four women who had a child in the last year—913,000 of 3.9 million women—was not married. More than two-thirds of the teen-agers who had babies last year were unmarried, and among black teen-agers having babies, only 10 percent were married, the Census Bureau reported . . .

Amara Bachu, a demographer at the Census Bureau, said the new data sug-

women are likely to have more spouses than men and women in polygamous societies.<sup>99</sup> As a consequence, the actual experience of most American families differs considerably from the rhetoric associated with the family in many judicial opinions.<sup>100</sup>

Thus, just as marriage has no theoretical coherence, it also has no coherence as a shared experience of heterosexuals. These statistics reflect a shifting population of married people (some of whom are themselves gay men and lesbians) who have an ambivalent experience of and relation to marriage. These statistics also show that tradition-based arguments for the ban on same-sex marriage are disingenuous. There is no coherent tradition of long-term, monogamous, procreation-oriented marriage among heterosexuals; rather, opposite-sex couples are abandoning what marriage has traditionally been and required.

The tradition of heterosexual marriage to which courts like *Baehr* refer is not so much an historical, descriptive tradition as it is an ahistorical, prescriptive ideal. What this tradition prescribes is heterosexuality, but heterosexuality as function, not desire. "Marriage" is framed in terms of procreation when the question is whether gays should marry; it is framed in terms of who should marry when the question is whether the couple should procreate. In either case, procreation leads courts to collapse two distinct issues: deciding whether the state must allow a couple to marry becomes a determination of whether the state must *not* allow a couple to marry.

The supposed bad effect of a parent's homosexuality on his or her children, a persistent canard,<sup>101</sup> justifies denying marriage to same-sex couples:

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gested that there was less of a social stigma attached to bearing children out of wedlock, so unmarried women who become pregnant nowadays are less likely to marry.

Many women conclude that they "may be better off in the long run by relying more on the support of their parents and relatives for financial and emotional assistance than by entering a potentially unstable marriage undertaken solely to prevent an out-of-wedlock birth," Miss Bachu said.

Cf. Cheryl Laird, *Teen-Age Moms; More Young Mothers Are Choosing to Stay Single*, HOUSTON CHRON., Jan. 8, 1992, at 1. See generally Joe Frolik, *Brave New World; Single Motherhood Loses Stigma for Children of Sexual Revolution*, PLAIN DEALER (Cleveland), Nov. 30, 1993, at 1A; Jean Marbella, *Unwed Mothers: What a Turnaround; In Days Past They Were Shunned, But Now the Reaction Is "So What"*, ST. LOUIS POST-DISPATCH, June 14, 1993, at 3D.

<sup>99</sup> LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW* 104-204 (1981).

<sup>100</sup> *Only One U.S. Family in Four is "Traditional"*, N.Y. TIMES, Jan. 30, 1991, at A19.

<sup>101</sup> E.g., *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865, 867, 869 (Mo. Ct. App. 1982) (ignoring expert testimony that 95% of adult-child sexual molestation is heterosexual: "Every trial judge . . . knows that the molestation of minor boys by adult males is not as uncommon

marriage is so clearly related to the public interest in affording a favorable environment for the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the legal union of one man and one woman.<sup>102</sup>

Marriage is a legal relation between adults; the extent to which children benefit from it depends upon the substance of the relationships among children and adults. Thus, happily unmarried persons may well provide a more "favorable" environment for children than an unhappily married couple. None of the supposed child-rearing strengths that are used to argue in favor of marriage are guaranteed by marriage, nor are they unavailable to unmarried people, except to the extent that the state makes child-rearing by an unmarried person difficult.

Notwithstanding the freedom to make reproductive choices that *Roe v. Wade*,<sup>103</sup> *Eisenstadt v. Baird*,<sup>104</sup> and *Griswold v. Connecticut*<sup>105</sup> established, opposite-sex couples participate in a scheme of procreative regulation by the very act of introducing their bodies into marriage. That scheme deploys children as symbols of procreation, itself a symbol of "normal" sexuality.

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as the psychological experts' testimony indicated."'). But see, e.g., Marianne T. O'Toole, Note, *Gay Parenting: Myths and Realities*, 9 PACE L. REV. 129, 144-45 (1989).

<sup>102</sup>Singer v. Hara, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974). See also Bruce Fein, *Gay Marriage: Should Homosexual Marriages Be Recognized Legally?*, A.B.A. J., Jan. 1990, at 42, 43:

The law should encourage male-female marriage vows over homosexual attachments in the interests of physically, mentally, and psychologically healthy children, the nation's most valuable asset.

Fein's unwarranted assumption is that encouraging opposite-sex marriages over "homosexual attachments" (as though the two were mutually exclusive) can alter an individual's experience of desire.

[N]o evidence exists to support the belief that banning homosexual marriages will promote heterosexual relationships. Most homosexuals prohibited from marrying will simply continue their homosexual relationship without official state recognition. Homosexuals will not reorient their affectional preference and marry a person of the other gender.

Cathy J. Jones, *The Rights to Marry and Divorce: A New Look at Some Unanswered Questions*, 63 WASH. U. L.Q. 577, 622 (1985). If it is true that same-sex marriage would lead to an appreciable increase in the number of gay people, then that suggests that many people, perhaps even many married people, are in relationships they would leave if they could. That it traps people in unhappy and unsatisfying relationships is not the most compelling case to be made for marriage.

<sup>103</sup>410 U.S. 113 (1973).

<sup>104</sup>405 U.S. 438 (1972).

<sup>105</sup>381 U.S. 479 (1965).

Courts also argue that same-sex couples must not marry because they cannot procreate.<sup>106</sup> Marriage, then, is “for” procreation,<sup>107</sup> even though married opposite-sex couples are not required to procreate or even to try to do so.<sup>108</sup> The wide range of non-coital means of becoming a parent—from *in vitro* fertilization to surrogacy to adoption—means marriage no longer requires or implies a link between sexuality and parenthood for many couples. On the other hand, polygamous marriages, which maximize procreation, are prohibited.<sup>109</sup> And, conversely, interracial marriage was opposed precisely because such a couple could procreate.<sup>110</sup>

It is a little surprising that heterosexuals have done to themselves what they so frequently do to gays and lesbians: namely, distill heterosexuality into one of its practices (procreation in marriage), in the same way that homosexuality is conflated with one of its practices (sodomy).<sup>111</sup> One suspects few heterosexuals experience heterosexuality in this one-di-

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<sup>106</sup> *E.g.*, *Singer*, 522 P.2d at 1197 (“[I]t is apparent that no same-sex couple offers the possibility of the birth of children by their union. Thus the refusal of the state to authorize same-sex marriages results from such impossibility of reproduction . . .”). That same-sex couples do not have children is, of course, untrue. *See, e.g.*, Nancy Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990); *The Lesbian Baby Boom*, NEWSDAY, July 13, 1989, at 8; *Gay Couples Begin a Baby Boom*, BOSTON GLOBE, Feb. 6, 1989, at 2.

<sup>107</sup> *E.g.*, *Constant A. v. Paul C.A.*, 496 A.2d 1, 7 (Pa. Super. Ct. 1985) (denying custody of children to lesbian mother, and noting that “[t]he essence of marriage is the coming together of a man and woman for the purpose of procreation and the rearing of children, thus creating what we know to be the traditional family”).

<sup>108</sup> *See, e.g.*, *Singer*, 522 P.2d at 1197 (conceding that “married persons are not required to have children or even to engage in sexual relations”); *see also* *Marks v. Marks*, 77 N.Y.S.2d 269, 270–71 (Kings County Sup. Ct. 1948) (opposite-sex couples may marry even though they know in advance that they cannot procreate).

<sup>109</sup> *E.g.*, *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878) (upholding conviction of Mormon settler on charges of polygamy, rejecting free exercise claim).

<sup>110</sup> Hence the concern over “mongrelization.” *See* *Loving v. Virginia*, 388 U.S. 1, 7 (1966).

<sup>111</sup> *See, e.g.*, *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 1075–76 (5th Cir. 1976) (relying on state sodomy statute to affirm newspaper’s decision not to print advertisements for gay organization on grounds that newspaper would become implicated in criminal activity), *cert. denied* 430 U.S. 982 (1977); *Appeal in Pima County Juvenile Action B-10489*, 727 P.2d 830, 835 (Ariz. Ct. App. 1986) (relying on state sodomy statute to determine bisexual man is “unacceptable” to adopt any child); *Head v. Newton*, 596 S.W.2d 209, 210 (Tex. Ct. App. 1980) (calling someone “queer” slander *per se* since it implies commission of the crime of sodomy); *Gay Activists v. Lomenzo*, 320 N.Y.S.2d 994, 997 (Sup. Ct. 1971) (“[I]n order to be a homosexual, the prohibited act must have at some time been committed, or at least presently contemplated.”), *rev’d sub nom. Owles v. Lomenzo*, 329 N.Y.S.2d 181 (App. Div. 1973), *aff’d sub nom. Gay Activists Alliance v. Lomenzo*, 293 N.E.2d 255 (1973). *See also* *Ratchford v. Gay Lib*, 434 U.S. 1080, 1084 (1978) (Rehnquist, J., dissenting from denial of cert.) (“[T]he question is not whether Gay Lib as an organization will abide by university regulations. Nor is it really whether Gay Lib will persuasively advocate violations of the sodomy statute. Instead, the question is whether a university can deny recognition to an organization the activities of which expert psychologists testify will in and of themselves lead directly to violations of a concededly valid state criminal law.”).

mensional, idealized way. Shifting the procreation argument to gays and lesbians betrays its deeper structure: marriage, as a statement about who should or can procreate, negatively defines who should or can belong to "our" community.<sup>112</sup>

In the same way that Virginia feared that all whites would be less white if some of them intermarried with non-whites,<sup>113</sup> Georgia argued in defense of its sodomy law that homosexual sodomy would somehow make heterosexuals less heterosexual. According to the Attorney General of Georgia, sodomy is the

anathema of the basic units of our society—marriage and the family. To decriminalize or artificially withdraw the public's expression of its disdain for this conduct does not uplift sodomy, but rather demotes these sacred institutions to merely alternative lifestyles.<sup>114</sup>

Thus, the "sacredness" of marriage stems not from a quality essential to marriage but from its oppositional relation to "non-marriage," rendered as homosexual sodomy.

### *B. Same-Sex Traditions of "Marriage"*

If in a tradition-based test the relevant tradition is always to be that of the dominant caste, and if the question is whether the dominant tradition has included the practices of the subordinate group, then it is clear that challenges to the exclusion of those practices must always fail except insofar as the subordinate tradition can show that it resembles the dominant tradition. If, however, the question is whether a tradition of the practices claimed by the minority group has existed, then a challenge to the exclusion of those practices need only fail if the practices of the dominant caste are necessary and necessarily exclude those of the minority group.

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<sup>112</sup> Cf. Leo Bersani, *Is the Rectum a Grave?*, in *AIDS: CULTURAL ANALYSIS/CULTURAL ACTIVISM* 197, 203 (Douglas Crimp ed., 1988) ("[T]he definition of the family as an identity is, inherently, an exclusionary process.").

<sup>113</sup> *Loving*, 388 U.S. at 7. The Virginia Supreme Court relied on its decision in *Naim v. Naim*, 87 S.E.2d 749 (Va. 1955), in which it had held that anti-miscegenation laws "preserve the racial integrity of its citizens" and prevent "a mongrel breed of citizens." *Naim*, 87 S.E.2d at 756.

<sup>114</sup> Brief of Petitioner Michael J. Bowers, Attorney General of Georgia, at 37-38, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140) (quoted in Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 219). See also RICHARD D. MOHR, *GAY IDEAS: OUTING AND OTHER CONTROVERSIES* (1992). Mohr writes that the same-sex marriage cases

Judicial application of tradition-based fundamental rights tests obscures a tradition in this country of same-sex pairings that resembled—and the partners treated as—“marriage.”<sup>115</sup> The same-sex marriage cases themselves are evidence that same-sex couples have formed relationships whose “sacrifice” would extinguish their “liberty.”<sup>116</sup> Same-sex couples have attempted to secure for themselves some of the benefits of marriage through a variety of legal mechanisms, including adoption,<sup>117</sup> contract,<sup>118</sup>

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presume[ ] that marriage, like titanium, is somehow a scarce commodity, the possession of which by one person necessarily excludes its possession by someone else—rather than that marriage is, as it is, a common good, like friendship or knowledge, that any number of people may possess and of which the possession by some may actually promote its possession by others.

*Id.* at 89–90.

<sup>115</sup>Professor Eskridge has written a detailed survey of same-sex relationships. *See generally* Eskridge, *supra* note 50. For example, Professor Eskridge describes male-male couples among pirates, hobos, cowboys, and Native Americans. *Id.* at 1453, 1476 & nn.205–07. Additionally, a wide variety of religions have recognized same-sex couples. *E.g.*, Lynda Richardson, *Methodist Congregation Blesses Lesbian Couple's Union*, WASH. POST, May 11, 1990, at C1; John Dart, *Support Grows Among Clergy for "Weddings" of Gay Couples*, L.A. TIMES, Dec. 7, 1987, at 3. In Harlem, lesbian couples would have large weddings for themselves. LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA* 73 (1991); *see also* Cheryl Clarke, *Of Althea and Flaxie*, in *GAY & LESBIAN POETRY IN OUR TIME* 77, 79 (Carl Morse & Joan Larkin eds., 1988) (telling story of two women, each of whom “did not care who knew she'd made her way with a woman”).

Some have estimated that half of all gay men and 70% of all lesbians are involved in long-term relationships. *See, e.g.*, Julienne C. Scocca, *Society's Ban on Same-Sex Marriages: A Reevaluation of the So-Called "Fundamental Right" of Marriage*, 2 SETON HALL CONST. L.J. 719, 720 (1992) (citing Brent Hartinger, *A Case for Gay Marriage*, COMMONWEAL, Nov. 22, 1991, at 681). Statistics such as these, however, should be taken with a grain of salt, since we know neither how many gay men and lesbians there are in this country nor how they individually define their relationships.

<sup>116</sup>*Cf. Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993) (holding that same-sex marriage is not “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed”).

<sup>117</sup>*See, e.g.*, *East 53rd St. Assocs. v. Mann*, 503 N.Y.S.2d 752, 755 (1986) (order of adoption intended to secure inheritance rights of adoptee not fraud *per se*); *In re Adoption of Adult Anonymous 1*, 435 N.Y.S.2d 527, 531 (Fam. Ct. 1981) (no public policy bar to adoption between competent and consenting adults in same-sex relationship). *But see, e.g.*, *In re Adoption of Robert Paul P.*, 471 N.E.2d 424, 427 (N.Y. 1984) (adoption statute restricted to the parent-child context and should not be extended to legitimizing adult relationships absent authorization from legislature).

<sup>118</sup>*See, e.g.*, *Crooke v. Gilden*, 414 S.E.2d 645, 646 (Ga. 1992) (holding contract to share assets and expenses between same-sex couple enforceable; invoking parol evidence rule to refuse to read sexual component into contract); *Whorton v. Dillingham*, 248 Cal. Rptr. 405, 407 (Ct. App. 1988) (same-sex cohabitators' agreement enforceable even though sexual relationship was part of the consideration); *but see Jones v. Daly*, 176 Cal. Rptr. 130, 133–34 (Ct. App. 1981) (declining to enforce oral cohabitators' agreement between two men where sex was part of the consideration therefor). The *Whorton* court distinguished *Daly* on the grounds that the sexual relationship contemplated in the *Whorton* agreement was severable from the rest of the agreement. *Whorton*, 248 Cal. Rptr. at 407.

judicial statutory construction,<sup>119</sup> or common law construction.<sup>120</sup> Each of these cases testifies to a history of same-sex love, whose participants have risked and lost a great deal in order not to lose their sense of their love's worth.<sup>121</sup> Beyond the legal system, an uncounted number of gays and lesbians quietly defy the hegemony of heterosexuality by creating and sustaining same-sex relationships.

Whatever these relationship are, however, they are not "marriage," even if they are long-term, monogamous, or procreation-oriented. If we insist on the conflicting, heterosexist definitions of "marriage," we do our own history a disservice by accepting a term defined by our exclusion, and one that cannot describe all the ways we have formed our relationships.

Whether or not it happens in Hawaii, it seems likely that same-sex marriage, of at least some form, is on the horizon.<sup>122</sup> The question is less

<sup>119</sup> See, e.g., *State v. Hadinger*, 573 N.E.2d 1191, 1192 (Ohio Ct. App. 1991) (same-sex couple in a "spousal relationship" for purposes of domestic violence statute); *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 53-54 (N.Y. 1989) (defining long-term same-sex couple as a "family" for purposes of New York City rent-control laws); 420 East 80th Co. v. Chin, 455 N.Y.S.2d 42, 44 (App. Term. 1982) (barring eviction of tenant's same-sex partner because shortage of housing in New York City forced groups other than nuclear families to share apartments), *aff'd* 468 N.Y.S.2d 9 (App. Div. 1983). But see, e.g., *In re Estate of Cooper*, 564 N.Y.S.2d 684, 688 (Surr. Ct. 1990) (surviving partner of same-sex relationship not a "surviving spouse" within meaning of statute providing that surviving spouse may elect against will).

<sup>120</sup> See, e.g., *Rowe v. Bennett*, 514 A.2d 802, 806 (Mo. 1986) (allowing emotional distress action against psychotherapist who dated plaintiff's same-sex partner after the couple went through counseling with her). But see, e.g., *Coon v. Joseph*, 237 Cal. Rptr. 873, 877 (Ct. App. 1987) (intimate same-sex relation not a sufficiently "close relationship" for purposes of negligent infliction of emotional distress). Cf. *Gajovski v. Gajovski*, 610 N.E.2d 431, 432 (Ohio Ct. App. 1991) (affirming lower court's refusal to terminate alimony when former wife began living with another woman on grounds that lesbians cannot marry and cannot be "concubines" to one another).

<sup>121</sup> See, e.g., *Singer v. United States Civil Serv. Comm'n*, 530 F.2d 247, 256 (9th Cir. 1976) (*Singer*, plaintiff in *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974), terminated by Equal Employment Opportunity Commission in part as result of publicity surrounding his attempt to secure a marriage license), *vacated*, 429 U.S. 1034 (1977); *McConnell v. Anderson*, 451 F.2d 193, 196 (8th Cir. 1971) (upholding withdrawal of offer of promotion following publicity surrounding the attempt of McConnell and Baker, plaintiff in *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), to secure a marriage license); *Shahar v. Bowers*, 58 Fair Empl. Prac. Cas. (BNA) 668, 668 (N.D. Ga. 1992) (*Bowers*, Attorney General of Georgia and defendant in *Bowers v. Hardwick*, 487 U.S. 186 (1986), withdrew offer of employment to Shahar after she went through marriage ceremony with another woman); see also, e.g., *In re Guardianship of Kowalski*, 478 N.W.2d 790, 791 (Minn. Ct. App. 1991) (custody of Kowalski, brain-damaged in automobile accident, awarded to her female partner after years of litigation that lasted almost twice as long as the length of their relationship at the time of the accident).

<sup>122</sup> See *Hunter*, *supra* note 52, at 10 ("[T]here is a rapidly developing sense that the legalization of marriage for lesbian and gay Americans is politically possible at some unknown but not unreachable point in the future, that it shimmers or lurks—depending on one's point of view—on the horizon of the law.").

Denmark now permits "registered partnerships" that resemble marriage, and Sweden recognizes "co-habitees." See Sheila Rule, *Rights for Gay Couples in Denmark*, N.Y.

one of when than of whether: "[g]iven that a same-sex marriage bar is a bad thing for the state to impose, lesbians and gay men still need to ask whether marriage is a good thing for them to seek."<sup>123</sup>

At least one commentator hopes that legal same-sex marriage will make heterosexuals see that gays and lesbians are, just like them, nice people.<sup>124</sup> I hope so, too, and why not? But it seems optimistic, and it essentializes law's power.

The argument that legally recognizing same-sex relationships as marriages will force our society to confront its deeply rooted sexist, heterosexist, and repressed beliefs about human sexuality and stimulate a complete rethinking of sexual relations is, I think, a brave but ultimately misdirected political strategy . . . . I worry whether the existence of a group of married lesbians and gay men can really revolutionize the institution of marriage. My concern arises from the fact that this argument is precisely the same as that used by reactionary groups *against* legal recognition of same-sex relationships as marriages.<sup>125</sup>

If marriage can work the social magic of "legitimizing" same-sex relationships, it is only at the cost of a massive conscription of lesbians and gay men into the project of re-writing gay life.

Proponents of same-sex marriage argue that such marriages make the law recognize new forms of relationships. This, however, is mistaken: marriage reforms our relationships in a way the state already recognizes. "[W]hat we 'win' when we wage a fight for freedom is often something quite different than we may have intended":<sup>126</sup> to gain same-sex marriage from a sexist and heterosexist legal establishment, we will have to be "the

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TIMES, Oct. 2, 1989, at A8; Eva Ahlberg, *Live-In Lovers in Sweden, Including Gays, Given Same Rights as Married Couples*, L.A. TIMES, Mar. 27, 1988, at 15. Six countries—Australia, Denmark, the Netherlands, New Zealand, Norway, and Sweden—will acknowledge same-sex partnerships of several years' duration for purposes of immigration and residency. See Arthur S. Leonard, *More Countries Recognize Gay Partners for Immigration*, 1991 LESBIAN/GAY L. NOTES 82.

<sup>123</sup>Duclos, *supra* note 71, at 42 (footnote omitted). See also Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, 2 OUT/LOOK, NAT'L LESBIAN & GAY Q. 9, 14 (1989) ("Marriage, as it exists today, is antithetical to my liberation as a lesbian and as a woman because it mainstreams my life and voice. I do not want to be known as 'Mrs. Attached-To-Somebody-Else.'").

<sup>124</sup>See Claudia A. Lewis, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 YALE L.J. 1783, 1800 & n.94 (1988) (recounting story of lesbian friend and her partner who had a baby and, as a result of the birth announcement, were able to make new connections to the author's family).

<sup>125</sup>Duclos, *supra* note 71, at 46–47 (footnotes omitted).

<sup>126</sup>Mary C. Dunlap, *The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 LAW & SEXUALITY 63, 91 (1991).



same" as heterosexuals.<sup>127</sup> That is, as the same-sex marriage cases demonstrate, we will have to show that our relationships are "the same" as the idealized heterosexual relationships courts envision when they deny marriage to us. The imposition of this ideal on gay and lesbian relationships will then more deeply inscribe certain differences within our own communities, delegitimizing some of us in the eyes of other gays and lesbians in the name of legitimizing all of us in the eyes of heterosexuals.

The specter of lesbian marriage and lesbian quasi-marriage . . . poses the danger of demarcating acceptable lesbians (married couples) from unacceptable lesbians (unmarried), as well as threatens to hetero-relationize and erase lesbianism.<sup>128</sup>

Thus, when newspapers begin to publish "wedding" announcements for same-sex couples,<sup>129</sup> a victory of sorts has been won, but it is not the defeat of the mechanisms by which we have been oppressed.

It seems speculative to hope that seeing our wedding announcements in the paper will cause our families to accept our homosexuality if they have previously been hostile to the idea. The opposite result seems much more likely. Ask any heterosexual who has made a marriage of which her family disapproves: legal marriage does not guarantee acceptance by one's family. The work of gaining community acceptance for our relationships must still be done the hard way, family by family.

So long as we allow heterosexuals to define which relationships matter, we will gain only marginally by squeezing a few of our number into their model. Some say that, in a time of AIDS, marriage is the most crucial battle, because it will save us from danger.<sup>130</sup> I do not believe this is so, nor do I believe it is the most compelling case to be made for marriage; it is a little like the argument for restricting marriage to opposite-sex couples in the first place. Marriage will not protect us from

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<sup>127</sup> See Lewis, *supra* note 124, at 1785 (discussing the "impoverished" Equal Protection ideal). Cf. *Bowers v. Hardwick*, 478 U.S. 186, 211 (1986) (Blackmun, J., dissenting) ("[Freedom] to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.") (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)); Dunlap, *supra* note 126, at 93 ("People should not have to be 'the same' to have equal rights, and, indeed, where we are 'the same,' questions of equality do not tend to arise.").

<sup>128</sup> Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMP. L. REV. 511, 540 (1990).

<sup>129</sup> *Paper Includes Gay Couples on What Was Wedding Page*, N.Y. TIMES, Mar. 23, 1991, at A10 (Minneapolis Star Tribune publishing same-sex domestic partnership announcements on wedding announcement page); note that the *New York Times* itself publishes only opposite-sex wedding announcements.

<sup>130</sup> See, e.g., LARRY KRAMER, *THE NORMAL HEART* 30 (1985) ("[W]hy didn't you guys fight for the right to get married instead of the right to legitimize promiscuity?").

danger; indeed it very often exposes us to danger. AIDS has shown that our suffering can leave heterosexuals unmoved—why should they be moved by our loving? Those friends who have died of AIDS are irretrievably gone. Gone, and marriage won't bring them back; nor will it challenge the sexual value system that condemned them and all of us as "promiscuous" and complicit in our fate.

#### IV. Beyond Marriage

Marriage has been described as having "positive values," and contributing to "community stability."<sup>131</sup> That the state has an interest in promoting marriage because of the social good marriage does is a circular argument, since marriage only performs those goods because the state assigns them to marriage or gives it a monopoly on them. Given the number of social evils for which marriage has provided an opportunity (such as spousal abuse and rape),<sup>132</sup> it seems equally plausible to argue that the state has an interest in preventing marriage.<sup>133</sup> The issue, then, is what the goals of state regulation of intimate relationships can or ought to be.

Same-sex couples who cannot marry, like opposite-sex couples who do not marry, are materially disadvantaged by the lack of the various benefits states give to married couples. That, however, is less an argument for extending marriage to same-sex couples than for re-thinking the distribution of certain benefits through marriage. Latent in the discussion of same-sex marriage, and of marriage generally, is the unanswered question

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<sup>131</sup> See Lewis, *supra* note 124, at 1802 (arguing that these values "are not exclusive to the heterosexual relationship").

<sup>132</sup> E.g., *Attacks on Women by Husbands, Lovers Widespread, Senate Says*, CHI. TRIB., Oct. 3, 1992, at 14 (citing Senate Judiciary Committee report estimating 1 million attacks on women by their husbands or lovers and 3 million unreported domestic crimes, including murders, rapes, and assaults).

<sup>133</sup> Indeed, the United States Supreme Court has held that states must "prevent" marriage to the extent that it legally consists of classifications that presume that husbands will act as privileged breadwinners and wives as subordinated homemakers. See, e.g., *Kirschberg v. Feenstra*, 450 U.S. 455, 461 (1981) (Louisiana code section designating husband as "head and master" of community estate unconstitutional); *Trammel v. United States*, 445 U.S. 40, 53 (1980) (allowing voluntary adverse spouse testimony in criminal trial over defendant-spouse's objection); *Orr v. Orr*, 440 U.S. 268, 280 (1979) (striking down statute imposing flat ban on alimony to men); *Califano v. Goldfarb*, 430 U.S. 199, 206-07 (1977) (women entitled to same Social Security benefits as men); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 71 (1976) (state may not require husband's consent for first trimester abortion); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975) (widowers entitled to same child care allowances as widows); *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) (enlisted women entitled to same military benefits as enlisted men). See also, e.g., *Warren v. State*, 336 S.E.2d 221, 221 (Ga. 1985) (marriage not a defense to marital rape); *State v. Kelly*, 478 A.2d 364, 375-76 (N.J. 1984) (allowing expert testimony on battered women's syndrome).

of how certain entitlements should be distributed, and how certain inequities are to be remedied.

As I have argued, same-sex marriage is a limited and speculative answer to this question. Speculative, both because the bundle of marital benefits can be given to us in a disjointed and inferior package and because it is unclear that it can change homophobic attitudes. Limited, both because it assumes a false symmetry between gays and lesbians and heterosexuals and because it makes the issue the narrow one of our access to the status quo.

The all-or-nothing marriage model, which serves heterosexuals so poorly, serves us even less well. We know, as gays and lesbians, that love is not always erotic and that what is erotic is not always love, and that the two of these in turn can be separate issues from questions of support and companionship. Yet these links are precisely what a two-person, monogamous model of marriage imposes. What of our circles of ex-lovers, our fuck-buddies, our housemates, our co-parents, our parents—our friends, the literal substance of our community—what of them? “Marriage” tangles questions of eros and love and economic dependency in a way that leaves us with little vocabulary for any relationship in which these are not present in heavy doses. I, for one, am against that.

We would do well not to romanticize marriage, for to do so is to romanticize the means of our oppression. Our desire for same-sex marriage is a radical affirmation of heterosexuals’ idealized social order, the very social order by which they oppress us. Marriage is not the same thing as love. For their part, heterosexuals have shown us what marriage is worth and how long it lasts. For our part, we have learned from our outlaw status a great deal about love—what it is worth, and how long it lasts.<sup>134</sup> Rather than accept the narrowness under which heterosexuals themselves chafe, why not invite them to share in what we know about the multiple ways in which relationships can form? If we come to heterosexuals and their institution, we valorize the mechanism of our oppression. Let them come to us.

—Steven K. Homer\*

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<sup>134</sup> Cf. Douglas Crimp, *How to Have Promiscuity in an Epidemic, in AIDS: CULTURAL ANALYSIS/CULTURAL ACTIVISM*, *supra* note 112, at 253 (“We were able to invent safe sex because we have always known that sex is not, in an epidemic or not, limited to penetrative sex. Our promiscuity taught us many things, not only about the pleasures of sex, but about the great multiplicity of those pleasures.”).

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