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Law, Social Justice, and Marriage: An Anti-Essentialist View

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What we today define as "traditional marriage" was essentialist and grounded in a profound sexism that we have since overcome, making marriage and family life much more egalitarian and just in comparison to the past. Reviewing this sexism—as well as the racism we find in the anti-miscegenation laws—and understanding why we no longer practice them officially will help readers to understand the problems with essentialist views of marriage in general, and help us to perceive the wisdom of removing the homophobic elements from the institution of marriage. I offer an alternative lens—non-essentialism—for describing marriage and family, one that frees us from the rigid thinking of the past, which has resulted in so much preventable human suffering by arbitrarily limiting our humanity and our ability to form healthy relationships with one another. *[Article copies available for a fee from The Transformative Studies Institute. E-mail address: journal@transformativestudies.org Website: http://www.transformativestudies.org ©2016 by The Transformative Studies Institute. All rights reserved.]*

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At the forefront of the culture wars today in the United States is the issue of same-sex marriage or "marriage equality." Advocates of marriage equality eschew the term "same-sex marriage" or "gay marriage" as it denotes a separate kind of institution, something "not really" marriage.

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The term "marriage equality," on the other hand, suggests that what the law commands—equal protection in terms of rights and responsibilities—is fulfilled.[1] In other words, marriage equality extends to all people the stabilizing legal expectations that comes with marriage that are reinforced in hundreds of different ways each day. These benefits break down roughly into six categories, including: death benefits, entitlements, evidentiary privileges, inheritance, surrogate decisions making issues, and tax issues.[2] Yet, the legalistic explanation of marriage is not enough; it also has a social component. The United States Supreme Court, in its landmark decision creating a constitutional right to privacy among spouses, reiterated the social importance of marriage:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[3]

The law, therefore, takes marriage very seriously, as it should. For all of its imperfections, marriage serves a range of functions that make life easier and more enjoyable for most people during at least some part of their lives. Thus qualified, marriage is a fundamental good. The legal and social values of marriage, however, does not answer the question of who gets to enjoy its benefits. The current battle is over same-sex couples, but previously it was over race and patriarchy, all of which reduce to, in my view, essentialist arguments that society has worked hard to overcome.

WHAT IS MARRIAGE? WHAT CONSTITUTES A FAMILY? WHO DECIDES?

According to the 2010 census, there are 901,997 same-sex couples in the United States.[4] These were people who identified as being spouses or unmarried partners. By March 2013, the number of *legally* married same-sex couples was 120,000.[5] Formal recognition of such relationships by the state is important for a variety of reasons which I will discuss below—not the least of which, notes journalist Frank Bruni, "for older relatives who now [have] a traditional vocabulary and framework—vows, rings, cake—for understanding the relationships."[6] These and related symbols are important and, in some sense, they mean *more* than the $360,000 tax bill that Edith Windsor was facing when she

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successfully challenged the federal Defense of Marriage Act.[7] Money, of course, is important, but not all "currency" involves dollars and cents.

In other words, the *symbolism* of marriage is precisely what gay people are fighting over. It is about other people understanding them and that we sometimes have to use the terms that other people recognize in order for them to recognize us. Such people can be important, such as relatives who are trying to make sense of our lives, who love us and want to support us, but do not have a way to process our decisions. Or it can be strangers who interact with us as citizens through daily social intercourse. Simply, adopting the symbols of the dominant society becomes a useful way for translating between different lived experiences. The overall effect of such symbolic exchange can be a notable change in consciousness. As activist Arnie Kantrowitz has noted, "The right to choose marriage is the ultimate normalization of relations between gay and non-gay society."[8] Such normalization is an end to which I hope will occur when the Supreme Court rules in June that the U.S. Constitution, in fact, guarantees Americans the right to enter into same-sex marriages.[9]

In order for readers to understand the importance of marriage equality for our society, I need to address the question: What is marriage? Or, more generally, what constitutes a family? The answer, as so much in life, *it depends*. To understand what we mean by marriage and family we have to first understand the distinction between *essentialism* and *non-essentialism* as it applies to family/family practices and what that means for how we conceptualize human relationships, how we invest such relationships with meaning. It is for this reason that I will be discussing legal patriarchy as well as anti-miscegenation laws as part of my argument for marriage equality.

Essentialism involves the assumption or belief made by many people that all things have a set of properties (or essences) of which any entity of that kind must have; without this property, it would naturally and logically be something else. While people generally tend not to *think* in philosophical terms, we tend to *speak*, philosophically in essentialist terms. An *essence* characterizes a form or permanent, unalterable, and eternal trait that is present in every possible world for all time with no exception. Essentialist beliefs constitute a constellation of ontological assumptions to reify social categories that reduce the variance between people and appear to be important. Essentialist thinking involves what I would consider to be an inappropriate conceptualization of social identifiers as "natural kinds," imposing on groups that are heterogeneous socially and historically who become pigeonholed as "biological kinds."

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As described by rhetorical scholar Richard Weaver, essentialist arguments include assumptions about the nature of a thing:

> Whether the genus is an already recognized convention, or whether it is defined at the moment by the orator, or whether it is left to be inferred from the aggregate of its species, the argument has a single postulate. The postulate is that there exist classes which are determinate and therefore predicable. In the ancient proposition of the schoolroom, "Socrates is mortal," the class of mortal beings is invoked as a predictable. Whatever is a member of the class will accordingly have the class attributes.[10]

Such "natural-kind" thinking involves two components: *inalterability* and *inductive potential*. Essentialized social categories impute to its members an immutable characteristic that allows others to make inferences about them. In the case of human traits, immutability is grounded in biological foundations that are considered discrete, historically invariable, and definitive. Within the existence of a thing is an a priori value associated with its nature—from this follows that structure involves order which implies hierarchy and value. Moralizations, from this point of view, are therefore inescapable and uncontestable—they reflect what are taken to be normative conditions, underwritten by reality itself. Homophobic, gender, racial, and ethnic liabilities in the law come from this line of thinking, at least to the extent they are taken seriously, as they have been historically.[11]

In terms of this study of marriage equality, we find that the dictionary meaning of marriage is essentialist. According to *Black's Law Dictionary*, marriage is "the civil status of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex."[12] Up until recently, courts have tended to conceive of marriage along these essentialist lines. For example, in *Baker v. Nelson*, the Minnesota Supreme Court denied two men from marrying, declaring that the "institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."[13]

Another court, after reviewing a few dictionary definitions of marriage, concluded that the appellants were not being prevented from marrying by any state action (i.e., action which would ground a potential lawsuit), "but rather by their own incapacity of entering into a marriage as that term is defined."[14] This reasoning is tautological; it assumes a

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definition without arguing for it. The court then concludes: "In substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage."[15] Again, the reasoning is unassailable if one were to accept the premises. Therefore, it would be impossible to issue a *marriage* license to same-sex couples, because they could not fit the definition. The court reasoned that it would be akin to going to the Department of Motor Vehicles and trying to get a car registration for your bicycle: "You can't do it because a bike isn't a car,"[16] the court explained, as if talking to a child. As the *Singer* court concluded, the two men "were not denied a marriage license because of their sex; rather, they were denied a marriage license because of the *nature* of marriage itself."[17] The court here speaks for a closed world, one in which everything has its place and one in which one's imagination is rather limited. Moreover, when operating from this perspective, a court or a person can deny that it is discriminating because the discrimination is *already* built into society or the law.[18] We see a similar phenomenon historically with patriarchy and the sexism that pervaded traditional practices of marriage and family life.

Unacceptable Sexism in Traditional Marriage

What we today define as "traditional marriage" was essentialist and grounded in a profound sexism that we have since overcome, making marriage and family life much more egalitarian and just in comparison to the past. Reviewing this sexism and understanding why we no longer practice it officially will help readers to understand the problems with essentialist views of marriage in general, and help us to perceive the wisdom of removing the homophobic elements from the institution of marriage.

Under traditional marriage, the family was considered an indissoluble and homogeneous unit centered on the ideal of procreation and the hegemony of the husband/father who was sovereign over the members of the household. Members were ranked in a strict hierarchy that assigned value based on status, of which gender was fundamental. Roles were rigidly constructed and brutally enforced at all levels of society.[19] The legal doctrine involved was called coverture and is encapsulated by the Latin phrase *propter defectum sexus* ("on account of defect of sex") in which women were viewed as defective men and, thus, needing marriage in order to be under the protective control of a man. Specifically, upon marriage, a woman's legal rights were subsumed under those of her husband. She was, in effect, a "covered woman" and often a *smothered*

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woman. The wife and husband were one person, and that person was the husband. As the influential English jurist William Blackstone explained:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French a femme-covert; is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.[20]

As a citizen, as a person, a woman was legally inconsequential. For instance, married women were prohibited from, among other things, voting, owning or inheriting property (their goods were transferred to her husband), keeping their own wages, serving on juries,[21] going to college and practicing most professions. Married women did not have equal rights to manage community property,[22] had to assume her husband's last name,[23] and live where the husband decided to live.[24] For a time, when an American woman married a foreign citizen, she would automatically lose her U.S. citizenship. For instance, in *Mackenzie v. Hare*, the Supreme Court upheld Congress's power to expatriate under the Citizen Act of 1907. As a result, U.S.-born female citizens would lose their citizenship by a marriage to any noncitizen. In other words, a husband's nationality would always determine that of the wife. If the husband was not eligible for nationalization, the wife lost her citizenship, even if she had been born a citizen of the U.S. The Court argued that such "expatriation" was justified under a type of national security rationale:

> We concur with counsel that citizenship is of tangible worth, and we sympathize with plaintiff in her desire to retain it and in her earnest assertion of it. But there is involved more than personal considerations. As we have seen, the legislation was urged by conditions of national moment. And this is an answer to the apprehension of counsel that our construction of the legislation will make every act, though lawful, as marriage, of course, is a renunciation of citizenship. The marriage of an American woman with a foreigner has consequences of like kind, may involve

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> national complications of like kind, as her physical expatriation may involve. Therefore, as long as the relation lasts, it is made tantamount to expatriation.[25]

The rights of husbands approached that of a sovereign and it covered areas that today would be unthinkable. In addition to what I have already described, runaway wives could be charged with a crime as well as the people who harbored her. The husband had the ability to sue for money if another man slept with his wife (i.e., "criminal conversation"). As a court explained in one successful suit, "The essential injury to the husband consists in the defilement of the marriage bed, in the invasion of his exclusive right to marital intercourse with his wife, and to beget his own children."[26] It gets worse.

If his wife ran off with her husband's children, the husband had the power to compel the police to return the children.[27] Wives and children could be institutionalized in mental hospitals on the word of their husbands if the husbands deemed them "incorrigible."[28] Unwed teenage mothers (but not fathers) were ostracized, kicked out of school or institutionalized. Up until relatively recently, women were treated as infantile and unable to exert agency over their lives, and in particular, their sexuality. For example, the infamous Mann Act, passed in 1910 exemplifies the notion that women have to be protected from sexual activity. The act assumes that women are naturally chaste and virtuous and cannot become a "whore" unless she has been raped, seduced, drugged or deserted. Similarly, statutory rape laws were intended, and enforced, against men to "protect" the virginity of women from being taken advantage of by bad men.[29] In other words, a woman had to be protected from losing her virginity to a man who would not marry her (as, for example, in the crime of seduction). Men could defend against a charge of seduction by pointing to the fact that the "victim" was not a virgin.

At the common law, husbands were permitted to chastise (i.e., beat) their wives. The reason given for this privilege was the fact that since the husband was responsible for the wife's behavior, including her debts and contracts, he needed the power to command her obedience. What we today call "corporal punishment" was what the law called "reasonable chastisement." The rule was that a husband could give his wife "moderate correction" so long as there was no permanent injury.[30] This criterion was literally interpreted by the courts. For example, in one case, a woman was repeatedly raped by her husband while suffering from poor health, and the court found there were no grounds for "cruelty" (which

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was necessary as this was a case for a divorce, and "cruelty" was the grounds upon which she was seeking to dissolve her marriage), as the woman was not permanently harmed and the husband, the court concluded, did not intend to harm. At issue here was not the sexual assault—at the common law, men had a right of sexual access to their wives as well as the right to mild chastisement of the wife in cases of disobedience, thus, legally speaking, *there was no sexual assault*:

> Here the act in it self was a lawful act—in ordinary circumstances, not injurious nor dangerous. It can, therefore, hardly be classed with those cases where an injury must almost necessarily follow from the act done. The impropriety of the act, and the injury from it, depended upon another fact—her state of health—of which he might not be apprised, in such a manner, as to make it intolerable cruelty in him. The court have indeed, upon the evidence before them, found, that the act was injurious to her health, and endangered it; but it is not found, that *he knew* this would be the consequence. It is not even found, that he knew her health was such as to be endangered by it.[31]

In other words, the salient question before the court was whether or not the special circumstances of the wife's illness were such that it was clear to the husband that the exercising of his right in this case would lead to certain harm:

> We know that in such a case, it is difficult to prove the precise state of facts, on the one side; and it is no less difficult to explain them, on the other. In a case of this kind, where the conduct charged is not in itself inhuman, but where its character is to depend upon extrinsic facts, of which facts the parties are in the first place to be judges, we must allow something to a want of correct information of facts, and something to incorrect judgment; whereas under the influence of excited passion, in every case where a doubt existed on such a subject, it becomes a reasonable man to exercise reason. But we cannot say, that in any case of doubt, the party is to be charged with cruelty, intolerable cruelty, which is to be a legal cause of separation.[32]

The wife's only legal recourse in cases such as this was a *writ of supplicavit* (an appeal for peace) which allowed her to ask the court for protection if the husband's violence was too much and threatened

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death.[33] If granted, the court would order the husband arrested and he would have to post bail upon promise to refrain from the abuse.

Contrast the previous case in which a vicious sexual assault by a husband on his wife was not seen as "cruelty" necessary for a divorce with the way the courts generally treated homosexuality as "cruelty" for purposes of granting the homosexual's partner a divorce. For purposes of divorce law, a married partner's homosexuality was seen for many decades as per se grounds for divorce in a fault-based divorce regime on the theory that one spouse's extramarital homosexual practices constitute cruelty to the other spouse. "Cruelty" in this sense is a legal term of art that refers to one of limited grounds for obtaining a divorce prior to divorce reform in the 1970s. A "fault" divorce is one in which one party blames the other for the failure of the marriage by legally proving wrongdoing. Wrongdoing was narrowly defined by a small category of offenses, violations of which may or may not rise to the level warranting a divorce—this was up to the judge after a full hearing. (Women complaining about domestic abuse, for example, often had a high bar to overcome before a court would rule that the beatings were severe enough to classify as "cruel.") The normative state assumption was that divorce was to be rare and permitted only in extreme circumstances. Grounds for establishing fault were limited to adultery, alcohol (or drug) abuse, cruelty (physical or mental), desertion, impotence, or insanity. A fault-based system of divorce was the norm in the United States until the early 1970s when, following California's lead, other states began switching to a no-fault system, as the traditional system had grown untenable. Here, as elsewhere, people acted on their own interests; openly defiant of legal norms (i.e., spouses colluded to deceive the court into granting them a divorce). New York, the last state to convert, did so piecemeal, finishing only in 2010.[34] In the no-fault system neither party is required to show fault in order to be able to divorce. Either party may request dissolution of the marriage, without the requirement that he/she show fault on the part of the other party and against that person's objections. The state no longer had the ability to force married people to remain married as they had prior to the 20th century under the increasingly anachronistic influence of Church Canon law and the ecclesiastical courts. (Britain secularized marriage and divorce only in the late nineteenth century).

So, for example, in *Crutcher v. Crutcher*, a 1905 case, we find the Supreme Court of Mississippi ruling that a husband who had improper intimacy with another man was behaving in such a manner as to constitute the "cruel and inhuman treatment" toward his wife for purposes of divorce law. According to the Court, "unnatural practices of

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the kind charged were an indignity to the wife, would have made the marriage relation so revolting to her that it would become impossible for her to discharge the duties of wife, and had defeated the whole purpose of the relation."[35] As the court reasoned, if "adultery is deemed a sufficient cause for divorce, certainly the crime against nature charged here is infinitely more serious and greater cause and surely more destructive of the peace, happiness, and objects of the marital relation; and in truth can the human mind conceive of a greater wrong by a husband or a more just and valid cause for a wife's complaint and claim for a divorce?"[36] Moreover, the court noted that the actions complained of by the wife "cause mental suffering to the extent of affecting her health, and would give rise to serious apprehension of communication to her of disease in case of the continuance of cohabitation. Such conduct constitutes extreme cruelty."[37]

In another case, many decades later, this sentiment was repeated when another court defined a woman's lesbianism as constituting "extreme cruelty" toward her husband, grounds for a fault-based divorce. As the court noted:

> It is difficult to conceive of a more grievous indignity to which a person of normal psychological and sexual constitution could be exposed than the entry by his spouse upon an active and continuous course of homosexual love with another. Added to the insult of sexual disloyalty *per se* (which is present in ordinary adultery) is the natural revulsion arising from knowledge of the fact that the spouse's betrayal takes the form of a perversion.[38]

The court goes on to note: "Few behavioral deviations are more offensive to American mores than is homosexuality. Common sense and modern psychiatric knowledge concur as to the incompatibility of homosexuality and the subsistence of marriage between one so afflicted and a normal person."[39]

As I have been trying to demonstrate, the common-law rights of the husband made him the financial head of the family, entitling him to the control of his wife and children; their property and personal property belonged to the husband. In some cases, the father had the power to kill the illicit lover of his daughter.[40] A husband is entitled to services of his wife and children and their wages, should they work, belonged to him. A husband/father is entitled to values of service for even *nonpaid* labor. For example, in an 1806 case, a father successfully sued a neighbor for the services of his teenage daughter after the daughter, who was abused at

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home by the father, left the father to find shelter. She lived for a time with a kindly neighbor for three and half years who took her in. As a result of his successful lawsuit, the father recovered from the neighbor the value of the service (cleaning, cooking, etc.) that the daughter provided to the neighbor for her upkeep. This case exemplifies the rule that a father is entitled to the earnings of his underage daughter.[41]

In a handful of states (Georgia, New Mexico, Texas, and Utah), a husband could murder his wife's lover with diminished responsibility or even be excused from legal liability entirely (in many other states, it was custom, not the law, that allowed husbands to do this). Under Article 1220 of the Penal Code of the State of Texas, for example, a homicide was considered "justifiable when committed by the husband upon one taken in the act of adultery with the wife, provided the killing take place before the parties to the act have separated."[42] This statute was in effect until 1974.[43] Georgia had a similar law in effect until 1977.[44] As explained by a Georgia court in 1860:

> In what has society a deeper concern than in the protection of female purity, and the marriage relation? The wife cannot surrender herself to another. It is treason against the conjugal rights. Dirty dollars will not compensate for a breach of the nuptial vow. And if the wife is too weak to save herself, is it not the privilege of the jury to say whether the strong arm of the husband may not interpose, to shield and defend her from pollution?[45]

This male power of protecting the sexuality of the wife from willing violation extended over the daughter. For instance, in one case a father had knowledge that his 16-year-old daughter was being seduced by a man. He went to the place where the couple met to have intercourse and killed the man. He was then convicted of voluntary manslaughter but had his conviction *reversed* on appeal on the grounds that the trial court failed to tell the jury that a father had the right to protect his daughter from a seducer. Here is how the court portrayed the situation:

> While a father cannot lawfully kill one merely because he has had unlawful sexual intercourse with his daughter, still he may justify the homicide by showing that it was necessary in order to prevent further acts of fornication. In a prosecution for homicide, where there is evidence such as to authorize the jury to find that the deceased had been maintaining illicit sexual relations with the defendant's minor unmarried daughter, and had threatened to kill

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> the father if he interfered, and that even after the father had become apprised of what had taken place, and was taking guard to prevent the further debauching of his child, the defendant, in company with the daughter, came upon the deceased under such circumstances as to indicate that he was endeavoring to continue the illicit relationship, and would likely seek to do so notwithstanding the father's protest.[46]

In essence, both the law and the institution of the natural sciences made the husband's power over wives and daughters ubiquitous and unquestioned. Both were considered his property and the husband had both the right and the obligation to protect it, regardless of what the women wanted.

The assumption courts have made in the past is that people are hardwired based upon their biology: men are hardwired to be repulsed by men sexually and they become enraged by other men's usurping of "their" women—be it their wife or their daughter. As one court explained, "The purpose of the law is not vindictive. It is humane. It recognizes the ungovernable passion which possesses a man when immediately confronted with his wife's dishonor. It merely says the man who takes life under those circumstances is not to be punished; not because he has performed a meritorious deed; but because he has acted naturally and humanly."[47] Further, women were so tightly controlled as sexual beings, that their offspring were even held hostage in the event that a woman procreated without proper authority. Specifically, the status of the legitimacy of a child was tied to the status of women, a way to control them by bringing hardship on their offspring.[48] Until 1968, to be a born a "bastard" was to come into the world with significant legal if not social disability.

Thankfully, what I have described above is no longer the legal status quo, although clearly some women continue to persevere in family relationships that resemble the injustices and often the terror of the past. We have changed and that change has been good for society overall and has made family life much more conducive to human happiness.

GAILY FORWARD: TOWARD A NON-ESSENTIALIST DEFINITION OF MARRIAGE/FAMILY

In the previous section I engaged and critiqued the essentialist and sexists arguments that underlay claims of traditional marriage and have shown how, far from being idealized, marriage needs to be viewed

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critically as a practice that serves contemporary needs. Patriarchal views of marriage have long lost their function. In this section, I offer an alternative lens—non-essentialism—for describing marriage and family, one that frees us from the rigid thinking of the past, which has resulted in so much preventable human suffering by arbitrarily limiting our humanity and our ability to form healthy relationships with one another.

Non-essentialism is the perspective that is crucial for understanding the experience of gay women and men and their quest for full equality in society. It maintains that identity is a social construction; identities are not known a priori but, rather, are worked out in experience through trial and error and through whims of chance. Discursive practices and political economies shape and constrain identity. Meaning is defined by use and is situated historically: it is not found but made. Under this perspective, meanings change with practice. We *are* what we *do*. The reality is that people live the lives they want to live, and the law and other cultural institutions have to struggle to keep up. People will pursue happiness, in spite of the law—laws are made and can be unmade and *should* be unmade when they interfere with the ability of people to engineer their lives in novel, self-satisfying ways.

Particularly with recent developments in reproductive technologies, the notion of what is a family is changing. As journalist Laura M. Holson has noted, the neat and tidy "family tree" is "beginning to look more like a tangled forest."[49] Moreover, "as the composition of families changes, so too has the notion of who gets a branch on the family tree."[50] It is not, however, just a "branch" that matters; what Holson is talking about are the messy and uncomfortable issues of inheritance, property, and power which flow from these decisions of who counts and who does not. Moreover, as legal scholar Mary Frances Berry notes, the legal treatment of fornication is connected to stories of race, gender and class: "We engage in sexual behavior because it is instinctual and pleasurable. Our goal of curbing it is based on our concepts of roles and relationships."[51] All of us are defined in this way. Who is a family is just as much a political question as a sociological one. Surprising to most people, family is *not* a biological question. Biology ends when the sperm fertilizes the egg. After that, culture takes over and with that agency over our lives.

Family has been historically defined by "bloodline." A bloodline was a carefully maintained prescriptive narrative that connected the present to the past in a calculated way to justify the privileges of the present. The metaphor of "blood" is a myth and, considering the history of racism and eugenics in the United States, a harmful one at that. So, for example, prior to the American Civil War, it was common practice for white slave

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owners to take black female slaves as mistresses and/or to subject them to rape knowing that the offspring of such intercourse would be their property. As a result, "Mulattos," "Quadroons," and "Octoroons" (the offspring of such unions across generations) were common and unremarkable in the American south. With the abolishment of slavery in 1865, however, white racists were desperate to reinvent the racial hierarchy and deemed such people a social threat, actively rallying against them through law and other coercive means, including imprisonment, lynching, and forced sterilization. There are many court cases concerning anti-miscegenation laws from this period, and they all frame the laws as enlightened public policy to protect the "purity" and "morals" of "white civilization." In *Scott v. Georgia*, for example, the court in 1869 held that a white Frenchman and a black woman would not be permitted to marry. According to the court:

> The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the fullblood of either race. It is sometimes urged that such marriages should be encouraged, for the purpose of elevating the inferior race. The reply is, that such connections never elevate the inferior race to the position of the superior, but they bring down the superior to that of the inferior. They are productive of evil, and evil only, without any corresponding good.[52]

Fifty years later, the reasoning of courts had not changed:

> Statutes forbidding intermarriage by the white and black races were without doubt dictated by wise statesmanship, and have a broad and solid foundation in enlightened policy, sustained by sound reason and common sense. The amalgamation of the races is not only unnatural, but is always productive of deplorable results. The purity of the public morals, the moral and physical development of both races, and the highest advancement of civilization, under which the two races must work out and accomplish their destiny, all require that they should be kept distinctly separate, and that connections and alliances so unnatural should be prohibited by positive law and subject to no evasion.[53]

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In both the above examples, and in many other court decisions until the late 1960s, judges routinely described what they called the "amalgamation" of the races as something unnatural and deplorable, inaccurately referring to the offspring of such unions as sickly, unhealthy, and degenerate. Other courts evoked God's "wishes" for the races to be kept separate:

> 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.[54]

The hysteria that accompanied these judicial opinions, as well as inflammatory statements by government and religious leaders at the time, were a major source of the stereotypes that reinforced discrimination and segregation of African Americans and, in the 1950s and 1960s, were a rallying call by segregationists to resist the demands of the civil rights movement.

As a society, we learned to see arguments about "family" being about protecting the "integrity" of racial groups as nothing more than backward political and hateful ways of thinking and we realized that family could be so much more. An important example of the meanings of family changing with practices can be found in the 1977 Supreme Court case, *Moore v. City of East Cleveland*.[55] This case concerned Inez Moore, who lived in East Cleveland with her son and her two grandchildren (who were first cousins). A city housing inspector took issue with the construction of this household and sent a violation notice to Moore for occupying the residence with a combination of family members prohibited by a city zoning ordinance that limited the definition of a family member to one related to the nominal head of the household, provided that such person is not part of the extended family. As a result, the nephew could not legally live in his grandmother's household as long as his uncle and cousin lived there. The notice directed Moore to remedy this breach by evicting her grandson. Moore sensibly refused to remove her grandson from her home, and the city filed a criminal charge against her and won a conviction. The U.S. Supreme Court, however, ruled that Moore had been deprived of her liberty in violation of the due process clause of the Fourteenth Amendment. The Court identified the fact that the zoning ordinance under dispute was clearly exclusionary in its attempt to restrict ethnic and racial minority groups by removing non-

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immediate family members from households. Family, the Court emphasized, is a larger concept:

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years, millions of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family. Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home.[56]

As the Court recognizes, there is more than one way to be a family and for the state to privilege one over the other is unconstitutional. Family *is* as family *does*.

In another example of the law confronting a non-traditional family in the lead-up to the Marriage Equality movement, the New York Court of appeals struggled with the word "family" in the context of an occupancy rights case concerning a 10-year-long, same-sex relationship in a rent-controlled apartment. Upon the death of the tenant of record, the landlord moved to evict the surviving partner so that he could re-lease the apartment for more money. The partner—a stranger in the eyes of the law—fought to have himself recognized as a human being who had as much right to stay as if he had been recognized by the law as a family member. In this context, the court was faced with deciding the meaning of the term "family."

> [W]e conclude that the term family, as used in [the statute], should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order. The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose

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> relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society's traditional concept of "family" and with the expectations of individuals who live in such nuclear units.

According to the court, family is wider than the legal fictions invented to define a preferred relationship type. Rather, family is something more organic:

> In fact, Webster's Dictionary defines "family" first as "a group of people united by certain convictions or common affiliation." Hence, it is reasonable to conclude that, in using the term "family," the Legislature intended to extend protection to those who reside in households having all of the normal familial characteristics. Appellant Braschi should therefore be afforded the opportunity to prove that he and Blanchard had such a household. This definition of "family" is consistent with both of the competing purposes of the rent-control laws: the protection of individuals from sudden dislocation and the gradual transition to a free market system. Family members, whether or not related by blood, or law who have always treated the apartment as their family home will be protected against the hardship of eviction following the death of the named tenant, thereby furthering the Legislature's goals of preventing dislocation and preserving family units which might otherwise be broken apart upon eviction.[57]

The court held that the long-term independent nature of the relationship, complete with emotional and financial commitment, the way they conducted their lives and held themselves out to the community, the fact they were regarded as a family by their extended families (for instance, the deceased partner's niece considered the surviving partner her "uncle"), the sharing of expenses, bank accounts, etc., led the court to conclude that the relationship fell into the standard category of "family."[58] Noteworthy about this case is that, in addition to recognizing the rights of same-sex couples, the court acknowledged the rights of disabled, elderly people on fixed incomes, or poor people more generally to live together to share household expenses and responsibilities. In other words, we can choose our families by the ways we consciously make decisions about how to live our lives.[59] The purpose of the law is to give protection for that commitment in which a court recognizes a sustained relationship in principle, absent a formal

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marriage/legal relationship. We, the living, the present, know what is best for us, not the ghosts of the past and the "dead hand" of tradition which haunts us often in the guise of religious values or custom.

My point that "tradition" is not the end of inquiry when justifying legal norms guiding marriage was acknowledged for the first time in 2003 by the Massachusetts Supreme Court, creating the right for same-sex marriage, the first in the United States: "We have recognized the long-standing statutory understanding, derived from the common law, that 'marriage' means the lawful union of a woman and a man. But that history cannot and does not foreclose the constitutional question."[60] The court goes on to note that the essence of modern marriage is *adult bonding*, not *child rearing*: "While it is certainly true that many, perhaps most, married couples have children together . . . it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the *sine qua non* of civil marriage."[61] Marriage is a state of mind, a status, a way of engaging meaningfully with another person and, together, with society. It is a way of being. Thus:

> We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others. This reformulation redresses the plaintiffs' constitutional injury and furthers the aim of marriage to promote stable, exclusive relationships. It advances the two legitimate State interests the department has identified: providing a stable setting for child rearing and conserving State resources.[62]

The *Goodrich* court rightly points out that "it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been."[63] On this point, history is poor counsel as I have been arguing. In fact, a statement issued in response to President George W. Bush's call for a federal constitutional amendment to ban same-sex marriage in which he called marriage equality "a threat to civilization," the American Anthropological Association, the leading and largest professional organization of anthropologists, strongly opposes legal efforts to exclude gay people from marrying, note:

> The results of more than a century of anthropological research on households, kinship relationships and families, across cultures and through time, provide no support whatsoever for the view that either

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> civilization or viable social orders depend on marriage as an exclusively heterosexual institution. Rather, anthropological research supports the conclusion that a vast array of family types, including families built on same-sex partnerships, can contribute to stable and humane societies.[64]

The fact is that marriage, first and foremost, is a public and legally binding commitment in the eyes of the state that includes primarily property rights and financial commitments. If people want to read *into* their marriage a religious dimension with its emphasis on a particular tradition, they are free to do so, but their religious biases do not trump the equal protection guarantees of the Constitution that require the states to treat people equally and to enforce *secular* not religious law. Most people opt for some type of religious ceremony—and even for a "covenant marriage" if that suits them. Covenant marriages are an attempt by some states to create opportunities for people to voluntarily enter into a traditional religious foundation for marriage. This involves the reintroduction of "fault" for divorce, spiritual counseling, and longer wait times for divorce, the goal being to make it more difficult for a couple to divorce by increasing the penalties for those who do so.[65] Such marriage agreements may be important to some people and that is fine; these are all choices people can make. The fact that they can make them, however, does not preclude others from making different choices.

The legal benefits of marriage are significant, including, at the federal level, more than 1,500. (Then, of course, there are the state benefits, which are considerable.) The following are only some of those benefits, many of which most of us would never even think about: ability to make medical decisions on behalf of partner; access to military stores veterans' discounts; adoption and foster care rights; assumption of spouse's pension at that person's death; automatic housing lease transfer; automatic inheritance; bereavement leave; burial determination; child custody rights; crime victim's recovery benefits; divorce protections; domestic violence protection; immigration benefits; immunity from having to testify against a spouse; insurance discounts; property tax exemptions on death of partner; sick leave to care for partner; social security survivor benefits; tax breaks; visitation of partner in hospital or prison; and wrongful death benefits.[66] We simply do not think about what we "get" when we enter marriage, how our marriage is subsidized by the state with a cacophony of institutionalized public benefits.[67] For most, these benefits appear to flow naturally, as if they were the proper order of things, like rain falling from the sky. But it is not. Someone had

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to decide that these things were important and to create them. Someone drew the line and someone else polices the border.

Other benefits that married couples receive are harder to quantify or to point to obvious state generosity to provide. For example, we know that married people have an advantage when it comes to their health—on average, they are happier, healthier, and live longer than unmarried people. Married people are less likely to suffer from cancer, heart disease, diabetes, and violent death. They also age more gracefully then unmarried people.[68] It is for reasons such as this that the American Psychiatric Association, the professional organization of the psychiatric industry, has come out on the side of marriage equality. Same-sex marriage, declared the APA, is "in the interest of maintaining and promoting mental health" and that "gay men and lesbians are full human beings who should be afforded the same human and civil rights."[69]

Regardless of people's view of the marriage equality debate, the place where we find the most support and least controversy for gay rights involves hospital visitation rights and the rights to make medical decisions for incapacitated loved ones. Support for these measures may be as high as 8 in 10.[70] Without these rights, immense injustice can occur, as exemplified in the case of Sharon Kowalski, the young women who suffered a terrible car accident and was rendered brain damaged and severely disabled.[71] Her partner, Karen Thompson, steadfastly stepped up to care for her but found herself in a long legal battle with Sharon's bigoted father, who was outraged to learn his daughter was gay and did everything he could to keep Karen from his daughter, even if it meant denying Sharon the medical attention she needed. The person who suffered the most was Sharon, who was kept from her partner for many years, which hindered her recovery.[72]

Finally, I want to point out that marriage equality is also important for children. Children need two committed parents, it does not matter if the parents are of the same or different sex and there is no evidence to suggest that gay parents are unfit parents as a result of their status.[73] More recently, the American Academy of Pediatrics issued a policy statement declaring that the best environment for raising children is one in which there are two loving parents who are committed to creating a permanent bond, *regardless of sexual orientation*.[74] Unfortunately, children are more likely to have unmarried parents than divorced ones as people are choosing not to marry for a variety of reasons, many of which are class-based. "There's a two-family model emerging in American life . . . . The educated and affluent enjoy relatively strong, stable families. Everyone else is more likely to be consigned to unstable, unworkable

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ones."[75] In other words, pervasive social inequality, not gay families, is the threat to marriage. Marriage equality then is good: it reinforces, not challenges, the institution of marriage. Children need the stability of marriage.

"MARRIAGE DISSIDENTS": THE QUEEREST OF THEM ALL

Not everyone in the gay rights movement, broadly defined, is satisfied with the focus on, and attainment of, marriage equality, but in studying the issue, my sense is that most gay people are in support of it—that the anti-marriage critique of gay marriage by gay people belongs largely to a political and/or cultural fringe. While I agree mostly with the radical politics of this group (its critique of capitalism, for example), I do not agree with some forms of its sexual politics (its glamorization of indiscriminate sex, for example). Moreover, for reasons I will explain below, I see what these anti-marriage queer activists want, politically and socially, as *separate* from the question of marriage equality. In other words, I do not see the movement for marriage equality being incommensurable with many or most of the goals desired by queer people that oppose it. Still, the arguments against marriage equality from this community deserve be addressed, and that is what I will do in the final part of this essay.

M. V. Lee Badgett, research director of the Williams Institute for Sexual Orientation Law and Public Policy at UCLA, dedicates a chapter of her book, *When Gay People Get Married*, to discussing what she calls "marriage dissidents." Badgett reviews the arguments of this group which she summarizes as (1) marriage leading to the end of gay culture; (2) fear that the campaign for marriage equality is hurting progress in other areas important to the gay and lesbian community; and (3) that the institution of marriage will marginalize lesbian and gay people who do not wish to be married.[76] To these concerns, I want to add two others that I discerned from my reading, namely that marriage, being fundamentally heteronormative, is ***irreconcilable*** with a gay identity and/or lifestyle, and that the marriage equality movement is an expression of neo-liberalism, a politically offensive phenomenon to people on the left. I will review and discuss each of these concerns below, all the while recognizing that the categories overlap, and making clear distinctions between them impossible.

I start with the supposed threat to gay culture that marriage dissidents' fear follows from marriage equality. According to Badgett, there is a concern among marriage dissidents that marriage equality will bring with

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it the end of gay culture as it has existed. Such critics are concerned that the main assumption behind the argument for marriage equality among mainstream gay rights activists—that to be gay is to be no different than being "straight"—will, if largely accepted, cause "traditional" gay communities to wither away. Such view assumes that "gay culture" is one thing to preserve or that what has counted as "gay culture" in the past is what should define it in the future. Critics fear, perhaps correctly, that what made being gay distinct may soon be unrecognizable or lost.

This fear of loss is represented by queer activist Mattilda Bernstein Sycamore, who complains that "Gay marriage advocates brush aside generations of queer efforts to create new ways of loving, lusting for, and caring for one another, in favor of a 1950s model of white-picket fence, 'we're-just-like-you' normalcy."[77] To this line of thinking, Sycamore adds that the word "homo" now stands for "homogeneous."[78] Another queer activist sums up this concern by warning against the "blandification of gay culture."[79] So-called "blandification" or homogenization comes at the loss of the "we-ness" that lesbians and gays created as part of the consciousness-raising struggle of gay pride and it's morphing into a queer identity. As Patrick Califia laments, "When the term 'queer' first came along, it was such a relief to be able to embrace a label that encompassed so much of my experience and identity, but normalization is a relentless as marching troop of army ants. 'Queer' is on the verge of becoming nothing but a synonym for 'gay.'"[80] The problem here is that to be "queer" is not necessarily to be "gay," particularly when "gay" means white-middle-class gay men. In other words, some queer activists wonder what happens to the queer identity when it becomes subsumed by the assimilated white wealthy group of powerful gays who define the gay movement in terms of their own interests.

Badgett's second category of concern among marriage dissidents is that, by focusing on winning marriage rights (or the right to serve openly in the military or in the priesthood), progress in other important areas of interest to the gay community will be hurt. For many gay people, the everyday needs of survival are more pressing than distant notions of marriage, which is unlikely because many gay people are people of color and/or impoverished and, consequently, do not see marriage as a possibility, as gay marriage takes place largely among white, middle-class people, as does marriage in general in this country. The argument here is that the larger, more diverse collection of gay people who do not benefit from marriage would much rather see activist energy spent on anti-racism and anti-poverty work, rights for transgender people, AIDS

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awareness, suicide prevention for young gay people, and improving the treatment of queers and transgender people in the adult and juvenile justice systems. [81] These critics of marriage equality point out that marriage is largely about middle-class norms and expectations, and that assimilationist goals are more about gaining "straight privilege" than they are about challenging power or flattening the social hierarchy.

Badgett's third category of concern among marriage dissidents is that marriage will bring with it the marginalization or exclusion of white gay people who do not want to participate in marriage. As marriage equality becomes more of a norm, pressure will be brought to bear on those couples, or even individuals who choose to not enter into long-term relationships, to play the marriage "mind games" or risk being branded as being bad or deficient. Such social pressures can lead, potentially, to a "good gay/bad gay" hierarchy with heterosexual-inspired marriage being the standard of measurement. Good gays, this arguments goes, should look like and act like heterosexuals. Sycamore echoes this concern when she writes that "Against the nightmare backdrop of assimilation queers striving to vie outside conventional norms become increasingly marginalized."[82] In an interview with National Public Radio, Sycamore elaborates: "Gay has become a narrow identity based in accessing straight privilege, whereas queer, to me, includes a wider diversity of people. And it also includes a politicized standpoint that means, you know, challenging the status quo and creating new ways of loving and living and with transforming our lives and one another, and also challenging the violence of traditional institutions."[83]

In other words, Sycamore's critique is that the gay marriage movement limits people's options to traditional monogamous relationships rather than allowing or encourage people from experiment with new relationship forms. Paula Ettelbrick, for example, argues that marriage equality is a challenge to gay identity and culture as well as an undermining of different forms of relationships.[84] She argues it will trivialize non-married relationships. This concern is shared by activist Patrick Moore, who warns that "in redefining what it means to be gay in America, the gay community itself is on the verge of marginalizing those who refuse to conform to a system of heterosexual morality."[85] Indeed, he argues this point further: "With the Census Bureau reporting that divorce rates are climbing and new marriages decreasing, it seems that gays are fighting to get into a burning house. If the legalization of gay marriage is achieved, will homosexuals be further marginalized if they can't or won't conform to a heterosexual idea that even straight people can't meet?"[86] Moreover, "By universally equating queer sex with love,

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and love with long-term relationships, the gay movement is selling itself short."[87]

A more radical critique is on display in an interesting collection of essays that appeared to express a collective "disillusionment" with the mainstreaming of the gay movement and with the liberal "assimilationist" gay political agenda.[88] The authors of these essays equate the movement for marriage equality with neoliberalism. They argue—not incorrectly—that marriage tends to be a middle-class institution that reinforces middle-class values. The institution of marriage, in effect, "tames" people, focusing them on careers, materialism, and other entrapments that work against collective action and self-determination for gay people, particularly for gay people of color who tend to not belong to the middle class. Moreover, marriage equality is seen as a "false hope" or an illusion, as gay people, they argue, will be just as ill-treated as before they were allowed to marry, and that the people who benefit from marriage equality are the same people who benefit now—the elite white gays who already have privileges in other forms of identity.

Additionally, the radical critique of marriage equality is that once marriage equality is achieved, the fear is that privileged gay men will have no interest in fighting for social justice on other fronts (if, indeed, they do now)—like eradicating poverty, universal health care, etc. These people will abandon the struggle for "mutual sustainability' within queer communities and will, in fact, abandon such communities. Sycamore is particularly adamant in making this point:

> Assimilation is violence, not just the violence of cultural erasure, but the violence of stepping on anyone who might get in the way of your upward mobility. Gay (and lesbian!) landlords evict people with AIDS to increase property values, gay bar owners arrest homeless queers so they don't get in the way of business, and gay political consultants mastermind the election of pro-development, anti-poor candidates.[89]

In all, marriage equality, according to this critique, is a superficial response to the problems that gays and lesbians and non-gender binary folks of all stripes, along with minorities and poor people generally, suffer.

My response to the above critiques from gays and lesbians (or queers, more generally) against marriage equality is that I recognize that there is more than a degree of truth in their critique. Moreover, I certainly share

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many of their concerns: I also believe that it is a waste of resources to have to be fighting for gay civil rights, that our society and world have more pressing problems with regard to social justice—for instance, fighting poverty, militarism, and environmental degradation. Fighting for civil rights in the twenty-first century seems so anachronistic. I also agree with the critique that the receipt of economic security and health care should not be dependent on marital status, as it largely does now (although hopefully the Affordable Care Act of 2010 will help change this situation). I also understand that gay people, like any other people, can be self-serving, greedy, and act out of base class interests or embody class privilege—for instance, critics point out that wealthy white gay landlords in high-density gay neighborhoods are often no better at treating tenants than wealthy straight landlords. Further, as the hostile social pressures that marked gay life for so long dissipate, the individuality of people who happen to be gay will be given free rein to blossom, which means that people will began to see themselves less-and-less as "gay" or as *less* gay in the ways that earlier gay people felt about themselves and their communities. All of the above may be true. Nevertheless, the quest for marriage equality is a just and important one if for no other reason than the fact that life has only gotten better for gays and lesbians because they *stood their ground* and fought for their rights.

Marriage may be an imperfect institution, and I am not here defending it per se, only defending the choice and freedom of all to have marriage if they want. I understand, at least in principle, the radial queer fringe who see their identities as too radical to participate in marriage, and that is fine. For example, while I cannot agree with Stephanie Schroeder's argument "that queer people having children conservatize not only themselves and their children, but tar the entire queer community as well [by mainstreaming it],"[90] I recognize that not everyone needs to have children—but many people, including gay people, *do*, and being a parent does not necessarily make one political conservative or mainstream (it does, I hope, make a person more *responsible*). Raising children is not necessarily only about exchanging our "activist/community membership cards for shitty diapers and college tuition bills."[91] Parenting is also about radicalizing, as well as raising, the next generation.

While the various critiques of the marriage dissidents is important, and while I condemn their marginalization from the mainstream gay rights community that, at times, seeks to silence them, the concerns of the marriage dissidents are, I argue, misplaced. Marriage equality and gay rights helps radical queers as well, providing them with more allies and a more tolerant legal environment generally. As for their radical critique of

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capitalism, I embrace it wholeheartedly, but I believe that the political goals of the marriage dissidents can be better achieved through more traditional leftist methods in alliance with straight people in progressive parties that have outgrown (hopefully) their homophobia.

CONCLUSION

My argument in this essay has been that marriage equality will work toward putting to rest the distinctions most people make between straight and gay people—or at least advance us greatly in that direction. Yes, religious bigots will continue to exist, but they, and not gay Americans, will operate from the margins. Most mainstream opponents of gay rights will move on with their lives as opponents of racial integration moved on with theirs. Such normalizations, I think, constitute a qualitative improvement for our nation. As legal scholar and lesbian activist Barbara Cox argues:

> Yes, we must be aware of the oppressive history that weddings symbolize. We must work to ensure that we do not simply accept whole-cloth an institution that symbolizes the loss and harm felt by women. But I find it difficult to understand how two lesbians, standing together openly and proudly, can be seen as accepting that institution? What is more anti-patriarchal and rejecting of an institution that carries the patriarchal power imbalance into most households than clearly stating that women can commit to one another with no man in sight? With no claim of dominion or control, but instead of equality and respect. I understand the fears of those who condemn us for our weddings, but I believe they fail to look beyond the symbol and cannot see the radical claim we are making.[92]

In reality, however, there is no such thing as "gay society" or "non-gay society" just as there is no "black" society to be contrasted with "white" society. There is only "society" with all its vibrant diversity. We no longer look at Black people, Jews, or Asians as non-Americans.

NOTES

[1] See Evan Wolfson, *Why Marriage Matters: America, Equality, and Gay People's Right to Marry* (New York: Simon & Shuster, 2004).
[2] Ibid.

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[3] *Griswold v. Connecticut*, 381 U.S. 479 (1965), 486.
[4] Sabrina Tavernise, “New Numbers, and Geography, for Gay Couples,” *The New York Times* (August 25, 2011). Retrieved from http://www.nytimes.com/2011/08/25/us/25census.html?Page wanted=all.
[5] Cited in Bill Mears, “Obama Views on Same-Sex Marriage Reflect Societal Shifts,” *CNN* (March 23, 2013). Retrieved from http://www.cnn.com/2013/03/22/politics/court-same-sex-obama.
[6] “One Country’s Big Gay Leap,” *The New York Times* (October 6, 2011). Retrieved from http:// www.nytimes.com/2011/10/09/opinion/sunday/bruni-same-sex-marriage-in-portugal.html?page wanted=all.
[7] United States v. Windsor, 570 U.S. ___ (2013).
[8] Cited in Evan Wolfson, “Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intro-Community Critique,” *New York University Review of Law and Social Change*, 21 (1994), 583.
[9] Robert Barnes, “Supreme Court Agrees to Hear Gay Marriage Issue,” *The Washington Post* (January 16, 2015). Retrieved from http://www.washingtonpost.com/politics/courts_law/supreme-court-agrees-to-hear-gay-marriage-issue/2015/01/16/865149ec-9d96-11e4-a7ee-526210d665b4_story.html.
[10] Richard Weaver, *The Ethics of Rhetoric* (Davis, CA: Hermagoras Press, 1985), 86.
[11] See Myron Rothbart and Marjorie Taylor, “Category Labels and Social Reality: Do We View Social Categories as Natural Kinds,” in Gun R. Semin and Klaus Fiedler (eds.), *Language and Social Cognition* (Thousand Oaks, CA: Sage, 1992), 11-36.
[12] *Black’s Law Dictionary: Deluxe Ninth Edition*, Brian A. Garner (ed.), (St. Paul, MN: West,
2009).
[13] 191 N.W. 2d 185 (Minn, 1971), 186. Admittedly, the Book of Genesis is old. While age may be a virtue for some things, wine for example, an *old* book is not necessarily a *good* book—the age of a thing says nothing about its value. While the Bible may have value to some people for some things, we no longer stone people to death either for such things as worshiping false gods, blaspheming, adultery, cursing one’s parents or even for being a rebellious child. The question, in all cases, is not age but *salience* or *applicability*. History is filled with bad ideas that people in later generations have left behind.
[14] *Jones v. Hallahan*, 501 S.W.2d 588 (Kent. App. 1973), 589.
[15] Ibid., 590.

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[16] *Singer v. Hara*, 522 P.2d 1187 (1974).
[17] Ibid., 261. Emphasis added.
[18] A more telling and crude expression of this limited imagination can be found in a letter from the Immigration and Naturalization Service (INS) denying marital status to a same-sex couple who claimed to be legally married in Colorado on account of a loophole in state law. The INS official wrote that the men "have failed to establish that a bona fide marital relationship can exist between two faggots."Reported in *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982).
[19] For a historical/cross cultural study see Omar Swartz, "Hierarchy is Not Harmony: A
View of the Traditional Chinese Family," in Xing Lu, Wenshan Jia, and D. Ray Heisey (eds.),
Chinese Communication Studies: Contexts and Comparisons (Westport, CT: Greenwood Press,
2002), 119-133.
[20] (1769). "Of Husband and Wife," *Commentaries on the Laws of England (1765-1769)*. See also Edward Mansfield, *The Legal Rights, Liabilities and Duties of Women* (Salem, MA: Jewett and Co, 1845).
[21] *Hoyt v. Florida*, 368 U.S. 57 (1961).
[22] It was not until 1979 that Louisiana, by Supreme Court decision, became the last state to treat spouses equally to manage community property. See *Kirchberg v. Feenstra*, 450 U. S. 455 (1981).
[23] See, *Chapman v. Phoenix National Bank*, 85 N.Y. 437 (1881). In reviewing the common law, the court wrote: "For several centuries, by the common law among all English speaking people, a woman, upon her marriage, takes her husband's surname. That becomes her legal name, and she ceases to be known by her maiden name. By that name she must sue and be sued, make and take grants and execute all legal documents. Her maiden surname is absolutely lost, and she ceases to be known thereby" (449).
[24] *Hair v. Hair*, 10 Rich (S.C.) 163 (1858).
[25] 239 U.S. 299 (1915), 312.
[26] *Bigaouette v. Paulet*, 134 Mass. 123 (1878), 125.
[27] See *Olmstead v Olmstead*, 27 Barb 9, 31 (N.Y. Sup. Ct. 1857), granting father habeas corpus remedy against mother and mother-in-law to obtain custody of child.
[28] This phenomenon is discussed in Phyllis Chesler's chapter, "Women of the Asylum: First-Person Accounts of Women Hospitalized in

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American Psychiatric Institutions 1840-1945." In Patriarchy: Notes of an Expert Witness (Monroe, ME: Common Courage Press, 1994), 15-33.
[29] *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981).
[30] *State v. Rhodes*, 61 N.C. 453 (1868).
[31] *Shaw v. Shaw*, 17 Conn. 189 (1845), 196.
[32] Ibid., The court proceeds to take great pains to view the situation from the perspective of the husband: "We must believe from what is disclosed, that he knew, that such was her claim; but are we to allow nothing to the innocent opinions of a man mad with jealousy? Are we to allow nothing to the frailty of human nature, excited by passion?"
[33] John Bouvier, *Institutes of American Law* v. 4 (1855). Of course, there was always self-help, in which women enjoined a man, a relative or someone hired to beat up her husband in kind and some women went so far as to take out ads in the paper in order to recruit such a person. For instance, in the Help Wanted section of a Seattle newspaper early in the 20th century appeared the following ad: "Wanted: A man to thrash a wife-beater; ten dollars reward; easy work. Mrs. H., 116 N. Avenue." Cited in Jerome Nadelhaft, "Wife Torture: A Known Phenomenon in Nineteenth-Century America," *Journal of American Culture* 10(3) (1987), 45.
[34] Nicholas Confessore, "N.Y. Moves Closer to No-Fault Divorce," The New York Times (June 15, 2010). Retreived from http://www.nytimes.com/2010/06/16/nyregion/16divorce.html?_r=0.
[35] 86 Miss. 231 (1905), 4.
[36] Ibid., 4.
[37] Ibid., 7.
[38] *H. v. H. 157*, A.2d 721 (1959).
[39] Ibid., 237.
[40] *Miller v. State*, 9 Ga. App. 599 (1911).
[41] *Benson v. Remington*, 2 Mass. 113.
[42] *Price v. State*, 18 Tex. Ct. App. 474 (1885). This protection applied only to the man. When a woman tried to evoke this in her defense of shooting her husband's lover, it was denied in *Reed v. State*, 123 Tex. Crim. 348 (1933).
[43] *Shaw v. State,* 510 S.W. 2d 926 (1974).
[44] *Burger v. State*, 238 Ga. 171 (1977).
[45] *Briggs v. State*, 29 Ga. 723 (1860), 729.
[46] *Miller v. State*, 9 Ga. App. 599 (1911), 600.
[47] *State v. Greenlee*, 33 N.M. 449 (1928), 455.
[48] This changed in *Levy v. Louisiana,* 391 U.S. 68 (1968).

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[49] Laura M. Holson, "Who's On the Family Tree? Now It's Complicated," *The New York Times* (July 4, 2011). Retrieved from http://www.nytimes.com/2011/07/05/us/05tree.html.
[50] Ibid.
[51] Mary Frances Berry, *The Pig Farmer's Daughter and Other Tales of American Justice: Episodes of Racism and Sexism in the Courts From 1865 to the Present* (New York: Alfred A. Knopf, 1999), 47.
[52] 39 Ga. Rep. 321, 324 (1869).
[53] *Eggers v. Olson*, 231 P. 483 (1924), 484. (Citing with approval commentary from an influential legal treatise.)
[54] This quote is from the trial court that convicted Mildred Jeter and Richard Loving of violating Virginia's anti-miscegenation laws. This decision was overturned by the landmark *Loving v. Virginia*, which quotes this language. Note, Bob Jones University prohibited interracial dating by its students until 2000 using this rationale.
[55] 431 U.S. 494 (1977).
[56] Ibid., 541.
[57] *Braschi v. Stahl Associates Company,* 74 N.Y.2d 201 (1989), 212.
[58] Ibid. Note, a later case, *East 10th Street Associates v. Estate of Goldstei*n 154 A.D.2d 142 (1990) followed the logic of Braschi and applied a more inclusive view of family grounded on "family relationships"—that is, looking at the totality of the relationship. Braschi dealt with "rent stabilization" legislation and this one with "rent control" rules. In both cases, the same sex couple acted like heterosexual couple and received the protection.
[59] Earlier, the U.S. Supreme Court afforded "Hippies" the right to live communally while receiving state aid. The case, *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) helped pave the way for the emergence of same sex family rights.
[60] Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003), 953.
[61] Ibid., 961.
[62] Ibid., 959.
[63] Ibid., note 23.
[64] *American Anthropological Association [AAA], Statement on Marriage and the Family* (February 26, 2004).
[65] See Elizabeth H. Baker, Laura A. Sanchez, Steven L. Nock, and James D. Wright, "Covenant Marriage and the Sanctification of Gendered Marital Roles," *Journal of Family Issues,* 30(2) (2009), 147-178.

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[66] For a more complete discussion of the scope of marriage benefits, see the 2004 report by the Government Accounting Office, which documents 1,138 federal statutory provisions classified to the United States Code. The report can be downloaded from www.gao.gov/new.items/d04353r .pdf.

[67] See Tara Siegel Bernard and Ron Lieber, "The High Price of Being a Gay Couple," The New York Times (October 3, 2009), analyzing the lost benefits that gay couples have vis-à-vis the benefits that heterosexual couples receive. Retrieved from http://www.nytimes.com/2009/10/03/your-money/03money.html.

[68] See Tara Parker-Pope, "Is Marriage Good for Your Health?" *The New York Times* (April 12, 2010). Retrieved from http://www.nytimes.com/2010/04/18/magazine/18marriage-t.html.

[69] "Top Psychiatric Group Urges Making Gay Marriage Legal," *The Washington Post* (May 23, 2005). Retrieved from http://www.washingtonpost.com/wp-dyn/content/article/2005/05/22/AR2005052200785.html.

[70] Kevin Sack, "In Hospital Decision, Obama Finds Safe Ground on Gay Rights," *The New York Times* (April 16, 2010). Retrieved from http://www.nytimes.com/2010/04/17/us/politics/17 hospitals.html.

[71] See Casey Charles, *The Sharon Kowalski Case: Lesbian and Gay Rights on Trial* (Lawrence, KS: University of Kansas Press, 2003).

[72] *In re Guardianship of Kowalski*, 478 N.W.2d 790 (Minn. Ct. App. 1991).

[73] Charlotte J. Patterson, "Family Relationships of Lesbians and Gay Men," *Journal of Marriage and Family*, 62 (2000), 1052-1069. http://dx.doi.org/10.1111/j.1741-3737.2000.01052.x See, also, Affidavit of Dr. Michael Lamb, for *Gill v. Office of Personnel Management* (2009) (testifying as to the lack of harm to children living with gay or lesbian parents).

[74] See Ellen C. Perrin and Benjamin S. Siegel, "Promoting the Well-Being of Children Whose Parents Are Gay or Lesbian," *Pediatrics*, 131(4)(2013), 827-830.

[75] Sabrina Tavernise, "More Unwed Parents Live Together, Report Finds," *The New York Times* (August 16, 2011). Retrieved from http://www.nytimes.com/2011/08/17/us/17cohabitation.html.

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[76] *When Gay People Get Married: What Happens When Societies Legalize Same-Sex Marriage* (New York: New York University Press, 2009), 129-150.
[77] "There's More to Life Than Platinum: Challenging the Tyranny of Sweatshop-Produced Rainbow Flags and Participatory Patriarchy," in Mattilda Bernstein Sycamore (ed.), *That's Revolting: Queer Strategies for Resisting Assimilation* (Berkeley, CA: Soft Skull Press, revised edition, 2008), 3.
[78] Ibid., 4.
[79] Benjamin Shepard, "Sylvia and Sylvia's Children: A Battle for a Queer Public Space," in Mattilda Bernstein Sycamore (ed.), *That's Revolting: Queer Strategies for Resisting Assimilation* (Berkeley, CA: Soft Skull Press, revised edition, 2008), 124.
[80] Patrick Califia, "Legalized Sodomy is Political Foreplay," in Mattilda Bernstein Sycamore (ed.), *That's Revolting: Queer Strategies for Resisting Assimilation* (Berkeley, CA: Soft Skull Press, revised edition, 2008), 97.
[81] Dean Spade, "Fighting to Win," in Mattilda Bernstein Sycamore (ed.), *That's Revolting: Queer Strategies for Resisting Assimilation* (Berkeley, CA: Soft Skull Press, revised edition, 2008), 51.
[82] "There's More to Life Than Platinum," 5.
[83] NPR interview with Michel Martin (June, 2010). Retrieved from http://www.npr.org/ templates/story/story.php?storyId=127740436.
[84] "Wedlock Alert: A Comment on Lesbian and Gay Family Recognition," *Journal of Law and Policy* (1996), 107-166.
[85] "Gays: Assimilated and Asexual?" Los Angeles Times (January 26, 2004). Retreived from http://articles.latimes.com/print/2004/jan/26/opinion/oe-moore26
[86] Ibid.
[87] Gina De Vries, "Unsuitable For Children," in Mattilda Bernstein Sycamore (ed.), *That's Revolting: Queer Strategies for Resisting Assimilation* (Berkeley, CA: Soft Skull Press, revised edition, 2008), 145.
[88] *Against Equality: Queer Critiques of Gay Marriage,* Ryan Conrad (ed.) (Lewiston, ME: Against Equality Publishing Collective, 2010).
[89] "There's More to Life Than Platinum," 4.
[90] "Queer Parents: An Oxymoron? Or Just Moronic?" in Mattilda Bernstein Sycamore (ed.), *That's Revolting: Queer Strategies for Resisting Assimilation* (Berkeley, CA: Soft Skull Press, revised edition, 2008), 103.

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[91] Ibid., 104.
[92] "A (Personal) Essay on Same-Sex Marriage," National Journal of Sexual Orientation Law *1(1)(1995). Retrieved from* http://www.cs.cmu.edu/afs/cs/usr/scotts/bulgarians /njsol/ personal_marriage.txt.

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