

MARRIAGE LAW AND FAMILY LAW: AUTONOMY, INTERDEPENDENCE, AND COUPLES OF THE SAME GENDER

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Abstract: *Contemporary family law and marriage law in the United States have been criticized by communitarian scholars and others as being too focused on individuals and individual fulfillment. These critiques make some valid points. It is also important, however, to emphasize that contemporary marriage law, for the first time, presents a model of equality and of reciprocal obligations. The Article articulates a broad framework of the functions of family and marriage law. It applies both this framework and the communitarian critique of family law to the issue of same-gender marriage. This analysis leads to the conclusion that same-gender marriage should be recognized. Arguments against same-gender marriage, discussed in the Article, contribute to the "atomistic" focus of contemporary family law.*

Two people together is a work heroic in its ordinariness.

—Adrienne Rich, *Twenty-One Love Poems*, in *THE DREAM OF A
COMMON LANGUAGE* (1978).

INTRODUCTION

The current debate about whether same-gender couples should have access to civil marriage ties in with larger discussions about the general direction of family law in the United States. Several communi-

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tarian¹ scholars in the family law area, including Mary Ann Glendon,² Carl Schneider,³ and Bruce Hafen⁴ have focused on the ways in which family law has been retreating from duties and responsibilities, and increasingly has become focused rather exclusively on individuals and individual rights.⁵ They have expressed concern that this atomistic

¹ The boundaries of the category of communitarian scholars are far from clear. As Marsha Garrison notes, "while communitarian thinkers are a diverse group, they uniformly favor a deemphasis on abstract individual rights; they tend to emphasize the individual's embeddedness in various communities of interest, such as the family." Marsha Garrison, *An Evaluation of Two Models of Parental Obligation*, 86 CAL. L. REV. 41, n.205 (1998). Glendon and Hafen have been characterized as communitarian. Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1227 n.3 (1998) [hereinafter Scott, *Relational Contract*]. Elizabeth Scott notes that Carl E. Schneider's article, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992) [hereinafter Schneider, *The Channelling Function*], "suggests sympathy with at least some parts of the communitarian critique." Elizabeth S. Scott, *Rehabilitating Liberalism in Modern Divorce Law*, 1994 UTAH L. REV. 687, 708 n.82. Some of Schneider's later work, such as Carl E. Schneider, *Marriage, Morals, and the Law: No-Fault Divorce and Moral Discourse*, 1994 UTAH L. REV. 503 (1994) [hereinafter Schneider, *Marriage and Morals*], and Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985) [hereinafter, Schneider, *Moral Discourse*], even more strongly suggests sympathy with the communitarian critique. Milton Regan and Martha Minow also have been referred to as communitarian. See Scott, *Relational Contract*, *supra*, at 1227-28 nn.3 & 5.

² MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989) [hereinafter GLENDON, *TRANSFORMATION OF FAMILY LAW*]; MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987) [hereinafter GLENDON, *ABORTION AND DIVORCE*].

³ Schneider, *Marriage and Morals*, *supra* note 1; Schneider, *The Channelling Function*, *supra* note 1; Schneider, *Moral Discourse*, *supra* note 1.

⁴ Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 B.Y.U. L. REV. 1 (1991) [hereinafter Hafen, *Individualism and Autonomy*]; Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983) [hereinafter Hafen, *Constitutional Status*].

⁵ Professor Glendon has extended this argument to other areas of law. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) [hereinafter RIGHTS TALK]. See generally ROBERT BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985). Martha Minow and others have been critical of family law's focus on protecting autonomous individuals. Martha L. Minow, *Forming Underneath Everything that Grows: Toward a History of Family Law*, 1985 WIS. L. REV. 819, 894 (1985) [hereinafter Minow, *Forming Underneath*]. Minow has also argued that family law should be more concerned than it has been recently with duties and obligations. Martha L. Minow, *All in the Family and in all Families: Membership, Loving and Owing*, 95 W. VA. L. REV. 275, 304, 307 (1992-93) [hereinafter Minow, *All in the Family*]. Minow has also noted limitations of rights discourse, but has argued that rights claims actually imply relationships among interdependent community members. MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 268-69, 292-95 (1990); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L. J. 1860, 1863-67 (1987). Milton C. Regan argues that family law should not be based on a model of individual private

focus has resulted in what Hafen has called a "waning of belonging."⁶ This Article will explore the following proposition: if we agree with scholars such as Glendon, Schneider, and Hafen that family law's increased orientation toward individuals has drawbacks, and that the state should have a role in fostering positive connections between people, then we must conclude that marriage by couples of the same gender should be allowed.⁷

The Article begins by reviewing, in Part I, various influential ideas about aspects of family law that have been articulated by Glendon and Schneider. Specifically, Schneider's discussion of the five functions of family law (protective, facilitative, dispute resolution, expressive, and channelling) and Glendon's more detailed discussion of the expressive function of family law are outlined.⁸ These ideas will serve as a framework, in Part III, for discussing the exclusion from marriage of same-gender couples.

Part II.A reviews some of these scholars' critical observations, as well as the observations of Hafen, concerning the individual focus of twentieth century changes in family and marriage law. Their analysis is termed the "atomism critique."⁹ Part II.B responds to the atomism critique specifically as it relates to marriage and marriage law. It finds that the critics' account raises legitimate issues. The atomism critique, however, understates the positive aspects of contemporary marriage law: for the first time marriage is an anti-individualistic institution in

ordering but should "promote a substantive moral vision of commitment and responsibility." MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 4 (1993).

⁶ Hafen, *Individualism and Autonomy*, *supra* note 4, at 32.

⁷ See *infra* Part III. For other scholarship making related arguments, see Carlos A. Ball, *Moral Foundations of a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L. J. 1871 (1997); Mary E. Becker, *Women, Morality, and Sexual Orientation*, 8 U.C.L.A. WOMEN'S L. J. 165 (1998) [hereinafter Becker, *Women and Morality*]; Chai R. Feldblum, *A Progressive Moral Case for Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 485 (1998); Linda S. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond "Empty" Toleration to Toleration as Respect*, 59 OHIO ST. L. J. 19 (1998); REGAN, *supra* note 5, at 119-22. This argument is separate from and in addition to the assertion that the federal Constitution or state constitutions do not allow states to forbid such marriages. An extensive body of scholarship exists on that topic. See e.g., WILLIAM ESKRIDGE, *THE CASE FOR SAME SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996); DAVID A.J. RICHARDS, *WOMEN, GAYS, AND THE CONSTITUTION: THE GROUNDS FOR FEMINISM AND GAY RIGHTS IN CULTURE AND LAW*, 411-57 (1998); MARK STRASSER, *LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION* (1997); Jennifer Wriggins, *Maine's 'Act to Protect Traditional Marriage and Prohibit Same-Sex Marriages': Questions of Constitutionality Under State and Federal Law*, 50 ME. L. REV. 345 (1998) [hereinafter Wriggins, *Questions of Constitutionality*].

⁸ See *infra* Parts I.A and B.

⁹ See *infra* Part II.A.

which both members of the couple are now recognized as individuals and owe equal duties and commitments to one another.¹⁰ Part II.C briefly reviews some of these scholars' comments about moral discourse in family law. This theme is termed the "decline of moral discourse" critique. Part II.D responds to this critique, arguing that moral discourse in family law has shifted at least as much as it has diminished.

Part III discusses the significance of the law's refusal to allow lesbian couples and gay male couples to marry. It argues that the atomism critique, at a general level, leads to a set of reasons for allowing such marriages distinct from the familiar rights-based claims. It further argues that the shift in moral concerns that has taken place in family law calls for recognition of such marriages.

The discussion in Part III is structured in terms of the various functions of family law as outlined by Schneider and Glendon. The expressive message sent by the law is that lesbians and gay men are essentially lone, atomistic individuals.¹¹ This story told by the law is false, because gay and lesbian people do have intimate, long-term relationships that are both fulfilling for them and good for society.¹² Gay male and lesbian couples by and large are left "outside the law,"¹³ without the framework offered by legal marriage through which to order their relationships.¹⁴ Marriage can promote and support constructive connections between people and can counteract the "waning of belonging."¹⁵

Part III also describes how family law largely fails to perform its instrumental functions of facilitation, protection, and dispute resolution for coupled lesbians and gay men, and argues that if marriage

¹⁰ See *infra* Part II.B.

¹¹ See *infra* Part III.A.

¹² See *infra* Part III.A.

¹³ Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299, 1300 (1997) [hereinafter Christensen, *Legal Ordering*].

¹⁴ See *infra* Part III. In arguing that the "framework offered by marriage" should be available to lesbian and gay couples, I am not taking a position in the debates about whether to characterize marriage as a status or as a contract, whether to emphasize one aspect or the other, or whether these aspects are opposed. See, e.g., REGAN, *supra* note 5, at 89-152; Scott, *Relational Contract*, *supra* note 1, at 1233-49; Katherine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 111-22 (1998) [hereinafter Silbaugh, *Family Economy*]. The defaults that marriage creates, however characterized, should be available to lesbian and gay male couples. See Christensen, *Legal Ordering*, *supra* note 13, at 1344-47. For further discussion of issues concerning marriage as a status or contract and the contractualization of marriage law, see *infra* notes 86-89, 241-46, and accompanying text.

¹⁵ See *infra* Part III.B.

was allowed it could more effectively fulfill these functions.¹⁶ Family law's channelling function tries to funnel lesbian and gay people into heterosexual marriage or independent existence.¹⁷ There is no valid reason for the current channelling that excludes gay men and lesbians from marriage; having a channelling option of marriage would be positive for society as a whole.¹⁸

Finally, Part IV discusses some arguments why such marriages nonetheless should not be allowed, such as the argument that the quest for marriage by same-gender couples is actually a retreat from marriage,¹⁹ the argument that heterosexual marriage has greater potential for benefiting individuals and society than does same-gender marriage,²⁰ and the argument that gay men and lesbians seeking marriage are actually repudiating morality by doing so.²¹ These arguments lack merit, particularly when considered in light of the preceding analysis. Indeed, refusing to allow marriage by same-gender couples furthers the trend toward atomization.

I. LAW'S FUNCTIONS IN FAMILY LAW

It is important to bear in mind that there is no consensus even as to what family law is²² and that there are basic issues in the field about what constitutes a family.²³ As Bruce Hafen has noted, "[f]amily law

¹⁶ See *infra* Part III.B.

¹⁷ See *infra* Part III.C.

¹⁸ See *infra* Part III.C.

¹⁹ See *infra* Part IV.A. The arguments discussed in Part IV are articulated in Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735 (1998) [hereinafter Wardle, *Efforts to Legitimate*].

²⁰ See *infra* Part IV.B.

²¹ See *infra* Part IV.C. For additional material countering arguments against same-gender marriage, see, for example, sources cited in note 7, *supra*; Mary Bonauto et al., *The Freedom to Marry for Same-Sex Couples: The Opening Appellate Brief of Plaintiffs Stan Baker et al.* in Baker et al. v. State of Vermont, 5 MICH. J. GENDER & L. 409 (1999); Mary Bonauto et al., *The Freedom to Marry for Same-Sex Couples: The Reply Brief of Plaintiffs Stan Baker et al.* in Baker et al. v. State of Vermont, 6 MICH. J. GENDER & L. 1 (1999); Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51 (1997) [hereinafter Koppelman, *Is Marriage Inherently Heterosexual?*].

²² Dean Judith Areen notes in her preface to a family law casebook, "there is no consensus about the proper scope of the [family law] course." JUDITH AREEN, CASES AND MATERIALS ON FAMILY LAW (3d. Ed. 1992). Areen also notes "the general lack of theory to employ in organizing the material." *Id.*

²³ Martha Minow notes that the three basic issues in family law are who is in a family, what benefits are obtained by being in a family and what obligations are incurred by being in a family. See Minow, *All in the Family*, *supra* note 5, at 275-76.

has always been longer on practice than on theory."²⁴ There is no overarching theory of family law, and there is likewise no overarching theory of family law for gay men and lesbians.²⁵ However, the scholarly work outlined below concerning the various functions of family law provides an analytically useful framework for discussion.

A. *The Five Functions of Family Law—Protective, Facilitative, Dispute Resolution, Expressive, and Channelling*

Carl Schneider has written that there are five functions of family law:²⁶ the protective function, the facilitative function, the dispute resolution function, the expressive function, and the channelling function.²⁷ In his fascinating article entitled *The Channelling Function in Family Law*,²⁸ he outlines each of these functions. Regarding the protective function, he states: "[o]ne of law's most basic duties is to protect citizens against harm done them by other citizens. This means protecting people from physical harm, as the law of spouse and child abuse attempts to do, and from non-physical harms, especially economic wrongs and psychological injuries."²⁹ The second function "is to help people organize their lives and affairs in the ways they prefer. Family law performs this 'facilitative' function by offering people the law's services in entering and enforcing contracts, by giving legal effect to their private arrangements."³⁰ The third function "is to help people resolve disputes."³¹ The current law of divorce "exemplifies family law's 'arbitral' function, since today's divorce courts primarily adjudicate conflicting claims to marital property, alimony, and child custody."³²

The law's "expressive" function is also important to Schneider and other scholars.³³ Schneider writes that this fourth, expressive,

²⁴ Hafen, *Constitutional Status*, *supra* note 4, at 489.

²⁵ See Christensen, *Legal Ordering*, *supra* note 13, at 1306.

²⁶ See Schneider, *The Channelling Function*, *supra* note 1, at 497. The channelling function has proven a useful concept in applying economic theories to families. Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989, 1048, 1050 (1995).

²⁷ Schneider, *The Channelling Function*, *supra* note 1, at 502-03.

²⁸ *Id.* at 495.

²⁹ *Id.* at 497.

³⁰ *Id.* at 497.

³¹ *Id.*

³² Schneider, *The Channelling Function*, *supra* note 1, at 497..

³³ See *infra* Part I.B.; see, e.g., GLENDON, ABORTION AND DIVORCE, *supra* note 2, at 8-9; Milton C. Regan, Jr., *How Does Law Matter?* 1 GREEN BAG 2d 265, 270-75 (1998); Carol

function, discussed in more detail in Part I.B, "works by deploying the law's power to impart ideas through words and symbols."³⁴ The final function listed by Schneider is the channelling function. In the channelling function, "the law creates or (more often) supports social institutions which are thought to serve socially desirable ends."³⁵ The channelling function works partly as a way of performing law's protective, facilitative, and dispute resolution functions, but the channelling function is also something more.³⁶ To Schneider, the channelling function has several tasks: first to recruit, mold, and sustain social institutions, and second to channel people into institutions.³⁷ It generally works by indirect means, such as by recognizing and endorsing institutions, rewarding participation in some institutions, disfavoring competing institutions, and penalizing non-use of particular institutions.³⁸ It has an efficiency component,³⁹ so that people entering an institution do not have to invent all the rules from scratch, and people outside that institution can have a clear understanding of the rules governing those within the institution.⁴⁰

Schneider uses the example of the laws surrounding corporations⁴¹ and marriage⁴² to describe the channelling function. According to Schneider, the advantages of institutions in family law are illuminated by situations involving their absence, such as stepparent situations.⁴³ Channelling institutions "set bright lines which establish for all concerned what people's status is. They make it easier for people to predict the consequences of their own acts. Further, they pro-

Weisbrod, *Essay on the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991, 995-99 (1989).

³⁴ Schneider, *The Channelling Function*, *supra* note 1, at 498. While part of the point of the expressive function is, as Schneider says, to alter behavior, he acknowledges that it is extremely difficult to draw clear conclusions from data in the family law area and thus determining the impact of any particular program or set of laws is often impossible. *See id.* at 521-22. For further discussion of the expressive function, see *infra* Part I.B.

³⁵ *See* Schneider, *The Channelling Function*, *supra* note 1, at 498.

³⁶ *See id.* at 505-07.

³⁷ *See id.* at 502.

³⁸ *See id.* at 503-05.

³⁹ *See id.* at 498. Schneider says he is "wryly" calling this aspect an efficiency component. *See* Schneider, *The Channelling Function*, *supra* note 1, at 508-09.

⁴⁰ *See id.* at 509. For instance, he uses the example that a person wearing a wedding ring sends a message that that person is not sexually available. *See id.*

⁴¹ *See id.* at 499, 505-07.

⁴² *See id.* at 499, 501-12.

⁴³ *See* Schneider, *The Channelling Function*, *supra* note 1, at 510. In such situations there is often "discomfort and even distress" about the "unclear and uncomfortable" relationships between stepparents and stepchildren. *Id.* at 510 (citations omitted).

tect people from intrusive governmental inquiries."⁴⁴ He uses *Marvin v. Marvin*,⁴⁵ the famous California Supreme Court case involving implied contracts and equitable remedies for unmarried opposite-sex partners who break up, to illustrate the costs, unpredictability, and intrusion that can come from case-by-case inquiry.⁴⁶ Channelling's institutions "necessarily have normative components and thus to some degree favor one such vision over the rest."⁴⁷ Schneider notes that it is extremely difficult to measure and analyze data pertinent to family law issues, and thus it is difficult to measure the success of any particular program or set of laws.⁴⁸ These functions of family law will be further discussed in Part III below in relation to marriage by same-gender couples.

B. Law's Expressive Function—The Story Told by Law

Mary Ann Glendon, like many others, has emphasized law's rhetorical, expressive functions.⁴⁹ She notes in the introduction to her study comparing abortion and divorce law in the United States and Western Europe that law, "in addition to all the other things it does, tells stories about the culture that helped to shape it and which it in turn helps to shape: stories about who we are, where we came from, and where we are going."⁵⁰ She writes:

Indeed, it may be that law affects our lives at least as much by these stories as it does by the specific rules, standards, institutions, and procedures of which it is composed. Thus it is not an unworthy task for scholars to ask how law interprets the world around it, what analogies and images it employs,

⁴⁴ *Id.* at 521.

⁴⁵ 557 P.2d 106 (Cal. 1976).

⁴⁶ See Schneider, *The Channelling Function*, *supra* note 1, at 514, 521. Glendon makes similar observations. See GLENDON, *TRANSFORMATION OF FAMILY LAW*, *supra* note 2, at 279–80.

⁴⁷ Schneider, *The Channelling Function*, *supra* note 1, at 529.

⁴⁸ See *id.* at 515–16, 521–22. Schneider wrote "all schemes of statutory regulation are ultimately based on unprovable assumptions about human nature." *Id.* at 525, quoting Schneider, *State-Interest Analysis in Fourteenth Amendment "Privacy" Law: An Essay on the Constitutionalization of Social Issues*, 51 LAW & CONTEMP. PROBS. 79, 103 (1988).

⁴⁹ See GLENDON, *ABORTION AND DIVORCE*, *supra* note 2, at 8. See generally JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985); REGAN, *supra* note 5, at 176–84; Regan, *supra* note 33, at 269–74.

⁵⁰ GLENDON, *ABORTION AND DIVORCE*, *supra* note 2, at 8.

what segments of history and what aspects of human experience it treats as relevant.⁵¹

Quoting James Boyd White, Glendon states that law is "an element in the perpetual remaking of the language and the culture that determines . . . who we are as individuals and as a society."⁵² In the context of divorce and abortion law, she asks, "[w]hat stories are being told in these bodies of law at the present time? How do these stories affect what issues are raised and treated as important and which are excluded from discussion or perhaps even obscured from view? . . . What sorts of meaning is family law creating and what sort of society is it helping to constitute?"⁵³ These questions will be considered as they relate to marriage of same-gender couples in Part III.A.

II. COMMUNITARIAN CRITIQUES OF CONTEMPORARY MARRIAGE AND FAMILY LAW, AND RESPONSES TO THESE CRITIQUES

It is a truism that the law pertaining to marriage and families in the United States has changed dramatically over the past fifty years. As Glendon notes, changes in marriage and family law are "but an aspect of the fact that society itself is in flux."⁵⁴ Marriage, families, and the law concerning them have changed significantly throughout recorded history.⁵⁵ "Over the centuries, family behavior and ideas about marriage and family life have undergone constant fluctuation."⁵⁶ In the past, the financial and procreative aspects of marriage were central features of marriage; now, the affective aspects are seen as central to its meaning.⁵⁷ This section broadly focuses on various developments and how they have been viewed in the work of Glendon, Schneider, and Hafen. As these scholars note, the developments in this field are complex and at times contradictory, and thus any attempt at system-

⁵¹ *Id.*

⁵² *Id.* at 9, quoting James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 691 (1985).

⁵³ *Id.*

⁵⁴ GLENDON, TRANSFORMATION OF FAMILY LAW, *supra* note 2, at 4.

⁵⁵ See generally E.J. GRAFF, WHAT IS MARRIAGE FOR? (1999); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA (1985); LAWRENCE STONE, ROAD TO DIVORCE: ENGLAND 1530-1987 (1990).

⁵⁶ GLENDON, TRANSFORMATION OF FAMILY LAW, *supra* note 2, at 4.

⁵⁷ See *id.* at 292-93; ESKRIDGE, *supra* note 7, at 96-98, 129-30. See generally GRAFF, *supra* note 55.

atic discussion runs the risk of being unduly reductionistic.⁵⁸ The major critique this Article will discuss and respond to is the idea that family law has become too centered on individuals and their rights: the atomism critique.⁵⁹ It will also discuss and respond to the idea that family law has retreated from concerns with morality.⁶⁰

A. The Atomism Critique

One prominent theme in these scholars' work is that marriage and family law have become too focused on individuals, their self-fulfillment, and their rights.⁶¹ In *The Transformation of Family Law*, Glendon states:

[T]he legal imagery of separateness and independence [in U.S. family law] contrasts everywhere with the way most functioning families operate and with the circumstances of mothers and young children in both intact and broken homes. Yet the law holds self-sufficiency up as an ideal, suggesting that dependency is somehow degrading, and implicitly denying the importance of human intersubjectivity.⁶²

American marriage ideology, to Glendon, is that "marriage is a relationship that exists primarily for the fulfillment of the individual spouses. If it ceases to perform this function, no one is to blame and either spouse may terminate it at will."⁶³ According to Glendon in her comparative study of abortion and divorce in the U.S. and Western Europe, "[m]ore than any other country among those examined here, the United States has accepted the idea of no-fault, no-responsibility divorce."⁶⁴ Divorce law "carries a powerful ideology,

⁵⁸ See GLENDON, *TRANSFORMATION OF FAMILY LAW*, *supra* note 2, at 2-3, 103; Hafen, *Individualism and Autonomy*, *supra* note 4, at 6; Schneider, *The Channelling Function*, *supra* note 1, at 512-19.

⁵⁹ See *infra* Parts II.A and II.B.

⁶⁰ See *infra* Part II.C and II.D.

⁶¹ Others have raised somewhat similar concerns. See, e.g., Minow, *Forming Underneath*, *supra* note 5, at 893-94 (noting that family law's focus on autonomous individuals and their rights is reductionistic and stating that family law should nurture relationships); REGAN, *supra* note 5, at 56-67 (noting that modern family law is focused on the individual and on emotional fulfillment which may result in more gratifying emotional relationships but make families less stable).

⁶² GLENDON, *TRANSFORMATION OF FAMILY LAW*, *supra* note 2, at 297. "Intersubjective" is defined as "involving or occurring between separate conscious minds." WEBSTER'S NEW COLLEGIATE DICTIONARY (1981). The noun form is intersubjectivity. See *id.*

⁶³ GLENDON, *ABORTION AND DIVORCE*, *supra* note 2, at 108.

⁶⁴ *Id.* at 105.

sending out distinctive messages about commitment, responsibility and dependency.⁶⁵ To her, the disjunction between the model of autonomous individuals, on the one hand, and the actual dependence of young children and their caretakers, on the other hand, has tremendous negative consequences, since young children and their caretakers so often end up in poverty after divorce.⁶⁶

Schneider sounds a similar note regarding contemporary U.S. marriage. He states that "[m]arriage is ever more seen as a forum for satisfying human needs, as part of the search for psychological health and personal fulfillment. . . . This reconceptualization of marriage in therapeutic terms . . . tends to shift the focus of concern from duties to others to duties to oneself."⁶⁷ He further states that "[i]f the primary duty is to oneself, independence becomes a virtue; dependence a fault."⁶⁸ For example, Schneider notes that "[h]istorically, spouses were admired for sacrificing themselves for each other"⁶⁹ but finds that is no longer the case.⁷⁰

Bruce Hafen frames individualist autonomy as opposing the idea of belonging in approaching recent family law history.⁷¹ He observes that attitudes toward marriage have been shifting from "familistic"⁷² to

⁶⁵ *Id.* at 106. Glendon argues that the law should develop clear principles for at least two different types of divorces, one for the short-term marriage where there are no children and the spouses (implicitly) are not economically dependent or interdependent. *See id.* A different set of principles should be applied for the largest single category of divorce; those situations where there are small children. *See id.* at 102. The majority of divorces involve families with small children. *See* GLENDON, ABORTION AND DIVORCE, *supra* note 2, at 102. Children's needs should always be placed above adults' needs, and divorcing parents' "contracts" concerning children's care should receive court scrutiny. *See id.*

⁶⁶ *Id.* at 93, 99-103, 109-11.

⁶⁷ Schneider, *Marriage and Morals*, *supra* note 1, at 525.

⁶⁸ *Id.* at 526.

⁶⁹ *Id.* at 533.

⁷⁰ *See id.*

⁷¹ *See* Hafen, *Individualism and Autonomy*, *supra* note 4, at 3. *See generally* Hafen, *Constitutional Status*, *supra* note 4.

⁷² Hafen, *Individualism and Autonomy*, *supra* note 4, at 23. Hafen uses sociologist Pitirim Sorokin's typology of personal relationships: familistic, contractual and compulsory. *See id.* at 23. "Familistic relationships involve an intermingled and organic unity in which shared commitments of mutual attachment transcend self-interest. Such interaction derives from an unlimited personal commitment, not merely to another person, but to the good of the relationship or the family entity as a larger order." *Id.* at 23-24. Contractual relationships are very different:

[Such relationships] by definition are always limited in scope and intensity. Parties enter a contractual relationship primarily because of self-interest; therefore, their commitment is measured by the extent to which the relationship assures them of profit, pleasure, or service. . . . Neither party to a con-

contractual,⁷³ and that family members increasingly tend to see themselves primarily as individuals rather than as parts of a larger group.⁷⁴ He claims that "individualistic civil liberties approaches" have been "transfer[red] to the divorce context,"⁷⁵ with attendant problems for the spouse who does not want the marriage to terminate.⁷⁶ Hafen notes that law and other behavior-oriented disciplines such as psychotherapy and theology "are less likely to reinforce any serious hope for the ideal of enduring relationships of commitment."⁷⁷

Hafen eloquently describes the importance of connections between people: "ours is the age of the waning of belonging."⁷⁸ In a section of an article that he describes as "consciously anecdotal and interdisciplinary,"⁷⁹ he writes about how "belonging"-type relationships demand that we draw on internal resources that might not otherwise be tapped:

The innate human intuition to belong occurs, and is often fulfilled, at the most fundamental levels of both human experience and aspiration. . . . Without a sense of belonging, we may never know—and never see the effects of—the reservoirs of strength and compassion we carry within ourselves. That is a loss not only to ourselves, but a major loss to society.⁸⁰

In an earlier article, he emphasizes the commitment typified by marriage: "the formal commitment of marriage is . . . the basis of stable expectations in personal relationships. The willingness to marry permits important legal and personal assumptions to arise about one's

tract may assume that the other acts in constant good faith, because, reflecting free market assumptions, both parties are expected to interpret the limits of their commitment according to self-interest.

Id. at 24. Third, compulsory relationships "are exclusively antagonistic: master and slave, conqueror and captive," although the individual with the power in the relationship may deploy ideology masking the power relationship. *Id.* at 24-25.

⁷³ See Hafen, *Individualism and Autonomy*, *supra* note 4, at 25-27. "No-fault" divorce is an example of this shift, according to him. See *id.* For further discussion of the shift to contract, see *infra* notes 86-89.

⁷⁴ See Hafen, *Individualism and Autonomy*, *supra* note 4, at 24-25.

⁷⁵ *Id.* at 27.

⁷⁶ See *id.*

⁷⁷ *Id.* at 37.

⁷⁸ See *id.* at 32.

⁷⁹ Hafen, *Individualism and Autonomy*, *supra* note 4, at 31.

⁸⁰ *Id.* at 39-41.

intentions."⁸¹ He also contrasts legal marriage with unmarried cohabitation: "legal marriage is more likely than is unmarried cohabitation to encourage such personal willingness to labor and 'invest' in relationships with other people, whether child or adult."⁸² He also notes that the range of "legally and socially acceptable" family forms has widened in the twentieth century to include "working" mothers, families headed by women, families in which fathers share housework, and families without children."⁸³ He also posits that "marriage alone plays a critical role in the democratic structure by interposing a significant legal entity between the individual and the state."⁸⁴ He hopes that in the future, "family law will find ways to sing more clearly the melody of belonging."⁸⁵

One of the ways in which family and marriage law have become more individual-oriented, as many have observed, is through the gradual move from status to contract.⁸⁶ Glendon, Schneider, and

⁸¹ Hafen, *Constitutional Status*, *supra* note 4, at 485–86.

⁸² *Id.* at 486. Milton Regan takes a similar position. See REGAN, *supra* note 5, at 122–28 (noting that unmarried unions tend to be less stable than married unions and arguing for a clear distinction between married and unmarried status). Mary Becker also contrasts the benefits of marriage with cohabitation. See Mary E. Becker, *Family Law in the Secular State and Restrictions on Same-Sex Marriage: Two Are Better than One*, 2000 U. ILL. L. REV. (forthcoming 2000) [hereinafter Becker, *Two Are Better*] (noting the cohabiting couples' relationships tend to be less stable and satisfying to their members than relationships between members of married couples).

⁸³ Hafen, *Constitutional Status*, *supra* note 4, at 490.

⁸⁴ *Id.* at 483.

⁸⁵ Hafen, *Individualism and Autonomy*, *supra* note 4, at 42.

⁸⁶ *Id.* at 25–26, 38; Schneider, *Marriage and Morals*, *supra* note 1, at 532–36. Various scholars have voiced concerns about the increased contractualization of family law. See, e.g., REGAN, *supra* note 5, at 2–3, 34–42; Minow, *Redefining Families: Who's In and Who's Out*, 62 U. COL. L. REV. 269, 282–83 (1991) [hereinafter Minow, *Redefining Families*]. Craig Christensen notes the difficulty of applying traditional contract principles to intimate relationships. See Christensen, *Legal Ordering*, *supra* note 13, at 1327–28. He also concludes that increased use of contracts by same-gender couples will be positive but will not be an adequate substitute for "marriage as a comprehensive arbiter of legally enforceable rights." *Id.* at 1347. Implicit in his idea, as well as in Regan's, Hafen's, and others', is the idea that marriage is something more than an individually negotiated contract; Regan and others refer to this as a status. There is debate about many aspects of the contractualization of family law. One scholar recently proposed incorporating commercial contract principles into marriage law through a premarital security agreement, pursuant to which the primary homemaker gets a security interest in the primary wage-earner's post-divorce income. See Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998) [hereinafter Ertman, *Commercializing Marriage*]. Another scholar has argued that the status/contract distinction is simplistic, and that selective enforcement of premarital agreements, pursuant to which financial terms are enforced while non-monetary terms are not enforced, disadvantages women. See Silbaugh, *Family Economy*, *supra* note 14. She further argues that premarital agreements

Hafen all find problems with the introduction of a contractual approach to family law. Hafen suggests that people invest less in their family relationships if a contractual approach is used.⁸⁷ Glendon notes that prenuptial agreements "are nearly always used to insulate the property of the more powerful spouse, who in most cases will have the better bargaining position."⁸⁸ And Schneider concludes that "contract law is primarily seen as a way of relieving people of obligations the laws and social norms have historically embodied."⁸⁹

Glendon and Schneider both discuss how the law of marriage and divorce has developed toward a model that does not recognize dependency or connections between human beings in a constructive way. To them and many others including many feminist scholars,⁹⁰ this is a serious shortcoming of modern marriage and family law.⁹¹ Glendon notes that families still provide much non-market care for the helpless (young, old, and disabled), despite the shortage of caregivers.⁹² Law should recognize this and yet does not, since it imposes an unrealistic model of autonomy. Family law in the United States should more effectively take account of actual relationships of dependency, for example when there are small children, according to Glendon,

should be unenforceable. *See id.* Still another approach is to challenge the idea that contractualization necessarily is related to atomism and lack of commitment. Robert and Elizabeth Scott argue that "contracts can serve very well as a basis for an enduring, committed relationship. Only two modest assumptions are required: that many individuals entering marriage are motivated to undertake a long-term commitment and wish to secure reciprocal commitments from their partners, and that both parties share the goal of a lasting marriage." Scott, *Relational Contract*, *supra* note 1, at 1246. They argue that the core meaning of contract is commitment. *See id.* at 1246. Even the writers who seem to favor increased "contractualization" of family law, recognize a need for broad principles or defaults such as those created by marriage rules. *See* Scott, *Relational Contract*, *supra* note 1, at 1320-29; Ertman, *Commercializing Marriage*, *supra* at 55, 59-60 n.159.

⁸⁷ He writes that "when commitments among spouses and children are unqualified, we learn and grow to an extent not possible in self-oriented, limited relationships of contract." Hafen, *Individualism and Autonomy*, *supra* note 4, at 39.

⁸⁸ GLENDON, *TRANSFORMATION OF FAMILY LAW*, *supra* note 2, at 139. She notes that while marriage contract proponents initially saw such contracts as "the ideal way to preserve the neutrality of the state, promote sex equality and respect individual liberty," in reality the issues are not so simple in view of power dynamics and issues about what should and should not be subject to contract. *Id.* For expression of similar concerns regarding applying traditional contract principles to intimate relationships, see Christensen, *Legal Ordering*, *supra* note 13, at 1327-28.

⁸⁹ Schneider, *Marriage and Morals*, *supra* note 1, at 532.

⁹⁰ *See generally* MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); Milow, *Forming Underneath*, *supra* note 5, at 894; Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 1-3 (1988).

⁹¹ *See infra* notes 127 and 257 for additional scholarship on these points.

⁹² *See* GLENDON, *TRANSFORMATION OF FAMILY LAW*, *supra* note 2, at 306-07.

Schneider, and others. These important observations will be linked with the law concerning same-gender couples in Part III.⁹³

B. *Limitations of the Atomism Critique*

Glendon, Schneider, and Hafen rightly highlight the dominant trend in the changes in laws over the last fifty years concerning marriage, divorce, and family as moving toward recognizing individuals as individuals, with individual rights.⁹⁴ For example, "nonfault divorce," to use Glendon's term,⁹⁵ has made it easier for a spouse to leave a marriage if the spouse is unhappy in the marriage, even if the other spouse does not want the marriage to end.⁹⁶ Enforcement of premarital agreements concerning property has increased, which allows people to tailor their post-divorce economic arrangements individually.⁹⁷ Developments such as the abrogation of interspousal tort immunity⁹⁸ and the availability of protective orders for domestic violence⁹⁹ recognize members of married couples as individuals in new ways. Glendon and Schneider also acknowledge that people may live their lives in more interconnected and generous ways than law or their own lan-

⁹³ See *infra* Parts III and IV.

⁹⁴ This trend is only partial regarding children. See Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 6 HARV. INT'L. L.J. 449, 451-57 (1996); Martha Minow, *Whatever Happened to Children's Rights*, 80 MINN. L. REV. 267 (1995).

⁹⁵ GLENDON, *TRANSFORMATION OF FAMILY LAW*, *supra* note 2, at 188-89.

⁹⁶ It is not clear precisely what role nonfault or no-fault divorce played in causing the heightened divorce rate from the seventies to the nineties. Naomi Cahn terms no-fault divorce a "contributing factor" but also points out that the divorce rate began rising well before no-fault was introduced and that many factors have contributed to it. See Naomi R. Cahn, *Review Essay: The Moral Complexities of Family Law*, 50 STAN. L. REV. 225, 249-50 (1997). No-fault divorce and its consequences have spawned a proliferation of literature; for a recent discussion, see Katherine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809 (1998).

⁹⁷ See Silbaugh, *Family Economy*, *supra* note 14; Ertman, *Commercializing Marriage*, *supra* note 86, at 60 n.159.

⁹⁸ See, e.g., *Hakkila v. Hakkila*, 812 P.2d 1320, 1326-27 (N.M. 1991) (finding action for intentional infliction of emotional distress not barred in interspousal context); *McCoy v. Cooke*, 419 N.W.2d 44, 46 (Mich. Ct. App. 1988) (reversing trial court's dismissal of wife's action for assault, battery, and intentional infliction of emotional distress for conduct of former husband during marriage); *Courtney v. Courtney*, 413 S.E.2d 418, 420 (W. Va. 1991) (same); *Stuart v. Stuart*, 421 N.W.2d 505 (Wis. 1988) (same).

⁹⁹ See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993).

guage would indicate.¹⁰⁰ Also, as Hafen notes, many people tend to see permanent commitment as the ideal.¹⁰¹

Nonetheless, to some extent, Glendon, Schneider, and Hafen overstate the extent to which marriage has become simply an institution for self-fulfillment. To a large extent, the old non-reciprocal duties¹⁰² of civil marriage¹⁰³ have been replaced by matching, reciprocal duties.¹⁰⁴ New family medical leave statutes recognize connections between people that were previously ignored by law.¹⁰⁵ "The story told by law"¹⁰⁶ about marriage now is not that it is simply an institution for

¹⁰⁰ See GLENDON, ABORTION AND DIVORCE, *supra* note 2, at 141-42; GLENDON, TRANSFORMATION OF FAMILY LAW, *supra* note 2, at 312-13; Schneider, *Marriage and Morals*, *supra* note 1, at 556-57, 583.

¹⁰¹ See Hafen, *Individualism and Autonomy*, *supra* note 4, at 34.

¹⁰² See *infra* notes 108-20 and accompanying text.

¹⁰³ Family law in the United States, including marriage law, is civil law rather than religious law. Lawrence M. Friedman states "[i]n England, ecclesiastical courts had jurisdiction over marriage and divorce, and the church had an important role in family law. The United States had no such court, and, after the early nineteenth century, no established churches. Family law was thoroughly secular in the United States." LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 202 (1985).

¹⁰⁴ See *infra* notes 108-20 and accompanying text. Glendon seems to conclude that this is not so. She writes:

[t]he trend toward withdrawal of regulation of the ongoing marriage in the United States is reinforced by the advance of the equality principle. While equality theoretically can be implemented by extending legal rights and duties connected with marriage to whichever sex previously lacked them, the equality principle more often, in combination with other factors, results in diminished rights and duties for both, draining marriage of much of its legal content [and] promoting the idea of marriage as an association of separate individuals. . . .

GLENDON, TRANSFORMATION OF FAMILY LAW, *supra* note 2, at 95. Despite Glendon's assertion, it seems that generally, duties and rights connected with marriage have been extended to whichever sex previously lacked them, as discussed *infra* at notes 108-120 and accompanying text. It is not clear exactly what Glendon is referring to when she discusses the "trend towards withdrawal of regulation of the ongoing marriage," since earlier she discussed the longstanding "principle" and practice of "noninterference in private life" that was dominant from the time of John Stewart Mill in common law systems. *Id.* at 86. She contrasts the continental systems which leave open possible judicial involvement in ongoing marriages, with the United States' "traditional approach of nonintervention." *Id.* at 94-95. Thus, it is not clear how the advance of the equality principle reinforces the trend toward withdrawal of regulation of the ongoing marriage. While it may be the case that the "other factors" she alludes to result in diminished rights and duties, the legal reforms in marriage seem generally to have extended duties, not contracted them.

¹⁰⁵ See Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2615 (1994). The Act requires certain employers to give qualified employees time off to care for a sick spouse, child or parent. *Id.* Various states also have family leave acts. See, e.g., CAL. GOV'T CODE § 12945.2 (West 2000).

¹⁰⁶ See GLENDON, ABORTION AND DIVORCE, *supra* note 2, at 9.

individual self-fulfillment, but rather that it is an institution based on equality and mutual commitment.¹⁰⁷

For example, at common law, the wife owed a duty to provide companionship and services to the husband, but the husband owed no such duty to the wife.¹⁰⁸ Thus, the husband could sue a third party for loss of her consortium, but she could not sue for loss of his consortium because she had no right to it. The common law and statutes, largely in the 1970s, came to provide that each spouse had a duty to provide services and companionship to the other, so that each spouse could sue for the loss of the other's companionship.¹⁰⁹ The law could have developed so that *neither* spouse had a duty to provide such services and companionship to the other, but it did not.

Similarly, at common law and well into this century, the husband owed a duty of support to the wife as long as she lived with him, but she had no duty to support the husband (even if she could do so).¹¹⁰

¹⁰⁷ It can be difficult to determine whether various developments further the trend toward atomization or not. For example, the Louisiana Covenant Marriage Law, LA. REV. STAT. ANN. § 9:307 (West 1997), heralded by some as a return to an earlier era when couples were more unified, actually can be seen as furthering the individualization of family law because it gives individuals and couples the opportunity to choose which set of divorce laws will apply to them should they separate.

¹⁰⁸ See Reva Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L. J. 2127, 2194 (1994), citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 142 [hereinafter Siegel, *Modernization*]; see, e.g., *Baird v. Cincinnati, New Orleans & Tex. Pac. R.R. Co.*, 368 S.W.2d 172 (Ky. 1963) (holding wife can not maintain action to recover for loss of husband's consortium although husband can maintain action to recover for loss of wife's consortium).

¹⁰⁹ See Paul Benjamin Linton, *State Equal Rights Amendments: Making a Difference or Making a Statement?*, 70 TEMP. L. REV. 907, 932 (1997) (noting that state courts have consistently held that loss of consortium must be extended to women to avoid violating equal rights guarantees); see, e.g., *Rodriguez v. Bethlehem Steel*, 525 P.2d 669 (Cal. 1974) (holding wife has loss of consortium action against third party who injured husband); ME. REV. STAT. ANN. tit. 14, § 302 (West 1999) (either spouse may sue for loss of consortium); OHIO REV. CODE ANN. § 2125.02(B) (Anderson 1999) (in wrongful death actions, surviving spouse can sue for loss of consortium).

¹¹⁰ See Robert C. Brown, *The Duty of the Husband to Support the Wife*, 18 VA. L. REV. 823 (1932), reprinted in *SELECTED ESSAYS ON FAMILY LAW* 810, 822 (American Association of Law Schools eds., 1950); Blanche Crozier, *Marital Support*, 15 B.U. L. REV. (1935), reprinted in *SELECTED ESSAYS ON FAMILY LAW* 831 (American Association of Law Schools eds., 1950); see, e.g., *Graham v. Graham*, 33 F. Supp. 936 (1940) (finding husband and wife can not contract to relieve husband of duty to support wife; contract giving wife obligation to support husband held void). In 1935, Blanche Crozier discussed the possibility of extending the duty of support to the wife, arguing that "[i]t is not possible to extend the duty of support to the wife so long as she is not the owner of her own means of support, her labor The husband's ownership of the wife's labor is the foundation of his duty of support; and one is as incapable of being made reciprocal as the other." Crozier, *Marital Support*, *supra*, at 859.

The duty of support was not absolute. For example, according to a 1932 commentator, "[t]here is no question that a wife who is without justification living apart from her husband is not entitled to support."¹¹¹ Now the duty of support extends to both spouses.¹¹² Under current law, each owes a duty to support the other during the marriage.¹¹³ Some statutes specify that the duty is owed whether or not the spouses are living together.¹¹⁴ Thus, not only has the duty to support been extended to both spouses, but in some instances it is less conditional than it was in the past. As with the example of consortium, the law could have developed in such a way that neither owed such a duty, but it did not.¹¹⁵

One interesting area where a non-reciprocal duty was not extended to both spouses in recent marriage reform is the duty to follow a spouse. It appears that generally under the common law, as long as a husband performed his duty of support, he could determine the wife's place of residence.¹¹⁶ For example, until it was struck down in 1983, a Louisiana law stated, "The wife is bound to live with her hus-

¹¹¹ Brown, *supra* note 110, at 822; see also *Steinfeld v. Girtard*, 68 A. 630 (1907) (finding wife who deserts husband without his fault forfeits right to support from him). The duty of support and companionship was generally not enforceable as long as the marriage was intact. See, e.g., *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953) (finding wife's claim that husband should be ordered to provide better living situation dismissed since parties were living together). This is still the case. See Margaret M. Mahoney, *Economic Sharing During Marriage: Equal Protection, Spousal Support and the Doctrine of Necessities*, 22 J. FAM. L. 221, 229 (1983-1984).

¹¹² See Silbaugh, *Family Economy*, *supra* note 14, at 84. See generally Mahoney, *supra* note 111.

¹¹³ See, e.g., DEL. CODE ANN. tit. 13, § 502 (1999) (spouse has duty to support spouse), MICH. COMP. LAWS § 401.5 (1999) (husband or wife must provide support); MONT. CODE ANN. § 40-2-102 (1997) (wife and husband have duty to support one another); N.Y. FAM. CT. ACT § 412 (McKinney 1998) (married person has duty to support spouse); OHIO REV. CODE ANN. § 3103.03 (West 1999) (married person must support spouse), OKLA. ST. ANN. tit. 43, § 202 (West 2000) (wife must support husband and husband must support wife).

¹¹⁴ See, e.g., CONN. GEN. STAT. ANN. § 46B-37 (West 1995) (spouse who abandons spouse without cause is liable for support of abandoned spouse); ME. REV. STAT. ANN. tit. 19-A, §§ 1504, 1505 (West 1998) (person has duty to support spouse and children regardless of whether person lives with spouse or children). But see CAL. FAM. CODE § 4302 (West 2000) (person not liable for support of spouse when the person is living separate from the spouse by agreement unless support is stipulated in the agreement).

¹¹⁵ The duty, in the past and currently, generally is only enforced by indirect means such as criminal law, the necessities doctrine or family expense statutes which allow creditors to seek recovery from one spouse for goods that the other spouse purchased. See Mahoney, *supra* note 111, at 229-45.

¹¹⁶ See Brown, *supra* note 110, at 814, citing *Kirk v. Chinstrand*, 88 N.W. 422 (Minn. 1901) (finding where husband refuses to permit wife to live with him, he may not dictate where she may live).

band and to follow him wherever he chooses to reside: the husband is obligated to receive her and to furnish her with whatever is required for the convenience of life, in proportion to his means and condition."¹¹⁷ The Louisiana Court of Appeals held that the gender-specific requirement that the wife follow the husband was unconstitutional.¹¹⁸ Now it appears that neither spouse owes a duty to follow the other.¹¹⁹ It needs no citation to assert that many married couples with two wage-earners have difficulty deciding where to live.

Generally, duties within marriage, where practical, have been extended to both spouses. Regarding the duty to follow a spouse, it would not be practical for obvious reasons to extend this to both spouses, and it has not been done. While duties within ongoing marriages are not directly enforceable, this is not new.¹²⁰

Although both members of the couple now are recognized as individuals by the law, that does not mean that marriage has become simply an institution for individual self-fulfillment.¹²¹ As Robin West writes, "Marriage just is, through and through, anti-individualistic. That is precisely its moral strength, and no small measure of its immense appeal."¹²² Marriage law for the first time presents men and women with a model of mutual duties owed by each member of the couple to the other. Marriage law has changed from an explicitly patriarchal model where the person who lacked legal identity, and who did not count as an individual, was the wife.¹²³

¹¹⁷ LA. CIV. CODE ANN. art. 120 (West 1999), *quoted in* Crosby v. Crosby, 434 So.2d 162, 163 (La. 1983).

¹¹⁸ See Crosby, 434 So.2d at 163, *appeal dismissed per stipulation*, 442 So.2d 1248 (La. 1983). This case took place against a backdrop of fault-based divorce laws. In order to obtain alimony, Mrs. Crosby had to show that she was free from fault. The only evidence of her fault was "her refusal to follow Mr. Crosby when he changed domiciles." *Id.* at 164. The refusal to follow violated LA. CIV. CODE ANN. art. 120 (West 1999), *quoted in* the text above.

¹¹⁹ See *id.*

¹²⁰ See Mahoney, *supra* note 111, at 229-45.

¹²¹ Milton Regan states, "spouses . . . don't simply help each other construct separate individual identities . . . [T]hey participate in the creation of a shared . . . identity." REGAN, *supra* note 5, at 94.

¹²² Robin West, *Universalism, Liberal Theory, and the Problem of Gay Marriage*, 25 FLA. ST. U. L. REV. 705, 729 (1998) [hereinafter West, *Universalism*].

¹²³ See LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP (1998) (discussing how in the United States married women's obligations to their families and husbands historically have substituted for their obligations to the state, and how this has changed only gradually); Siegel, *Modernization*, *supra* note 108, at 2194. Thus, even the idea of some women having autonomy is relatively new.

As Katharine Baker has stated, "[t]raditionally, family relationships were treated as property relationships, with the husband and father essentially 'owning' his wife and children."¹²⁴ As Baker notes, "[t]he abolition of coverture and the Married Women's Property Acts helped alleviate some of the more blatantly subordinating effects of marriage for women."¹²⁵ Nonetheless, as Reva Siegel has explained in detail, the legal system resisted legal reforms aimed at improving wives' economic status, well into this century.¹²⁶ While marriage is now an institution of formal equality, various factors lead to continuing concerns about women's status in marriage.¹²⁷

Even the idea of women being autonomous individuals is relatively new. While white women and black women historically have been denied individual autonomy (in very different ways), white men's individual autonomy has been widely encouraged.¹²⁸ As Baker observes, "the values associated with individualism and autonomy are values that many men may already have, but that women may

¹²⁴ Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L. J. 1523, 1525 (1998).

¹²⁵ *Id.* at 1530.

¹²⁶ See Siegel, *Modernization*, *supra* note 108; Reva Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994) [hereinafter Siegel, *Home as Work*].

¹²⁷ See, e.g., Becker, *Women and Morality*, *supra* note 7 (arguing that current marriage rules exacerbate women's subordinate status); Ertman, *Commercializing Marriage*, *supra* note 86, at 17-22, 31 (arguing that devaluation of women's household labor operates to the detriment of homemakers and all women); Katherine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 6 (1996) [hereinafter Silbaugh, *Labor into Love*] (arguing that treatment of women's unpaid household labor disadvantages women).

¹²⁸ See Baker, *supra* note 124, at 1549-58. This framework is extremely broad-brush, and applies mainly to white women and men in the United States, and not to all of them, since issues of class, region, religion and so forth complicate matters. It can not be plausibly argued that black men's or black women's autonomy was encouraged in the United States under slavery. In view of racist legal structures that have persisted throughout most of the twentieth century, it is difficult to claim that black men's or black women's autonomy has at any time been widely encouraged in the same way that some white men's autonomy has been encouraged. See, e.g., Denise C. Morgan, *Jack Johnson: Reluctant Hero of the Black Community*, 32 AKRON L. REV. 529 (1999) (stating that a strong sense of individuality has been a punishable offense for black Americans for most of the history of the United States). Gender issues for black women are often very different from gender issues for white women, in family law as in other areas. See, e.g., Twila L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 GEO. L.J. 2481 (1994) (noting married black women may be less economically dependent within marriage than white women and that alimony theory may rest on assumptions more applicable on average to white women than to black women); Jennifer Wiggins, *Note: Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103 (1983) (rape laws and prosecutions historically ignored all rape of black women while taking seriously some rape charges by white women, as long as those charges were against black men).

need."¹²⁹ Thus, criticizing the recent individual orientation of family law and marriage has undertones of targeting women's newfound autonomy while accepting without question the autonomy which for many white men has been there all along.¹³⁰

In discussing marriage, Schneider and Hafen tend to give only passing attention to the patterns of gender subordination that were an explicit and integral part of marriage law until recently. For example, while Schneider notes that "historically, spouses were admired for sacrificing themselves for each other,"¹³¹ he does not deal with the gender-based disparity of "sacrifice" expected in "traditional" marriage, and appears to assume that the "sacrifice" expected of each spouse was the same or equivalent.¹³² It was not.¹³³

In short, the changes in the law of marriage over the past fifty years and longer have created an ideal model of matching duty and equality, of commitment between spouses.¹³⁴ The changes in marriage law are not just about loosening bonds between people, although there is that aspect.¹³⁵ The recent law of marriage presents a model, not just of individual fulfillment or gratification, but of commitment to a truly shared, interdependent life.

¹²⁹ Baker, *supra* note 124, at 1556.

¹³⁰ See *id.* at 1556. See generally Bartlett, *Saving the Family from the Reformers*, *supra* note 96.

¹³¹ See Schneider, *Marriage and Morals*, *supra* note 1, at 523.

¹³² He notes that many family law reforms have been made in order "to change gender relations" in American society. See *id.* at 523. Hafen acknowledges the trend toward gender equality, see *Constitutional Status*, *supra* note 4, at 490, and notes the "widespread evidence of gender inequality in traditional American culture." Hafen, *Individualism and Autonomy*, *supra* note 4, at 38.

¹³³ See generally Siegel, *Modernization*, *supra* note 108, at 2131 (arguing that wives in the industrial era and in the present were economically disempowered by marriage and impoverished by divorce); Siegel, *Home as Work*, *supra* note 126 (reviewing efforts to reform doctrines that gave husband title over property notwithstanding wives' labor contributions in pre-Civil War period); *supra* notes 108-09, 124-27 and accompanying text.

¹³⁴ See *supra* notes 108-20 and accompanying text. For a similar argument extending beyond marriage to family law generally, see generally Cahn, *Review Essay: The Moral Complexities of Family Law*, *supra* note 96.

¹³⁵ See *supra* notes 95-97 and accompanying text. Of course, not all loosening of bonds between people is negative. For example, few would argue for a return to the days when domestic violence was protected by the mantle of family privacy and the husband-wife bond. Moreover, it may be that individual autonomy can be a foundation for genuine community. Katherine Bartlett explicitly makes this link, claiming that "robust notions of the community and family depend" on "diversity and notions of individual freedom." Bartlett, *Saving the Family from the Reformers*, *supra* note 96, at 818.

C. *The Decline of Moral Discourse Critique*

Another related theme in the work of these scholars is that moral discourse in family law has declined and that family law has become separated from moral concerns. Schneider's important 1985 article, *Moral Discourse and the Transformation of Family Law*¹³⁶ argues that there is a powerful "tendency toward diminished moral discourse and transferred moral responsibility in family law."¹³⁷ He believes that this thesis is supported by no-fault divorce laws,¹³⁸ by child custody laws where custody is no longer supposed to be awarded on the basis of a parent's sexual behavior,¹³⁹ by increased enforcement of interspousal contracts,¹⁴⁰ and by other legal phenomena.¹⁴¹ The shift in his view was related to a number of factors; to a large extent, he believes, moral discourse has been replaced by psychological discourse.¹⁴² Schneider later writes, "for some people and in some ways, morals—and thus moral discourse—has become a diminished and disfavored category not just in law, but in life, and . . . this change has helped impel the law away from moral discourse."¹⁴³ Schneider also notes an increased skepticism toward rules and broad principles and a professed, al-

¹³⁶ 83 MICH. L. REV. 1803 (1985).

¹³⁷ *Id.* at 1809. He states that there has been "a diminution of the law's discourse in moral terms about the relations between family members, and the transfer of many moral decisions from the law to the people the law once regulated." *Id.* at 1807-08.

¹³⁸ *See id.* at 1810-11.

¹³⁹ *See id.* at 1811.

¹⁴⁰ *See* Schneider, *Moral Discourse and the Transformation of Family Law*, *supra* note 136, at 1814.

¹⁴¹ *See id.* at 1814-16.

¹⁴² *See id.* The factors to which he attributes the changes are the legal tradition of non-interference in family matters, the ideology of liberal individualism, American society's changing moral beliefs, and the rise of "psychologic man." *See id.* at 1808-09.

¹⁴³ Schneider, *Marriage and Morals*, *supra* note 1, at 519. Schneider notes that for many, the term 'morality' has come to have a narrow meaning, referring to traditional sexual morality. *See id.* at 537-38. He notes that:

the term "moral" has in some milieux taken on a narrow—and derogatory—meaning. "Morality" means "traditional morality" which means sexual morality. The relegation of morals to sexual morals does little to advance the dignity of moral thought, for sexual morals have come to connote a narrow, rigid, prudish, restrictive, and repressive regime of outdated ideas hypocritically stated and heartlessly imposed In short, moral has come to mean moralistic.

though incomplete, moral relativism in students such that they are unwilling to make moral judgments about family matters openly.¹⁴⁴

Glendon notes that in the United States, "secular family . . . law substantially refrains from articulating a common morality."¹⁴⁵ Glendon claims that family law:

[H]as been influenced by new ideas, not about families, but about law and morality. Such ideas include the problematic notions that courts and legislatures should not attempt to impose "values" (except for equality, individual liberty and tolerance). . . . The result is often that other normative legal propositions have tended to be phased out, even when they are quite widely shared.¹⁴⁶

Hafen also seems to support the idea that moral discourse has declined.¹⁴⁷ He notes that "the legal system is generally less confident about the normative posture of many former notions of morality and ideal behavior, even in the context of criminal law."¹⁴⁸ Without being very specific,¹⁴⁹ these authors convey an impression of some nostalgia for the passed time when the rules were clearer and the legal system was more confident about rules and morality.¹⁵⁰

¹⁴⁴ See *id.* at 543. In his article, *Marriage and Morals*, *supra* note 1, Schneider uses the example of the reaction of his family law students to a hypothetical of a man wanting to leave his wife of many years for his young secretary to make various points. These points include the idea that students view marriage as primarily a vehicle for self-fulfillment, since few articulated any moral objections to the man leaving his marriage, and few articulated any moral reasons why he should continue to support his spouse after marriage. See *id.* at 509-17. By contrast, in teaching family law at University of Maine School of Law, I have found students articulate the opposite thoughts; that after a certain time a relationship (married or unmarried, gay or straight) carries with it an obligation to stay, divide property not according to title, and/or to provide ongoing support of some kind.

¹⁴⁵ GLENDON, *TRANSFORMATION OF FAMILY LAW*, *supra* note 2, at 14.

¹⁴⁶ *Id.* at 297.

¹⁴⁷ See Hafen, *Individualism and Autonomy*, *supra* note 4, at 1-3.

¹⁴⁸ *Id.* at 5.

¹⁴⁹ Margaret Brinig notes that "much of the communitarian literature . . . sets a mood rather than providing an agenda." Margaret F. Brinig, *Status, Contract and Covenant*, 79 CORNELL L. REV. 1573, 1573 (1994) (reviewing MILTON REGAN, *FAMILY LAW AND THE PURSUIT OF INTIMACY* (1993)).

¹⁵⁰ See, e.g., Hafen, *Individualism and Autonomy*, *supra* note 4, at 1-18. See generally Schneider, *Marriage and Morals*, *supra* note 1; GLENDON, *ABORTION AND DIVORCE*, *supra* note 2, at 112-42.

D. *Limitations of the Decline in Moral Discourse Critique*

Glendon, Schneider, and Hafen are correct that courts "are now less likely to rely on moralistic language or moral judgments in the entire range of family law issues, from divorce to child custody to child neglect,"¹⁵¹ and in that sense moral discourse certainly has declined. This does not mean, however, that moral concerns have been exiled from family law.¹⁵² Instead, moral values different from those that grounded family law in the fault divorce era increasingly animate family law.¹⁵³ These "moral values are grounded in equality, fairness, commitment, and nurturance"¹⁵⁴ and are explored in recent scholarship, discussed in this section.

For example, some recent developments in family law, such as the societal recognition of domestic violence and the jettisoning of archaic rules that discriminated against women, can be seen as based on moral values that view violence within families and discrimination against women as wrong. As Naomi Cahn writes in an instructive review essay, "claims [about the decline of moral discourse] fail to recognize the 'moral values' underlying [recent] changes in family law."¹⁵⁵

Cahn identifies a "new Family Morality" which "addresses family values, promotes acceptance of broader definitions of the family, and draws on notions of fairness and equality."¹⁵⁶ Cahn argues that:

¹⁵¹ Hafen, *Individualism and Autonomy*, *supra* note 4, at 5. Compare *In re Black*, 283 P.2d 887 (Utah 1955) (upholding termination of parental rights of polygamous parents because of immorality of polygamous environment for children), with *Sanderson v. Tryon*, 739 P.2d 623 (Utah 1987) (finding that a parent's practicing polygamy, standing alone, is insufficient to support a custody award to the non-polygamous parent).

¹⁵² The broad question of the relationship between law and morality is beyond the scope of this article. Very influential works include PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965) (claiming that law should be used to uphold society's moral standards in the context of criminal laws forbidding homosexual sex); HERBERT A. HART, *LIBERTY AND MORALITY* (1963) (claiming that it is not justified to use criminal law to outlaw conduct simply because that conduct is immoral according to common belief). For a recent argument that although law and morality overlap, moral theory has nothing to offer jurisprudence, see RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 91-182 (1999).

¹⁵³ See Bartlett, *Saving the Family from the Reformers*, *supra* note 96, at 816; Cahn, *Review Essay: The Moral Complexities of Family Law*, *supra* note 96, at 238; Silbaugh, *Family Economy*, *supra* note 14, at 67 n.1.

¹⁵⁴ Cahn, *Review Essay: The Moral Complexities of Family Law*, *supra* note 96, at 238.

¹⁵⁵ *Id.* at 244-45. Cahn notes that the decline of moral discourse and concerns over the increased individual focus of family law raise troubling questions and that issues about divorce and children should cause concern. See *id.*

¹⁵⁶ *Id.* at 245.

[t]he shift away from traditional moral discourse and toward private contracting does not indicate diminished moral discourse in family law; instead, this shift represents only one of the many different trends within family law. The new family morality recognizes that there is, simultaneously, an increase in new types of moral discourse in some of those same areas, as well as the inevitable tension between private contracting and status based assumptions.¹⁵⁷

Katharine Silbaugh, similarly, observes that "moral values in family law have shifted toward equity and away from older moral values, such as marital fault defined as infidelity."¹⁵⁸ Lee Teitelbaum has argued that the decline in moral discourse seems to follow from the abandonment of "a moral theory to which the use of expressly moralistic language is expressly suited,"¹⁵⁹ but does not reflect "a wholesale abandonment of morality."¹⁶⁰ He writes of the inadequacy of rights talk in family law, and urges consideration of ways "to talk about families as relationships."¹⁶¹

Regan takes the position that family law should promote "a substantive moral vision of commitment and responsibility."¹⁶² Another scholar with strong moral concerns, Martha Minow, emphasizes issues of obligation and moral responsibility.¹⁶³ She discusses duties at length.¹⁶⁴ She endorses a "liberal approach to family membership but a strict view of family obligation."¹⁶⁵ This scholarship shows that con-

¹⁵⁷ *Id.*

¹⁵⁸ Silbaugh, *Family Economy*, *supra* note 14, at n. 1. Silbaugh's article, for example, explicitly "privileges equality . . . over other values, including liberty."

¹⁵⁹ Lee Teitelbaum, *Correspondence—Moral Discourse and Family Law*, 84 MICH. L. REV. 430, 431 (1985).

¹⁶⁰ *Id.* at 431.

¹⁶¹ *Id.* at 441. He notes that a "revised teleological view, directed to the functions and characteristics we now value in [family] relationships, may provide one way of thinking about these questions." *Id.*

¹⁶² REGAN, *supra* note 5, at 4.

¹⁶³ Minow, *All in the Family*, *supra* note 5, at 306.

¹⁶⁴ *Id.* at 325–32.

¹⁶⁵ Minow, *Redefining Families*, *supra* note 86, at 282. Illustrating this principle, she writes:

[I]f someone claims family membership and the benefits that go along with it, that person may also be said to consent to and accept the obligations that attach to family roles. In other words, let us be welcoming toward those who are willing to take on family obligations, but serious in enforcing the expectation that those obligations will in fact be fulfilled.

Minow, *All in the Family*, *supra* note 5, at 307.

cerns with moral issues in family law remain strong, although these concerns often focus on different issues than those considered overriding in the past.

Katharine Bartlett acknowledges problems and challenges faced by families and articulates a "family-enabling model of reform,"¹⁶⁶ but avoids using moral terminology. She writes:

Family law is soaked in moral judgments that both reinforce the law and are reinforced by it. At some level, the question is not whether family law should reflect moral principles but what those principles will be. When it comes to the moral principles the state should be trying to reinforce, I favor respect or moral accommodation for a broad range of family forms that are capable of providing nurturing environments to its members.¹⁶⁷

She states that "[i]n today's debates over the family, however, speaking in broad moral terms is too readily associated with one set of specific, conservative values to the exclusion of other values."¹⁶⁸ Since her model accepts a wide range of family types, she "usually find[s] moral terminology more confusing than helpful and [tries] to avoid it."¹⁶⁹ She argues that strengthening two-parent families is a valid policy goal since such families tend to be better for children, but that family-standardizing reform proposals such as proposals to restrict grounds for divorce are likely to have negative consequences for women and children.¹⁷⁰

Family law issues, like other legal issues, relate to moral questions. Family law's moral discourse has diminished in some respects and in some contexts. But in important ways, the moral concerns of family law have not simply declined but rather have shifted to concerns with fairness, equality, commitment and nurturing.¹⁷¹

¹⁶⁶ Bartlett, *Saving the Family from the Reformers*, *supra* note 96, at 843.

¹⁶⁷ *Id.* at 816.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *See id.* at 819-43.

¹⁷¹ *See supra* notes 155-170 and accompanying text.

III. THE EXCLUSION OF LESBIAN AND GAY MALE COUPLES FROM CIVIL MARRIAGE

Many lesbians and gay men are in long-term, committed couple relationships¹⁷² and many would marry if they were not prohibited from doing so.¹⁷³ Information from surveys of unmarried partners has shown that about 1.7 million unmarried households "are likely to be headed by same-sex couples."¹⁷⁴ Lesbian and gay male couples in the United States have been trying to obtain recognition of their unions as legal marriages for over twenty-five years.¹⁷⁵ Some courts in recent years have shown increased receptivity to such claims.¹⁷⁶ Most notably,

¹⁷² See Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage"*, 66 *FORDHAM L. REV.* 1699, 1726-27, 1729 (1998) [hereinafter Christensen, *If Not Marriage?*]; David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 *MICH. L. REV.* 447, 449 (1996). For example, in one study, 25% of the 560 gay male couples studied and 14% of the 706 lesbian couples studied had lived together for ten or more years. See A. Steve Biyan and Demian, *Relationship Characteristics of Gay and Lesbian Couples: Findings from a National Survey* <demian@buddybuddy.com> (an academic presentation of key findings from this survey also appears in 1(2) *J. OF GAY & LESBIAN SOC. SERVS.* (1994)); see also Lawrence A. Kurdek, *Lesbian and Gay Couples in LESBIAN, GAY, AND BISEXUAL IDENTITIES OVER THE LIFESPAN: PSYCHOLOGICAL PERSPECTIVES* 243, 243 (Anthony R. D'Augelli & Charlotte J. Patterson eds., 1995) (noting survey results that between 45% and 80% of lesbians and between 40% and 60% of gay men are currently involved in a romantic relationship). Also, "partners in same sex relationships score high on scales designed to measure attachment, caring and intimacy, with scores indistinguishable from heterosexual couples." REGAN, *supra* note 5, at 120.

¹⁷³ See ESKRIDGE, *supra* note 7, at 1-4; Chambers, *supra* note 172, at 450 n.7; Christensen, *If Not Marriage*, *supra* note 172, at 1726 n.162-63.. Not all lesbians and gay men see marriage as an ideal model and some define family in different ways. See Christensen, *Legal Ordering*, *supra* note 13, at 1304; see, e.g., Darren L. Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 *CONN. L. REV.* 561, 591-601 (1997) (arguing that securing legal marriage for gay male and lesbian couples is a questionable goal).

¹⁷⁴ Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 *LAW & INEQ.* 1, 2 (1998).

¹⁷⁵ See, e.g., *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) (stating that marriage by same-gender couples is not marriage).

¹⁷⁶ See *Brause v. Bureau of Vital Stats.*, No. 3AN-95-0562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998) (holding that because the right to choose one's life partner is fundamental, a ban on marriage by couples of the same gender must be justified by a compelling state interest in order to be constitutional under the state constitution); *Baehr v. Mille*, Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *rev'd and remanded*, 994 P.2d 566 (Haw. Dec. 9, 1999) (Hawaii trial judge holds state can not forbid marriage by same-gender couples). In earlier proceedings in the same case, a plurality of the Hawaii Supreme Court had held that the state's ban on marriage by same-gender couples had to be justified by a compelling state interest in order to be constitutional. See *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993), *modified by* 852 P.2d 74 (Haw. 1993). In November 1998, Alaska voters amended the state constitution to define marriage as between

the Vermont Supreme Court recently held that under the Vermont constitution, the state could not deny to same-sex couples "the common benefit, protection and security that Vermont law provides opposite-sex married couples."¹⁷⁷ The idea of marriage by same-gender couples has encountered major legislative resistance, with numerous states passing bans on marriage by same-gender couples in the past five years.¹⁷⁸ This section does not review the territory of whether such statutes are constitutional.¹⁷⁹ It instead examines the significance of the exclusion from marriage and argues that marriage of same-gender couples can foster positive connections between people and should be allowed.¹⁸⁰

a man and a woman only. See Carey Goldberg, *Vermont Supreme Court Takes Up Gay Marriage*, Nov. 19, 1998, N.Y.T. Abstracts 20, 1998 WL 22333334. In November 1998, Hawaii voters passed a constitutional amendment opposing the trial court's decision. See *id.*

¹⁷⁷ Baker v. Vermont, 1999 WL 1211709, at *20 (Dec. 20, 1999).

¹⁷⁸ See Appendix: State Anti Same-Sex Marriage Statutes, 16 QUINNIPIAC L. REV. 134 (1996). Also, although marriage is an area traditionally reserved to the states, Congress in 1997 passed the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419, codified at 1 U.S.C. § 728, 28 U.S.C. § 1738C which for the first time created a federal definition of marriage. Some of the states' anti-same-gender marriage statutes have been used as authority to deny other types of connections between gay couples. For example, Arizona's ban was used by the State Department of Corrections to justify forbidding any gay prisoner from holding hands with, hugging or kissing his or her partner at the beginning or end of a prison visit, although heterosexual couples were allowed such physical contact. See *infra* notes 207-12 and accompanying text. Pennsylvania's law was authority for a court's conclusion that two women could not adopt the biological child born to one of them. *In re Adoption of R.B.F. and R.C.F.* (Ct. of Common Pleas of Lancaster County, Pa. Oct. 22, 1998) (order dismissing adoption petition with prejudice).

¹⁷⁹ For arguments that such statutes are unconstitutional, see sources cited at *supra* note 7; see also Samuel A. Marcossion, *Romer and the Limits of Legitimacy: Stripping Opponents of Gay and Lesbian Rights of their "First Line of Defense" in the Same-Sex Marriage Fight*, 24 J. CONTEMP. L. 217 (1998).

¹⁸⁰ In arguing that marriage by same-gender couples be allowed, I am not arguing that such marriage will solve all or almost all problems faced by gay men and lesbians. As Darren Hutchinson has pointed out, for black and Latino lesbians and gay men, marriage may not make much, or any, difference. See Hutchinson, *supra* note 173, at 591. Hutchinson argues: "Because most gays and lesbians of color remain invisible and marginalized within the larger gay and lesbian community, it is extremely unlikely that a marriage license will close much of the gap between them and the center of a heterosexual society that is stratified by race, class, gender, and sexuality." *Id.* at 591. Accepting these assertions, however, does not make the denial of marriage to same-gender couples acceptable. Hutchinson also points out that "substantial sociological, historical, and anthropological research demonstrates that African-American blacks, and other non-white cultures place tremendous importance on 'extended families,' rather than rigid nuclear bodies, as a means of social organization and child-rearing. These patterns result from economic necessity and cultural practice." *Id.* at 592. Assuming that this expansive generalization is supported, it is clear that in the United States' legal system today, marriage nonetheless plays quite an important role. See GLENDON, TRANSFORMATION OF FAMILY LAW, *supra* note

A. *The Expressive Function—The Story Told by Law*

The "story told by law"¹⁸¹ about lesbian and gay coupled, committed relationships by the exclusion from marriage¹⁸² is that they do not exist or do not count.¹⁸³ Law tells all people that lesbians and gay men are lone individuals¹⁸⁴ despite the fact that they have "familistic" rela-

2. at 293 (noting that law in the United States remains quite marriage-centered although less so than in the past). The exclusion from it is thus also significant. Hutchinson further writes, "if gay marriage does not challenge racial, class, and gender inequality, then we should—in light of the 'multilayered and synergistic' nature of sexual subordination—continue to question its high priority and even legitimacy, as an instrument of gay and lesbian liberation." Hutchinson, *supra* note 173, at 601. As discussed *infra*, marriage by same-gender couples may challenge gender inequality. See *infra* notes 308, 315–16 and accompanying text. I agree that marriage by same-gender couples does not, in and of itself, challenge class or racial inequality. Few legal reforms challenge all these forms of inequality simultaneously, but that does not mean none should be pursued. Access to marriage nonetheless is important, despite the acknowledgment that it is not a panacea for inequality of various kinds, for several reasons including the following: First, marriage recognizes important connections between people. As Robin West says, "marriage just is, through and through, anti-individualistic. That is precisely its moral strength, and to no small measure the source of its immense appeal." West, *Universalism*, *supra* note 122, at 729. Second, the exclusion has negative practical consequences for many gay men and lesbians whatever their race or class. For example, the Family and Medical Leave Act does not require employers to provide leave so that an employee can care for his or her partner, only for a spouse or child. See *infra* note 241 and accompanying text. Third, the exclusion tells false stories about gay male and lesbian couples in committed relationships. Fourth, it stigmatizes all gay men and lesbians. This is not to claim that there are no more severe forms of stigma, or that all gay men and lesbians face only that stigma. Of course, racism may be a more severe form of stigma for African-American gay men and lesbians than the exclusion from marriage. Last, the exclusion is a denial of formal equality.

¹⁸¹ GLENDON, ABORTION AND DIVORCE, *supra* note 2, at 9.

¹⁸² The exclusion from marriage is an important exclusion. Although the legal significance of marriage has diminished, see Mary Ann Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 681 (1976), our law remains quite marriage-centered. See GLENDON, TRANSFORMATION OF FAMILY LAW, *supra* note 2, at 293–94.

¹⁸³ Marriage has great practical significance and also has symbolic significance. See Christensen, *If Not Marriage*, *supra* note 172, at 1746, 1783; Chambers, *What if?*, *supra* note 172, at 449. Marriage law involves a panoply of legal protections and burdens. See generally Chambers, *supra* note 172. A federal study by the General Accounting Office found 1049 federal statutes under which marital or spousal status affects an entitlement, right or obligation. Rep. No. GAO1, OCG 97–16, 1997 WL 67783 (Jan. 31, 1997). See also Fellows et al., *Committed Partners and Inheritance*, *supra* note 174; Matthew R. Dubois, *Legal Planning for Gay, Lesbian and Non-Traditional Elders*, 63 ALBANY L. REV. 263 (2000).

¹⁸⁴ Mary Ann Case has shown how in litigation of lesbian and gay issues other than marriage cases, couples are usually absent. See Mary Ann Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643 (1993). She also highlights cases where an individual employee is in a same-gender couple and open about it, and that fact is used against the employee. For a recent example, see *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc) (upholding state attorney general's decision to rescind job offer to female employee for participating in a wedding ceremony with another woman). She points out that in the few cases where courts

tionships.¹⁸⁵ This story is both false and stigmatizing.¹⁸⁶ The coupled, committed relationships of lesbians and gay men are, as noted above, "outside the law."¹⁸⁷ When such relationships end, through death or breakup, it is as though they never existed. While the law is not uniform, there are few exceptions to this principle.¹⁸⁸ The intersubjectivity of lesbian and gay male couples is unrecognized, no matter how long they have been together. Their interdependence, or the dependence of one on another for health or other reasons, generally is ignored. Since marriage is the quintessential, legally recognized way for two adults to "belong" to one another, refusing to recognize committed, coupled gay relationships consigns the members of such relationships to the impossibility of that kind of "belonging."¹⁸⁹ It thus prevents gay couples from attaining what benefits may come from such belonging and also deprives society of the benefits that may come from belonging. As Hafen claims, without "belonging, we may

have been able to recognize and accept a lesbian or gay couple, one of the partners is either dead, see *Braschi v. Stahl Assoc. Co.*, 544 N.Y.S.2d 784 (1989) (surviving partner of deceased tenant is "family member" within meaning of rent control statute), or seriously disabled, see *In re Guardianship of Kowalski*, 478 N.W.2d 790 (Minn. 1991), discussed *infra* at text accompanying notes 190–200. Cheshire Calhoun aptly has observed that an important subtext in debates about treatment of lesbian and gay male couples is the powerful but false notion that gay men and lesbians are incapable of romantic love and commitment. See Cheshire Calhoun, *Making Up Emotional People: The Case of Romantic Love*, in *THE PASSIONS OF LAW* 3, 24 (Susan Bandes, ed.) (forthcoming 1999). Law generally reflects this. The notion that gay men and lesbians are incapable of romantic love is the flip-side of the also incorrect notion that gay men and lesbians are defined by sexual activity, which is discussed further at Part IV.C.

¹⁸⁵ See Hafen, *Individualism and Autonomy*, *supra* note 4, at 23.

¹⁸⁶ See Calhoun, *supra* note 184 (highlighting stigmatizing conception of gay men and lesbians as possessing an excessive and unregulated sexuality and psychological inability to maintain stable relationships); Wiggins, *Questions of Constitutionality*, *supra* note 7, at 394–96 (arguing that exclusion of an entire group from marriage makes a negative statement about the group and that wholesale exclusion of gay men and lesbians from the institution, contrasted with the relaxed treatment of entry into marriage by heterosexuals, is stigmatizing). I am not claiming that the only valid form of relationship is a marriage-like relationship. A long-term, committed, marital relationship, however, can be a very important, challenging and satisfying part of life which brings benefits to the individuals involved, as well as society. See, e.g., *ESKRIDGE*, *supra* note 7, at 109–11; Ball, *supra* note 7, at 1938; Brinig, *supra* note 149, at 1600.

¹⁸⁷ See Christensen, *Legal Ordering*, *supra* note 13, at 1300–01.

¹⁸⁸ See, e.g., *Adoption of Tammy*, 416 Mass. 205, 207 (1993) (adoption by two women of biological child of one of the women allowed); *In re Guardianship of Kowalski*, 478 N.W.2d 790 (Minn. 1991) (lesbian may be guardian of her severely injured and disabled partner despite objections of injured person's parents); *Braschi v. Stahl Assoc. Co.*, 544 N.Y.S.2d 784 (1989) (holding that under New York rent control statute, long-term gay partner of deceased tenant was a "family member").

¹⁸⁹ See Hafen, *Individualism and Autonomy*, *supra* note 4, at 32.

never know . . . the reservoirs of strength and compassion we carry within ourselves. That is a loss not only to ourselves, but a major loss to society."¹⁹⁰ While family law, as Glendon points out, in its focus on individuals unfortunately often ignores actual intersubjectivity and interdependence, this is *even more true* with regard to gay people.¹⁹¹

"Familistic relationships," in work quoted by Hafen, "involve an intermingled and organic unity in which shared commitments of mutual attachment transcend self-interest. Such interaction derives from an unlimited personal commitment, not merely to another person but to the good of the relationship or the family entity as a larger order."¹⁹² This form of relationship, with "commitments of mutual attachment [that] transcend self-interest," is not limited to heterosexual couples.¹⁹³ Yet law generally ignores support, dependency, commitments, and "familistic behavior" between members of same-gender couples, as the following examples suggest.

The facts of *In re Guardianship of Sharon Kowalski*, provide an excellent illustration.¹⁹⁴ At the age of 27, Sharon Kowalski suffered severe brain injuries in a car accident. As a result of the accident, she needed to use a wheelchair for transportation and her memory and ability to speak were impaired.¹⁹⁵ At the time of the accident, she had been living, as a couple, with her lesbian partner, Karen Thompson, for four years.¹⁹⁶ They had exchanged rings and named each other as beneficiaries on their insurance policies, but Sharon's parents were not aware of Sharon's lesbian relationship.¹⁹⁷

After the accident, a dispute began concerning guardianship of Sharon between Sharon's parents and Karen.¹⁹⁸ Eventually, in 1991, eight years after Sharon's car accident, Karen was appointed Sharon's

¹⁹⁰ *Id.* at 38-40.

¹⁹¹ See GLENDON, *TRANSFORMATION OF FAMILY LAW*, *supra* note 2, at 297.

¹⁹² Hafen, *Individualism and Autonomy*, *supra* note 4, at 23.

¹⁹³ See REGAN, *supra* note 5, at 120 (moral aspiration of marriage is cultivation of a relational sense of identity not necessarily heterosexual intimacy); Ball, *supra* note 7, at 1936-42 (same-sex relationships are morally good and provide means for gay and lesbian people to connect with one another and achieve autonomy); Brinig, *supra* note 149, at 1600 (same-sex couples "can make the permanent commitment and exhibit the selfless loving and giving required for a covenant"); Michael Perry, *The Morality of Homosexual Conduct: A Response to John Finnis*, 9 NOTRE DAME J. L. ETHICS & PUB. POL'Y 41, 55(1995) (both heterosexual and homosexual relationships can be lifelong, monogamous, faithful, and loving).

¹⁹⁴ See 478 N.W.2d 790 (Minn. 1991).

¹⁹⁵ See *id.*

¹⁹⁶ See *id.*

¹⁹⁷ See *id.*

¹⁹⁸ See *id.* at 791-92.

guardian. Karen Thompson's continuing devotion to her disabled partner took many forms. Karen actively worked with Sharon three or more days a week on Sharon's therapy and daily skills. Karen was the only person willing to care for Sharon outside an institution, and she built a completely handicap-accessible home in the hope that Sharon could live there.¹⁹⁹ Karen was the person best able to motivate Sharon with her therapy.²⁰⁰ The nitty-gritty details are striking. Karen was often "the only one who can clean Sharon's mouth and teeth, since Sharon is apparently highly sensitive to invasion of her mouth."²⁰¹ By contrast, none of Sharon's biological relatives could care for Sharon outside an institution.²⁰² The actions taken by Karen Thompson with respect to her partner demonstrate the existence of a "familistic" relationship. Paraphrasing Hafén, through the mutually belonging relationship between Karen and Sharon, Karen apparently found "reservoirs of strength and compassion" within herself that she might not have known she had; society as well as Sharon have benefited.²⁰³

The situation of the couples in Vermont who are seeking to marry also reflects devotion and commitment. For example, Lois Farnham and Holly Puterbaugh, two of the plaintiffs in *Baker v. Vermont*,²⁰⁴ have been together as a couple for more than twenty-five years.²⁰⁵ Stan Baker and his partner Peter Harrigan, also plaintiffs in *Baker v. Vermont*, have been together as a couple for over four years.²⁰⁶

An example of the state's refusal to recognize any kind of connections between gay people is the Arizona Department of Corrections policy on contact between relatives during prison visitation.²⁰⁷ It allows for a "brief period of kissing and embracing for relatives and immediate family at the start and end of each visit," but forbids such

¹⁹⁹ See *Guardianship of Sharon Kowalski*, 478 N.W.2d at 793.

²⁰⁰ See *id.* at 793-94.

²⁰¹ See *id.* at 794. The court went on to write that: "Oral hygiene is crucial to prevent recurrence of a mouth fungus which can contribute to pain and tooth loss, further inhibiting Sharon's communication skills and her ability to eat solid foods." *Id.*

²⁰² See *id.* at 793.

²⁰³ See Hafén, *Individualism and Autonomy*, *supra* note 4, at 30. While the ultimate outcome was positive for Karen and Sharon, it took eight years to achieve. Had they been married, Karen's appropriateness as a guardian would have been assumed.

²⁰⁴ 1999 WL 1211709 (Dec. 20, 1999).

²⁰⁵ Leah Gardner, *Courting the Right to Marry*, VT. TIMES, Aug. 20, 1997 at 7.

²⁰⁶ *Id.* Regan also gives various examples of the commitments and bonds of gay male and lesbian couples. See REGAN, *supra* note 5, at 120-21. Other examples abound. See, e.g., ESKRIDGE, *supra* note 7, at 5-10.

²⁰⁷ Stephanie Innes, *Prison's Ban on Gay Contact Visits Challenged*, TUCSON CITIZEN, Sept. 15, 1997 available in 1997 WL 11147718.

contact between same-sex partners.²⁰⁸ When the policy was questioned, the Arizona Director of Corrections justified it based on the state's ban on same-sex marriages and a statute promoting strong families and family values.²⁰⁹ The Director wrote that "any policy condoning homosexual activity at visitation, amid families and children, would be contrary to state law."²¹⁰ The Director also wrote that "the Department recognizes the emotional hardships associated with having a loved one incarcerated and the impact imprisonment has on a family. Consequently, the Department allows limited contact between relatives during visitation."²¹¹ However, to allow gay couples to hug or kiss goodbye would be to "condone homosexual activity." The story told by the state is that it is not an emotional hardship for a gay or lesbian non-incarcerated person to have his or her loved one incarcerated if the loved one is of the same gender. The state sees the prisoner as neither a "loved one" nor a relative, so the relationship simply does not count.²¹²

In *re Estate of Hall* is an instructive example of law refusing to recognize commitment and dependence.²¹³ Hall and petitioner went through a private marriage ceremony. They commingled their funds. "They were dependent on each other for the maintenance and upkeep of their home as well as daily living expenses and necessities of life."²¹⁴ Their financial obligations "also included the financial support of Hall's sister and Hall's minor son."²¹⁵ When Hall died intestate, petitioner unsuccessfully sought a surviving spouse share under Illinois law. The holding denying relief to petitioner is less important than the facts—deep commitment demonstrated by a private marriage, dependence, financial support of each other and of others.²¹⁶

²⁰⁸ See Letter from Terry L. Stewart, Director, Arizona Department of Corrections, to Arizona House Representative Ken Chevront (Aug. 8, 1997) (on file with the author).

²⁰⁹ See *id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Also it is revealing that the Department considers hugging and kissing between gay people to be "homosexual activity," when it seems not to consider such activities between heterosexuals to be "heterosexual activity." See *infra* notes 377–87 and accompanying text.

²¹³ See 707 N.E.2d 201 (Ill. 1998).

²¹⁴ *Id.* at 203.

²¹⁵ *Id.*

²¹⁶ Many other examples could be listed. In *Rovira v. AT&T*, Sandra Rovira and her partner Marjorie Forlini had a private wedding ceremony and pooled their financial resources. 817 F. Supp. 1062, at 1064 (S.D.N.Y. 1993). Rovira's children from a prior marriage lived with Rovira and Forlini for ten years. Forlini died of cancer after the couple had been together for twelve years. See *id.* After Forlini died, Rovira and Forlini's children applied for Sickness Death Benefits from Forlini's employer, AT&T, which were denied by

"Familistic" relationships and relationships of mutual dependence and support between coupled adults are good for society, as well as the members of the relationship, and should be recognized and supported by law. It is not as if every long-term committed same-gender relationship necessarily involves "shared commitments of mutual attachment [that] transcend self-interest."²¹⁷ Nor does every marriage.²¹⁸ Many same-gender relationships, however, have these qualities.²¹⁹ The story told by the law that such relationships do not exist is not true and leaves the law at a dangerous disconnect from people's lives.²²⁰ It also stigmatizes gay and lesbian people.²²¹

The story of non-existence told by law has immense practical implications for gay and lesbian couples, discussed in more detail in Parts III.B and C below. The absence of the legal ordering provided by marriage (and divorce) means that lesbian and gay male couples can not rely on the default mechanisms of marriage to order their lives.²²² They live their lives as most couples do, having various under-

AT&T. The decision to deny benefits was upheld by the court. *See id.* In yet another example, Sherry Barone and Cynthia Friedman had been partners for thirteen years when Friedman found out she had cancer. They signed powers of attorney, wills, health care directives, written instructions to carry out wishes, and so on, to ensure that Barone would have control over, among other things, Friedman's burial. Yet, once Friedman died, the cemetery refused to allow the inscription she had wanted, "Beloved life partner, daughter, granddaughter, sister, and aunt." Barone had to sue in order to get the cemetery to follow her instructions, and after a year, the cemetery relented. GRAFF, *supra* note 55 at 48. In *Adams v. Howerton*, two men, one of whom was Australian and one of whom was a U.S. citizen, privately married and subsequently sought to have the Australian declared an "immediate relative," so he could permanently reside in this country. *See* 486 F. Supp. 1119, 1120 (C.D.Cal. 1980). *aff'd*, 673 F.2d 1036, 1038 (9th Cir. 1982), *cert. den.*, 458 U.S. 1111 (1982). Yet the INS declared, and a federal district court affirmed, that the Australian was not an immediate relative of the American, so that regardless of the bond between them the Australian would not be entitled to permanent residence status. *See id.* In *Coon v. Joseph*, a California court held that a plaintiff who had witnessed his partner being assaulted could not claim negligent infliction of emotional distress since he did not meet the "close relationship" test required to state a claim. *See* 192 Cal. App. 3d 1269 (1987).

²¹⁷ Hafén, *Individualism and Autonomy*, *supra* note 4, at 23.

²¹⁸ *See* Perry, *Morality of Homosexual Conduct*, *supra* note 193, at 56. Marriage does not require that partners have particular financial or living arrangements, nor does marriage law require the capacity for "familistic behavior" as a condition for entry into the institution.

²¹⁹ *See supra* notes 196-216 and accompanying text.

²²⁰ As Martha Minow states, "unless we start to make family law connect with how people really live, the law is either largely irrelevant or merely ideology: merely statements of the kinds of human arrangements the lawmakers do and do not endorse." Minow, *Redefining Families*, *supra* note 86, at 271.

²²¹ *See supra* note 184.

²²² These include intestacy laws, spouse's elective share laws, community property laws, laws providing for equitable distribution of marital property and alimony at divorce, and a

standings that may change over time but no written contracts, expecting never to become disabled, or break up, and not planning for death.²²³ If one partner dies without a will, this results in the application of state intestacy laws, which do not recognize same-gender partners.²²⁴ If one partner becomes disabled and needs a guardian, the other partner will not necessarily be recognized as a guardian.²²⁵ If such a couple breaks up and a member or members of the couple has property, legal confusion can result about who owns what.²²⁶ Disputes between ex-partners may result in painfully intrusive, expensive, time-consuming, and unpredictable litigation.²²⁷ Both Glendon and Schneider have noted the invasive, unpredictable, and unsatisfactory character of the *Marvin v. Marvin* litigation for unmarried heterosexual couples;²²⁸ the same problems arise for gay male and lesbian couples.

The story law should be telling is that coupled relationships between adults of the same gender involving "shared commitments of mutual attachment [that] transcend self-interest"²²⁹ are civil marriages

wide variety of other provisions. See Chambers, *What if?* *supra* note 172; Christensen, *If Not Marriage*, *supra* note 172; Christensen, *Legal Ordering*, *supra* note 13. These provisions not only reflect the expressive function, but also the protective function, because they are in part aimed at protecting the economically weaker party from disadvantage caused by the other's actions. For example, laws providing for equitable distribution of property are aimed at dividing property in a fair manner, regardless of which party has title.

²²³ See Martha M. Ertman, *Contractual Purgatory for Sexual Minorities: Not Heaven but Not Hell Either*, 73 DENV. U. L. REV. 1107, 1141 (1996) [hereinafter Ertman, *Contractual Purgatory*].

²²⁴ See Fellows et al., *supra* note 174, at 2. Efforts to inherit through intestacy laws are unavailing. See *In re Estate of Hall*, 707 N.E.2d 701 (1998) (discussed at text accompanying notes 213-16).

²²⁵ See *Guardianship of Sharon Kowalski*, 478 N.W.2d 790 (Minn. 1991), discussed at text accompanying notes 194-216.

²²⁶ By mentioning property disputes, it is not to be inferred that all lesbians and gay men are affluent. According to research by Professor Lee Badgett, "lesbians and gay men earn no more than heterosexual people; indeed, in some cases gay men appear to earn less than comparable heterosexual men." M.V. Lee Badgett, *Income Inflation: The Myth of Affluence Among Gay, Lesbian, and Bisexual Americans*, 2 NATIONAL GAY AND LESBIAN TASK FORCE POLICY INSTITUTE (1998) (visited Feb. 2, 2000) <<http://www.ngltf.org/pub>>.

²²⁷ See, e.g., *Hanselman v. Shepardson*, 1996 WL 99377 (S.D.N.Y. 1996) (describing property dispute between same-gender couple that had broken up, involving claims for breach of contract or quasi-contract, rescission of contract, fraud, misrepresentation and negligence). See generally Christensen, *Legal Ordering*, *supra* note 13. For disputes involving unmarried heterosexuals who lived together and split up, compare *Morone v. Morone*, 413 N.E.2d 1154 (N.Y. 1980) (enforcing only express contracts), with *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979) (failing to enforce even express contracts).

²²⁸ See *supra* notes 45-46.

²²⁹ Hafen, *Individualism and Autonomy*, *supra* note 4, at 23.

if the members of the couple choose to make them so.²³⁰ Concerns about the increased contractualization or individual orientation of family law, and about individuals making only limited investments in relationships, should lead to support of marriage by same-gender couples. Law should encourage members of married couples to be responsible for one another and for their dependents.²³¹ Marriage, whether between opposite-gender or same-gender couples, opposes atomism and recognizes positive, beneficial connections between members of a couple. This is a very good thing, especially in a society in which people (as Glendon, Schneider, Hafen, and others warn),²³² may be becoming increasingly self-oriented, less generous and less connected to one another.

Legally recognized civil marriage is the most practical boundary or shorthand for this goal of expressing a shared commitment,²³³ because as Hafen notes, "a boundary based on the degree of commitment to a relationship or individuals' expectations regarding a relationship's permanence would require intolerable inquiries into the most private realm of individuals' lives."²³⁴

Moreover, in accord with the "new Family Morality" as outlined by Cahn,²³⁵ which is based on moral values of "equity, fairness, commitment and nurturance,"²³⁶ the expressive message that law should be sending is that coupled, intimate, same-gender, committed relationships exist and are positive for the individuals involved as well as for society. Allowing such marriage does not require a radical redefinition of the family, but rather simply a fair expansion of those

²³⁰ And, of course, provided they meet other requirements of marriage, such as being of age and not already being married. The Vermont Supreme Court's decision in *Baker v. Vermont* acknowledges that the extension of marriage to same-gender couples is a matter of recognizing commitment and, at a deeper level, commonality between human beings. The court wrote "[t]he extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity." *Baker v. Vermont*, 1999 WL 1211709, at *23.

²³¹ See *supra* Part II.D; Minow, *Redefining Families*, *supra* note 86, at 282 (arguing that law should be flexible regarding entry into families but should enforce family duties).

²³² See *supra* Part II.A; *supra* note 4. Crucially, nothing about "belonging" is inherently heterosexual.

²³³ See Bartlett, *Saving the Family from the Reformers*, *supra* note 96, at 815-16 (noting that marriage remains an important ideal).

²³⁴ Hafen, *Constitutional Status*, *supra* note 4, at 487. See Christensen, *Legal Ordering*, *supra* note 13, at 1321-22.

²³⁵ Cahn, *Review Essay: The Moral Complexities of Family Law*, *supra* note 96, at 245.

²³⁶ *Id.* at 238.

entitled to marry.²³⁷ As Regan says in support of marriage by same-gender couples, "the moral aspiration that marriage has expressed is not heterosexual intimacy per se, but the more general vision of responsibility based on the cultivation of a relational sense of identity."²³⁸

B. *The Facilitative, Protective, and Dispute Resolution Functions*

Three of the most important functions of family law are the protective, facilitative, and dispute resolution functions.²³⁹ By excluding gay people from marriage, the law performs these functions less effectively than if lesbian and gay male couples were allowed to marry.

The facilitative function "help[s] people organize their lives and affairs in the ways they prefer."²⁴⁰ Many of the laws concerning marriage perform a facilitative function.²⁴¹ These range widely. For example, the Family and Medical Leave Act requires employers to offer unpaid leave of up to twelve weeks annually to a qualified employee to care for a spouse with a serious health problem.²⁴² Leave is also allowed for an employee to care for parents and children but not for anyone else. Taxation provisions allow spouses to transfer property between themselves without subjecting them to gift tax.²⁴³ These types of provisions facilitate couples' financial and personal bonds, encouraging mutual care, dependence, and support. Lesbian and gay male couples are left out of these facilitative provisions.

²³⁷ Indeed, one need not embrace the entire "new Family Morality" outlined by Calin in order to recognize marriage by same-gender couples.

²³⁸ REGAN, *supra* note 5, at 120.

²³⁹ Schneider, *The Channelling Function*, *supra* note 1, at 497, 505-06.

²⁴⁰ *Id.* at 497.

²⁴¹ Chambers, *What if?*, *supra* note 172, at 485. Many elements of law have overlapping functions. For example, the Family and Medical Leave Act, 29 U.S.C. §§ 2611, 2612(a)(1)(c) (1994), has a facilitative function in that it helps employees care for sick relatives without losing their jobs. It also has an expressive function, in the limitations it sets on who can care for whom; part of its expressive message is that gay couples' relationships do not count.

²⁴² See 29 U.S.C. §§ 2611, 2612(a)(1)(c).

²⁴³ To take a concrete example, if a gay person owns a house, then falls in love with someone, the partner moves into the house, and the homeowner puts the house in joint tenancy to reflect the couple's closeness and financial intertwinedness, this could be a taxable gift by the original homeowner to the new joint tenant. See 26 U.S.C. § 2503 (1994). On the same facts, if the couple consisted of opposite sex partners, they got married and the homeowner put the house in joint tenancy, this would not be a taxable gift. The gay person's situation is treated the same as if a person owns a house, and puts a stranger on the deed. 26 U.S.C. § 2503 (1994). See BORIS I. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* ¶ 123.3, P-123-5(2) (2d. ed. 1993).

But the facilitative function, for Schneider, also is concerned with individual ordering. As Schneider notes, law's facilitative function "offer[s] people the law's services in entering and enforcing contracts, by giving legal effect to their private arrangements."²⁴⁴

Given the exclusion from marriage, gay male and lesbian couples can attempt to order their material arrangements through individual devices such as wills or written contracts and try to rely on family law's facilitative function in enforcing contracts and giving effect to intentions. Certainly a will is a good idea, but many people can not afford the usual legal fees, and wills are sometimes challenged by family members.²⁴⁵ Contracts between members of gay couples may or may not be enforceable.²⁴⁶ Moreover, as Craig Christensen has shown, the panoply of legal responsibilities and benefits afforded by marriage can not be constructed from individuals' contracts.²⁴⁷

In addition, as Hafen, Schneider, Glendon, and others have argued,²⁴⁸ the move to contract in family law is not an unmitigated good.²⁴⁹ Ordering intimate relationships through bargained-for contracts may protect the more powerful person²⁵⁰ and encourage the

²⁴⁴ Schneider, *The Channelling Function*, *supra* note 1, at 497.

²⁴⁵ GRAFF, *supra* note 55, at 49.

²⁴⁶ See Christensen, *If Not Marriage*, *supra* note 172, at 1733 n.213; Christensen, *Legal Ordering*, *supra* note 13, at 1341, 1344-1347; Ertman, *Contractual Purgatory*, *supra* note 223, at 1138. Ertman notes that it seems that "the best way to maximize the likelihood of judicial enforcement of gay couples' cohabitation contracts is to expressly formulate them as business agreements omitting any mention of the parties' relationship." Ertman, *Contractual Purgatory*, *supra* note 223, at 1138. See, e.g., Posik v. Layton, 695 So.2d 759 (Fla. Dist. App. 1997) (holding enforceable a written agreement providing that if Posik breached agreement she would pay Layton \$2500 per month for rest of Layton's life), Crooke v. Gilden, 414 S.E.2d 645 (Ga. 1992) (upholding contract between lesbian couple for joint ownership and division of real property, reversing trial court's decision that contract was void because parties' "illegal and immoral" sexual relationship implicitly was part of contract).

²⁴⁷ Christensen, *If Not Marriage*, *supra* note 172, at 1733-34; Christensen, *Legal Ordering*, *supra* note 13, at 1321-22. Even when members of a couple contract with each other, this does not change the couple's situation in relation to third parties. For example, as Christensen points out, an individual may try and negotiate with his employer to have the employer pay for the health insurance of the life partner, but this is unlikely to be successful. See *id.* at 1346. Ertman argues that enforcement of gay couples' contracts is better than nothing; this is not disputed. Ertman, *Contractual Purgatory*, *supra* note 223, at 1110.

²⁴⁸ See *supra* notes 86-89 and accompanying text.

²⁴⁹ But see Scott, *Relational Contract*, *supra* note 1; Ertman, *Commercializing Marriage*, *supra* note 86.

²⁵⁰ See *supra* notes 86-89 and accompanying text; Fellows et al., *Committed Partners and Inheritance*, *supra* note 174, at 19-22; Silbaugh, *Family Economy*, *supra* note 14, at 134. The facilitative function of enforcing contracts stands in some tension with the aspect of the

parties to think in self-oriented, rather than familistic terms.²⁵¹ Moreover, it is impractical and undesirable for gay male and lesbian couples to have to order their lives together by written contracts.²⁵² Thus, this aspect of the facilitative function does not substitute for marriage.

Regarding the protective function, several things should be acknowledged. First, family law in general does not fulfill the protective function particularly well.²⁵³ Second, most states' laws about domestic violence, a classic example of the current protective function,²⁵⁴ do not exclude gay or lesbian couples.²⁵⁵ Reports exist that gay and lesbian victims of domestic violence often do not get effective help through the court system even when the laws cover their situation.²⁵⁶ Perhaps marriage by same-gender couples would persuade judges and other court personnel to take such abuse more seriously.²⁵⁷

protective function, which is supposed to protect against economic harms, in view of unequal bargaining power between parties.

²⁵¹ See *supra* notes 72-75 and accompanying text.

²⁵² See Christensen, *If Not Marriage*, *supra* note 172, at 1733; Christensen, *Legal Ordering*, *supra* note 13, at 1344-47.

²⁵³ Domestic violence "is a societal problem of epidemic proportions." Deborah Goelman & Roberta Valente, *When Will They Ever Learn? Education to End Domestic Violence: A Law School Report 1*, ABA Commission on Domestic Violence (1997). The exact incidence of domestic violence is impossible to determine, but it is common. KATHERINE T. BARTLETT & ANGELA HARRIS, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 561-565 (2d ed. 1998). Abuse of children is also a major problem. See Amy Sinden, *In Search of Affirmative Duties Toward Children under a Post-DeShaney Constitution*, 139 U. PA. L. REV. 227 (1990).

²⁵⁴ See Schneider, *The Channelling Function*, *supra* note 1, at 497.

²⁵⁵ See Sandra E. Lundy, *Abuse That Dare Not Speak its Name: Assisting Victims of Lesbian and Gay Domestic Violence in Massachusetts*, 28 NEW. ENG. L. REV. 273, 292 n.105 (1994). Some states' statutes, however, apply only to heterosexual couples. See *id.* In addition, problems initially arose with some statutes' application to gay and lesbian couples. For example, prior to statutory amendments, Maine's law stated that one could seek a protective order if the parties were or had been "spouses or living as spouses." A trial judge dismissed a complaint by a lesbian against her allegedly abusive partner, reasoning that because lesbians could not marry one another they could not live "as spouses." Thus, the alleged victim could not seek relief under the statute. *Sax v. Bowler*, No. 87-CV-PA-697 (Maine Dist. Ct. Dec. 1, 1987) (order dismissing complaint). But see *State v. Hadinger*, 573 N.E.2d 1191, 1192 (Ohio Ct. App. 1991) (holding that two people of the same gender can be living "as . . . spouse[s]" with one another for purposes of application of the domestic violence statute).

²⁵⁶ See generally Lundy, *Abuse that Dare Not Speak its Name*, *supra* note 255.

²⁵⁷ It may seem somewhat surprising to bring up domestic abuse in the context of marriage and to speculate that marriage may increase sensitivity to domestic abuse, given the history of ignoring abuse in marriage. Marriage does not provide an excuse for ignoring abuse, however, and perhaps recent increased awareness of dynamics within relationships may make courts more responsive when a gay married partner abuses his or her spouse. As Hafen notes, "the new skepticism about relationships of dependency has exposed certain

Another aspect of the protective function is "protecting people from economic harms and psychological injuries."²⁵⁸ State intervention to protect from such injuries in an ongoing marriage is, and should be, rare.²⁵⁹ Current divorce law is not an inspiring model of protections against economic harms or psychological injuries.²⁶⁰ Nonetheless, the mechanisms of alimony and equitable distribution of property provide the potential for some protection, at least, for the economically weaker party.²⁶¹ By contrast, where there is no marriage, there is no mechanism to seek long-term or short-term support for a dependent party when a relationship ends. There is no practical mechanism to distribute real property between the title holder and the other partner.²⁶²

Regarding dispute resolution, procedural and substantive assistance are both lacking. The vast majority of states now have laws that either require or recommend mediation for family disputes.²⁶³ Family law is the area in which mediation is most frequently mandated.²⁶⁴ No mediation process exists for property or custody disputes between same-gender couples, and the legal principles available for married couples to deal with inequality in ownership of property when a relationship breaks up are absent. The legal system should be available if

patterns of abuse and domination that cried out for closer public and legal scrutiny." Hafen, *Individualism and Autonomy*, *supra* note 4, at 38.

²⁵⁸ Schneider, *The Channelling Function*, *supra* note 1, at 497.

²⁵⁹ See Baker, *supra* note 124, at 1535-38 (describing reasons law generally should not intervene in ongoing horizontal relationships).

²⁶⁰ Numerous scholars have written about how divorce, for example, does not protect the less economically powerful spouse. See, e.g., MARTHA F. FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991); Ertman, *Commercializing Marriage*, *supra* note 86, at 17-22, 31; Schneider, *The Channelling Function*, *supra* note 1, at 497.

²⁶¹ It is difficult to analyze how current divorce law protects from psychological injuries. Although it was hoped that no-fault divorce would reduce the acrimony in divorces, it is not clear if that has taken place. Spouses now often can sue after marriage for torts such as intentional infliction of emotional distress during the marriage. See *Hakkila v. Hakkila*, 812 P.2d 1320, 1326-27 (N.M. 1991); *McCoy v. Cooke*, 419 N.W.2d 44, 46 (Mich. App. 1988); *Courtney v. Courtney*, 413 S.E.2d 418, 420 (W. Va. 1991); *Stuart v. Stuart*, 421 N.W.2d 505 (Wisc. 1988). It is not clear, however, if that threat serves as a deterrent and thus protects against psychological injuries.

²⁶² See Chambers, *What If?*, *supra* note 172, at 478-83.

²⁶³ See NANCY H. ROGERS & CRAIG A. McEWEN, *MEDIATION: LAW, POLICY AND PRACTICE* App. B, Cum. Supp. 149-251 (2d. ed. 1998).

²⁶⁴ See *id.* § 7.01, ch. 7 p. 4.

a relationship breaks up to ensure that the less powerful party is protected.²⁶⁵

C. *The Channelling Function*

According to Schneider, the channelling function works through social institutions, "which are thought to serve desirable ends," such as marriage.²⁶⁶ The institutions used in channelling "necessarily have normative components."²⁶⁷ Not being allowed to be part of an institution is a channelling mechanism in itself; being treated as a legal stranger to one's mate is an example of law's channelling function in action.²⁶⁸

Channelling institutions create clear boundaries and impose expectations, providing useful models for people and sparing people the necessity of making up rules and institutions from scratch.²⁶⁹ To illustrate this, Schneider invokes the image of "two nineteen-year-olds living in a state of nature who find themselves in love," and discusses how marriage customs and law in the mid-twentieth century would guide, but not coerce, them.²⁷⁰ He does not identify the race or gender of the nineteen-year-olds. But he seems to be assuming that they are of different genders, since two nineteen-year-olds of the same gender who found themselves in love in the mid-twentieth century would not have been provided guidance from law or custom about what to do to live out their love.²⁷¹ He also seems to be assuming that

²⁶⁵ There are major issues about how well the law currently performs this function in the context of divorce. It is designed, however, more for that function than the law concerning strangers. See *supra* note 260.

²⁶⁶ Schneider, *The Channelling Function*, *supra* note 1, at 498.

²⁶⁷ See *id.* at 529.

²⁶⁸ See *id.* at 510.

²⁶⁹ See *id.* at 507-11.

²⁷⁰ *Id.* at 508.

²⁷¹ Two nineteen-year-olds of the same gender who found themselves in love in the mid-twentieth century indeed would be likely to have had a difficult time acting on their feelings. The 1950s were the heyday of the psychiatric notion that homosexuality was sick. For example, in 1952 the American Psychiatric Association, *Diagnostic and Statistic Manual, Mental Disorders (DSM-I)* listed homosexuality as a sociopathic personality disturbance. NEIL MILLER, *OUT OF THE PAST: GAY AND LESBIAN HISTORY FROM 1869 TO THE PRESENT* 249 (1995). During that period, gays were frequently dismissed from government and other jobs simply because of their homosexuality (or suspicions of same) and there was an "atmosphere of persecution and purge nationwide." *Id.* at 271. Given the situation in the 1950s, the hypothetical same-gender nineteen-year-olds might simply have been isolated and not fallen in love. In *The Channelling Function*, Schneider discusses a hypothetical legislator who posits a "normative model of 'marriage' with several fundamental characteristics. It is monogamous, heterosexual, and permanent." Schneider, *The Channelling Function*,

they are of the same race, because an interracial couple in the mid-1950s probably could not marry legally, and even if they could, custom would impose severe sanctions on the couple.²⁷² Channelling thus works not to urge any two hypothetical nineteen-year-olds into the tried-and-true positive institution of marriage, but only certain nineteen-year-olds deemed by law and custom to be suitable for one another. This is not very different from what Schneider says the channelling function does,²⁷³ but it illustrates that examples of channelling which are assumed at first to represent general guidance toward a general good actually may be founded on unspoken but strictly enforced exclusions and coercion.

In discussing the workings of the channelling function, Schneider analogizes marriage to tennis, pointing out that participants in tennis benefit from rules already being in place and that participants

supra note 1, at 500-01. The legislator writes "standards" for entry into marriage "which prohibit homosexual unions." *Id.* at 502. Thus, it appears that the two nineteen-year-olds are intended to be of different genders.

²⁷² In 1955, "[m]ore than half of the States of the Union [had] miscegenation statutes." *Naim v. Naim*, 87 S.E.2d 749, 753 (Va. 1955). In the 1950s, Alabama, for example, still criminally prosecuted violations of its miscegenation statute and Virginia still enforced its prohibitions. Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia 1860s-1960s*, 70 CHI. KENT L. REV. 371, 412, 416 (1994). Gunnar Myrdal in 1944 noted the centrality of the bans on racial intermarriage for the system of white supremacy. GUNNAR MYRDAL, *AN AMERICAN DILEMMA* 606 (1944). Arnold Rose, in his official summary of Myrdal's book, wrote "[e]ven in the northern states where, for the most part, intermarriage is not barred by law, mixed couples are punished by nearly complete social ostracism." ARNOLD ROSE, *THE NEGRO IN AMERICA* 22 (1948); see also Morgan, *supra* note 128 (describing prosecutions of prominent champion black boxer Jack Johnson in 1920s for violation of Mann Act because he married white women and hired white women prostitutes). The idea of black men socializing with white women has continued past the 1950s to be racially charged for many. For example, in 1981 a black man in Alabama was lynched; suggestions were made in the community that he was killed for socializing with white women or was mistaken for a co-worker who socialized with white women. N.Y. TIMES, July 28, 1981, at A12, col. 6. Three white men arrested for the murder were released after a grand jury refused to issue indictments. *Id.* at A12, col. 6. Given the barriers of racism, racist violence and segregation of the 1950s, the hypothetical nineteen-year-olds might well never have met or fallen in love. And if the hypothetical nineteen-year-olds were of different races and of the same gender, their romance seems even less likely.

²⁷³ Schneider notes that "channelling's worth in any particular instance will depend on the specific institutions it supports. Even if an institution serves the function's ends well, it must be evaluated in terms of all its social consequences." Schneider, *The Channelling Function*, *supra* note 1, at 522. The major mechanisms of channelling to him are to create social institutions and to channel people into them through several methods. One method is recognizing and endorsing the institution; another is rewarding participation in an institution; a third is disfavoring competing institutions; a fourth is penalizing non-use of an institution. See *id.* at 503-04. "By and large, then, the channelling function does not primarily use direct legal coercion." *Id.* at 504.

who try and make up rules from scratch would be less likely to invent as good a game as that which already exists. "Tennis, in other words, succeeds because it is a shared and well-established institution. Marriage and parenthood benefit from that same fact."²⁷⁴ This analogy highlights the benefit of having rules, which of course are considerable,²⁷⁵ but provides no way of thinking about whether the actual rules are fair or otherwise beneficial.²⁷⁶ Schneider is correct to note that family law institutions have a normative component and inevitably channel (or attempt to channel) people in certain directions.²⁷⁷

The structure of excluding gay male and lesbian couples from marriage may be seen as trying to channel people who have a same-gender sexual orientation into either marrying someone of the opposite gender or into spending their lives without a mate. Regarding the first option, as Mark Strasser points out, "it is unlikely that a marriage between an individual with a same-sex orientation and an individual with an opposite-sex orientation would be happy or stable."²⁷⁸ Unhappy and unstable marriages tend not to be good for the participants or the wider society and are likely to end up as divorces, which can have their own negative consequences.²⁷⁹ Thus, if this is what the channelling function is trying to do, it is not a sensible goal. Regarding the second option, of channelling gay men and lesbians into perpetually single lives, this seems counterproductive given the positive consequences that intimate, stable relationships have for couples, and thus for society as a whole, regardless of gender.²⁸⁰

²⁷⁴ Schneider, *The Channelling Function*, *supra* note 1, at 511.

²⁷⁵ See *supra* notes 250–62 and accompanying text (pointing out importance of statutory mechanisms such as equitable property distribution, alimony, and alternative dispute resolution).

²⁷⁶ See Baker, *Property Rules*, *supra* note 124, at 153 n.159 (discussing Schneider's tennis game analogy and showing that fact that a game has rules does not mean that rules are fair or equally challenging to all participants). In the case of marriage law historically, the rules have been tremendously unfair to women. See *supra* notes 108–130 and accompanying text. Currently, marriage laws are tremendously unfair to gay men and lesbians.

²⁷⁷ See, e.g., Bartlett, *Saving the Family from the Reformers*, *supra* note 96, at 816 (noting that family law is infused with moral concerns).

²⁷⁸ STRASSER, *supra* note 7, at 72.

²⁷⁹ See Bartlett, *Saving the Family from the Reformers*, *supra* note 96, at 819–22 n.124 (reviewing scholarship about divorce and its correlations with child poverty and other negative factors).

²⁸⁰ As the Vermont Supreme Court wrote, "[t]he state's interest in extending official recognition and legal protection to the professed commitment of two individuals to a lasting relationship of mutual affection is predicated on the belief that legal support of a couple's commitment provides stability for the individuals, their family, and the broader

The current channelling also makes no sense because it treats so differently relationships that are the same or equivalent.²⁸¹ Intimate, committed, coupled, same-gender relationships should be treated the same by law, in that participants in them should be able to marry, for numerous reasons. First, they are subjectively the same (or equivalent) to the participants. They should be valued for the same reasons that marriages are valued. Various types of marriage relationships are valued in this society.²⁸² As Carlos Ball points out, "the normative value of a committed homosexual relationship is just as high—the affection, the love, the fidelity, the commitment are the same as in a committed heterosexual relationship."²⁸³ In addition to being morally good, long-term intimate dependent or interdependent relationships also can have positive instrumental consequences: they can foster individuals' stability and health.²⁸⁴ Healthy, happy, stable, supported individuals in turn tend to contribute more to communities than do unhealthy, unhappy individuals. Resource-pooling by couples is helpful for economic independence and stability for the couple (and hence for the community) because of the economies of scale involved. In a committed couple relationship, where one partner becomes ill, the other partner often cares for the ill partner, providing family care that does not need to be provided by the state.²⁸⁵ This benefits both the individuals involved and the state. Moreover, full inclusion of gay couples in society will further full participation by gay people in society which is a worthwhile goal.²⁸⁶ A society where people are disconnected from one another is a society in danger of disinte-

community." *Baker v. Vermont*, 1999 WL 1211709, at *20 (Dec. 20, 1999); see *Baker*, *supra* note 124, at 1530–38; Becker, *Two are Better*, *supra* note 82; GRAFF, *supra* note 55, at 45–48.

²⁸¹ See Ball, *supra* note 7, at 1938.

²⁸² See Hafen, *Constitutional Status*, *supra* note 4, at 490 (noting variety of acceptable family forms).

²⁸³ Ball, *supra* note 7, at 1938.

²⁸⁴ See GRAFF, *supra* note 55, at 45–48. See generally REGAN, *supra* note 5; Becker, *Two are Better*, *supra* note 82.

²⁸⁵ GLENDON, *TRANSFORMATION OF FAMILY LAW*, *supra* note 2, at 307 (noting that much care of dependents is provided within the family); see, e.g., *In re Guardianship of Kowalski*, 478 N.W.2d 790 (Minn. 1991).

²⁸⁶ Carlos Ball has thoughtfully written of perfectionist liberal theory as providing a discourse favoring marriage by same-gender couples. See Ball, *supra* note 7. Linda McClain also recently made an argument for toleration as respect, which argues that the "prohibition of same-sex marriage imposes an intolerant, unjust, and sectarian governmental orthodoxy about gender." McClain, *supra* note 7, at 121.

gration; law plays an important role in furthering and supporting connections between people.²⁸⁷

Gay couples currently are unable to reproduce biologically with one another. Yet this should not be a basis for the law's current channelling activity.²⁸⁸ The United States Supreme Court has made clear that reproduction is not critical to marriage.²⁸⁹ In *Turner v. Safley*,²⁹⁰ which dealt with constitutionality of marriage restrictions on prison inmates, the Supreme Court discussed what attributes of marriage remained after taking into account incarceration:

[i]nmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition . . . the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be consummated. Finally, marital status often is a precondition to the receipt of government benefits . . . property rights . . . and other, less tangible benefits.²⁹¹

²⁸⁷ GLENDON, TRANSFORMATION OF FAMILY LAW, *supra* note 2, at 306–13. As Schneider says, “[f]or people to be moved to help each other, they need some sense of commonality with them—some sense that their fellow citizens are people like themselves, whose experiences, concerns, and interests they can at least understand and to some degree share. Social institutions help provide such a sense.” Schneider, *Channelling Function*, *supra* note 1, at 511. Extending this observation, the exclusion from marriage reduces the “sense of commonality” that heterosexuals otherwise might feel with gay men and lesbians. Glendon notes that the extent of law’s influence is difficult to measure. It is easy to exaggerate law’s influence, yet that influence is significant and must not be ignored. See GLENDON, TRANSFORMATION OF FAMILY LAW, *supra* note 2, at 311–13. Schneider also notes the difficulty of measuring the consequences of legal programs. See Schneider, *Channelling Function*, *supra* note 1, at 521–22.

²⁸⁸ For example, in Hafen’s discussion of “belonging,” there is no requirement that the “belonging” be related to procreation, although of course often it is related to parenting and children. See Hafen, *Individualism and Autonomy*, *supra* note 4. He writes that the lack of “belonging” and the demands it makes, are “a major loss to society,” but procreation is not a necessary or sufficient condition for belonging. See *id.* at 41.

²⁸⁹ For example, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court decided that the state could not bar access of married couples to contraceptives, thus showing that the state could not decide that procreation was essential to marriage.

²⁹⁰ 482 U.S. 78 (1987).

²⁹¹ 482 U.S. at 96.

Moreover, childless heterosexual couples are recognized as fully married²⁹² as are infertile or elderly couples who marry.²⁹³ Many gay couples raise children whether they are from prior relationships or come into the family through adoption or assisted conception.²⁹⁴ As Craig Christensen has shown, marriage would benefit these children.²⁹⁵ We are past the time, if indeed there ever was such a time, when unitary principles can be applied in all circumstances to all marriages.²⁹⁶ The normative goals of marriage generally are furthered by extending marriage to same-gender couples.

Perhaps the idea is that channelling everyone into heterosexual marriage or life without a mate is a good thing because same-gender, intimate, committed, couple relationships are immoral and, therefore, should be discouraged by family law's mechanisms.²⁹⁷ Same-

²⁹² See Hafen, *Constitutional Status*, *supra* note 4, at 490 (noting variety of acceptable family forms including childless marriages). Glendon has proposed that there should be a particular set of divorce rules designed for childless couples where marriages of short duration end. See GLENDON, *ABORTION AND DIVORCE*, *supra* note 2, at 103.

²⁹³ There is a scholarly debate about the ethical and moral significance of sexual activity between heterosexual married members of a sterile couple as compared to the ethical and moral significance of sex between members of a gay male or lesbian couple. See, e.g., Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 287 (1995) (arguing that there is no significant ethical difference between the two situations.); Gerald Bradley & Robert P. George, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301 (1995) (arguing that justifying point of sexual relations between spouses is not pleasure or expressions of feeling but is intrinsic good of marriage considered as one-flesh communion of spouses actualized by acts which, qua reproductive acts, unite spouses biologically); Patrick Lee & Robert P. George, *What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union*, 42 AM. J. JURIS. 135, 150 (1997) (arguing that heterosexual couples "who engage in a reproductive type act, truly become one body, one organism," and that this difference between heterosexual sex and homosexual sex is morally significant); John M. Finnis, *Law, Morality, and "Sexual Orientation"*, 69 NOTRE DAME L. REV. 1049, 1066 (1994) (arguing that "union of reproductive organs of husband and wife unites them biologically, and this unites them personally, whereas gay couples' sexual activity can not make them a biological and therefore a personal unit"); Koppelman, *Is Marriage Inherently Heterosexual?*, *supra* note 21, 51, 62-95 (arguing that even if marriage is noninstrumental good, it is not necessarily heterosexual and couples do not need to engage in "sexual acts of the reproductive kind" in order to realize its goods).

²⁹⁴ See Christensen, *If Not Marriage*, *supra* note 172, at 1759-68; Christensen, *Legal Ordering*, *supra* note 13.

²⁹⁵ Christensen, *If Not Marriage*, *supra* note 172, at 1759-68; Christensen, *Legal Ordering*, *supra* note 13. The trial court in *Baehr v. Miike* came to a similar conclusion. See Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

²⁹⁶ As Schneider writes, "I doubt that you can go home again, and even if you could, I doubt you would enjoy it." Schneider, *Moral Discourse*, *supra* note 1, at 1808.

²⁹⁷ This notion is basically equivalent to the argument that gay people, by seeking access to marriage, are "repudiating morality," made by Wardle in *Efforts to Legitimate*, *supra* note 19. This argument is discussed in more detail in Part IV.C, *infra*.

gender relationships, however, are not immoral and in fact can be normatively good.²⁹⁸ The current channelling of gay people into either perpetually single lives or heterosexual marriage is therefore both counterproductive and destructive, because it discourages normatively good relationships. Family law models that are rooted in moral concerns, such as Bartlett's, Cahn's, Minow's, and Regan's, all support marriage by same-gender couples.²⁹⁹

IV. ARGUMENTS AGAINST ALLOWING MARRIAGE BY SAME-GENDER COUPLES AND RESPONSES TO THESE ARGUMENTS

Those opposed to marriage by same-gender couples would likely respond that the current story of non-recognition is exactly the "story that should be told by law." Law should "channel" people into heterosexual marriage. The question remains as to *why* law should tell this story; why should this channelling be attempted, given all the observations that have been made above? There is a growing literature on this topic.³⁰⁰ This section will discuss several arguments recently made against marriage by same-gender couples,³⁰¹ and will oppose those

²⁹⁸ See REGAN, *supra* note 5, at 120; Ball, *supra* note 7, at 1936-1942; Brinig, *supra* note 149, at 1600; Michael Perry, *The Morality of Homosexual Conduct: A Response to John Finnis*, 9 NOTRE DAME J. L. ETHICS & PUB. POL'Y 41, 55 (1995). See Part IV.C for further discussion.

²⁹⁹ Bartlett writes that "reforms . . . such as gay and lesbian marriage, are also supportable" within her "family-enabling model of reform." Bartlett, *Saving the Family from the Reformers*, *supra* note 96, at 854. Cahn's idea of a "new Family Morality," based on values of commitment, caring and equity, recognizes that efforts to allow same-gender couples to marry "reflect the importance and value of marriage and represent efforts to strengthen, not undermine the institution." Cahn, *Review Essay: The Moral Complexities of Family Law*, *supra* note 96, at 246. Minow's idea that we should create welcoming rules governing entry into families and be strict about enforcing family responsibilities, leads to allowing gay men and lesbians to be family members. Minow, *All in the Family*, *supra* note 5, at 307; Minow, *Redefining Families*, *supra* note 86, at 280-82. Regarding the view that gay men and lesbians should be excluded from family membership, she writes, "[i]t will not do . . . to support this view by reference to nature, convention, or even religion. Many religions are themselves struggling with these questions. Some are performing marriages of gays and lesbians, and some are ordaining gay and lesbian clergy. Minow, *All in the Family*, *supra* note 5, at 283-84. Regan's retooled status-based model of marriage calls for recognition of marriage by same-gender couples. See REGAN, *supra* note 5, at 120.

³⁰⁰ See *supra* notes 7, 21 and 193. For scholarship opposed to marriage by same-gender couples, see, for example, Bradley & George, *supra* note 293; David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1 (1997); Finnis, *Law, Morality and "Sexual Orientation"*, *supra* note 293; Lee & George, *What Sex Can Be*, *supra* note 293; Raymond O'Brien, *Single-Gender Marriage: A Religious Perspective*, 7 TEMP. POL. & CIV. RTS. L. REV. 429 (1998); Wardle, *Efforts to Legitimate*, *supra* note 19; Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1.

³⁰¹ Lynn Wardle makes these arguments against same-gender marriage in *Efforts to Legitimate*, *supra* note 19.

arguments with points developed in the preceding section. One is that the effort to broaden access to marriage is actually a retreat from marriage.³⁰² The second is that heterosexual marriage necessarily has greater potential for benefiting individuals and society than does marriage by same-gender couples.³⁰³ Third is the argument that efforts to seek same-gender marriage are a repudiation of morality.³⁰⁴

A. *The Argument that the Effort to Allow Same-Gender Couples to Marry Is Actually a Retreat from Marriage*

Lynn D. Wardle argues that the effort to extend marriage to same-gender couples actually is an effort to retreat from marriage.³⁰⁵ The couples over the last twenty-nine years who have gone first to town clerk's offices and then to court to try to get married would dispute this. Contrary to Wardle's contention, the effort to broaden access to marriage is not an effort to retreat from it. The couples involved are trying to have their intimate, committed relationships recognized by the state through marriage. As Naomi Cahn has pointed out, the efforts to allow same-gender partners to marry "reflect the importance and value of marriage and represent attempts to strengthen, not undermine, the institution."³⁰⁶ The efforts through the courts have not sought a particular type of marriage, but just access to marriage, with the same responsibilities and rights as everyone else.

Wardle notes that some writers advocating marriage by same-gender couples have called for changing marriage,³⁰⁷ as if that means that they want to retreat from it.³⁰⁸ He cites one writer who argues that "legalizing same-sex unions might even transform marriage into a state divested of its sexist base."³⁰⁹ Some of the historical sexist basis of

³⁰² See *infra* Part IV.A.

³⁰³ See *infra* Part IV.B.

³⁰⁴ See *infra* Part IV.C.

³⁰⁵ Wardle, *Efforts to Legitimate*, *supra* note 19, at 758. He claims that "[i]n reality, it is a profound, but subtle and disarming, rejection of marriage." *Id.*

³⁰⁶ Cahn, *Review Essay: The Moral Complexities of Family Law*, *supra* note 96, at 246.

³⁰⁷ See Wardle, *Efforts to Legitimate*, *supra* note 19, at 758.

³⁰⁸ Marriage has changed constantly over the centuries. Mary Ann Glendon calls it a "polymorphous and mutable institution." GLENDON, *TRANSFORMATION OF FAMILY LAW*, *supra* note 2, at 4; see *supra* note 55.

³⁰⁹ *Id.*, citing Nancy Polikoff citing Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, in *LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES* 13, 14-16 (Suzanne Sherman ed., 1992).

marriage has been discussed above,³¹⁰ and if marriage by same-gender couples makes marriage less sexist, this is a good thing. As Schneider notes, simply because the institution of marriage is "developing, does not mean that [its] normative core will disappear."³¹¹

Loud calls for changing marriage have been heard in our nation's history. For example, Elizabeth Cady Stanton, in her famous Address to the Legislature of the State of New York, in 1854, stated:

Look at the position of woman as wife. Your laws relating to marriage—founded as they are on the old common law of England, a compound of barbarous usages, but partially modified by progressive civilization—are in open violation of our enlightened ideas of justice, and of the holiest feelings of our nature.³¹²

While advocating radical changes in marriage laws, Stanton was not advocating a retreat from marriage. Marriage and marriage law have been constantly changing, and seemingly fundamental aspects of both have changed.³¹³

Various scholars have argued in recent years that bans on marriage by same-gender couples are gender discrimination.³¹⁴ Wardle counters this view by claiming that "heterosexual marriage is the oldest gender-equality institution in the law."³¹⁵ This statement is difficult—some would say impossible—to reconcile with the history of women's subordination explicit in marriage laws until recently.³¹⁶

Wardle then goes on to state that "[t]he requirement that marriage consist of both a man and a woman emphasizes the absolute equality and equal necessity of both sexes for the most fundamental

³¹⁰ See *supra* Part II.B.

³¹¹ Schneider, *The Channelling Function*, *supra* note 1, at 519.

³¹² Elizabeth Cady Stanton, *Address to the Legislature of the State of New York (February 14, 1854)*, I HISTORY OF WOMEN'S SUFFRAGE, 1848–1861, at 595–605 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joselyn Gage, eds., reprint ed. 1985), reprinted in KATHERINE T. BARTLETT AND ANGELA P. HARRIS, *supra* note 253, at 57, 60.

³¹³ See STRASSER, *supra* note 7, at 117–20. See generally GLENDON, TRANSFORMATION OF FAMILY LAW, *supra* note 2; GRAFF, *supra* note 55; GROSSBERG, *supra* note 55; STONE, *supra* note 55.

³¹⁴ See, e.g., Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1998 WIS. L. REV. 187 (1988); see also Christensen, *If Not Marriage*, *supra* note 173, at n.20 (listing scholarship making this argument).

³¹⁵ Wardle, *Efforts to Legitimate*, *supra* note 19, at 753.

³¹⁶ See *supra* Part II.B.

unit of society."³¹⁷ Here he seems to narrow the immediately prior claim that "heterosexual marriage" as a whole "is" a gender equality institution, and instead to make the seemingly more modest claim that the man-woman requirement "emphasizes" the "absolute equality" and "equal necessity" of both sexes. However, this statement is also problematic. An "absolute equality" between the sexes can not be "emphasized" if it does not exist in the first place.³¹⁸ The idea that "traditional" marriage "emphasizes" the "equality" of the sexes makes no sense in view of the history of marriage.³¹⁹ Moreover, the statement that the man-woman requirement is a way of "emphasizing" the "equal necessity" of both sexes in society's "most fundamental unit" is simply a way of restating the requirement. In other words, it says that the man-woman requirement is a requirement because it is necessary for the unit. This neither explains nor justifies the requirement itself.³²⁰

Moreover, even if heterosexual marriage is a "gender-equality institution," this does not mean that marriage by same-gender couples is not also a gender-equality institution. Some have argued that marriage between two people of the same gender may be more likely to be a gender-equality institution than heterosexual marriage in view of the relative lack of stereotyped gender roles that people may bring to such marriages.³²¹ It may be that allowing people of the same gender to marry will be more likely to further gender equality than the current restriction does.³²²

³¹⁷ Wardle, *Efforts to Legitimate*, *supra* note 19, at 753.

³¹⁸ See *supra* note 127.

³¹⁹ See *supra* Part II.B.

³²⁰ Wardle emphasizes information about lack of male monogamy in committed gay male relationships as part of his effort to show that seeking marriage is a retreat from it. See Wardle, *Efforts to Legitimate*, *supra* note 19, at 759-60. However, this does not shed light on what behavior will be if marriage by same-gender couples is allowed. According to SEX IN AMERICA, "no matter what [married couples] did before they wed, no matter how many partners they had, the sexual lives of married people are similar. Despite the popular myth that there is a great deal of adultery in marriage, our data and other reliable studies do not find it. Instead, a vast majority are faithful while the marriage is intact." ROBERT T. MICHAEL ET AL., SEX IN AMERICA: A DEFINITIVE SURVEY 89 (1994). Some reach different conclusions, however, about the prevalence of adultery. See, e.g., Joan D. Atwood and Madeline Seifer, *Extramarital Affairs and Constructed Meanings: A Social Constructionist Therapeutic Approach*, 25 AMER. J. OF FAMILY THERAPY 55 (1997) (estimating 50-60% of married men and 45-55% of married women engage in extramarital sex at some time during their marriage).

³²¹ See Stoddard, *supra* note 309, at 13, 14-16. See generally Becker, *Women and Morality*, *supra* note 7.

³²² See generally Becker, *Women and Morality*, *supra* note 7.

Wardle also takes an absolutist view of the man-woman requirement:

[C]laims for same-sex marriage cannot exist with the belief that there is an inherent, essential nature of marriage or that marriage reflects something fundamental and inherent in the natures of men and women. Nor can the concept that marriage is ordained by God, and has some absolute fixed, immutable characteristics, coexist with belief in same-sex marriage.³²³

While Wardle and others³²⁴ believe a certain kind of marriage is ordained by God, other religious denominations believe that God welcomes marriages by same-gender couples.³²⁵ In a society where marriage is a civil institution,³²⁶ it is not sufficient to justify the marriage exclusion by asserting that God has defined marriage in a certain way.³²⁷

Wardle also claims that marriage by same-gender couples is logically inconsistent with marriage by different-gender couples:

[C]laims for same-sex marriage logically presuppose a rejection of traditional marriage because they are based upon fundamentally incompatible concepts of marriage and humanity Inevitably claims for same-sex marriage must lead to rejection of traditional male-female marriage that is predicated on an incompatible belief in the inherent natures of humanity and marriage.³²⁸

³²³ Wardle, *Efforts to Legitimate*, *supra* note 19, at 76.

³²⁴ See, e.g., Finnis, *Law, Morality and "Sexual Orientation," supra* note 293; O'Brien, *supra* note 300. See Part IV.C. for further discussion of Finnis' arguments.

³²⁵ See STRASSER, *supra* note 7, at 12-13; see also ESKRIDGE, *supra* note 7, at 193-217 (Appendix: Letters from the Faithful on the Legal Recognition of Same-Sex Marriage).

³²⁶ See *supra* note 103.

³²⁷ For additional discussion, see *infra* notes 373-376 and accompanying text. See Baker v. Vermont, 1999 WL1211709, at *23 (Dec. 20, 1999) (noting that "it is plaintiff's claim to the secular benefits and protections of marriage that . . . characterizes this case"). As Martha Minow states regarding those who support the view that gay men and lesbians should be excluded from the privileges of family membership, "[i]t will not do . . . to support this view by reference to nature, convention, or even religion. Many religions are themselves struggling with these questions; some are performing marriages for gays and lesbians, some are ordaining gay and lesbian clergy." Minow, *All in the Family*, *supra* note 5, at 284.

³²⁸ Wardle, *Efforts to Legitimate*, *supra* note 19, at 762. The notion that the man-woman requirement "reflects something fundamental and inherent in the natures of men and women" is discussed more fully at *infra* Part IV.B.

Despite his insistence, there is no reason why claims for marriage by same-gender couples "must lead to a rejection" of "traditional male-female marriage."³²⁹ Same-gender couples who seek to marry in this society are not thereby rejecting or denigrating "traditional male-female marriage." It does not diminish the rights or responsibilities of male-female married couples to allow same-gender couples to marry.

In sum, the effort to broaden access to civil marriage so that gay male and lesbian couples can marry is simply what it seems to be—an effort to allow such couples to marry. Calls for marriage reform, and changes in marriage laws, recur throughout United States and European history. Allowing gay male and lesbian couples to marry does not affect the rights and responsibilities of heterosexual married couples and does not entail a rejection of heterosexual marriage.

B. The Argument That Heterosexual Marriage Necessarily Has Greater Potential for Benefitting Individuals and Society Than Does Marriage by Same-Gender Couples

Wardle also argues that there is something inherent in committed relationships between opposite sex couples that makes such relationships more important and worth supporting than relationships between couples of the same gender. He writes "[n]o other companionate relationship provides the same great potential for benefiting individuals and society as the heterosexual covenant union we call marriage and that is why only committed heterosexual unions are given the legal status of marriage."³³⁰ He also claims that "the integration of the universe of gender differences (profound and subtle, biological and cultural, psychological and genetic) associated with sexual identity, constitutes the core and essence of marriage."³³¹ He does not seem to assert that the purpose of marriage is procreation and that is why the institution should be limited to persons of opposite genders.

The values of connection and commitment, so important to individuals and society, have heterosexuality and heterosexual marriage as neither a necessary nor sufficient condition. People of the same gender engage in "familistic"³³² behavior, support one another and others, become financially dependent on one another, and so on. The

³²⁹ Given the historical evidence about changes in the functions, laws, and customs surrounding marriage, it is not at all clear what, if anything, "traditional male-female marriage" means. See generally GRAFF, *supra* note 55.

³³⁰ Wardle, *Efforts to Legitimate*, *supra* note 19, at 749.

³³¹ *Id.* at 748.

³³² See Hafen, *Individualism and Autonomy*, *supra* note 4, at 23–24.

potential for community involvement and individual fulfillment that exists for heterosexual couples also exists for same-gender couples. For example, Margaret F. Brinig, in an article calling for use of the term "covenant" in the context of marriage, writes that same-sex couples "can make the permanent commitment and exhibit the selfless loving and giving required for a covenant."³³³

The rewards of being in a couple and being married and the demands serious commitment makes can also be rewards to society. Assuming that Hafen's statement that "legal marriage is more likely than is unmarried cohabitation to encourage . . . personal willingness to labor and invest in relationships with other people, whether child or adult"³³⁴ is correct, this counsels for recognizing same-gender relationships, not for pretending they do not exist. If individuals do not plumb the depths of their commitments to each other, society suffers a loss.³³⁵

Wardle's statement that "the integration of the universe of gender differences . . . associated with sexual identity constitutes the core and essence of marriage"³³⁶ is problematic for a number of related reasons. First, it assumes that there is a "core and essence of marriage" and that he knows what that is.³³⁷ Others view the core and essence of marriage as consisting of love and commitment.³³⁸ Second, it ignores the historical evidence that marriage is a social and economic institution whose functions have changed radically through the course of Western history.³³⁹ Third, it assumes that certain gender differences are known and universal and thus essentializes gender. Fourth, it is based on gender stereotyping and ignores the vast variations in gender differences that occur across cultures and among individuals.³⁴⁰

³³³ Brinig, *supra* note 149, at 1600.

³³⁴ Hafen, *Constitutional Status*, *supra* note 4, at 486.

³³⁵ Hafen, *Individualism and Autonomy*, *supra* note 4, at 38-40.

³³⁶ Wardle, *Efforts to Legitimate*, *supra* note 19, at 748.

³³⁷ Elsewhere in the article, Wardle seems to endorse the idea that "marriage is ordained by God, and has some absolute fixed immutable characteristics." *Id.* at 761-62. It appears from the reference to the integration of gender differences being the core and essence of marriage, that to him the man-woman requirement is one of the most important, if not the most important, of the "fixed immutable characteristics" of marriage.

³³⁸ See, e.g., REGAN, *supra* note 5, at 120.

³³⁹ See *supra* note 55. Glendon, for example, writes that marriage has evolved to being an institution now held together primarily by emotional ties as opposed to earlier times when it was held together primarily by financial and procreative ties. See GLENDON, *TRANSFORMATION OF FAMILY LAW*, *supra* note 2, at 293.

³⁴⁰ In *Baker v. Vermont*, the state of Vermont advanced this gender integration argument as a reason for restricting marriage to opposite sex couples. See No. S1009-97 (Vt. Super. Ct. Dec. 19, 1997), slip op. at 15, *appeal docketed* No. 98-32 (Vt. Jan. 15, 1998). The

Finally, it ignores differences that might exist along race and class lines.³⁴¹

Lesbian and gay male couples in committed, loving, marital relationships assert that their relationships are of great benefit to themselves and society. If pressed to compare these relationships with others' relationships, they argue that their relationships are in all relevant senses equivalent to heterosexuals' marriage relationships. Gay people and their supporters claim that the potential of a companionate relationship to benefit individuals and society has to do with the individuals and their relationship, not with their gender.³⁴²

Wardle asserts that this "functional equivalence" argument is invalid because it is "over-inclusive," since "people who are engaged in incestuous relations" also may argue that their relationships "are functionally equivalent to traditional marriages (and certainly to same-sex unions) in terms of their preferences and commitments."³⁴³ Comparing the relationships of people who are "engaged in incestuous relations" with the relationships of same-gender couples is inapt. First, Wardle never defines "incestuous relations," so it is difficult to know precisely what kinds of relations he is talking about. As Carolyn Bratt has noted, "the mere word 'incest' triggers strong feelings of revulsion in most people Such revulsion stems largely from the confusion of incest with the sexual abuse of children."³⁴⁴ Bratt highlights the important distinction between "state incest statutes as a vehicle for prohibiting and punishing sexual abuse of minors and state incest statutes as a marriage prohibition for adults,"³⁴⁵ while Wardle elides the distinction.

trial judge found that this was not a strong enough argument for the marriage restrictions sufficient to survive a 12(b)(6) motion, since it was based on impermissible sex stereotyping. See *id.* In the Vermont Supreme Court's recent decision in *Baker v. Vermont*, this argument was alluded to but not discussed. *Baker v. Vermont*, 1999 WL1211709, at *19 (referring to "state's purported interests . . . in bridging differences between the sexes"). See generally JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).

³⁴¹ See, e.g., Twila Perry, *Alimony, Race, Privilege and Dependency*, *supra* note 128 (noting that issues of alimony and dependency on average may be very different for black women than for white women).

³⁴² See *supra* notes 280-82 and accompanying text.

³⁴³ Wardle, *Efforts to Legitimate*, *supra* note 19, at 749.

³⁴⁴ Carolyn S. Bratt, *Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry?*, 18 FAM. L.Q. 257 (1984).

³⁴⁵ *Id.* at 258; see also Leigh B. Bienen, *Defining Incest*, 92 NW. U. L. REV. 1501 (1998) (discussing history of incest laws and prosecutions).

Assuming that the "incestuous relations" Wardle is referring to are instances of sexual intercourse between a father and a minor daughter, criminal laws cover such situations.³⁴⁶ If Wardle is referring to marriages that run afoul of state incest restrictions, perhaps there is ground to challenge some such restrictions.³⁴⁷ While detailed consideration of the issue of laws against incestuous marriages is beyond the scope of this article, Carolyn Bratt provides a lengthy explanation as to why marriage incest statutes do not protect against genetic defects and argues that many such restrictions do not withstand "objective evaluation."³⁴⁸ The considerable state-by-state variation in incest-marriage provisions may confirm this.³⁴⁹ Nonetheless, some incest-marriage provisions may protect against actual harms. By contrast, no harms follow, to the participants or to anyone else, from the participation of lesbian and gay adults in committed, loving, coupled, marital relationships.³⁵⁰ Thus, to point to the hypothetical example of people enjoying incestuous relationships does not mean that gay couples' functional equivalence argument is invalid.

The functional equivalence argument is valid, as shown above.³⁵¹ Since family law should value and nurture positive, serious commitments between adults, it should recognize marriage by same-gender couples.³⁵² If we want to encourage people to have personal commit-

³⁴⁶ Bratt notes "the intrinsically abusive nature of adult-child sexual relationships." Bratt, *supra* note 343, at 258. Bratt notes that in a random sample of 101 appellate decisions in cases involving claimed violations of criminal incest laws, all involved prosecutions for sexual intercourse, and 94 cases "involved father-daughter, father-adoptive daughter or stepfather-stepdaughter relationships." *Id.* at 257.

³⁴⁷ See Bratt, *supra* note 344, at 258-60.

³⁴⁸ See *id.* at 258.

³⁴⁹ For example, in Rhode Island, marrying one's first cousin is allowed. See R.I. GEN. LAWS § 15-1-1 & § 15-1-2 (1996). In Maine, by contrast, one can only marry one's first cousin if one provides a certificate of genetic counseling. ME. REV. STAT. ANN. tit. 19-A, § 701(2)(B) (West 1998). There is also tremendous historical variation in what constitutes incest for marriage purposes. See GRAFF, *supra* note 55, at 160-68.

³⁵⁰ See, e.g., STRASSER, *supra* note 7, at 72; Ball, *supra* note 7, at 1936-42; Perry, *Morality of Homosexual Conduct*, *supra* note 193. As Bartlett notes, "I oppose families based on incestuous relationships because of the high risk such relationships raise for exploitation." Bartlett, *Saving the Family from the Reformers*, *supra* note 96, at 817.

³⁵¹ See Ball, *supra* note 7, at 1938; *supra* notes 181-285 and accompanying text. See generally ESKRIDGE, *supra* note 7.

³⁵² Wardle argues that the principle of tolerance is not a basis for recognizing marriage by same-gender couples, because marriage is a preferred status which is distinct from a tolerated status. Wardle, *Efforts to Legitimate*, *supra* note 19, at 751-52, citing Hafén, *Constitutional Status*, *supra* note 4, at 546-47. Thus, Wardle says, "the claim for same-sex marriage is not a claim for mere tolerance, but for special preference." *Id.* However, this reflects a cramped view of tolerance and a misleading view of marriage restrictions. Given the state's

ments to others and lead interdependent lives, we should allow civil marriage by same-gender couples.

C. *The Argument that Gay Men and Lesbians Seeking Access to Marriage Are Repudiating Morality*

Wardle states that "it seems inconsistent for gay and lesbian advocates to appeal to one moral value—equality—at the same time as they repudiate morality (i.e., the traditional moral opposition to homosexual practices and exclusive preference for sex within heterosexual marriage) as an improper basis for marriage laws."³⁵³ The idea that gay men and lesbians seeking to broaden access to marriage are thereby "repudiat[ing] morality" is unsupported.

First, as Mark Strasser points out, "same-sex relationships are not immoral, just as interracial relationships are not immoral, majority view notwithstanding. Neither type of relationship harms anyone."³⁵⁴ Moreover, the normative value of a committed gay male or lesbian couple relationship is the same as in a committed heterosexual relationship.³⁵⁵ Second, the use of the term "morality" is not determinative, since arguments based on "morality" have been used to justify both morality and immorality.³⁵⁶ There are genuine differences about what constitutes "morality" regarding sexual behavior, and thus it is not accurate to accuse people of "repudiating morality" if they are seeking the right to marry.³⁵⁷

treatment of marriage (it is a civil institution, there is minimal restriction on entry into it, there is no requirement of any special living arrangement or financial arrangement, it is available to people who are sterile and who have no interest in bearing or raising children, and who have no aptitude for intimacy), it can be argued that forbidding the entry of lesbian and gay male couples is indeed intolerant. See Wiggins, *Questions of Constitutionality*, *supra* note 7, at 395–96. Moreover, Linda McClain recently argued for a tolerance-as-respect model, which is violated by banning marriage by same-gender couples. McClain, *supra* note 7, at 121. To McClain, allowing such marriage "recognizes the diversity among persons concerning their conceptions of the good and the intimate relationships they seek to secure. At a minimum, permitting same-sex marriage accepts the fact of diversity and properly affords to gay men and lesbians the cultural resources to engage in the exercise of their moral powers." *Id.* at 122.

³⁵³ Wardle, *Efforts to Legitimate*, *supra* note 19, at 756.

³⁵⁴ STRASSER, *supra* note 7, at 72.

³⁵⁵ See Ball, *supra* note 7, at 1938. See generally note 193 and sources cited therein.

³⁵⁶ See Becker, *Women and Morality*, *supra* note 7, at 167. Becker notes that "moral and religious arguments have supported and opposed violence, slavery, and patriarchy." *Id.*

³⁵⁷ In *SEX IN AMERICA*, the researchers found that nearly half of the sample fall in what the authors called the "relational" category, whose members believed "that sex should be part of a loving relationship, but that it need not always be reserved for marriage. These people, who make up nearly half our sample, disagree with the statement that premarital

Wardle refers to "morality" in this context as "the traditional moral opposition to homosexual practices and exclusive preference for sex within heterosexual marriage."³⁵⁸ This view of "morality" is similar to, and appears to be based at least in part on, that of the "new natural law theorists."³⁵⁹ These writers claim to prove, on the basis of natural law, that "sexual acts are morally right only within marriage."³⁶⁰ John Finnis, for example, writes that for sex acts to be moral, they must have "unitive significance."³⁶¹ He writes that:

sexual acts are not unitive in their significance unless they are marital (actualizing the all-level unity of marriage) and (since the common good of marriage has two aspects) they are not marital unless they have not only the generosity of acts of friendship but also the procreative significance, not necessarily of being intended to generate or capable in the circumstances of generating but at least of being, as human conduct, acts of the reproductive kind.³⁶²

Finnis claims that "deliberately contracepted sex" within heterosexual marriage is not sex of the unitive, moral variety but instead is immoral.³⁶³

The new natural law theorists' arguments have been countered by various scholars, such as Michael Perry,³⁶⁴ Andrew Koppelman,³⁶⁵

sex is always wrong, for example. Most, however, say that marital infidelity is always wrong and that they would not have sex with someone they did not love." MICHAEL ET AL., *supra* note 320, at 233. One-third of the sample fell in the "traditional" category, and said "that their religious beliefs always guide their sexual behavior . . . that homosexuality is always wrong . . . that premarital sex, teenage sex, and extramarital sex are wrong." *Id.* at 232-33.

³⁵⁸ Wardle, *Efforts to Legitimate*, *supra* note 19, at 756.

³⁵⁹ Andrew Koppelman refers to the "new natural law theorists" as Germain Grisez, John Finnis, Gerard V. Bradley, and Robert P. George. Koppelman, *Is Marriage Inherently Heterosexual?*, *supra* note 21, at 52. Germain Grisez is not a legal scholar, but Finnis, Bradley, and George rely on him. For examples of their work, see Finnis, *Law, Morality and "Sexual Orientation"*, *supra* note 293; Bradley & George, *Marriage and the Liberal Imagination*, *supra* note 293. Patrick Lee has written an article with Robert P. George, and he could be termed a new natural law theorist as well. See Lee & George, *What Sex Can Be*, *supra* note 293.

³⁶⁰ See Lee & George, *What Sex Can Be*, *supra* note 293, at 135.

³⁶¹ Finnis, *Law, Morality and "Sexual Orientation"*, *supra* note 293, at 1067; see also Bradley & George, *Marriage and the Liberal Image*, *supra* note 293, at 305.

³⁶² Finnis, *Law, Morality and "Sexual Orientation"*, *supra* note 293, at 1067.

³⁶³ See *id.* at 31.

³⁶⁴ See Perry, *Morality of Homosexual Conduct*, *supra* note 193.

³⁶⁵ See Koppelman, *Is Marriage Inherently Heterosexual?*, *supra* note 21.

Carlos Ball,³⁶⁶ Stephen Macedo,³⁶⁷ and Mary Becker.³⁶⁸ These scholars reject the notion that "deliberately contracepted sex" within marriage is immoral.³⁶⁹ They also reject the notion that sex between persons of the same gender is necessarily morally deficient.³⁷⁰

Becker responds to the natural law theorists' idea that heterosexuality is inherently morally superior to homosexuality as follows: "[T]he conviction that heterosexuality is inherently morally superior to homosexuality is difficult to respond to because one either sees the moral superiority of noncontracepted heterosexual intercourse in marriage or one does not."³⁷¹ While Wardle and others see the inherent moral superiority of noncontracepted heterosexual intercourse, others do not.³⁷²

While the new natural law theorists' arguments are not overtly based on religion, various scholars have shown that they are religion-based. Carlos Ball argues, "despite . . . protestations, Finnis' arguments depend ultimately on theology-based notions that only sexual acts which are reproductive in nature can be inherently good."³⁷³ Richard Posner writes that Finnis "expound[s] an Orthodox Catholic view in a manner incomprehensible to the secular mind."³⁷⁴ According to Koppelman, bans on same-gender marriage should not be based on the "exceedingly contestable religious surmises" of the new natural law theorists.³⁷⁵ It is also significant that some religions besides

³⁶⁶ See Ball, *supra* note 7.

³⁶⁷ See Macedo, *Homosexuality and the Conservative Mind*, *supra* note 293.

³⁶⁸ See Becker, *Women and Morality*, *supra* note 7.

³⁶⁹ See Ball, *supra* note 7, at 1909-19; Becker, *Women and Morality*, *supra* note 7, at 188; Koppelman, *Is Marriage Inherently Heterosexual?*, *supra* note 21, at 58-62; Macedo, *Homosexuality and the Conservative Mind*, *supra* note 293; Michael Perry, *Morality of Homosexual Conduct*, *supra* note 193, at 43.

³⁷⁰ See Ball, *supra* note 7, at 1909-19; Becker, *Women and Morality*, *supra* note 7, at 188; Koppelman, *Is Marriage Inherently Heterosexual?*, *supra* note 21, at 58-62; Macedo, *Homosexuality and the Conservative Mind*, *supra* note 293; Michael Perry, *Morality of Homosexual Conduct*, *supra* note 193, at 43.

³⁷¹ Becker, *Women and Morality*, *supra* note 7, at 188.

³⁷² Becker discusses the new natural law theorists' views in greater detail and argues that keeping marriage closed to same-gender couples, particularly lesbian couples, is on questionable moral grounds for a number of reasons, including that it narrows women's options. See *id.*

³⁷³ Ball, *supra* note 7, at 1912, 1918 (arguing that new natural law theorists give secular gloss to traditional but controversial Catholic theology); see also Perry, *Morality of Homosexual Conduct*, *supra* note 193, at 66 (noting that Finnis' position defends the "official" view of the Catholic church but that this is not the position of all Christians or all Catholics).

³⁷⁴ POSNER, *supra* note 152, at 76.

³⁷⁵ See Koppelman, *Is Marriage Inherently Heterosexual?*, *supra* note 21, at 95.

Catholicism have different views on the issue of marriage between couples of the same gender; some religions welcome such unions.³⁷⁶

Ball, importantly, makes clear that his disagreement with Finnis is not simply because his arguments are based in religion or morality: "Finnis is not incorrect *because* he incorporates arguments of morality and the good to defend his position that public policy should discourage homosexual conduct. Instead, Finnis is incorrect because his arguments are inconsistent, flawed and ultimately unpersuasive."³⁷⁷ The effort to broaden access to marriage, far from repudiating morality, advances it by endorsing values and aspirations such as commitment, duties, fairness, and caring.³⁷⁸

Wardle argues that gay men and lesbians have no basis for discrimination claims with respect to marriage, employment, or other areas because gay men and lesbians are defined by "sexual behavior."³⁷⁹ Thus, to him, it is incorrect to speak of invidious discrimination against this group. He states, "the particular sexual behavior that defines the group seeking same-sex marriage entails uniquely high risks to public health and jeopardizes sexual integrity and social order more than most other sexual practices (incest and adultery are the most comparable behaviors)."³⁸⁰ First, lesbians actually have the lowest rate of sexually transmitted disease of any sexually active group.³⁸¹ Second, the phrase "jeopardiz[ing] sexual integrity" is so vague as to be mysterious.³⁸² Third, it is not clear what it is about gay sexual behavior that "jeopardizes . . . the social order." Is it the fact that gay male and lesbian couples can not get married? Comparing the situation of gay male and lesbian couples who want to get married with adulterous sexual activity simply highlights the exclusion from marriage.³⁸³

³⁷⁶ See *supra* notes 324–27 and accompanying text.

³⁷⁷ Ball, *supra* note 7, at 1912.

³⁷⁸ See REGAN, *supra* note 5, at 120; Ball, *supra* note 7, at 1938; Bartlett, *Saving the Family from the Reformers*, *supra* note 96, at 843; Cahill, *Review Essay: The Moral Complexities of Family Law*, *supra* note 96, at 237; McClain, *supra* note 7, at 121.

³⁷⁹ Wardle, *Efforts to Legitimate*, *supra* note 19, at 756.

³⁸⁰ *Id.* at 756.

³⁸¹ Becker, *Women and Morality*, *supra* note 7, at 175.

³⁸² Becker might agree that "jeopardizing sexual integrity" is bad, but may have a very different analysis of what that means. See Becker, *Women and Morality*, *supra* note 7, at 170. Becker argues that alienating, objectifying, autonomy-denying sex is normatively negative, and that such sex is more likely in heterosexual relationships than in lesbian relationships. Thus, she argues, it is bad for women to be restricted to heterosexual marriage. See *id.* This illustrates the vagueness of Wardle's statement.

³⁸³ For discussion of the incest comparison, see *supra* notes 344–49.

Even more important is Wardle's focus on the "sexual behavior that defines the group."³⁸⁴ Wardle's focus on "sexual behavior that defines the group" of gay men and lesbians interestingly mirrors the new natural law theorists' focus on sexual acts outlined above.³⁸⁵ These opponents of marriage by same-gender couples seem to consider sexual activity to be of paramount importance. But it is inaccurate to say that lesbians and gay men are defined as unique by their sexual behavior, since practices such as oral sex are engaged in by both heterosexuals and homosexuals.³⁸⁶ Mark Strasser has argued that sexual orientation is distinct from sexual behavior,³⁸⁷ and that "sexual orientation does not merely involve a simple, easily identifiable behavior or tendency to perform such behavior, but instead is a vital part of one's personality."³⁸⁸ Defining lesbian couples and gay male couples seeking access to marriage only or even primarily by their sexual behavior is inaccurate and reductionistic. Such a definition ignores the "familistic" behavior that such couples engage in and overlooks the benefits of "belonging" that such couples may bring to society. It would be similarly inaccurate and reductionistic to define heterosexual marriage in a way that simply focused on "the particular type of [sexual] behavior that defines the group."³⁸⁹ Marriage is about connection, interdependence and love, not simply sexual behavior.

CONCLUSION

Family law, and the law of marriage and divorce, have to a considerable extent become increasingly focused on individuals and their rights over the last forty years. Scholarship based on communitarian ideas has highlighted the trend toward atomism in family law and behavior. However, in important ways, the law of marriage has become more oriented toward mutual duties, and for the first time presents a

³⁸⁴ Wardle, *Efforts to Legitimate*, *supra* note 19, at 756.

³⁸⁵ See *supra* notes 362-63. Craig Christensen has noted that "[g]ay rights opponents have remained fixated on the sexual aspects of sexual orientation." Christensen, *If Not Marriage?*, *supra* note 172, at 1783.

³⁸⁶ See MICHAEL ET AL., *supra* note 320, at 140-41.

³⁸⁷ See STRASSER, *supra* note 7, at 37-38. Strasser notes that "it would approach absurdity to suggest that only those who engage in sexual relations with the opposite sex are heterosexual. On such an account, individuals who refrained from having sexual relations, citing health or religious reasons, would seem to be neither heterosexual nor homosexual. . . . Individuals who wait until they marry before having sexual relations have a sexual orientation even if they have not yet been sexually active." *Id.* at 37.

³⁸⁸ *Id.* at 40.

³⁸⁹ Wardle, *Efforts to Legitimate*, *supra* note 19, at 756; see Ball, *supra* note 7, at 1913.

model of mutual commitment, equality, and interdependence. Acknowledging scholars' concerns about the atomization of law and society as significant and in some ways negative, the quest for marriage by same-gender couples can be seen as clearly positive. It is a striving toward connection, duty, and responsibility. The opposition to marriage by same-gender couples should be seen as undermining and attempting to sever important connections between people, and in turn fostering increased atomization. Allowing marriage by same-gender couples will be a step toward family law's finding "ways to sing more clearly the melody of belonging."³⁹⁰

³⁹⁰ Hafen, *Individualism and Autonomy*, *supra* note 4, at 42.