

# Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality

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## I. INTRODUCTION

Suppose . . . we began by asking not what is being *prohibited*, but what is being *produced*. Suppose we looked not to the negative aspect of the law—the interdiction by which it formally expresses itself—but at its positive aspect: the real effects that conformity with the law produces at the level of everyday lives and social practices.<sup>1</sup>

Could we ask, about a concept like bisexuality that is gaining new currency, [not] so much ‘What does it *really* mean?’ or ‘Who owns it and are they good or bad?’, but ‘What does it *do*?’—what . . . does it make easier or harder for people of various kinds to accomplish and think?<sup>2</sup>

This Article proposes that same-sex marriage bans channel individuals, particularly bisexuals, into heterosexual relations and relationships, impermissibly burdening sexual liberty interests protected under *Lawrence v. Texas*.<sup>3</sup> A claim from sexual liberty departs dramatically from the legal paradigms and advocacy strategies that currently dictate the terms of constitutional debate on this issue. In case after case, plaintiffs who come in pairs allege that the requirement of “one man and one woman” infringes their fundamental right to marry and discriminates on the basis of both sex and sexual orientation. Partners of five, fifteen, even fifty years protest that their exclusion from marriage is baseless and harmful, and they demand as couples that the state immediately issue them

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1. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 783 (1989).

2. Posting of Eve Kosofsky Sedgwick to QSTUDY-L@UBVM.cc.buffalo.edu (Aug. 17, 1994, 7:49 PM) (emphasis denoted by asterisks in original), *quoted in* Clare Hemmings, *Bisexual Theoretical Perspectives: Emergent and Contingent Relationships*, in THE BISEXUAL IMAGINARY 14, 16 (Bi Academic Intervention ed., 1997).

3. 539 U.S. 558 (2003).

licenses.<sup>4</sup> These arguments, despite their legal force and emotional appeal, ignore and effectively occlude one of the most insidious aspects of same-sex marriage bans. Existing couples are indeed disadvantaged and stigmatized by the traditional definition of marriage, but also injured are individuals with open choices about whether and with whom to partner. For this latter, larger class of persons, the law's harm is not its failure to acknowledge and support an already-flourishing relationship, but its interference with personal choices about which relationships to enter in the first place.

The institution of marriage excludes, but it also compels and deters. Nowhere is this coercion more palpable than from the standpoint of bisexuality. It is precisely because a bisexual possesses the "meaningful alternative" denied an exclusive homosexual<sup>5</sup>—because she *can* marry someone of a sex she desires—that her prerogatives are so readily and understandably manipulated by marriage's enormous prestige and benefits. To be sure, the marriage laws' encroachment onto sexual liberty is impermissible regardless of sexual orientation. The constitutional right to choose homosexual relations and relationships is a universal freedom and inheres whatever one's desire or disposition to exercise it. But it is in the lives of bisexuals, whose desires and dispositions are not categorically limited by sex, that the traditional definition of marriage is best poised, as *Lawrence* puts it, to "control their destiny."<sup>6</sup>

The bisexual's claim mobilizes one of the few aspects of *Lawrence* neglected in same-sex marriage litigation: its holding.<sup>7</sup> Judges call upon *Lawrence* for an array of doctrinal and rhetorical purposes, but rarely and fleetingly do they mention the sexual liberty the decision centrally

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4. See Third Amended Petition for Writ of Mandate & Complaint for Declaratory & Injunctive Relief at 13, *Woo v. Lockyer*, No. 4365 (Cal. Super. Ct. Mar. 12, 2004), available at [http://www.domawatch.org/cases/california/sanfranciscovstate/Woo\\_3rdAmndPet.pdf](http://www.domawatch.org/cases/california/sanfranciscovstate/Woo_3rdAmndPet.pdf) (noting fifty-one year partnership of Phyllis Lyon and Del Martin); Verified Complaint at 9, *Kerrigan v. State*, 909 A.2d 89 (Conn. Super. Ct. 2004) (No. CV04-4001813), 2004 WL 5651244 [hereinafter *Kerrigan* Complaint] (noting fifteen-year partnership of Jeffrey Busch and Stephen Davis); Amended Complaint to Redress the Denial of the Basic Civil Right to Marry at 6, *Andersen v. King Cnty.*, 138 P.3d 963 (Wash. 2006) (No. 04-2-04964-4SEA), 2004 WL 5577870 (noting five-year partnership of Michelle Esguerra and Boo Torres de Esguerra).

5. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 969 (N.D. Cal. 2010), *aff'd sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

6. *Lawrence*, 539 U.S. at 578.

7. By *holding*, I mean the "incontrovertible" proposition "that Texas's prohibition on same-sex sodomy violated the Due Process Clause." Jamal Greene, *Beyond Lawrence: Metaprivacy and Punishment*, 115 YALE L.J. 1862, 1868 (2006).

protects. Meanwhile, gay rights advocates deploy sexual liberty for context, not content—to situate plaintiffs’ fundamental right to marry within a family of protected freedoms, not to supply an independent ground for redress.<sup>8</sup> Yet the freedom to marry is not the only due process liberty that judges and litigators can invoke in this contest. As several courts have made clear in *Lawrence*-based challenges to the military’s “Don’t Ask, Don’t Tell” policy, autonomy’s “substantial protection . . . in matters pertaining to sex” forbids less ambitious intrusions than outright criminal prohibition.<sup>9</sup>

This Article proceeds in four parts. Part II develops the legal argument that same-sex marriage bans are unconstitutional under *Lawrence* because they substantially burden the right to choose homosexual relations and relationships.<sup>10</sup> It draws on Professor Carl Schneider’s influential taxonomy of the “channelling function in family law” to describe marriage’s tripartite encroachment onto this right: proscription of competing institutions, vast material support, and symbolic valorization.<sup>11</sup> These burdens fall differently on different people, punishing those who form same-sex couples while disciplining single individuals into different-sex relationships. Though both perspectives furnish grounds for constitutional objection, the individual’s claim of compulsion more effectively conjures the anti-“normalizing,” indeed “antitotalitarian,”<sup>12</sup> spirit that animates “the substantive reach of liberty under the Due Process Clause.”<sup>13</sup> Part

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8. The term *gay rights* often effects the very bisexual erasure this Article challenges. It is used here to resuscitate the idea that gay rights are not just for *gay people*, narrowly construed as exclusive homosexuals. See *infra* Part VI; see also Jay P. Paul, *Bisexuality: Reassessing Our Paradigms of Sexuality*, in *BISEXUALITIES: THEORY AND RESEARCH* 21, 26–27 (Fritz Klein & Timothy J. Wolf eds., 1985) (paraphrasing DON CLARK, *LOVING SOMEONE GAY* 71–73 (1977)) (“Homosexual is the label that was applied to Gay people as a device for separating us from the rest of the population . . . . Gay . . . means that we are *capable* of fully loving a person of the same gender. . . . But the label does not limit us. We who are Gay can still love someone of [the] other gender.”).

9. *Lawrence*, 539 U.S. at 572; *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 819 (9th Cir. 2008) (quoting this language from *Lawrence*); *Cook v. Gates*, 528 F.3d 42, 52 (1st Cir. 2008) (same).

10. To ground its arguments in a legal idiom that is broadly applicable and generally familiar, this Article relies primarily on the Fourteenth Amendment of the U.S. Constitution as interpreted in *Lawrence v. Texas*, 539 U.S. 558. It should be noted, however, that a number of state constitutions have been held to protect sexual rights more vigorously than the federal Constitution. See, e.g., *Jegley v. Picado*, 80 S.W.3d 332, 349 (Ark. 2002) (invalidating sodomy law to afford “protection of individual rights greater than the federal floor”); *Powell v. State*, 510 S.E.2d 18, 22 (Ga. 1998) (same); *Commonwealth v. Wasson*, 842 S.W.2d 487, 497 (Ky. 1992) (same); *Gryczan v. State*, 942 P.2d 112, 123 (Mont. 1997) (same).

11. Carl E. Schneider, *The Channelling Function in Family Law*, 20 *HOFSTRA L. REV.* 495, 503–12 (1992).

12. Rubinfeld, *supra* note 1, at 776, 804.

13. *Lawrence*, 539 U.S. at 564.

II concludes that the marriage laws' burden on the homosexual dimension of sexual liberty is, to put it mildly, substantial.

Part III posits bisexuality, understood as dual-sex desire, as an illuminating perspective on the coerced heterosexuality of marriage.<sup>14</sup> Analyzing bisexual experience in terms of what Adrienne Rich, pointing first and foremost to marriage, influentially called "compulsory heterosexuality,"<sup>15</sup> it reviews psychological, sociological, and biographical evidence that marriage is an important factor in many bisexuals' rejection of homosexual relations and relationships. To the extent such proof depends on the hindsight of self-identified and often plucky, politicized bisexuals, it represents the tip of a massive iceberg, deep and mute.<sup>16</sup> Part III concludes by emphasizing the principle of "sexual choice" that advocates of a distinctively bisexual politics avow in debates over gay rights.<sup>17</sup>

Part IV asks why same-sex marriage advocates, far from advancing any argument specifically grounded in bisexuality, faithfully uphold what Professor Kenji Yoshino dubbed "an epistemic contract of bisexual erasure."<sup>18</sup> Bisexuality's seeming lubrication of the slippery slope to polygamy is one reason for this erasure, but far more important is bisexuality's complication of the fixed and binary conception of sexual orientation on which several equality arguments for same-sex marriage currently depend. First, bisexuality disturbs the "conduct-status conflation," or the idea that discrimination against homosexual couples is effectively

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14. To the extent legal scholarship has addressed marriage's channeling of bisexuals into heterosexuality, the problem has been cast in terms of sex equality, not sexual liberty. See Mary Becker, *Women, Morality, and Sexual Orientation*, 8 UCLA WOMEN'S L.J. 165, 174, 212, 213 (1998) (arguing that, in addition to formally discriminating on the basis of sex, same-sex marriage bans effect a "substantive" discrimination against women by steering their more "fluid" sexuality "into intimate relationships in which they are subordinated and exploited"); Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 459 (2000) (speculating that a bisexual might challenge these bans as sex-based discriminations because they inhibit "seeing 'through' sex to other traits [a bisexual] . . . find[s] more important").

15. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS: J. WOMEN CULTURE & SOC'Y 631, 632 (1980).

16. Most persons with dual-sex attractions do not identify as bisexual. See ANJANI CHANDRA ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., SEXUAL BEHAVIOR, SEXUAL ATTRACTION, AND SEXUAL IDENTITY IN THE UNITED STATES: DATA FROM THE 2006–2008 NATIONAL SURVEY OF FAMILY GROWTH 31 (2011), available at <http://www.cdc.gov/nchs/data/nhsr/nhsr036.pdf>.

17. See *infra* notes 233–37 and accompanying text.

18. Yoshino, *supra* note 14, at 460.

discrimination against homosexual people. Second, bisexuality confounds the “claim of identity negation,” which holds that same-sex marriage bans discriminate on the basis of sexual orientation—even though they make no mention of that characteristic—because a homosexual’s right to marry heterosexually is no right at all. Third, bisexuality troubles the “immutability excuse,” or the argument that same-sex marriage bans warrant heightened judicial scrutiny because sexual orientation is inalterable. All three arguments implicitly concede that deterrence of homosexuality is bad because it is useless, not because it is wrong. This Article urges same-sex marriage advocates to reconsider whether that concession, and the bisexual erasure it demands, are doctrinally and strategically necessary.

Part V describes the “politics of containment” lurking behind the rhetoric of homosexual equality. It shows that opposition to gay rights is premised, often explicitly, on the belief that liberalization signals moral approval of homosexuality and thereby emboldens homosexual “lifestyle choices” among people who would otherwise pursue heterosexuality. Because same-sex marriage epitomizes such approval, and because bisexuals epitomize the class of persons whose sexual careers hang in the balance, gay rights advocates’ need to suppress bisexuality may seem compelling in this context. As a legal matter, however, morality-based deterrence of homosexuality has been largely expunged from constitutional debate on same-sex marriage. With the exception of arguments about parents’ influence on the sexual and gender development of children—arguments whose legal refutation actually might be bolstered by the bisexual’s anti-channeling claim—opponents of gay rights effectively concede that same-sex marriage bans cannot stand upon a purely moral preference for heterosexuality.

The Article concludes that a claim from (bi)sexual liberty is worth raising in same-sex marriage litigation despite the existence of sometimes-successful alternatives. In addition to the claim’s doctrinal plausibility, its faithful account of a widespread injustice, and its robust representation of a neglected gay rights constituency, an argument from bisexuality for same-sex marriage develops enabling frameworks for sexual politics beyond *Lawrence* and beyond same-sex marriage. Where some gay rights advocates champion marriage as gay people’s abandonment of “sexual liberty” for “civilized commitment,” their ascension to “*full formal equality*,” indeed their incorporation into the “last legal bastion of *compulsory* heterosexuality,”<sup>19</sup> this Article asks how this civil rights

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19. WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 65 (1996) [hereinafter ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE]; WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, GAY

imperative can serve less normalizing aspirations and more imaginative goals.<sup>20</sup> By characterizing same-sex marriage bans as coercive as well as discriminatory, the bisexual's claim advances a universalizing conception of homosexuality that may enable detection of subtler heterosexist compulsions than marriage. And by emphasizing sexual choice over sexual orientation, it stakes the most prominent gay rights issue of our time on grounds that "persons in every generation can invoke . . . in their own search for greater freedom."<sup>21</sup>

## II. SEXUAL LIBERTY AND SAME-SEX MARRIAGE

### A. *A Right To Choose Homosexual Relations and Relationships*

In September 1998, officers of the Houston police department were "dispatched to [the] private residence" of John Geddes Lawrence, whom they found having anal sex with another man, Tyron Garner.<sup>22</sup> Lawrence and Garner were arrested, convicted, and fined under a Texas law prohibiting "deviate sexual intercourse" between persons of the same sex.<sup>23</sup> Relying on *Bowers v. Hardwick*,<sup>24</sup> the Texas Court of Appeals upheld their convictions.<sup>25</sup> The U.S. Supreme Court granted certiorari on three questions: (1) whether Texas's "Homosexual Conduct" law violated equal protection by proscribing "sexual intimacy by same-sex couples, but not identical behavior by different-sex couples"; (2) whether it violated "vital interests in liberty and privacy protected by the Due

MARRIAGE: FOR BETTER OR FOR WORSE?: WHAT WE'VE LEARNED FROM THE EVIDENCE 12 (2006).

20. A number of legal scholars have advocated for same-sex marriage on grounds other than formal equality. See, e.g., Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871 (1997); Chai R. Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139 (2005); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 L. & SEXUALITY 9 (1991); Robin West, *Universalism, Liberal Theory, and the Problem of Gay Marriage*, 25 FLA. ST. U. L. REV. 705 (1998).

21. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

22. *Id.* at 562–63. The facts of the *Lawrence* case are far more complicated and contested than those related by the Supreme Court. Indeed, Lawrence and Garner may not have been engaging in sexual activity at all when the police appeared. See DALE CARPENTER, *FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS* 61–74 (2012).

23. *Lawrence*, 539 U.S. at 563.

24. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (upholding Georgia's sodomy statute on the ground that the Constitution does not guarantee "a fundamental right to engage in homosexual sodomy"), *overruled by Lawrence*, 539 U.S. 558.

25. *Lawrence*, 539 U.S. at 563.

Process Clause of the Fourteenth Amendment”; and (3) “[w]hether *Bowers* . . . should be overruled.”<sup>26</sup> The *Lawrence* majority focused on the latter two questions and answered both affirmatively. Adopting Justice Stevens’s dissenting analysis in *Bowers*, the Court declined to distinguish between the sexual liberty of married and unmarried persons and rejected majoritarian morality as a “sufficient reason” for prohibiting a sexual practice.<sup>27</sup> “The Texas statute,” it concluded, “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”<sup>28</sup>

“Liberty,” Justice Kennedy wrote for the Court, “presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”<sup>29</sup> His opinion traces along two main tracks the development of the particular liberty “at stake” in *Lawrence*<sup>30</sup>: state-level legislative and constitutional history, which attested before and after *Bowers* to “an emerging awareness that liberty gives substantial protection” to decisions about “matters pertaining to sex”;<sup>31</sup> and forty years of precedent expanding the “substantive reach of liberty under the Due Process Clause.”<sup>32</sup> The decision characterizes *Bowers* as an aberration from *Griswold v. Connecticut*,<sup>33</sup> *Eisenstadt v. Baird*,<sup>34</sup> *Roe v. Wade*,<sup>35</sup> *Carey v. Population Services International*,<sup>36</sup> and especially *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>37</sup> which affirmed eight years after *Bowers* that a range of “personal decisions” enjoys constitutional protection.<sup>38</sup> Justice Kennedy’s most succinct statement of *Lawrence*’s holding is immediately supported with a line from *Casey*: “The[] right to liberty under the Due Process Clause gives [Petitioners] the full right to engage in their conduct without intervention of the

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26. *Id.* at 564.

27. *Id.* at 577–78 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

28. *Id.* at 578.

29. *Id.* at 562.

30. *Id.* at 567.

31. *Id.* at 568–73.

32. *Id.* at 564–68, 573–74.

33. 381 U.S. 479 (1965) (invalidating ban on assisted contraception by married couples).

34. 405 U.S. 438 (1972) (extending *Griswold* on equal protection grounds to unmarried couples).

35. 410 U.S. 113 (1973) (invalidating ban on abortion), *overruled in part by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

36. 431 U.S. 678 (1977) (invalidating ban on provision of contraception to persons under sixteen).

37. 505 U.S. 833 (affirming that the right to choose abortion is constitutionally protected).

38. *Lawrence v. Texas*, 539 U.S. 558, 564–66, 573–74 (2003).



government. ‘It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.’<sup>39</sup>

Justice O’Connor, who voted with the majority in *Bowers*, would have invalidated Texas’s Homosexual Conduct Law not for violating the freedom to engage in, quite precisely, homosexual conduct, but for invidious discrimination under the Equal Protection Clause: “While it is true that the law applies only to conduct, the conduct . . . is closely correlated with being homosexual. Under such circumstances, Texas’ sodomy law is targeted at . . . gay persons as a class.”<sup>40</sup> At the time no Justices joined Justice O’Connor’s concurrence, but her analysis was quietly affirmed in *Christian Legal Society v. Martinez*.<sup>41</sup> Faced with a religious organization’s claim that its membership policy excluded only practicing, unrepentant homosexuals, Justice Ginsburg answered: “Our decisions have declined to distinguish between status and conduct in this context.”<sup>42</sup> As Justice Kennedy had written in *Lawrence*, “[e]quality of treatment and . . . the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”<sup>43</sup>

*Lawrence*’s recognition that liberty and equality are often related is a vital development for gay rights specifically and for constitutional law generally.<sup>44</sup> It is not, however, an invitation to collapse one value into the other, as if personal freedom were a mere instrumentality of social parity. However “tenable” the Court found *Lawrence* and Garner’s equal protection claim,<sup>45</sup> it was sexual liberty, not homosexual equality, that the majority unequivocally vindicated: “Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the

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39. *Id.* at 578 (quoting *Casey*, 505 U.S. at 847).

40. *Id.* at 583 (O’Connor, J., concurring).

41. See *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971 (2010).

42. *Id.* at 2990 (“When homosexual conduct is made criminal by the law of the State, that declaration . . . is an invitation to subject homosexual persons to discrimination.” (emphasis omitted) (quoting *Lawrence*, 539 U.S. at 575)).

43. *Lawrence*, 539 U.S. at 575.

44. See generally Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004) (describing *Lawrence*’s significance to both the gay rights movement and the Supreme Court’s substantive due process jurisprudence); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011) (examining the Court’s intertwined conceptions of equality and liberty).

45. *Lawrence*, 539 U.S. at 574.

conduct both between same-sex and different-sex participants.”<sup>46</sup> In light of this clear statement, it is initially perplexing that Professor Pamela Karlan, to take one example, should insist that *Lawrence* is fundamentally about equality.<sup>47</sup> Reading “class-based animosity” toward “gay people” where Justice Kennedy identified moral “[c]ondemnation of [homosexual] practices,” Professor Karlan says that the Court’s rejection of this purpose, “whatever the Court’s doctrinal handle, sounds in equal protection.”<sup>48</sup> Underlying this conclusion is the unverifiable contention that, though sodomy laws deprived “gay people . . . equal respect for their life choices,” they staged no real “interference” with whether and how those choices were reached.<sup>49</sup> Noting that Texas’s sodomy prohibition was “virtually never enforced,” Karlan finds it “hard to imagine that the law had any activity-level effects on nonpublic, consensual behavior at all.”<sup>50</sup> Thus *Lawrence* was “different from . . . the Court’s previous autonomy cases,” and was really about treating like things alike—specifically, the respective “love lives” of gay and straight people.<sup>51</sup>

The Court, however, saw the question presented in *Lawrence* more broadly, and prominently ranked the Texas statute’s ostensible purpose of discouraging homosexual relations and relationships among its practical effects: “The petitioners are entitled to respect for their private lives. The State cannot demean their existence *or* control their destiny by making their private sexual conduct a crime.”<sup>52</sup> *Lawrence* clearly rejects both of these intentions, but control over one’s destiny is the principle proclaimed at the decision’s philosophical core. Quoting the opinion he co-authored in *Casey*, Justice Kennedy wrote:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could

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46. *Id.* at 575.

47. See Pamela S. Karlan, *Loving Lawrence*, 102 MICH. L. REV. 1447 (2004); see also Greene, *supra* note 7, at 1867 (identifying *Lawrence*’s “rationale” as “the proposition that conduct agreed by social consensus to be ‘status-definitional’ cannot be punished for morality’s sake”); cf. Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1104, 1123 (2004) (characterizing equality as a “minor chord” rounding out *Lawrence*’s “major chord” of liberty).

48. *Lawrence*, 539 U.S. at 571; Karlan, *supra* note 47, at 1450–51.

49. Karlan, *supra* note 47, at 1450, 1452.

50. *Id.* at 1452–53.

51. *Id.*

52. *Lawrence*, 539 U.S. at 578 (emphasis added).

not define the attributes of personhood were they formed under compulsion of the State.<sup>53</sup>

Read out of context, these lines might evoke religious liberties protected by the First Amendment, not sexual liberties protected by the Fourteenth. Indeed their emphasis on the metaphysical stakes of certain intimate decisions suggests a new kind of “disestablishment”<sup>54</sup>—a transfer into the domain of individual discretion certain moral questions on which religion, despite successive consolidations of political secularism, remained uniquely authoritative for public policy.<sup>55</sup> *Lawrence*’s “sweet-mystery-of-life passage,” as Justice Scalia derisively called it,<sup>56</sup> makes a good deal more sense when one considers the Court’s acknowledgment that age-old condemnations of “homosexual conduct as immoral” continue to this day to control the destiny of countless individuals: “For many persons these are not trivial concerns but . . . ethical and moral principles to which they aspire and which thus determine the course of their lives.”<sup>57</sup>

Thus *Lawrence*’s ultimate concern is not with what people are or even what they do, but with the exercise of conscience that mediates between an actor and her acts. Like the *Casey* opinion on which it extensively draws, *Lawrence* safeguards a “right to choose”<sup>58</sup>—specifically, a right

53. *Id.* at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

54. Clifford J. Rosky, *Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913, 970 (2011).

55. Anglo-American legal discourse long characterized sodomy as “a very horrible vice which should not be named,” KENNETH BORRIS, *SAME-SEX DESIRE IN THE ENGLISH RENAISSANCE: A SOURCEBOOK OF TEXTS, 1470–1650*, at 385 n.67 (2004) (citing V THE PARLIAMENT ROLLS OF MEDIEVAL ENGLAND 1275–1504: EDWARD III 1351–1377, at 318 (Mark Ormrod ed., 2005) (1376)), “a detestable, and abominable sin, amongst Christians not to be named,” EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 58 (William S. Hein Co. 1986) (1644), “*peccatum illud horribile inter Christianos non nominandum*,” IV WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 215 (Duyckinck, Long, Collins & Co. 1822) (1769), “that most horrid and detestable crime (among Christians not to be named),” *Davis v. State*, 3 H. & J. 154, 154 (Md. 1810), “sexual behavior . . . as should not be described among Christians,” *Berryman v. State*, 283 P.2d 558, 563 (Okla. Crim. App. 1955), and “a detestable, and abominable sin, amongst Christians not to be named,” *Ex parte H.H.*, 830 So. 2d 21, 34 (Ala. 2002) (quoting COKE, *supra*, at 58).

56. *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting).

57. *Id.* at 571 (majority opinion).

58. *Id.* at 558, 567 (“The liberty protected by the Constitution allows homosexual persons the right to make this choice.”); see also Sonia K. Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of Lawrence*, 14 WM. & MARY BILL

to choose homosexual relations and relationships. How far beyond the criminal context this right extends is another question and is taken up in the following subpart. For now it suffices to affirm that, in Justice Kennedy’s telling expression, “practices common to a homosexual lifestyle” are squarely “within the liberty of persons to choose.”<sup>59</sup>

### B. Marriage’s Burden on the Right

Rhetorically, doctrinally, and philosophically, *Lawrence* takes after *Casey*. Analytically, however, the decisions are very different. Where *Casey* applies an explicit standard—the “undue burden” test—to alleged violations of the right to choose abortion,<sup>60</sup> *Lawrence* offers no such guidance with regard to sexual liberty in general or the “full right” to choose homosexual relations and relationships in particular.<sup>61</sup> On the bench and in the academy, *Lawrence*’s interpreters have inferred nearly every conceivable approach: strict scrutiny;<sup>62</sup> intermediate scrutiny;<sup>63</sup> rational basis review;<sup>64</sup> “rational basis with bite;”<sup>65</sup> and unstructured balancing of the interests served and liberties infringed by a given law.<sup>66</sup> This Article neither endorses nor applies any of these tests. Whatever analysis might govern a *Lawrence*-based claim for same-sex marriage, a court first must be persuaded that there is some meaningful infringement to analyze.<sup>67</sup> Thus the remainder of this Part describes the nature and

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RTS. J. 1429, 1472–78 (2006) (discussing *Lawrence*’s reliance on *Casey*’s conception of “decisional autonomy”).

59. *Lawrence*, 539 U.S. at 578, 567.

60. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

61. *Lawrence*, 539 U.S. at 578.

62. *See, e.g., Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 377 F.3d 1275, 1313 (11th Cir. 2004) (Barkett, J., dissenting) (demanding “a compelling and narrowly tailored justification” for a law prohibiting adoption by homosexuals).

63. *See, e.g., Witt v. Dep’t of the Air Force*, 527 F.3d 806, 821–22 (9th Cir. 2008) (applying “an intermediate level of scrutiny” to “Don’t Ask, Don’t Tell”).

64. *See, e.g., Seegmiller v. Laverkin City*, 528 F.3d 762, 771 (10th Cir. 2008) (applying rational basis review to punishment of a police officer for off-duty sexual conduct).

65. *See* Claudio J. Pavia, *Constitutional Protection of “Sexting” in the Wake of Lawrence: The Rights of Parents and Privacy*, 16 VA. J.L. & TECH. 189, 202 (2011) (applying “*Lawrence*’s seeming rational basis with bite” to regulations of teenage sexuality); *see also Witt*, 527 F.3d at 818 (contemplating but rejecting the possibility that *Lawrence* applied a “heightened level of scrutiny” other than strict or intermediate).

66. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 745 (5th Cir. 2008).

67. Though the marriage laws do not directly interfere with the right under *Lawrence* to choose homosexual relations and relationships, Supreme Court precedent under several doctrines, including substantive due process, generally “recognize[s] that an incidental burden on a primary conduct right triggers some form of heightened scrutiny.” Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1232–33 (1996).

magnitude of same-sex marriage bans' burden on the right to choose homosexual relations and relationships.<sup>68</sup>

A threshold inquiry is whether *Lawrence* specifically insulates itself from the same-sex marriage controversy. Tempering some evocative language about the vital role of homosexual sex in the formation and perpetuation of “enduring” homosexual relationships,<sup>69</sup> the *Lawrence* Court pointedly insisted that it was ruling on a sodomy law, not a same-sex marriage ban. The Texas statute sought to control a “personal relationship that, *whether or not entitled to formal recognition in the law*, is within the liberty of persons to choose without being punished as

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68. It is immaterial that this infringement takes the form of selective subsidization—support for heterosexual but not homosexual couples—rather than outright prohibition. The benefit-burden distinction, always “tendentious and question-begging,” is particularly inapt here. See LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 74–75 (1996); see also Julie Nice, *How Equality Constitutes Liberty: The Alignment of CLS v. Martinez*, 38 HASTINGS CONST. L.Q. 631, 648–54 (2011) (describing the Supreme Court’s “inconsisten[t]” choice, in cases of selective subsidization, between the principle that “the government may not do indirectly (through conditions on benefits) what it may not do directly (through compulsion)” and the principle that “the greater power includes the lesser [power]”). Cases involving government funding of abortions offer the most doctrinally relevant points of comparison. Since 1977, the Supreme Court has consistently held that a woman’s right to terminate a pregnancy imposes no duty on the state to fund or otherwise facilitate abortions, even as it funds other medical decisions and family planning services. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 173, 203 (1991) (upholding federal regulation withholding federal funding from programs that, inter alia, provide counseling about or “referrals for . . . abortion as a method of family planning”); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 511 (1989) (upholding state prohibition on use of public employees and facilities to perform or assist elective abortions); *Harris v. McRae*, 448 U.S. 297, 326 (1980) (upholding statutory withholding of federal funding for medically necessary abortions); *Maher v. Roe*, 432 U.S. 464, 474 (1977) (holding that state limitation of Medicaid funding to medically necessary abortions did not “impinge upon the fundamental right recognized in *Roe*”). Every one of these cases was based on the crucial premise that the state had a constitutionally legitimate preference for the activity it chose to subsidize—carrying a pregnancy to term. See *Maher*, 432 U.S. at 475–76 (“There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.”); *Rust*, 500 U.S. at 193 (same); *Harris*, 448 U.S. at 315 (same); see also *Webster*, 492 U.S. at 511 (“[T]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth . . .” (quoting *Poelker v. Doe*, 432 U.S. 519, 521 (1977))). The legitimacy of this “value judgment” was inscribed in “*Roe [v. Wade]* itself.” *Maher*, 432 U.S. at 474, 478. By contrast, the selective subsidization at issue here—the state’s preference for heterosexual over homosexual relationships—admits no such a priori justification. To the contrary, *Lawrence* made clear that a “value judgment” favoring heterosexual over homosexual relationships is an unconstitutional ground of legislation. See *infra* Part V.

69. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

criminals.”<sup>70</sup> The Court emphasized this distinction near the end of its opinion, noting that “[t]he present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”<sup>71</sup> Whether these caveats were meant to prejudice or cautiously leave open the question of same-sex marriage appears to hinge on what one makes of the Court’s admonition against “attempts by the State . . . to define the meaning of [a] relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.”<sup>72</sup> Assuming marriage to be the “institution” at issue here,<sup>73</sup> there are at least two reasons why same-sex marriage is not among the “abuse[s]” the Court fears. First, the opinion’s juxtaposition of “injury to a person” and “abuse of an institution” suggests concern about practices widely understood to encompass both harms: adultery or polygamy, perhaps.<sup>74</sup> Second, although some people do consider same-sex marriage harmful—to its participants, to society, to marriage itself—attributing this sentiment to the *Lawrence* majority seems ungenerous.<sup>75</sup> It would be incongruously and gratuitously insulting, a sharp aftertaste of *Bowers*,<sup>76</sup> for an opinion that is otherwise so respectful of “homosexual persons,” so concerned for their “dignity,”<sup>77</sup> to call same-sex marriage an “abuse” of the marital institution.

Ultimately one can only speculate as to the *Lawrence* Court’s immediate intentions with respect to same-sex marriage. What is clear is that from the day *Lawrence* was decided, commentators of various political stripes have doubted the existence of a constitutionally meaningful obstacle to extending the case to this issue.<sup>78</sup> Justice Scalia’s dissent offered the first and still the most memorable expression of this view. In direct response to the Court’s “bald, unreasoned disclaimer,” he stated simply: “Do not believe it. . . . This case ‘does not involve’ the issue of homosexual marriage only if one entertains the belief that principle and logic have

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70. *Id.* (emphasis added).

71. *Id.* at 578.

72. *Id.* at 567.

73. Karlan, *supra* note 47, at 1459.

74. For an early suggestion to this effect, see Mary Anne Case, *Of “This” and “That” in Lawrence v. Texas*, 2003 SUP. CT. REV. 75, 140–41 (2004).

75. See Tribe, *supra* note 44, at 1950 (calling it “implausible,” in light of other rhetoric in *Lawrence*, that this language refers to same-sex marriage).

76. See EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 6 (1990) (describing *Bowers*’s “unusual power to offend”).

77. *Lawrence*, 539 U.S. at 560, 567, 572, 575, 577.

78. See, e.g., Sarah Kershaw, *Adversaries on Gay Rights Vow State-by-State Fight*, N.Y. TIMES, July 6, 2003, at 8 (quoting Freedom to Marry director Evan Wolfson’s prediction that *Lawrence* provides “a tremendous tool” for winning same-sex marriage); *The Threat to Marriage from the Courts*, U.S. SENATE REPUBLICAN POL’Y COMMITTEE (July 29, 2003), <http://rpc.senate.gov/releases/2003/jd072903.pdf>.

nothing to do with the decisions of this Court.”<sup>79</sup> Justice Scalia’s fears have proved warranted. Judges who favor same-sex marriage do not feel constrained by *Lawrence*’s questionable caveats. Citing *Lawrence*, they discount “moral disapprobation” of homosexuality<sup>80</sup> as a constitutionally permissible rationale for denying marriage licenses to same-sex couples.<sup>81</sup> Citing *Lawrence*, they equate homosexual conduct with homosexual status, and go on to analyze same-sex marriage bans as infringements of equal protection.<sup>82</sup> Citing *Lawrence*, they consider “history and tradition” as informative, not determinative, of plaintiffs’ substantive due process claim of a fundamental right to marry.<sup>83</sup> And citing *Lawrence*, they repudiate *Bowers v. Hardwick*’s error of framing contested rights so narrowly as to render them unprecedented.<sup>84</sup>

### 1. Discipline or Punishment?

One aspect of *Lawrence* that receives scant attention in same-sex marriage litigation is the sexual liberty the decision fundamentally ensures. At most, advocates invoke this liberty to situate couples’ asserted “right to marry” within a constellation of constitutional freedoms related to family and reproduction, not to supply an independent ground for relief.<sup>85</sup> One reason for this omission may be the fact that, as couples,

79. *Lawrence*, 539 U.S. at 604–05 (Scalia, J., dissenting).

80. *Id.* at 604.

81. See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1002 (N.D. Cal. 2010), *aff’d sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 389–90 (D. Mass. 2010); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 479 (Conn. 2008); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003); *Hernandez v. Robles*, 855 N.E.2d 1, 26 (N.Y. 2006) (Kaye, C.J., dissenting).

82. See *Perry*, 704 F. Supp. 2d at 997; *In re Marriage Cases*, 183 P.3d 384, 440–43 (Cal. 2008), *superseded by constitutional amendment*, CALIF. CONST. art. 1, § 7.5 (West, Westlaw through Nov. 2008 amendments); *Kerrigan*, 957 A.2d at 431 n.24; *Varnum v. Brien*, 763 N.W.2d 862, 885 (Iowa 2009); *Conaway v. Deane*, 932 A.2d 571, 598, 605–06 (Md. 2007).

83. See *In re Marriage Cases*, 183 P.3d at 421; *Kerrigan*, 957 A.2d at 466; *Deane*, 932 A.2d at 696 (Bell, C.J., dissenting); *Hernandez*, 855 N.E.2d at 33 (Kaye, C.J., dissenting).

84. See *In re Marriage Cases*, 183 P.3d at 421; *Deane*, 932 A.2d at 696 (Bell, C.J., dissenting); *Hernandez*, 855 N.E.2d at 23 (Kaye, C.J., dissenting); *Andersen v. King Cnty.*, 138 P.3d 963, 1028 (Wash. 2006) (Bridge, J., dissenting).

85. See, e.g., Respondent’s Brief at 38–39, *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Ct. App. 2005) (No. A110449), 2005 WL 3967315 [hereinafter *Marriage Cases Respondent’s Brief*]; Brief of Plaintiffs-Appellees at 32–33, *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (No. 44) [hereinafter *Deane Appellees’ Brief*]. These invocations

plaintiffs in these cases proclaim—indeed “flaunt”—their exercise of the right to choose homosexual relations and relationships.<sup>86</sup> In *Perry v. Schwarzenegger*, however, gay rights advocates overcame this imaginative hurdle and urged the Ninth Circuit to analyze Proposition 8, California’s constitutional amendment prohibiting same-sex marriage, as a burden on sexual liberty, which the court had done two years earlier in a case holding “Don’t Ask, Don’t Tell” unconstitutional under *Lawrence*.<sup>87</sup> The *Perry* amici argued that, like the military’s employment policy, the marriage ban “disadvantages those who are in same-sex relationships because they are in same-sex relationships. . . . Indeed, Proposition 8 strikes closer to the . . . right identified in *Lawrence*,” placing “a disadvantage on the relationship itself.”<sup>88</sup>

As the *Perry* brief illustrates, one way to raise a *Lawrence*-based marriage claim is to characterize the harm wrought by same-sex marriage bans as punitive and to show how same-sex couples are “disadvantage[d]” for their exercise of a constitutionally protected liberty. But there is another way, one that comes closer to the anti-“normalizing” spirit of *Lawrence*, *Casey*, and their antecedents.<sup>89</sup> Focusing on individuals rather than couples, advocates can characterize the challenged laws as disciplinary, coercive, deterrent.<sup>90</sup> Of course the two arguments are of a piece; punishment and deterrence often work together.<sup>91</sup>

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resonate with the “domesticated liberty” that *Lawrence*’s rhetoric idealizes, though its holding clearly encompassed the casual sexual relations for which petitioners in that case had been convicted. See Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1414 (2004); Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464, 1523 (2004).

86. Mary Anne 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, 1658 (1993).

87. Brief of Amici Curiae ACLU Foundation of Northern California et al. in Support of Plaintiffs-Appellees at 21–28, *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010) (No. 10-16696) [hereinafter *Perry* LGBT Advocates’ Brief] (citing Witt v. Dep’t of the Air Force, 527 F.3d 806 (9th Cir. 2008)).

88. *Perry* LGBT Advocates’ Brief, *supra* note 87, at 22, 25 (emphasis added).

89. See Rubinfeld, *supra* note 1, at 800–01.

90. Alleging a “burden” on “the fundamental right to enter into an intimate relationship,” complaints filed in Maryland and Oregon hinted at the deterrent aspect of same-sex marriage bans, but in neither case did subsequent filings elaborate this claim. See Complaint for Declaratory & Injunctive Relief at 36–37, *Deane v. Conaway*, No. 24-C-04-005390, 2006 WL 148145 (Md. Cir. Jan. 20, 2006) (No. 10-840), available at <http://www.aclu.org/files/FilesPDFs/deane%20polyak%20complaint.pdf>; First Amended Complaint at 27, *Li v. State*, No. 0403-03057, 2004 WL 1258167 (Or. Cir. Apr. 20, 2004) [hereinafter *Li* Complaint].

91. See Kathleen Callahan, *In Limbo: In re Davis and the Future of Herrera Innocence Claims in Federal Habeas Proceedings*, 53 ARIZ. L. REV. 629, 640 (2011) (noting “the twin purposes of retribution and deterrence” in the context of capital punishment).



The Arkansas Supreme Court's 2011 decision in *Department of Human Services v. Cole* offers a useful analogy for the dual nature of the burden that same-sex marriage bans impose on sexual liberty.<sup>92</sup> At issue in *Cole* was a law prohibiting adoption and foster care by sexually intimate, unmarried cohabitants.<sup>93</sup> Relying on its prior decision invalidating a statute much like Texas's Homosexual Conduct Law, the court analyzed and ultimately struck down the ban as a burden on the liberty "to engage in private, consensual, noncommercial, sexual conduct."<sup>94</sup> The Arkansas court compared *Cole* to *Sherbert v. Verner*, where the U.S. Supreme Court accepted a Sabbatarian's claim that the Free Exercise Clause did not permit the State of Alabama to condition her unemployment benefits on willingness to work on Saturdays.<sup>95</sup> The *Sherbert* Court held that Alabama could not "pressure" an individual to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."<sup>96</sup> Likewise the Arkansas Supreme Court denied that the state could force Cole to "choose between exercising her fundamental right to engage in an intimate sexual relationship in the privacy of her home" and "being eligible to adopt or foster children."<sup>97</sup> It specifically contemplated the possibility that some citizens will respond to the ban by electing to "lead a life of private, sexual intimacy with a partner without the opportunity to adopt or foster children" (punishment) while others will "forego sexual cohabitation and, thereby, attain eligibility to adopt or foster" (deterrence).<sup>98</sup>

Essentially the same dynamics are at play in the same-sex marriage context. Same-sex couples, already enjoying their liberty "to engage in an intimate sexual relationship" with someone of the same sex, are forced to live "without the opportunity" to marry.<sup>99</sup> The law penalizes them through deprivation and stigmatization. Meanwhile, single individuals are instructed to "attain eligibility" to marry by "forego[ing]" exercise of

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92. Ark. Dep't of Human Servs. v. Cole, 2011 Ark. 145 (2011), available at <http://opinions.aoc.arkansas.gov/WebLink8/ElectronicFile.aspx?docid=60137&&dbid=0>.

93. See *id.* at 2–3.

94. *Id.* at 9.

95. *Id.* at 12 (discussing *Sherbert v. Verner*, 374 U.S. 398, 408–09 (1963)).

96. *Sherbert*, 374 U.S. at 404.

97. *Cole*, 2011 Ark. 145, at 13–14.

98. *Id.* at 11.

99. See *supra* notes 97–98 and accompanying text.

their right to choose a homosexual relationship.<sup>100</sup> The law coerces them by threat of deprivation and stigmatization, functioning similarly to, and perhaps more effectively than, outright prohibitions of homosexual conduct.<sup>101</sup>

The marriage laws' simultaneously coercive and punitive aspects may be complementary, but they are not for that reason equivalent. The constitutional significance of the distinction between conformity and dissent, adherence to the legal norm and disrespect of it, discipline and punishment, is nowhere more salient than in the jurisprudence of substantive due process. As Professor Jed Rubenfeld argued in a critique aimed largely at *Bowers*, the "distinctive and singular characteristic" of laws invalidated under this doctrine is "their *productive* or *affirmative*" power, "their profound capacity to direct" the fate of individuals who accede to the state's preferences.<sup>102</sup> These laws are harmful, to the point of being totalitarian, because they steer a life's "development along a particular avenue."<sup>103</sup> Prohibitions of homosexual sex, for example, "channel certain individuals—supposing the law is obeyed—into a network of social institutions and relations that will occupy their lives . . . . The proscription is against homosexual sex; the products are lives forced into relations with the opposite sex."<sup>104</sup> So too with same-sex marriage bans, whose victims include not only longtime couples penalized for their homosexual choices but also individuals goaded into heterosexual relationships—heterosexual marriages, certainly, but also the nonmarital, premarital, and quasi-marital relations that so many people pursue in search of a spouse.

## 2. *The Burden's Substance and Magnitude*

Same-sex marriage advocates could argue, though they have not done so, that same-sex marriage bans are unconstitutional simply because they compel individuals to choose between two constitutional rights: the sexual liberty protected in *Lawrence* and the freedom to marry recognized in *Loving v. Virginia* and other cases.<sup>105</sup> In *McDaniel v. Paty*, for

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100. See *supra* note 98 and accompanying text.

101. The distinction between individuals and couples should not be overstated. An individual in a same-sex couple, for example, may still be influenced by same-sex bans to exit her present relationship in order to pursue a possible spouse.

102. Rubenfeld, *supra* note 1, at 739, 784.

103. *Id.* at 784.

104. *Id.* at 799–800.

105. I thank Christy Mallory for drawing my attention to this missing argument. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (invalidating ban on interracial marriage); *Turner v. Safley*, 482 U.S. 78, 99 (1987) (invalidating prison policy prohibiting inmates

example, the Supreme Court unanimously struck down a Tennessee law prohibiting clergy from running for state office.<sup>106</sup> Of the eight Justices who participated in that case, seven agreed that the statute was invalid because it conditioned a right of political participation on renunciation of a specific form of religious exercise.<sup>107</sup> Though *Paty* seems readily applicable to the tension between same-sex marriage bans and the right to choose homosexual relations and relationships, the remainder of this subpart shows that these bans' burden on sexual liberty is unconstitutional regardless of whether the right to marry is truly fundamental or is fundamental only as to heterosexual unions.

The law forcefully directs people to marry.<sup>108</sup> States avow their policy to "favor" and "encourage" marriage, and they pursue that purpose in a bewildering array of contexts.<sup>109</sup> The fact of this favoritism is one of the few points on which both sides of the same-sex marriage debate agree. One side decries same-sex couples' exclusion from the numerous rights and benefits of civil marriage, and from the social legitimacy and self-satisfaction that marital status affords.<sup>110</sup> The other side insists that these same blandishments are necessary to preserve the traditional family, and particularly to convey to heterosexually active individuals that marriage is the proper setting in which to bear and raise children.<sup>111</sup>

Marriage is the signal instance of what Professor Carl Schneider influentially called the "channeling function" in family law, or the multiple and varied ways by which government "recruits, builds, shapes, sustains,

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from marrying); *Zablocki v. Redhail*, 434 U.S. 374, 388–91 (1978) (invalidating ban on marriages by men with outstanding child support obligations).

106. *McDaniel v. Paty*, 435 U.S. 618, 629 (1978).

107. *See id.* at 626; *id.* at 641 (Brennan, J., concurring); *id.* at 642–43 (Stewart, J., concurring).

108. *See* Ruthann Robson, *Compulsory Matrimony*, in *FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS* 313, 314 (Martha Albertson Fineman et al. eds., 2009) (describing "forces that impose, manage, organize, propagandize and forcefully maintain the political institution of marriage").

109. *See* Kathryn Zwickler, *Statutory and Judicial Statements of Public Policy Favoring or Encouraging Marriage in the Fifty States* (July 25, 2011) (on file with author).

110. *See, e.g.*, Robson, *supra* note 108, at 314.

111. For a discussion of the increasingly prominent argument that marriage accommodates heterosexuals' "accidental procreation," and therefore must remain heterosexual, see Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 *YALE J.L. & HUMAN.* 1, 2–3 (2009).

and promotes social institutions.”<sup>112</sup> Rarely does the state undertake this function through outright compulsion.<sup>113</sup> Rather, institutions’ “very presence, the social currency they have, and the governmental support they receive . . . combine to make it seem reasonable and even natural for people to use them.”<sup>114</sup>

The law’s channeling function operates primarily through three modes, all of which Professor Schneider illustrated by reference to marriage: prohibition or discouragement of alternatives, material reward, and symbolic valorization.<sup>115</sup> The first of these modes effectively posits as a given what the present Article sets out to prove—that disfavoring “competing” social institutions steers people into the one on offer.<sup>116</sup> Though Schneider made no mention of same-sex marriage bans, he emphasized that “criminal sanctions”—against practices like “sodomy, bigamy, adultery . . . prostitution . . . fornication and cohabitation”—usually are not the state’s most effective means of steering individuals into the “normative” ideal of “monogamous, heterosexual, and permanent” marriage.<sup>117</sup> Civil proscriptions can be deployed to the same end, albeit through less patently coercive means.<sup>118</sup>

Most laws relevant to marriage are not proscriptive at all. Rather they offer material support<sup>119</sup>—myriad incentives, “particularly with respect to taxation, state employee benefits, and dissolution.”<sup>120</sup> As the Supreme Judicial Court of Massachusetts wrote, “[t]he benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death.”<sup>121</sup> It is instructive simply to count the ways: 1,138 statutory provisions in “the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges”;<sup>122</sup> “over 500” in Oregon;<sup>123</sup> 425 in Maryland;<sup>124</sup> and “hundreds” in Massachusetts,<sup>125</sup> only some of them listed in the margin below.<sup>126</sup>

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112. Schneider, *supra* note 11, at 496.

113. *Id.* at 503–04.

114. *Id.* at 498.

115. *Id.* at 503.

116. *Id.*

117. *Id.* at 520, 503, 500–01.

118. *Id.* at 503–04.

119. *Id.* at 503.

120. M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 *DRAKE L. REV.* 1081, 1082–83 (2010).

121. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003).

122. See Badgett, *supra* note 120, at 1082 (quoting Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004), <http://www.gao.gov/new.items/d04353r.pdf>).

123. *Li Complaint*, *supra* note 90, at 4.

124. *Conaway v. Deane*, 932 A.2d 571, 646 (Md. 2007) (Raker, J., concurring in part and dissenting in part).

125. *Goodridge*, 798 N.E.2d at 955.

“What is all this,” asked the English jurist James Fitzjames Stephen in 1874, “except the expression of the strongest possible determination on the part of the Legislature to recognize, maintain, and favour marriage in every possible manner as the foundation of civilized society?”<sup>127</sup> The question is no less apt today.

Adding “competing institutions”<sup>128</sup> designed specifically for same-sex couples, like civil union or domestic partnership,<sup>129</sup> or extending equal support to all families regardless of marital status,<sup>130</sup> would mitigate but could not eliminate the marriage laws’ burden on sexual choice. Such innovations lack, among other things, marriage’s social currency and prestige, attributes that for centuries the state has worked purposefully to cultivate.<sup>131</sup> California’s expensive, bitter fight over Proposition 8

126. Professor Janet Halley lists the “legal attributes of marriage” discussed in *Goodridge*:

Joint filing of state income tax; tenancy by the entirety; spouses’ and children’s homestead claim; rights to inherit from an intestate spouse; rights to the elective share . . . ; entitlement to wages owed to a deceased employee spouse; . . . right to share [a] medical policy . . . ; thirty-nine week continuation of health care coverage for the spouse of an insured who is laid off or dies; preferential options under the state pension system; preferential benefits in the state’s medical insurance program . . . ; spousal benefits and preferences in veterans’ benefits programs; financial protections for spouses of certain state employees . . . killed in the performance of duty; . . . equitable division of property upon divorce; . . . standing to claim for wrongful death[,] loss of consortium, . . . funeral and burial expenses and punitive damages in tort actions . . . ; presumption of legitimacy and parentage of children born to the wife; testimonial privileges . . . ; qualification for bereavement or medical leave to care for individuals related by . . . marriage; automatic “family member” preference to make medical decisions for an incompetent or disabled spouse . . . ; application of the rules of child custody, visitation, support and removal out-of-state as part of divorce proceedings; priority rights to be the administrator of the estate of a . . . spouse who dies intestate . . . ; right to burial in the lot or tomb owned by the deceased spouse.

Janet E. Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND 1, 49–50 (2010) (original punctuation and capitalization altered) (citing *Goodridge*, 798 N.E.2d at 955–56).

127. JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* (1874), reprinted in *LIBERTY, EQUALITY, FRATERNITY AND THREE BRIEF ESSAYS* 23, 156 (Univ. of Chi. Press 1991).

128. Schneider, *supra* note 11, at 503.

129. See, e.g., N.J. STAT. ANN. § 37:1-29 (West 2010) (establishing civil union); OR. REV. STAT. § 106.305 (2009) (establishing domestic partnership).

130. For a powerful statement of this imperative, see NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008).

131. See Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1257–58 (2010) (“[T]he state has encouraged the view that public recognition

showed the extent to which governmental recognition of a relationship as “marriage,” its mere use of the word to describe some and not other unions, is a coveted mark of social distinction.<sup>132</sup> The Supreme Court itself has described the marital bond as “sacred,”<sup>133</sup> ennobling,<sup>134</sup> the “most important relation in life, . . . having more to do with the morals and civilization of a people than any other institution.”<sup>135</sup>

Such official endorsements articulate some of the ideology government mobilizes through the channeling function. Marriage in our society is a pattern of human relationship thoroughly identified with government—hence the metaphor “making it legal”—yet whose replication may or may not depend on the state, drawing as it does on other sources, forces, and needs. That marriage is an institution upheld in the depth of people’s souls no less than in statute books is an aggravating, not mitigating, factor in assessing the marriage laws’ burden on the right to choose homosexual relationships.<sup>136</sup> The marriage to which so many individuals aspire, the institution that more or less shapes their sexual careers, is a thoroughly hybrid animal.<sup>137</sup> In measuring this creature’s incursion onto the right to choose homosexual relationships, it is futile—and for the state disingenuous—to try to separate its legal and nonlegal limbs. As Karl Llewellyn perfectly put it in 1932, “once [the] law has intervened in marriage . . . [it] gathers to itself much of [its] ideological power.”<sup>138</sup>

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as a family is something to be prized . . . [and] that individuals should place tremendous value on their public recognition as husbands [or] wives.”)

132. This lexical privilege was understood by both supporters and opponents of same-sex marriage in California to be the linchpin of the fundamental, constitutional right to marry. See Respondents’ Supplemental Brief at 18–29, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999); Answer Brief of Campaign for California Families on the Merits at 7–12, *In re Marriage Cases*, 183 P.3d 384 (No. S147999). For a rich discussion of the cultural significance of the legal designation “marriage,” see Marc R. Poirier, *Name Calling: Identifying Stigma in the “Civil Union”/“Marriage” Distinction*, 41 CONN. L. REV. 1425 (2009). See also *Perry v. Brown*, 671 F.3d 1052, 1078–79 (9th Cir. 2012) (“The incidents of marriage, standing alone, do not . . . convey the same governmental and societal recognition as does the designation of ‘marriage’ itself[,] . . . the principal manner in which the State attaches respect and dignity to the highest form of a committed relationship and to the individuals who have entered into it.”).

133. See *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)).

134. *Zablocki*, 434 U.S. at 384; *Griswold*, 381 U.S. at 486; *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885).

135. *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

136. In regulating marriage at all, the state “operate[s] on drives and desires too strong or too subtle for most to resist.” Rubinfeld, *supra* note 1, at 784.

137. See Karl N. Llewellyn, *Behind the Law of Divorce* (pt. 1), 32 COLUM. L. REV. 1281, 1282 (1932) (“‘The law’ of marriage is hard to isolate, a deal harder than ‘the law’ of most other matters.”).

138. *Id.* at 1302.

Notably, gay rights opponents are the first to acknowledge marriage's capacity to channel people into heterosexuality—not to mention monogamy, or indeed sexual relationships *tout court*.<sup>139</sup> Maggie Gallagher attests: “By socially defining and supporting a particular kind of sexual union between men and women,” the law of marriage “defines” for young people “what the preferred relationship is and what purposes it serves,”<sup>140</sup> informing them of “the outward meaning of their most urgent, personal impulses.”<sup>141</sup> And not only youth. The sexual malleability that children and adolescents represent in the conservative imagination also abides in adults, who depend on the marital institution to keep them from the temptations of a homosexual lifestyle. This reliance furnishes one answer to liberals’ often glib challenge, “How does [same-sex marriage] do any harm to . . . heterosexual marriage?”<sup>142</sup> The Family Research Council explains:

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139. This Article focuses on civil marriage as a heterosexual institution, but it is possible that marriage is vulnerable to other claims from sexual liberty insofar as it (1) channels people into sexual relationships at all—call this *an argument from celibacy*—and (2) channels people into a particular form of sexual relationship—call this *an argument from nonmonogamy*. These are interesting and important possibilities, but at each step of constitutional analysis they pose difficulties well beyond the scope of this Article. First, the sexual liberties infringed by “marriage itself” are not so obviously protected under *Lawrence* as the right to choose homosexual relations and relationships. Second, the state’s purported rationales for reserving marriage to heterosexual couples have been well rehearsed in same-sex marriage litigation, and so are bracketed here to better focus on the underlying claim of burdened liberty. It would be impossible, however, to introduce claims against marriage’s other constraints on sexual liberty without dwelling substantially on the possibility that the institution’s alleged constitutional vice is precisely its saving virtue—that human sexuality channeled into marriage, or some other sexually restrictive and socially useful institution, is preferable to unfettered sexual liberty. Third, where this Article seeks an obvious remedy—invalidation of same-sex marriage bans—it is unclear what claimants against marital channeling would or could demand. Do they seek abolition of all or most forms of sexual regulation specific to marriage? If they seek abolition of marriage itself, is that remedy constitutionally permissible? Affirmative answers to these questions are conceivable, but they are not easy extensions from a *Lawrence*-based argument for same-sex marriage.

140. Maggie Gallagher, *What Is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 782 (2002).

141. *Id.* at 790.

142. Peter Sprigg, Family Research Council, *Questions and Answers: What’s Wrong with Letting Same-Sex Couples “Marry?”*, FREE REPUBLIC (Dec. 28, 2003, 3:42 PM), <http://www.freerepublic.com/focus/f-news/1047830/posts>.

[H]omosexual unions often have a more direct impact on heterosexual marriages than one would think. . . . “[N]early 40 percent” of the 5,700 homosexual couples who have entered into “civil unions” in Vermont “have had a previous heterosexual marriage.” . . . [T]he popular myth that a homosexual orientation is fixed at birth and unchangeable may have blinded us to the fact that many supposed “homosexuals” have, in fact, had perfectly functional heterosexual marriages. . . . “In another time or another state, some of those marriages might have worked out. [Without t]he old stigmas, the universal standards that were so important to family stability, . . . [these marriages] were left exposed and vulnerable.”<sup>143</sup>

Gay divorcés are not the only individuals whom same-sex marriage, depending on one’s perspective, will leave “vulnerable” or empowered to choose homosexual relations and relationships. As a female bisexual from Massachusetts explained in the wake of *Goodridge*,<sup>144</sup> “Now that I could marry a woman, I didn’t feel like in being with a woman I had to give anything up anymore. I could be married and have everything I would want in a committed relationship.”<sup>145</sup>

### III. BISEXUALITY AND MARRIAGE

The right to choose homosexual relations and relationships is a universal liberty. It inheres regardless of any particular individual’s sexual orientation, just as the rights to contraception and abortion belong even to the most doctrinaire Catholic. Nonetheless, rights usually are claimed on behalf of those who are tangibly injured by their breach, and “[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects.”<sup>146</sup> This Part describes one class of individuals, amorphous yet numerous, for whom the marriage laws’ infringement of the right to choose homosexual relations and relationships is specially consequential.

#### A. *Why Bisexuality?*

Consider the following hypothetical from Justice Denise Johnson’s opinion concurring in part and dissenting in part in *Baker v. State*: “Dr.

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143. *Id.* (quoting Patricia Wen, *A Civil Tradition: Data Show Same-Sex Unions in VT. Draw a Privileged Group*, BOSTON GLOBE, June 29, 2003, at B1, available at 2003 WLNR 3414546, and Jeff Jacoby, Op-Ed., *The Threat from Gay Marriage*, BOSTON GLOBE, July 3, 2003, at A13, available at 2003 WLNR 3427363).

144. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

145. Pamela J. Lannutti, “*This Is Not a Lesbian Wedding*”: *Examining Same-Sex Marriage and Bisexual-Lesbian Couples*, in BISEXUALITY AND SAME-SEX MARRIAGE 99, 109 (M. Paz Galupo ed., 2009).

146. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992) (“The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.”).



A and Dr. B both want to marry Ms. C, an X-ray technician. Dr. A may do so because Dr. A is a man. Dr. B may not because Dr. B is a woman.”<sup>147</sup>

Commenting on this scenario, Professor Mary Anne Case identifies Ms. C, the X-ray technician, as “one of the few bisexuals to be discussed explicitly in same-sex marriage litigation.”<sup>148</sup> Though nothing in Justice Johnson’s opinion explicitly indicates Ms. C’s sexual orientation one way or another, Professor Case’s reading imbues this imaginary love triangle with dramatic tension—and a distinctive constitutional problematic. Justice Johnson’s hypothetical not only makes plain why same-sex marriage bans discriminate on the basis of sex, it also “vindicates the rights of . . . bisexuals.”<sup>149</sup>

How so? Under what conception of bisexuality does Ms. C have a special interest in the legalization of same-sex marriage? Typically, three variables are employed to describe sexual orientation: attraction, conduct, and self-identification.<sup>150</sup> The bisexual population’s size and composition vary markedly depending which measure is employed. A 2008 survey sponsored by the U.S. Department of Health and Human Services found that among adults under 45 years old, 16.8% of women and 7.1% of men admit same-sex attractions and 12.7% of women and 5.6% of men have engaged in homosexual sex, while only 4.6% of women and 2.5% of men identify as either bisexual (3.5% of women, 1.1% of men) or homosexual (1.1% of women, 1.7% of men).<sup>151</sup> Of course these findings depend on researchers’ success in securing honest and accurate responses, a rare achievement where homosexuality and bisexuality are concerned.<sup>152</sup> Few studies have come close to replicating findings like those of the New York City Department of Health, whose population-based survey of more than 4,000 male residents found that 9.4% of heterosexuals and fully 10% of husbands had sex with a man in

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147. *Baker v. State*, 744 A.2d 864, 906 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part).

148. Mary Anne Case, *What Feminists Have To Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199, 1220 (2010).

149. *Id.*

150. Yoshino, *supra* note 14, at 371.

151. See CHANDRA ET AL., *supra* note 16, at 31 tbls.14 & 15.

152. EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 284 (1994) (“[E]stimates derived from survey data on socially stigmatized sexual behaviors and feelings . . . are no doubt lower-bound estimates.”).

the past year, while 72.8% of all homosexually active men identify as heterosexual.<sup>153</sup>

Bisexuality, as used in this Article, refers to the “state or condition of being sexually attracted to members of both sexes.”<sup>154</sup> It is bisexual desire, not bisexual conduct or identification per se, that renders a person uniquely vulnerable to pressure toward heterosexuality. Returning to Justice Johnson’s hypothetical in *Baker*, suppose that Ms. C is bisexual purely as a matter of conduct. Suppose she desires and dates men, never women, but supplements her income as an X-ray technician with turns in X-rated films, performing both straight and lesbian scenes. In such case Ms. C’s bisexuality creates no meaningful rivalry between Drs. A and B; the law of attraction, not the law of marriage, foils the same-sex match. Now imagine instead that Ms. C is bisexual purely as a matter of identity. No doubt most people who call themselves bisexual intend to say something about their erotic attractions,<sup>155</sup> but suppose that Ms. C has known only heterosexual desires and relationships, and identifies as bisexual for ideological reasons: to promote bisexual visibility; to establish her prerogative to pursue same-sex relations and relationships should her desires change over time; to assert not only alliance but identification with LGBT people and communities.<sup>156</sup> Whatever the reason, Mrs. C’s “bisexuality” in this case neither validates Dr. B’s nuptial ambitions nor instantiates her injury under a same-sex marriage ban. Desire is key.

It might be asked at this point why, even under a desire-based conception of sexual orientation, our inquiry into marriage’s coercive aspect should focus on bisexuals rather than exclusive homosexuals. Why should bisexual Ms. C serve as our exemplary victim and not the heterosexually married homosexual—say, “Boris,” a married man for

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153. Preeti Pathela et al., *Discordance Between Sexual Behavior and Self-Reported Sexual Identity: A Population-Based Survey of New York City Men*, 145 ANNALS INTERNAL MED. 416, 419, 423 (2006).

154. *Bisexuality*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com> (enter “bisexuality”; then click “Go”) (last visited May 31, 2012). Though this definition, like the word *bisexual* itself, erroneously assumes only two sexes, the state’s binary classification of sex determines spousal eligibility regardless of genetic, hormonal, anatomical, or subjective intermediacy or disjuncture. See, e.g., *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999) (denying post-operative male-to-female transsexual the right to sue for husband’s wrongful death).

155. See BETH A. FIRESTEIN, *BECOMING VISIBLE: COUNSELING BISEXUALS ACROSS THE LIFESPAN*, at vii, xix–xx (2007); LAUMANN ET AL., *supra* note 152, at 300.

156. On the political uptake of sexual identity, see Carla Golden, *What’s in a Name? Sexual Self-Identification Among Women*, in *THE LIVES OF LESBIANS, GAYS, AND BISEXUALS: CHILDREN TO ADULTS* 229, 231–32 (Ritch C. Savin-Williams & Kenneth M. Cohen eds., 1996); Paula C. Rust, *The Politics of Sexual Identity: Sexual Attraction and Behavior Among Lesbian and Bisexual Women*, 39 SOC. PROBS. 366, 367 (1992).

twenty years and counting, who was “gay from the beginning (and knew it)?”<sup>157</sup>

Certainly Ms. C’s and Boris’s experiences will share important affinities.<sup>158</sup> As a counselor of both homosexuals and bisexuals explains, “[a]nyone sexually attracted to persons of their own gender must struggle with society’s taboo against homosexuality.”<sup>159</sup> Self-identified homosexuals and bisexuals both say things like:

It took me years to realize I had . . . homosexual interests; I didn’t see the relevance of early homosexual experiences; I wanted to get rid of homosexual feelings; . . . I thought I was going through a homosexual stage; I thought I would naturally change and become heterosexual.<sup>160</sup>

Bisexuals, though, tend to have longer careers identifying and behaving as exclusive heterosexuals.<sup>161</sup> Whereas nearly 90% of “gay or lesbian individuals say they were first attracted to someone of the same sex when they were under age 18,” fewer than 60% of bisexuals do.<sup>162</sup> Some interpreters believe such findings “suggest that exclusive homosexuality tends to emerge from a deep-seated predisposition, while bisexuality is more subject to influence by social and sexual learning.”<sup>163</sup> But the difference between a “deep-seated predisposition” and a susceptibility to “social and sexual learning” is not so clear. As sociologist Paula Rodríguez Rust writes,

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157. FRITZ KLEIN & TOM SCHWARTZ, *BISEXUAL AND GAY HUSBANDS: THEIR STORIES, THEIR WORDS* 45 (2001).

158. *See generally id.* (providing insight into the experiences of gay and bisexual men married to women).

159. David R. Matteson, *Counseling and Psychotherapy with Bisexual and Exploring Clients*, in *BISEXUALITY: THE PSYCHOLOGY AND POLITICS OF AN INVISIBLE MINORITY* 185, 186 (Beth A. Firestein ed., 1996) [hereinafter *BISEXUALITY: PSYCHOLOGY AND POLITICS*].

160. MARTIN S. WEINBERG ET AL., *DUAL ATTRACTION: UNDERSTANDING BISEXUALITY* 143 (1994).

161. *Id.* at 7; Matteson, *supra* note 159, at 187 (noting “[t]he delayed coming out of bisexuals” documented in several studies).

162. GARY J. GATES, *THE WILLIAMS INST., UCLA SCH. OF LAW, SEXUAL MINORITIES IN THE 2008 GENERAL SOCIAL SURVEY: COMING OUT AND DEMOGRAPHIC CHARACTERISTICS* 4 (2010).

163. Gary Zinik, *Identity Conflict or Adaptive Flexibility? Bisexuality Reconsidered*, in *BISEXUALITIES: THEORY AND RESEARCH*, *supra* note 8, at 7, 14 (emphasis omitted) (quoting ALAN PAUL BELL ET AL., *SEXUAL PREFERENCES: ITS DEVELOPMENT IN MEN AND WOMEN* 201 (1981)).

Because individuals are raised to assume heterosexual identities, the development of nonheterosexual identity requires the perception of a contradiction between one's initial heterosexual identity and one's own psychosexual experience. Much experience goes unacknowledged and uncoded, particularly experience that does not fit into an existing perceptual schema or . . . is socially disapproved. Heterosexual identity serves as a perceptual schema that filters and guides the interpretation of experience; experiences are given meanings that are consistent with heterosexual identity.<sup>164</sup>

Although the psychological dynamics Rust describes are similar in substance for bisexuals and homosexuals, the demands of heterosexual conformity often operate differently for members of each group. Exclusive homosexuals, who have no choice consistent with their desires but to pursue homosexual relations and relationships, often cite their affirmation of gay or lesbian identity as the moment when they renounced heterosexual intimacy.<sup>165</sup> Bisexuals generally do not share that experience. Uptake of bisexual identity rarely entails a disavowal of heterosexual relations and relationships.<sup>166</sup> Even after coming out to themselves and others, bisexuals are "able to choose which side of their sexuality to express"<sup>167</sup> and so continue, as we shall see with marriage, to feel "pressure . . . to exercise their heterosexual option."<sup>168</sup>

The channeling of bisexuals into heterosexuality is ultimately "a special case of a general phenomenon."<sup>169</sup> In its legal mechanisms, the pressure brought to bear on bisexuals is essentially the same as that imposed on homosexuals and even heterosexuals, who are not so obviously victimized by it. What makes bisexuals unique vis-à-vis homosexuals is, again, their special vulnerability to this pressure. An exclusive homosexual channeled into heterosexual marriage may suffer more intensely than would a bisexual in the same situation, but this is just why the average bisexual is so much more likely to conform. That conformity's harm may be lighter for bisexuals than homosexuals does not mean that they

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164. Paula C. Rust, "Coming Out" in the Age of Social Constructionism: Sexual Identity Formation Among Lesbian and Bisexual Women, 7 *GENDER & SOC.* 50, 71 (1993).

165. See, e.g., *BOYS LIKE US: GAY WRITERS TELL THEIR COMING OUT STORIES* (Patrick Merla ed., 1996) (recounting the "coming out" experiences of homosexual men); *THE COMING OUT STORIES* (Susan J. Wolfe & Julia Penelope Stanley eds., 1980) (describing the "coming out" experiences of lesbians).

166. See, e.g., *BI ANY OTHER NAME: BISEXUAL PEOPLE SPEAK OUT* (Loraine Hutchins & Lani Kaahumanu eds., 1991) (describing common bisexual experiences); KLEIN & SCHWARTZ, *supra* note 157, at 1.

167. SUE GEORGE, *WOMEN AND BISEXUALITY* 103 (1993).

168. Gilbert H. Herdt, *A Comment on Cultural Attributes and Fluidity of Bisexuality*, 10 *J. HOMOSEXUALITY* 53, 59 (1985). In *Fricke v. Lynch*, for example, a teenager who wished to bring a same-sex date to the prom emphasized to his principal a "commitment to homosexuality[.] . . . indicat[ing] that although it was possible he might someday be bisexual, at present he is exclusively homosexual and could not conscientiously date girls." 491 F. Supp. 381, 383 (D.R.I. 1980).

169. Thanks to Clifford Rosky for this elegant formulation.

suffer no injury at all. The state curtails their autonomy by withholding a choice—same-sex marriage—they may or may not ever wish to exercise, but whose preservation is valuable in itself and valuable for the homosexual relations and relationships it enables among individuals who are inclined to wed.

Bisexuality also offers a heuristic possibility that exclusive homosexuality does not. Although few persons are equally desirous of women and men,<sup>170</sup> the theoretical possibility of indifference and the reality of its innumerable approximations permit keener appreciation of external forces' role in shaping sexual choice. It is characteristic of indifference to yield. If Ms. C is unsure whether to date male Dr. A or female Dr. B, she can look to the overwhelming consensus of culture, memorialized in the law of marriage, to resolve her indecision. No doubt Ms. C's choice may be affected by considerations other than, say, conformity to social expectation or a wish to raise children in a legally secure household: Dr. A's wealth, Dr. B's youth, et cetera. But it is perfectly plausible that Ms. C's aspiration to marry, answerable only by a male suitor, could be as determinative of her choice as Dr. A's money or Dr. B's immaturity. Suppose Ms. C is creating an online dating profile and must indicate whether she is interested in men, women, or both. Imagine, again, that she is truly indifferent to sex but anxious for approval or concerned to protect her children's welfare. Which box will she choose?

A final definitional issue concerns latent bisexuality. What if Ms. C's dual-sex desire is unconscious, repressed, suppressed? Does she share the bisexual's special stake in legalization of same-sex marriage? This question of latency is distinct from the still touchier issue of whether "everyone" is "really,"<sup>171</sup> "inherently,"<sup>172</sup> or "innately"<sup>173</sup> bisexual, though the two problems are theoretically and historically related. Sigmund Freud, the prophet of the unconscious, repeatedly claimed "that every human

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170. Paula C. Rodríguez Rust, *Review of Statistical Findings About Bisexual Behavior, Feelings, and Identities*, in *BISEXUALITY IN THE UNITED STATES: A SOCIAL SCIENCE READER* 129, 161–62 (Paula C. Rodríguez Rust ed., 2000) (collecting studies).

171. See Robyn Ochs, *Bisexual Etiquette: Helpful Hints for Bisexuals Working with Lesbians and Gay Men*, in *BISEXUAL POLITICS: THEORIES, QUERIES, AND VISIONS* 237, 237 (Naomi Tucker ed., 1995) (urging bisexuals to refrain from claiming that "everyone's really bisexual").

172. See ROBERT H. ALLEN, *THE CLASSICAL ORIGINS OF MODERN HOMOPHOBIA* 113 (2006) (calling humans "inherently bisexual").

173. See FRANK S. PITTMAN III, *MAN ENOUGH: FATHERS, SONS, AND THE SEARCH FOR MASCULINITY* 182 (1993) (affirming "the innate bisexuality of all men").

being is bisexual[;] . . . his libido is distributed, either in a manifest or a latent fashion, over objects of both sexes.”<sup>174</sup> Freud’s view was and continues to be shared by numerous psychologists and psychiatrists.<sup>175</sup> More than a few anthropologists have endorsed some version of it as well. Drawing on research into nearly 200 cultures, Clellan Ford and Frank Beach’s classic *Patterns of Sexual Behavior* argued that exclusive homosexuality and exclusive heterosexuality are “extremes represent[ing] movement away from the original, intermediate . . . capacity for both forms of sexual expression.”<sup>176</sup> Margaret Mead drew a less sweeping but still impressive conclusion: “Even a superficial look at other societies and some groups in our own society should be enough to convince us that a very large number of human beings—probably a majority—are bisexual in their potential capacity for love.”<sup>177</sup>

Whether or not most people are “really” latent bisexuals, it is highly unlikely that no one is. Not only Freud and Mead but also many ordinary individuals attest to the phenomenon’s reality. Just as many self-professed homosexuals recount a discovery of same-sex attraction relatively late in life, so do many bisexuals. The trope is as at least equally common to bisexual coming-out narratives as homosexual ones.<sup>178</sup> Indeed it is telling, given bisexuality’s consistent erasure in same-sex marriage litigation,<sup>179</sup> that latency is at issue in both of bisexuality’s most sustained appearances in these cases. In *Perry v. Schwarzenegger*, plaintiffs’ trial counsel Ted Olson took pains to show that his client Sandy Stier, who previously had been married to a man, really is and always was a lesbian.<sup>180</sup> The fact of Stier’s escape from bisexual ascription, to which we will return, is for now less important than the narrative by which that

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174. SIGMUND FREUD, ANALYSIS TERMINABLE AND INTERMINABLE (1937), reprinted in 23 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 216, 244 (James Strachey ed. & trans., 1964).

175. See JOHN MONEY & PATRICIA TUCKER, SEXUAL SIGNATURES: ON BEING A MAN OR A WOMAN 16 (1975); WILHELM STEKEL, BI-SEXUAL LOVE 39–41 (James S. Van Teslaar trans., 1922); Havelock Ellis, *Sexo-Aesthetic Inversion*, 34 ALIENIST & NEUROLOGIST 249, 279 (1913); Joyce McDougall, *Sexuality and the Neosexual*, 25 MODERN PSYCHOANALYSIS 155, 158 (2000); Robert E. Gould, *If It Isn’t an Illness, What Is It? What We Don’t Know About Homosexuality*, N.Y. TIMES MAG., Feb. 24, 1974, at 13, 63.

176. CLELLAN S. FORD & FRANK A. BEACH, PATTERNS OF SEXUAL BEHAVIOR 258–59 (1951).

177. Margaret Mead, *Bisexuality: What’s It All About?*, REDBOOK, Jan. 1975, at 29.

178. See generally BI ANY OTHER NAME, *supra* note 166 (cataloguing stories from members of the bisexual community); GETTING BI: VOICES OF BISEXUALS AROUND THE WORLD (Robyn Ochs & Sarah E. Rowley eds., 2005) (same).

179. See *infra* Part IV.A.

180. Transcript of Proceedings at 161–62, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292-VRW).

escape was attempted—a tale of latent sexuality so recognizable that it required no psychological explanation, expert or otherwise:

Q. You had no feeling at that point in time married to a man that you were a lesbian?

A. At that time I did not.<sup>181</sup>

We encounter a similar story, now with a bisexual hero, in *Varnum v. Brien*.<sup>182</sup> Testifying as an expert witness about the difficulty of ascertaining “the numbers of gays and lesbians” in Iowa and nationally, sociologist Pepper Schwartz saw fit to bring up her brother-in-law, Howard.<sup>183</sup> “For 45 years or more, [Howard] was a married heterosexual guy.”<sup>184</sup> Then Howard “decided that there was a part of him he hadn’t explored.”<sup>185</sup> So he “gets on the Internet, . . . starts talking to other guys,” and before long “realizes this is a really important part of him that he wants to know more about.”<sup>186</sup> Howard “gets involved, falls in love,” and ultimately partners with a man.<sup>187</sup> Today, “if you asked Howard how he defined himself, he would say bisexual.”<sup>188</sup>

Who knows how many Howards there are in the world.<sup>189</sup> Unconscious bisexuality may be extremely rare or it may be nearly universal, accounting for everyone whose felt desires are exclusively heterosexual or homosexual. This Article affirms only that people like Howard exist and that uncertainty as to their prevalence should not exclude them from the class of individuals whose sexuality is specially targeted by compulsion toward heterosexuality. Almost by definition, the unconscious is susceptible to social conditioning,<sup>190</sup> no doubt through operations that are bafflingly complex, hypercontextual, sometimes counterintuitive, and variable over time. To provisionally part ways

181. *Id.* at 162. For a collection of “awakening” narratives like Stier’s, see CARREN STROCK, *MARRIED WOMEN WHO LOVE WOMEN* 3–22 (2d ed. 2008).

182. 763 N.W.2d 862 (Iowa 2009).

183. Transcript of Deposition Upon Oral Examination of Pepper Judith Schwartz at 55–56, *Varnum v. Brien*, No. CV5965 (Iowa Dist. Ct. Aug. 30, 2007), 2007 WL 2814089.

184. *Id.* at 56.

185. *Id.*

186. *Id.*

187. *Id.* at 56–57.

188. *Id.* at 57.

189. For a number of poignant accounts like Howard’s, see KLEIN & SCHWARTZ, *supra* note 157.

190. FLOYD HENRY ALLPORT, *SOCIAL PSYCHOLOGY* 278 (1952) (arguing that “the attitude of social conformity,” “a basic human tendency,” is a matter of “submit[ting] one’s self unconsciously” to external mores).

with Freud as to bisexuality's alleged universality, conscious in some and unconscious in most, is not to dispense with his lifelong affirmation of the powerful effect that civilization, and particularly its law, exerts upon *eros*.<sup>191</sup> Counting heterosexual object-choice among "the tasks implicit" in proper sexual development, Freud held that "the strongest force" working against homosexual orientation, apart from the independently insufficient "attraction which the opposing sexual characters exercise upon one another," is "its authoritative prohibition by society."<sup>192</sup> Anthropological perspectives again affirm Freud's basic point. Mead, for example, held that human beings' careers as heterosexuals, homosexuals, or bisexuals are, "in fact, a consequence . . . of the particular beliefs and prejudices of the society they live in and, to some extent, of their own life history."<sup>193</sup> Because unconscious desire, certainly no less than conscious attraction, is susceptible to cultural "prohibition[s]," "beliefs," and "prejudices,"<sup>194</sup> latent bisexuals are part of this Article's constituency.

### B. *Compulsory Heterosexuality and Bisexual Existence*

Though the term *compulsory heterosexuality* did not originate with Adrienne Rich, her essay on the subject was instrumental in elaborating and popularizing it. The central question of *Compulsory Heterosexuality and Lesbian Existence* was "whether in a different context, or other things being equal, women would choose heterosexual coupling and marriage."<sup>195</sup> In light of plentiful if usually overlooked evidence that many women find among themselves their most reliable, nonexploitative,

191. See SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS (1930), *reprinted in* 21 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 64 (James Strachey ed. & trans., Hogarth Press 1961); SIGMUND FREUD, TOTEM AND TABOO (1913), *reprinted in* 13 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 1 (James Strachey ed. & trans., Hogarth Press 1953); see also HERBERT MARCUSE, EROS AND CIVILIZATION: A PHILOSOPHICAL INQUIRY INTO FREUD (1955).

192. SIGMUND FREUD, THREE ESSAYS ON SEXUALITY (1905), *reprinted in* 7 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 135, 229 (James Strachey ed. & trans., 1953) ("Where inversion is not regarded as a crime it will be found that it answers fully to the sexual inclinations of no small number of people.").

193. Mead, *supra* note 177, at 29; see also Gilbert Herdt, *Bisexuality and the Causes of Homosexuality: The Case of the Sambia*, in BISEXUALITIES: THE IDEOLOGY AND PRACTICE OF SEXUAL CONTACT WITH BOTH MEN AND WOMEN 157, 162 (Erwin J. Haeberle & Rolf Gindorf eds., 1998) ("[S]ocial and cultural factors very broadly channel and limit sexual variation in human populations. Sexual laws, codes, and roles do restrict the range and intensity of sexual practices.").

194. See FREUD, *supra* note 174, at 229; Mead, *supra* note 177, at 29.

195. Rich, *supra* note 15, at 633; see also *id.* at 653 (noting that "[c]ompulsory heterosexuality" was named a "'crime[] against women' by the Brussels Tribunal on Crimes against Women in 1976").



sustaining, and passionate relationships, Rich suggested that what looked simply like social or emotional preference might, in different political circumstances, admit a sexual possibility or indeed constitute a sexual preference.<sup>196</sup>

One of the most striking things about Rich's essay is its insistent linkage of compulsory heterosexuality and marriage. It asks how "women have been convinced that marriage, and sexual orientation toward men, are inevitable," and it catalogues "the covert socializations and the overt forces which have channeled women into marriage and heterosexual romance."<sup>197</sup> One of the essay's most powerful passages undertakes a swift and sweeping answer to the suggestion that women "who married [and] stayed married . . . 'preferred' or 'chose' heterosexuality":

Women have married because it was necessary, in order to survive economically, in order to have children who would not suffer economic deprivation or social ostracism, in order to remain respectable, in order to do what was expected of women[,] because . . . they wanted to feel 'normal,' and because heterosexual romance has been represented as the great female adventure, duty, and fulfillment.<sup>198</sup>

Even as Rich conceded of marriage that "[w]ithin the institution exist . . . qualitative differences of experience," the possibility that some women might be deliriously happy with their husbands could not excuse "the absence of choice [that] remains the great unacknowledged reality."<sup>199</sup>

Consider in light of Rich's critique the sexual biographies of two women—"Gwen" and "Monica"—interviewed for psychologist Lisa Diamond's book, *Sexual Fluidity*:

Gwen, who is now married to a man, never considered herself a very sexual person. When she was nineteen, she became unexpectedly romantically and sexually involved with a close female friend, and they carried on an intense affair for more than a year. She thinks that most women probably have some degree of attraction for women, whether or not they acknowledge or act on it. But Gwen thinks it is unlikely that she will ever again be involved with a woman. Most of her attractions are focused on her husband these days. When she does find herself drawn to a woman, the desire is not nearly as intense as her feelings for her husband. Nonetheless, she still has more sexual fantasies about women than about men.<sup>200</sup>

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196. *Id.* at 632, 637, 646–47, 652, 657.

197. *Id.* at 640, 636.

198. *Id.* at 654.

199. *Id.* at 659.

200. LISA M. DIAMOND, *SEXUAL FLUIDITY: UNDERSTANDING WOMEN'S LOVE AND DESIRE* 92 (2008).

Monica admits that she sometimes thinks the only reason she is *ever* attracted to men is that she has been socialized to find them attractive. But other times, she feels that those attractions are authentic. Her emotional bonds with women are more intense and satisfying, but she has never been involved with a woman. Her friends convinced her that because she gets involved only with men, she cannot legitimately consider herself bisexual. They urged her to “come out as heterosexual.” She is now happily married to a man who considers her to be “100 percent straight—end of story.” Her husband is not aware that she is still attracted to women and fantasizes about them several times a week.<sup>201</sup>

Marriage clearly has shaped the heterosexual destiny that Gwen and Monica are living today. But based only on these brief sketches—of characters with mighty, current investments in their families and with motivations mysterious even to themselves<sup>202</sup>—it is difficult to isolate precisely which cultural and legal pressures, if any, marshaled these wives to the altar. Some of Diamond’s other interviews, however, did manage to uncover reasons why most bisexual women over time “gravitate[] toward men.”<sup>203</sup> Participants “repeatedly mentioned” “the relative ease and social acceptability of pursuing other-sex versus same-sex relationships.”<sup>204</sup> One respondent, age nineteen, explained, “It’s like there’s this track for men, and it’s just easier to get on that track. But because of society, there *is* no track for my feelings for women.”<sup>205</sup> Another woman, age thirty, affirmed, “[W]hen I look to the future I see myself more easily falling into a relationship with a guy. . . . I do still think of myself as bisexual, so I guess I’m leaning more toward men . . . due to more practical reasons, societal reasons.”<sup>206</sup>

Sue George’s study of 142 bisexual women revealed similar patterns.<sup>207</sup> Sixty-eight of her respondents had a primary relationship with a man, twenty-eight of them marital.<sup>208</sup> Many of these women affirmed the importance of “social factors” in shaping their sexual choices.<sup>209</sup> Specific reasons, to the extent they could be articulated, ranged from the most private imperatives to the most public incentives. “I’m not quite sure why I got married,” said one.<sup>210</sup> “Basically, not to hurt my family’s feelings, for tax incentives, and to some extent to

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201. *Id.* at 91.

202. One of Diamond’s subjects asked, “Am I attracted to a particular man because he’s great, or because society has just conditioned me to be turned on by men?” *Id.* at 129.

203. *Id.* at 117.

204. *Id.*

205. *Id.* at 129.

206. *Id.* at 119.

207. GEORGE, *supra* note 167, at 64.

208. *Id.* at 69, 88.

209. DIAMOND, *supra* note 200, at 117.

210. GEORGE, *supra* note 167, at 88.

provide my child with security.”<sup>211</sup> That last word—security—came up in George’s study with special frequency.<sup>212</sup> Security is one reason why anxious parents, especially mothers, encourage their bisexual children, especially daughters, to “do the right thing,”<sup>213</sup> find “Mr. Right,”<sup>214</sup> make it legal.

Dorian Solot and Marshall Miller affirm that bisexuals of both sexes “get married for the same reasons most Americans marry: because it is expected of them; because marriage offers community legitimacy, social status, legal protections, and sometimes health insurance; or because it is a way to demonstrate love and commitment to a partner.”<sup>215</sup> They marry “to avoid family censure, develop their careers, and raise children with societal approval.”<sup>216</sup> And like some homosexuals, they may marry out of failure to acknowledge, or in “conscious flight” from, homosexual attractions.<sup>217</sup> Eli Coleman’s studies of bisexuals’ reasons for marrying reveal just such mixed motivations.<sup>218</sup> Moreover his male respondents unanimously cited “a “perceived lack of intimacy in the homosexual world” among their reasons for marrying women,<sup>219</sup> confirming another study’s finding that bisexuals avoid same-sex relationships because there are “few if any of the external factors . . . that cemented and bonded heterosexual couples together such as a traditional state-sanctioned marriage.”<sup>220</sup>

Even when bisexuals pursue relationships with both men and women, these experiences often teach that their best bet is the one society

211. *Id.*

212. *See id.* at 87–88, 90.

213. *Id.* at 88.

214. Robyn Ochs, *From the Closet to the Stage*, in BI ANY OTHER NAME, *supra* note 166, at 210, 212; GEORGE, *supra* note 167, at 89.

215. Dorian Solot & Marshall Miller, *Unmarried Bisexuals: Distinct Voices on Marriage and Family*, 1 J. BISEXUALITY, no. 4, 2001, at 81, 84.

216. Robyn Ochs, *Biphobia: It Goes More Than Two Ways*, in BISEXUALITY: PSYCHOLOGY AND POLITICS, *supra* note 159, at 217, 229.

217. Stuart J. Edser & John D. Shea, *An Exploratory Investigation of Bisexual Men in Monogamous, Heterosexual Marriages*, 2 J. BISEXUALITY, no. 4, 2002, at 5, 9 (summarizing research on “why gay or bisexual men . . . marry”).

218. *See* Eli Coleman, *Integration of Male Bisexuality and Marriage*, 11 J. HOMOSEXUALITY 189, 194–95 (1985) [hereinafter Coleman, *Integration*]; *see also* Eli Coleman, *Bisexual Women in Marriages*, 11 J. HOMOSEXUALITY 87, 91–92 (1985) (citing “love for husband,” “societal pressures” to marry, “interest in having . . . children,” and a wish to “overcome same-sex feelings”).

219. Coleman, *Integration*, *supra* note 218, at 194–95.

220. WEINBERG ET AL., *supra* note 160, at 184.

underwrites. “With society as it is,” says one woman, “I prefer to be married to a loving, gentle, intelligent, caring young man. If society w[ere] different I would not care at all.”<sup>221</sup> Just how many bisexuals pick “the path of least resistance” is impossible to know.<sup>222</sup> Though reliable numbers are scarce, it appears that most bisexuals are, as one man put it, “committed . . . to the institution of marriage.”<sup>223</sup> Self-identified bisexuals in the 2008 General Social Survey were only 20% less likely to be currently married than self-identified heterosexuals.<sup>224</sup> Diamond’s longitudinal study of “bisexual and unlabeled” women found that, by the end of ten years, 80% were “in a committed monogamous relationship,” two-thirds of which were with men; “of these, half resulted in marriage.”<sup>225</sup> A study of active members of San Francisco’s Bisexual Center—no bastion of homophobia—found that many participants were or had been married and that “[e]ven among those who were divorced, a substantial number expressed a desire to [remarry].”<sup>226</sup> It should be stressed again that such trends describe only self-identified bisexuals. It would be startling if bisexuals’ true rates of heterosexual coupling and marriage were not significantly higher.

Precisely because many, probably most, bisexuals “live hidden in the shadows of heterosexuality,”<sup>227</sup> those who are politicized frequently and often explicitly invoke compulsory heterosexuality to describe their constituency’s subordination.<sup>228</sup> Bisexual interrogations of this demand emphasize its disciplinary aspect—its preference for reward over punishment, and specifically its imposition through “heterosexual

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221. *Id.* at 259.

222. DIAMOND, *supra* note 200, at 192.

223. KLEIN & SCHWARTZ, *supra* note 157, at 35.

224. Email from Gary J. Gates, Senior Scholar, The Williams Inst., to Michael Boucai (Jan. 12, 2011, 10:23:22 PST) (on file with author) (supplying raw data from the General Social Survey 2008).

225. DIAMOND, *supra* note 200, at 114–15.

226. WEINBERG ET AL., *supra* note 160, at 93.

227. Amanda Yoshizaki, *Breaking the Rules: Constructing a Bisexual Feminist Marriage*, in CLOSER TO HOME: BISEXUALITY & FEMINISM 155, 156 (Elizabeth Reba Weise ed., 1992).

228. See, e.g., Elizabeth Armstrong, *Traitors to the Cause? Understanding the Lesbian/Gay “Bisexuality Debates,”* in BISEXUAL POLITICS, *supra* note 171, at 199, 201, 203–05; Elias Farajajé-Jones, *Fluid Desire: Race, HIV/AIDS, and Bisexual Politics*, in BISEXUAL POLITICS, *supra* note 171, at 119, 123; Laura Johnson, *Making My Own Way*, in BI ANY OTHER NAME, *supra* note 166, at 40; Robyn Ochs, *Bisexuality, Feminism, Men and Me*, in CLOSER TO HOME, *supra* note 227, at 127, 127, 130; Erich Steinman, *Interpreting the Invisibility of Male Bisexuality: Theories, Interactions, Politics*, in BISEXUALITY IN THE LIVES OF MEN: FACTS AND FICTIONS 15, 40 (Brett Beemyn & Erich Steinman eds., 2001); Amanda Udis-Kessler, *Bisexuality in an Essentialist World: Toward an Understanding of Biphobia*, in BISEXUALITY: A READER AND SOURCEBOOK 51, 56 (Thomas Geller ed., 1990).

privilege.”<sup>229</sup> Like homosexuals, bisexuals describe heterosexual privilege as both an urgent political problem and a banal background reality. What sets their literature apart is its insistent representation of such privilege as a pervasive, quotidian dilemma, rather than the scorned sanctuary of an abandoned closet.<sup>230</sup> Marriage, unsurprisingly, figures in these accounts as heterosexual privilege’s most powerful and immediate association, its foremost example, the part that stands for the whole.<sup>231</sup>

Because it is so widely thought that bisexuals can and should succumb to the demands of compulsory heterosexuality and the enticements of heterosexual privilege, and because bisexuals so frequently do succumb to them, “[s]exual freedom” is widely considered the “dominant ideology” of a distinctively bisexual politics.<sup>232</sup> “At this moment in human sexual

229. See, e.g., WEINBERG ET AL., *supra* note 160, at 19–20; Amber Ault, *Ambiguous Identity in an Unambiguous Sex/Gender Structure: The Case of Bisexual Women*, in BISEXUALITY: A CRITICAL READER 167, 179 (Merl Storr ed., 1999); Tamara Bower, *Bisexual Women, Feminist Politics*, in BISEXUAL POLITICS, *supra* note 171, at 99, 100; Mary Bradford, *The Bisexual Experience: Living in a Dichotomous Culture*, in CURRENT RESEARCH ON BISEXUALITY 7, 15 (Ronald C. Fox ed., 2004); *Glossary to BI ANY OTHER NAME*, *supra* note 166, at 369; Liz A. Highleyman, *Identity and Ideas: Strategies for Bisexuals*, in BISEXUAL POLITICS, *supra* note 171, at 73, 88; Naomi Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts*, 10 BERKELEY WOMEN’S L.J. 98, 133 (1995); Ochs, *supra* note 216, at 217–20, 229, 235; Solot & Miller, *supra* note 215, at 83–84; Udis-Kessler, *supra* note 228, at 58. For an impressive list of “heterosexual privileges,” see Devon W. Carbado, *Straight Out of the Closet*, 15 BERKELEY WOMEN’S L.J. 76, 116–22 (2000).

230. See, e.g., FIRESTEIN, *supra* note 155, at 117 (counting struggles with “heterosexual privilege” among the “issues” that bring bisexual men into therapy); Amanda Udis-Kessler, *Closer to Home: Bisexual Feminism and the Transformation of Hetero/sexism*, in CLOSER TO HOME, *supra* note 227, at 183, 184 (noting that “bisexual women experience heterosexual privilege differently than either lesbians or heterosexual women do, given our capacity to be on either end of its effects”).

231. See, e.g., FIRESTEIN, *supra* note 155, at 118; AMANDA UDIS-KESSLER, QUEER INCLUSION IN THE UNITED METHODIST CHURCH 106 (2008); Bower, *supra* note 229, at 99; *Glossary to BI ANY OTHER NAME*, *supra* note 166, at 369; Solot & Miller, *supra* note 215, at 83–84; Yoshizaki, *supra* note 227, at 155–156; Julie Ellen Hartman, *Bi Outside the Bedroom: The Performance of Bisexual Identity Among Women in “Heterosexual” Relationships* 105–07 (2008) (unpublished Ph.D. dissertation, Michigan State University) (on file with author).

232. WEINBERG ET AL., *supra* note 160, at 8; see also Valerie Barlow, *Bisexuality and Feminism: One Black Woman’s Perspective*, in BISEXUAL HORIZONS: POLITICS, HISTORIES, LIVES 38, 38 (Sharon Rose et al. eds., 1996) (identifying bisexuality with “the freedom to choose . . . partners on the basis of [one’s own] criteria rather than on the basis of a societally prescribed sexual choice”); Loraine Hutchins, *Bisexuality: Politics and Community*, in BISEXUALITY: PSYCHOLOGY AND POLITICS, *supra* note 159, at 240, 247 (“[S]ame-sex love can . . . be a choice and, like religion, also deserves defense on that ground.”); Zélie Pollon, *Naming Her Destiny: June Jordan Speaks on Bisexuality*, in

history,” wrote activist Rebecca Shuster in 1987, “the presence of bisexuals conspicuously reopens the issue of sexual choice.”<sup>233</sup> More than two decades later, with same-sex marriage dominating the gay rights agenda, bisexuality continues to provide, as Marjorie Garber put it, “a crucial paradigm . . . for thinking differently about human freedom.”<sup>234</sup> “[B]isexuals . . . claim a right to *choose* their own sexual relationships,”<sup>235</sup> a right heavily burdened by the restriction of marriage to different-sex couples. A 2007 forum on bisexuality and same-sex marriage underscored legalization’s capacity to “remove[] a barrier to [bisexuals’] relational freedom” and thus to support “true freedom of choice” as between homosexual and heterosexual relationships.<sup>236</sup> A participant from Massachusetts said, “I was so excited that marriage was being recognized for everybody. . . . [F]or me, being bi has always been about making my own choices and not having society . . . make them for me.”<sup>237</sup>

#### IV. BRINGING OUT BISEXUALITY

Bisexuality is “virtually invisible” in same-sex marriage litigation.<sup>238</sup> Though many of the organizations that serve as plaintiffs’ advocates or amici purport in their mission statements to represent bisexuals along

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PLURAL DESIRES: WRITING BISEXUAL WOMEN’S REALITIES 77, 79 (Bisexual Anthology Collective ed., 1995) (“The fact is that people who call themselves bisexual . . . are fighting for sexual freedom.”).

233. Rebecca Shuster, *Sexuality as a Continuum: The Bisexual Identity*, in LESBIAN PSYCHOLOGIES: EXPLORATIONS AND CHALLENGES 56, 62 (Bos. Lesbian Psychologies Collective ed., 1987).

234. MARJORIE GARBER, VICE VERSA: BISEXUALITY AND THE EROTICISM OF EVERYDAY LIFE 89–90 (1995) (answering the question, “What . . . is a bisexual politics?”).

235. MARK BLASIUS, GAY AND LESBIAN POLITICS: SEXUALITY AND THE EMERGENCE OF A NEW ETHIC 148 (1994). Bisexual actress Cynthia Nixon recently made headlines by expressing resentment at the notion that people only enter homosexual relationships because they are not drawn to heterosexual relationships: “Why can’t it be a choice? Why is that any less legitimate?” Alex Witchel, *Life after ‘Sex,’* N.Y. TIMES MAG., Jan. 22, 2012, at 24, 27.

236. Lannutti, *supra* note 145, at 109.

237. *Id.*

238. Heron Greenesmith, *Drawing Bisexuality Back into the Picture: How Bisexuality Fits into LGBT Legal Strategy Ten Years After Bisexual Erasure*, 17 CARDOZO J.L. & GENDER 65, 78 (2010); *see also* Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1366 n.16 (2011) (noting that same-sex marriage decisions “frequently refer only to ‘gay’ or ‘gay and lesbian’ persons, and have not separately analyzed at any length the implications for bisexual . . . persons”). Professor Schacter is referring here to the question of whether sexual orientation is a suspect classification, and specifically whether the class harmed by same-sex marriage bans is “political[ly] powerless[.]” *id.* at 1365–66, but her observation holds for all aspects of judicial analysis in these cases.

with gay men, lesbians, and sometimes, transgender people,<sup>239</sup> these are the very groups that most concerted ignore bisexual existence. If the subject surfaces at all in these cases, it is same-sex marriage opponents who raise it. However fleeting and infrequent, conservative invocations of bisexuality shed light on the reasons for “LGBT” advocates’ meticulous avoidance of the subject. This Part describes those reasons and contests their legal and strategic necessity.

#### A. *Bisexual Erasure in Same-Sex Marriage Litigation*

When plaintiffs in same-sex marriage cases are affirmatively assigned a sexual identity—by their lawyers, amici, or judges—that identity is invariably “gay” or “lesbian.”<sup>240</sup> Not a single plaintiff is clearly identified as bisexual. Occasionally a sexual history involving both men and women can be inferred from references to children conceived in a prior heterosexual relationship and currently raised by one natural parent and a same-sex partner. Though two-thirds of children reared in “same-sex households” come into being this way,<sup>241</sup> such offspring account for a relatively small number of those brought to courts’ attention.<sup>242</sup> Of the ten children raised by plaintiff couples in Connecticut, the seven raised by plaintiffs in Oregon, and the five raised by plaintiffs in Iowa, none were conceived in a current parent’s prior heterosexual relationship.<sup>243</sup>

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239. See, e.g., *About Us*, LAMBDA LEGAL, <http://www.lambdalegal.org/about-us> (last visited May 31, 2012); *About NCLR*, NAT’L CENTER FOR LESBIAN RTS., [http://www.nclrights.org/site/PageServer?pagename=about\\_overview](http://www.nclrights.org/site/PageServer?pagename=about_overview) (last visited May 31, 2012).

240. See, e.g., Brief of Appellants at 1, *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (No. 58,398) [hereinafter *Lewis* Appellants’ Brief] (“Plaintiffs are lesbian and gay individuals . . .”).

241. Gary J. Gates & Adam P. Romero, *Parenting by Gay Men and Lesbians: Beyond the Current Research*, in *MARRIAGE AND FAMILY: PERSPECTIVES AND COMPLEXITIES* 227, 235 (H. Elizabeth Peters & Claire M. Kamp Dush eds., 2009); see also Dan Black et al., *Demographics of the Gay and Lesbian Population in the United States: Evidence from Available Systematic Data Sources*, 37 *DEMOGRAPHY* 139, 150 (2000) (“Many of the children in gay and lesbian households recorded in the census were probably born in previous marriages.”).

242. See Complaint at 7, 16, 18, *Samuels v. N.Y. State Dep’t of Health*, No. 1967-04 (N.Y. Sup. Ct. Dec. 7, 2004) (describing three sets of plaintiff couples raising children from previous relationships).

243. See *Kerrigan* Complaint, *supra* note 4, *passim*; *Li* Complaint, *supra* note 90, at 5–10; Final Brief of Plaintiffs-Appellees at 6, 8, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (No. 07-1499) [hereinafter *Varnum* Appellees’ Brief].

Almost without exception, courts and parties draw no distinction between a homosexual couple and a couple of homosexuals.<sup>244</sup> Their interchangeable use of “same-sex” couples and “gay and lesbian” couples, a penchant noticed by bisexual commentators,<sup>245</sup> reflects more than the obvious fact that the relationships in question are homosexual. Even as the adjectives *gay* and *lesbian* properly modify collective nouns like *couple*, *family*, and *household*, they also describe the class of individuals that plaintiffs are said to represent—the class of “homosexuals.”<sup>246</sup> At every turn, judges and advocates speak of “homosexual persons,”<sup>247</sup> “gay persons,”<sup>248</sup> “gays,”<sup>249</sup> “gay men and women,”<sup>250</sup> “gays and lesbians,”<sup>251</sup> “gay men and lesbians,”<sup>252</sup> “lesbians and gay men,”<sup>253</sup> “gay and lesbian

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244. A review of hundreds of filings—opinions, briefs, and complaints—in same-sex marriage cases since 1991 yields but a handful of exceptions to the rule of bisexual invisibility. Briefs of the American Psychological Association supporting same-sex marriage usually include a boilerplate footnote conceding their “focus . . . on . . . gay men and lesbians” even though “many bisexual persons are involved in committed same-sex relationships.” See, e.g., Brief of American Psychological Ass’n & New Jersey Psychological Ass’n as Amici Curiae in Support of Plaintiffs-Appellants at 9 n.4, *Lewis v. Harris*, 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005) (No. A-2244-03T5). The Maryland Court of Appeals, declining to recognize a right to same-sex marriage, referred consistently to “gay, lesbian, and bisexual persons,” as did a brief filed in Massachusetts in support of same-sex marriage by professors of constitutional law. *Conaway v. Deane*, 932 A.2d 571 *passim* (Md. 2007); Brief of Amicus Curiae Professors of Expression & Constitutional Law *passim*, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (No. SJ-08860). And in a statement starkly at odds with Judge Walker’s determination in *Perry* that “Proposition 8 eliminates a right only a gay man or a lesbian would exercise,” plaintiffs in California state court correctly argued that that no one “but a gay or bisexual man (or woman) would want to marry another man (or woman).” *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012); *Marriage Cases* Respondent’s Brief, *supra* note 85, at 40.

245. Laurie J. Kendall, *Dancing with My Grandma: Talking with Robyn Ochs About Complex Identities and Simple Messages in the Marriage Equality Movement*, in BISEXUALITY AND SAME-SEX MARRIAGE, *supra* note 145, at 181, 191; Lannutti, *supra* note 145, at 118; Ramki Ramakrishnan, *Bisexual Politics for Lesbians and Gay Men*, in GETTING BI, *supra* note 178, at 198, 198; Solot & Miller, *supra* note 215, at 87.

246. See Complaint for Declaratory Relief by Same-Sex Married Couples Challenging the Constitutionality of the Family Code at 3, *Clinton v. Schwarzenegger*, No. CGC-04-429542 (Cal. Super. Ct. Aug. 13, 2004) [hereinafter *Clinton* Complaint].

247. See, e.g., *Goodridge*, 798 N.E.2d at 962.

248. See, e.g., *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 466 (Conn. 2008).

249. See, e.g., *Clinton* Complaint, *supra* note 246, *passim*.

250. See, e.g., Brief of Amici Curiae in Support of Respondents Challenging the Marriage Exclusion at 2, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999).

251. See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

252. See, e.g., Brief & Appendix of Defendants-Respondents at 26, *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (No. 58,389).



people,<sup>254</sup> “lesbian and gay people,”<sup>255</sup> “gay and lesbian individuals,”<sup>256</sup> “lesbian and gay citizens,”<sup>257</sup> “gay and lesbian residents,”<sup>258</sup> “gay and lesbian colleagues, family members and neighbors,”<sup>259</sup> “lesbian and gay New Yorkers,”<sup>260</sup> “lesbian and gay Oregonians,”<sup>261</sup> “the Commonwealth’s gay and lesbian citizens.”<sup>262</sup>

Bisexual invisibility in same-sex marriage litigation tends to be a negative phenomenon—erasure by mere omission—but sometimes it happens through affirmative, active deletion. In the Supreme Court of California, plaintiffs argued that the state “intentionally denies lesbians and gay men the right to marry, even though it also has determined that there is absolutely nothing wrong with gay and lesbian families.”<sup>263</sup> In fact, the state’s determination about these families, recorded in its Domestic Partner Act, was that “many lesbian, gay, and bisexual Californians have formed lasting, committed, and caring relationships with persons of the same sex.”<sup>264</sup> Plaintiffs quote this language elsewhere in their brief, dropping the legislature’s reference to “bisexuals.”<sup>265</sup>

A more dramatic instance of bisexual erasure was mentioned earlier in this Article: the exchange in *Perry v. Schwarzenegger* where plaintiffs’

253. See, e.g., Brief of Legal Momentum as Amicus Curiae in Support of Plaintiffs-Appellants at 32, *Lewis v. Harris*, 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005) (No. A-2244-03T5).

254. See, e.g., *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009).

255. See, e.g., Intervenor’s Cross-Complaint for Declaratory & Injunctive Relief para. 3, *Thomasson v. Newsom*, No. CGC 04-428794 (Cal. Super. Ct. Mar. 10, 2004), 2004 WL 5134446.

256. See, e.g., Application to File Amicus Curiae Brief of the American Psychoanalytic Ass’n et al. Urging Reversal of the Decision of the Court of Appeal at 1, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999).

257. *Lewis Appellants’ Brief*, *supra* note 240, at 15.

258. Complaint for Declaratory, Injunctive, or Other Relief at 1, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 3:09-cv -02292-VRW).

259. Brief of Gay & Lesbian Advocates & Defenders as Amici Curiae at 27, *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (No. 103434/04) [hereinafter *Hernandez GLAD Brief*].

260. Brief for Plaintiffs-Appellants at 3, *Hernandez*, 855 N.E.2d 1 (No. 103434/04) [hereinafter *Hernandez Appellants’ Brief*].

261. *Li Complaint*, *supra* note 90, at 20.

262. *Hernandez GLAD Brief*, *supra* note 259, at 22.

263. *Marriage Cases Respondent’s Brief*, *supra* note 85, at 6 (capitalization altered).

264. CAL. FAM. CODE § 297 historical and statutory notes (West 2004).

265. *Marriage Cases Respondent’s Brief*, *supra* note 85, at 1 (“The Legislature has found that, despite longstanding discrimination, many gay men and lesbians ‘have formed lasting, committed, and caring relationships’ with another person . . .”).

counsel Ted Olson interrogated Sandy Stier, would-be bride of the eponymous Kris Perry, as to the validity of her “gay” identity.<sup>266</sup> Stier, again, had been married to a man.<sup>267</sup>

- Q. Ms. Stier,  
...  
... you live with Ms. Perry?
- A. I do.
- Q. And tell us about your family?
- A. Well, our family is a blended family with our four boys. We each bring two biological children to our family. . . .
- ... .
- Q. How would you describe your sexual orientation?
- A. I’m gay.
- Q. When did you learn that about yourself?
- A. I really learned it about myself fairly late in life, in my mid-thirties.
- Q. Had you been married before at that time?
- A. Yes, I was married before.
- ... .
- Q. And you had no feeling at that point in time married to a man that you were a lesbian?
- A. At that time I did not.
- ... .
- Q. And how did your relationship with [Ms. Perry] develop?
- ... .
- A. I was teaching a computer class and she was a student in my class. . . . [T]hen we started working together on projects at work . . . and became fast friends quite quickly. . . . I began to realize that . . . I had a very strong attraction to her and, indeed, I was falling in love with her. . . . I had never experienced falling in love before, and I think—
- Q. Are you saying that you weren’t in love with your husband?
- A. I was not in love with my husband, no. . . .
- ... .
- And while I did love him when I married him, I honestly just couldn’t relate when people said they were in love.
- ... .
- Q. How convinced are you that you are gay? You’ve lived with a husband. You said you loved him. Some people might say, Well, it’s this and then it’s that and it could be this again. Answer that.
- A. Well, I’m convinced, because at 47 years old I have fallen in love one time and it’s with Kris. . . .
- Q. Why are you a plaintiff in this case?
- A. Well, I’m a plaintiff in this case because I would like to get married, and I would like to marry the person that I choose and that is Kris Perry. She is a woman. And according to California law right now, we can’t get married, and I want to get married.<sup>268</sup>

Olson is a renowned advocate, a former Solicitor General. Why would he embark on this sensitive and—as we shall see—potentially dangerous line of questioning unless he thought it important to negate the possibility

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266. See *supra* notes 180–81 and accompanying text.

267. See *supra* note 180 and accompanying text.

268. Transcript of Proceedings, *supra* note 181, at 160–67.

that one of his clients is bisexual—perhaps, indeed, both of his lead clients, each of whom “bring[s] two biological children” to their family?<sup>269</sup> Commenting on this interrogation, Professor Elizabeth Glazer observes that “[t]he assumption in same-sex marriage lawsuits seems to be that plaintiffs should identify not only as members of same-sex couples but also as homosexual individuals.”<sup>270</sup> Bisexual activists get the same impression. “I’m sure that if I identified as lesbian,” says Robyn Ochs, “it would [be] easier to make me a poster-child.”<sup>271</sup>

Why aren’t bisexuals desirable plaintiffs? What imperatives compel Ted Olson to clarify that his client is not one? Kenji Yoshino’s *The Epistemic Contract of Bisexual Erasure* offers a theoretical framework for approaching these questions.<sup>272</sup> Arguing that bisexual erasure is not just a quirky habit of thought attributable to mere ignorance or indifference, Yoshino proposed that homosexuals and heterosexuals both have interests in perpetuating a fantasy that bisexuality does not exist, among them “defending norms of monogamy” and “stabilizing sexual orientation.”<sup>273</sup> The following subparts treat each of these investments in turn.

#### *B. An Argument from Bisexuality for Polygamous Marriage?*

When the subject of bisexuality is raised in legal debate on same-sex marriage, it usually embellishes the claim that if two men or two women may marry, legalized polygamy cannot be far behind.<sup>274</sup> Interveners in Washington State’s marriage case, for example, argued that “[t]he State need no more ‘prove’ that excluding gays furthers the purposes of heterosexual marriage than excluding bisexuals who wish to marry a man and woman.”<sup>275</sup> More rarely, invocations of bisexuality evince fear

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269. *Id.* at 161.

270. Elizabeth M. Glazer, *Sexual Reorientation* 30 (Hofstra Univ. Sch. of Law Legal Studies Research Paper Series, Research Paper No. 10-30, 2010), available at <http://ssrn.com/abstract=1690590> (published in revised form as Elizabeth M. Glazer, *Sexual Reorientation*, 100 GEO. L.J. 997 (2012)).

271. *See, e.g.*, Kendall, *supra* note 245, at 191.

272. *See* Yoshino, *supra* note 14.

273. *Id.* at 362.

274. *See, e.g.*, Brief Amicus Curiae of the American Center for Law & Justice in Support of Respondent Proposition 22 Legal Defense & Education Fund at 16–17, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999).

275. Intervenor’s Reply Brief at 2, *Andersen v. King Cnty.*, 138 P.3d 963 (Wash. 2006) (No. 75934-1).

of another deviation from monogamy: adultery. One of plaintiffs' expert witnesses in *Varnum* was asked whether he knew of any "particular difficulties encountered by bisexuals compared to gays or heterosexuals in sustaining their relationships,"<sup>276</sup> while another expert was interrogated on the possibility that HIV could be "spread through bisexuals having sex with both men and women."<sup>277</sup>

There are both ideological and empirical reasons for bisexuality's thorny relation to the norm of monogamy. As Professor Yoshino might observe, it is primarily a consequence of the cultural valuation of sex—male/female—as "a dominant metric of differentiation."<sup>278</sup> Bisexuality would scarcely disturb norms of monogamy if the difference between men and women were not so erotically portentous that a person who desires both sexes and is limited to one partner endures harsher deprivation and greater temptation than a person who desires only his or her partner's sex. The theory is to some extent borne out by experience. Although most self-identified bisexuals prefer monogamous relationships,<sup>279</sup> they are more likely than most people to favor less restrictive arrangements (or at least to be honest about it),<sup>280</sup> and their political and autobiographical writings attest to widespread ambivalence and antagonism toward this powerful cultural ideal.<sup>281</sup>

To the extent bisexuals provoke concerns about monogamy or raise such concerns themselves, their participation or acknowledgment in same-sex marriage litigation might undermine the wholesome image of "committed couples" that plaintiffs are carefully selected to project.<sup>282</sup> To date, however, bisexuality's uneasy relationship to monogamy—like gay men's equally fraught association with promiscuity—has lacked serious legal currency.<sup>283</sup> The specter of polygamy is raised more often

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276. Deposition of George Austin Chauncey, Jr. at 58, *Varnum v. Brien*, No. CV5965 (Iowa Dist. Ct. Aug. 30, 2007), 2007 WL 2809785.

277. Deposition of Gregory M. Herek, Ph.D. at 74, *Varnum*, No. CV5965, 2007 WL 2809784.

278. Yoshino, *supra* note 14, at 362.

279. See Paula C. Rust, *Monogamy and Polyamory: Relationship Issues for Bisexuals*, in BISEXUALITY: PSYCHOLOGY AND POLITICS, *supra* note 159, at 127, 135.

280. Paula C. Rodríguez Rust, *The Biology, Psychology, Sociology, and Sexuality of Bisexuality*, in BISEXUALITY IN THE UNITED STATES, *supra* note 170, at 403, 421–22 (collecting studies).

281. See, e.g., PLURAL LOVES: DESIGNS FOR BI AND POLY LIVING (Serena Anderlini-D'Onofrio ed., 2004); BI ANY OTHER NAME, *supra* note 166.

282. Brief of Civil Rights Groups Anti-Defamation League et al. at 1, 3, *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (No. 10343/04).

283. See Brief of Amici Curiae Focus on the Family et al. in Opposition to Plaintiffs' Motion for Summary Judgment at 28, *Goodridge v. Dep't of Pub. Health*, 14 Mass L. Rptr. 591 (Super. Ct. 2002) (No. 01-1647A), 2001 WL 34825140 [hereinafter *Goodridge Focus on the Family Brief*] (discussing "ample evidence that homosexual relationships are highly promiscuous"); Brief of Monmouth Plastics, Corp. & John M.

without reference to bisexuality than with it, and no judge has discussed, let alone endorsed, the bisexual spin on this most common of slippery-slope arguments. Still, gay rights advocates might fear that an argument from bisexuality for same-sex marriage paves the way to an argument from bisexuality for polygamy. If the marital rule of heterosexuality compels bisexuals to choose one sex *over* the other, the rule of monogamy compels them to choose one sex *or* another.

Today, polygamy seems distinguishable from same-sex marriage on a number of grounds. Polygamy bans are said to thwart, in *Lawrence*'s words, "abuse of an institution"<sup>284</sup>: if one can marry two, then why not four, eight, sixteen?<sup>285</sup> Others say these bans prevent "injury,"<sup>286</sup> mainly to women and girls,<sup>287</sup> by inhibiting "patriarchal . . . despotism" in the private sphere and safeguarding the family's public function as an incubator of democratic values.<sup>288</sup> Repealing these bans, moreover, would entail far more fundamental changes to the legal order than permitting same-sex marriage. As Professor Adrienne Davis has argued, plural marriages accommodate "serial additions and exits" that disrupt family law's relatively manageable "binary between intact and dissolving families."<sup>289</sup>

Whether or not such distinctions will continue to persuade,<sup>290</sup> there is a more compelling and relevant reason why an argument from bisexuality for same-sex marriage does not entail an argument from bisexuality for polygamy. Quite simply, the analogy fails the test of

Bonforte Sr. as Amici Curiae in Support of Defendants-Respondents at 43, *Lewis v. Harris*, 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005) (No. A-2244-03T5) (discussing "documented promiscuity among homosexual males"); cf. *Andersen v. King Cnty.*, 138 P.3d 963, 1036 (Wash. 2006) (Bridge, J., dissenting) (citing legislator's characterization of "homosexual people as inherently more promiscuous" as evidence of antigay animus).

284. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

285. Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 2025 (2010) (counting "corruption and fraud" among the "charge[s] against polygamy").

286. *Lawrence*, 539 U.S. at 567.

287. See Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 357 (2003).

288. See *Reynolds v. United States*, 98 U.S. 145, 165–66 (1878).

289. See Davis, *supra* note 285, at 1994–95.

290. A number of prominent voices already are not persuaded. See, e.g., *State v. Holm*, 2006 UT 31, ¶ 131, 137 P.3d 726, 758 (Durham, C.J., concurring in part and dissenting in part) (concluding that bigamy prosecution based on a marriage "unlicensed, unsolemnized by any civil authority" violates "the privacy of intimate, personal relationships between consenting adults"); Martha C. Nussbaum, *A Right to Marry?*, 98 CALIF. L. REV. 667, 688 (2010) ("The legal arguments against polygamy . . . are extremely weak.").

logic. Bisexuality implies choice along the very axis—male/female—that same-sex marriage bans explicitly maintain. It does not necessarily entail a unique capacity or preference for nonmonogamy, as same-sex marriage advocates already argue when the issue arises.<sup>291</sup> The bisexual’s choice of one person, of but one sex, simply sets in stark relief “what is emotionally”—and sexually—“the case for any . . . marriage.”<sup>292</sup> As sociologists Philip Blumstein and Pepper Schwartz found in studies involving more than 12,000 participants, “[n]on-monogamy touches the lives of all couples[, e]ven if they are in fact monogamous.”<sup>293</sup> Temptation is one law that does not discriminate on the basis of sexual orientation.

### C. Bisexuality and the Rhetoric of Gay Equality

Same-sex marriage advocates have more pressing reasons than polygamy to avoid the subject of bisexuality. These reasons cluster around the first of the imperatives discussed in Yoshino’s article: stabilizing a categorical, binary conception of sexual orientation.<sup>294</sup> This imperative is articulated most blatantly in the argument that same-sex marriage bans do not discriminate on the basis of sexual orientation because there is no such thing as sexual orientation—that the “construct lacks conceptual clarity and precision of definition.”<sup>295</sup> The wide spectrum of bisexuality and the multiple variables by which it can be defined provide fodder for this claim, ironically a longtime favorite of queer scholarship.<sup>296</sup> Although ignored by judges and same-sex marriage

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291. Telephone Interview with Jon Davidson, Legal Dir., Lambda Legal (Aug. 4, 2011).

292. GARBER, *supra* note 234, at 419.

293. PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES* 267–306 (1983).

294. Yoshino, *supra* note 14, at 362.

295. Declaration of Warren Throckmorton, PhD as Expert Witness for Defendant at para. 5, *Varnum v. Brien*, No. CV5965 (Iowa Dist. Ct. Aug. 30, 2007), 2007 WL 2809840; *see also* Brief Amici Curiae of Professors of Psychology & Psychiatry in Support of Defendants-Respondents at 13–14, *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (No. A-224-03T5) [hereinafter *Lewis* Psychologists’ Brief] (calling strict scrutiny “inappropriate . . . when no scientific or social consensus exists on the nature, membership and characteristics of the class claiming discrimination”).

296. *See* Brief of Amici Curiae Ass’n of Md. Families & Liberty Counsel in Support of Appellants at 17, *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (No. 44) [hereinafter *Maryland Families Brief*] (“[T]he categories of homosexual and heterosexual ‘are rhetorical . . . because of a disjuncture between the concepts of homosexual and heterosexual and the sexual acts they claim to signify.’” (alteration in original) (quoting Mezey, *supra* note 229, at 98)); *see also* *Lewis* Psychologists’ Brief, *supra* note 295, at 4.

advocates alike, the claim epitomizes the deconstructive potential that renders bisexuality problematic for several prominent advocacy scripts.<sup>297</sup>

As the legal director of a major gay rights organization confirmed, the main “challenge” bisexuality poses in same-sex marriage litigation is convincing courts that same-sex marriage bans discriminate on the basis of sexual orientation and persuading them to apply heightened scrutiny.<sup>298</sup> Bisexuality troubles three arguments by which advocates accomplish these tasks. First, it complicates the equation of homosexual conduct and homosexual status that permits judges to analyze same-sex marriage bans under equal protection principles, even though these laws regulate relationships and make no mention of sexual orientation. This is the “O’Connor argument for same-sex marriage,” named in honor of that Justice’s concurring opinion in *Lawrence*.<sup>299</sup> Second, bisexuality disturbs the claim that same-sex marriage bans discriminate on the basis of sexual orientation by denying homosexuals “meaningful exercise” of the right to marry. This is the “Blackmun argument for same-sex marriage,” named in honor of that Justice’s dissenting opinion in *Bowers*.<sup>300</sup> Finally, and still within the ambit of equal protection, bisexuality muddles the “immutability excuse,” or the argument that same-sex marriage bans warrant heightened scrutiny because sexual orientation is inalterable. Each of these arguments, as presently articulated, is legally and strategically unsound, and should not stand in the way of an argument from bisexuality for same-sex marriage.

### *1. The Conduct-Status Conflation*

In the litigation that temporarily brought same-sex marriage to California, Governor Schwarzenegger and several amici raised the common argument that the state’s marriage laws “do not classify on the basis of sexual orientation” because they “make no mention of sexual orientation, nor . . . make heterosexuality a prerequisite for a marriage

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297. For approving accounts of “bisexuality as a tool of deconstructive analysis,” see STEVEN ANGELIDES, *A HISTORY OF BISEXUALITY* 131, 132–61 (2001); GARBER, *supra* note 234, at 15, 30, 65–66, 526.

298. Telephone Interview with Jon Davidson, *supra* note 291 (“The challenge is getting the court to recognize that it is sexual orientation discrimination . . . and getting the court to apply heightened scrutiny.”).

299. See *Lawrence v. Texas*, 539 U.S. 558, 579–85 (2003) (O’Connor, J., concurring).

300. See *Bowers v. Hardwick*, 478 U.S. 186, 199–214 (1986) (Blackmun, J., dissenting), *overruled by Lawrence*, 539 U.S. 558.

license.”<sup>301</sup> Though only a handful of judges have credited this argument,<sup>302</sup> and though a surprising number of decisions ruling against same-sex marriage have explicitly rejected it,<sup>303</sup> same-sex marriage advocates sometimes feel obliged to refute it head-on. Presupposing some form of status-based discrimination, plaintiffs in California called the state’s position incompatible with its assertion that the marriage laws, which apply equally to men and women, do not “classify on the basis of gender”: “If not sexual orientation, then what?”<sup>304</sup> More often, advocates establish sexual orientation discrimination by invoking Justice O’Connor’s theory in *Lawrence* that the nature of the proscribed relationship—homosexual—defines the class of persons burdened by the law—homosexuals.<sup>305</sup> As Judge Vaughn Walker wrote in *Perry*, echoing four major LGBT advocacy organizations, “[t]hose who would choose to marry someone of the same sex—homosexuals—have had their right to marry eliminated.”<sup>306</sup>

The conflation of homosexual conduct and status did not originate with Justice O’Connor. It has a long history, legal and otherwise; it is in some sense the history of homosexuality itself.<sup>307</sup> In the same-sex marriage context, it has been a feature of legal debate since the landmark Hawaii case of *Baehr v. Miike*, where the state rebutted plaintiffs’ claim of sex-based discrimination by asserting that its prohibition of same-sex

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301. Answer Brief of Governor Arnold Schwarzenegger & State Registrar of Vital Statistics Teresita Trinidad on the Merits at 25, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999) [hereinafter Schwarzenegger Brief]; see also Brief of Amicus Curiae, the Family Research Council, in Support of the Intervening Defendants-Appellants at 16–19, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (No. 10-16696); Brief Amicus Curiae of the Knights of Columbus in Support of the State Defendants at 14–15, *In re Marriage Cases*, 183 P.3d 384 (No. S147999); Brief of Defendant-Appellees with Appendix at 43, *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (No. S.C. 17716); *Goodridge* Focus on the Family Brief, *supra* note 283, at 15–16; Reply Brief of Appellant King County at 10–11, *Andersen v. King Cnty.*, 138 P.3d 963 (Wash. 2006) (No. 75934-1).

302. See *Dean v. District of Columbia*, 653 A.2d 307, 362–63 (D.C. 1995) (Steadman, J., concurring); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 975 (Mass. 2003) (Spina, J., dissenting); *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114, at \*22 (N.J. Super. Ct. Law Div. Nov. 5, 2003).

303. See *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 709–10 (Ct. App. 2006) (unpublished); *Conaway v. Deane*, 932 A.2d 571, 606 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 11 (N.Y. 2006); *Hernandez v. Robles*, 805 N.Y.S.2d 354, 360–61 (App. Div. 2005), *aff’d*, 855 N.E.2d 1.

304. *Marriage Cases* Respondent’s Brief, *supra* note 85, at 40 (emphasis omitted).

305. *Lawrence v. Texas*, 539 U.S. 558, 583–84 (2003) (O’Connor, J., concurring).

306. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012); see also *Perry* LGBT Advocates’ Brief, *supra* note 87, at 4 (“Proposition 8 stripped from *lesbians and gay men* their right to . . . marriage, while leaving intact a lesser status through which *same-sex couples* may access all the [institution’s] legal rights and obligations.” (emphasis added)).

307. See generally DAVID M. HALPERIN, *ONE HUNDRED YEARS OF HOMOSEXUALITY AND OTHER ESSAYS ON GREEK LOVE* (1990) (providing a history of homosexuality).



marriage “disadvantages only those individuals who desire to marry persons of the same sex—that is, a class of homosexuals.”<sup>308</sup> Under *Bowers*, then, the conduct-status equation could be fatal to gay rights claims;<sup>309</sup> under *Lawrence*, and particularly Justice O’Connor’s concurrence, it is a gateway to equal protection.<sup>310</sup> Popular with judges on both sides of the same-sex marriage debate, Justice O’Connor’s unapologetic conflation has been adopted in rulings from California,<sup>311</sup> Connecticut,<sup>312</sup> Iowa,<sup>313</sup> and Maryland.<sup>314</sup>

As presently articulated, the conduct-status equation excludes bisexuals, and is to that extent an inaccurate description of the class disadvantaged by same-sex marriage laws. Although Justice O’Connor admits in *Lawrence* that homosexual conduct is at best “closely correlated” with homosexual identity,<sup>315</sup> maintaining the closeness of this correlation gives advocates a powerful incentive to downplay bisexuals’ membership in their constituency. This is not to say that the equation should be retired. In addition to its unwitting reproduction of the discursive conditions under which same-sex couples actually live,<sup>316</sup> it is perfectly coherent—

308. Defendant-Appellant’s Opening Brief at 15, *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999) (No. 20371) [hereinafter *Baehr* Appellant’s Brief].

309. See, e.g., *Romer v. Evans*, 517 U.S. 620, 641–42 (1996) (Scalia, J., dissenting) (“If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.”); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (“After *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm.”). For a pithy account of gay rights advocates’ need to “litigate around *Hardwick*,” see Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1617 (1993).

310. See, e.g., *Christian Legal Soc’y v. Eck*, 625 F. Supp. 2d 1026, 1043 (D. Mont. 2009).

311. See *Perry*, 704 F. Supp. 2d at 997; *In re Balas*, 449 B.R. 567, 573 (Bankr. C.D. Cal. 2011); *In re Marriage Cases*, 183 P.3d 384, 438 (Cal. 2008), *superseded by constitutional amendment*, CALIF. CONST. art. 1, § 7.5 (West, Westlaw through Nov. 2008 amendments).

312. See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 431 n.24 (Conn. 2008).

313. See *Varnum v. Brien*, 763 N.W.2d 862, 885 (Iowa 2009).

314. See *Conaway v. Deane*, 932 A.2d 571, 598, 605–06 (Md. 2007).

315. *Lawrence v. Texas*, 539 U.S. 558, 583 (2003).

316. To adapt Professor Janet Halley’s account of the closet, roughly the same phenomenon in reverse, at issue here “is not the supposed *essence* of sexual orientation, but the *representation* of it available for social interpretation.” Because “social agents work with social meaning[,] . . . the constitutionality of their acts must be measured in the context of the practical, not the ideal, epistemology of their decisionmaking.” Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 934 (1989). Therefore same-sex marriage bans may be said to discriminate against “homosexuals” insofar as same-sex coupling raises inferences of homosexual status, even when one or both participants is actually bisexual.

and legally accurate—to insist that a law that discriminates against homosexuals *and* bisexuals is still a law that discriminates on the basis of sexual orientation.<sup>317</sup> What matters for equal protection purposes is the invidiousness of the challenged legislative classification,<sup>318</sup> not whether the class harmed by the law is heterogeneous in its manifestation of the trait at issue, and not whether particular members of the class are “hybrid” with respect to that trait.<sup>319</sup> Just as biracial people who are partially white may claim race-based discrimination under a policy that disadvantages nonwhites, so too may a bisexual claim orientation-based discrimination under a same-sex marriage ban, which disadvantages anyone who is not heterosexual.<sup>320</sup>

Admittedly, the assertion that both bisexuals and homosexuals would not marry a same-sex partner but for their sexual orientation restates the very assumption that same-sex marriage opponents contest when they argue that, under the letter of the law, homosexuals are perfectly entitled to enter different-sex marriages.<sup>321</sup> As the Supreme Judicial Court of Massachusetts observed, however, “intimate relations” are among “the central expectations of marriage.”<sup>322</sup> Even conceding that some people pursue matrimony with little hope of satisfying consummation, courts are entitled to take for granted that when people enter into the “sexual family” we call marriage,<sup>323</sup> they make this “most intimate and personal” decision in accord with their “most intimate and personal” desires.<sup>324</sup> An argument from bisexuality explicitly acknowledges these profound erotic stakes of marital choice. Far from undermining same-sex couples’

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*See* Bradford, *supra* note 229, at 14; Ochs, *supra* note 216, at 225; Rust, *supra* note 279, at 128.

317. *See* *Romer v. Evans*, 517 U.S. 620, 624, 635–36 (1996) (invalidating law discriminating against persons with “homosexual, lesbian or bisexual orientation, conduct, practices or relationships” (quoting COLO. CONST. art. 2, § 30b, *invalidated by Romer*, 517 U.S. 620)).

318. *See* Halley, *supra* note 316, at 923 (“[I]t is surely not the class, but the classification, that is suspect.”).

319. *See generally* RUTH COLKER, *HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW* (1996) (describing the experience of individuals living as “legal hybrids” such as bisexuals).

320. *See* *Mitchell v. Champs Sports*, 42 F. Supp. 2d 642, 646, 649 (E.D. Tex. 1998) (allowing “mixed-race” employee to proceed on claim of racial discrimination); *Walker v. Univ. of Colo. Bd. of Regents*, Nos. 90–M–932, 90–M–372, 1994 WL 752651, at \*1 (D. Colo. Mar. 30, 1994) (“Multiracial persons may be considered members of each of the protected groups with which they have any significant identification.”), *aff’d*, 45 F.3d 440 (10th Cir. 1994).

321. *See infra* notes 332–35 and accompanying text.

322. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 n.22 (Mass. 2003).

323. *See* MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 143–98 (1995).

324. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Se. Penn. v. Casey*, 539 U.S. 833, 851 (1992)).

claim of discrimination, the bisexual's claim of liberty foregrounds the social practices and cultural values that give it meaning.

## 2. *The Claim of Identity Negation*

Unlike Justice O'Connor, Justice Blackmun dissented in *Bowers*. He believed that, as a matter of substantive due process, Georgia's sodomy statute violated "individuals['] . . . right to choose for themselves how to conduct their intimate relationships."<sup>325</sup> In a lengthy footnote, Justice Blackmun wondered if Georgia's law also ran afoul of the Eighth Amendment by imposing on homosexuals the cruel and unusual punishment of state-imposed celibacy.<sup>326</sup> Excluding homosexual behavior from the range of "constitutionally protected 'decisions concerning sexual relations'" rendered this protection "empty" for a homosexual: "[H]e or she is given no real choice but a life without any physical intimacy."<sup>327</sup> This lack of choice was vital to Justice Blackmun's Eighth Amendment objection. Comparing homosexuality to narcotics addiction, a "condition" that cannot be criminalized because it "may be contracted innocently or involuntarily," Justice Blackmun wrote that homosexuality "is [not] simply a matter of deliberate personal election. Homosexual orientation may well form part of the very fiber of an individual's personality."<sup>328</sup>

As one conservative commentator recognized prior to *Lawrence*, the logic of Blackmun's footnote is easily applicable to same-sex marriage: under a same-sex marriage ban, one who is exclusively and "involuntarily" homosexual "is given no real choice but a life without" marriage.<sup>329</sup> The "constitutionally protected 'decision[]'" to marry is an "empty" choice for such a person.<sup>330</sup> Under this view, a plaintiff's injury is not the inability to marry the same-sex partner with whom the plaintiff brought suit, but the inability to marry anyone who is sexually compatible. As plaintiffs in New Jersey argued, homosexuals are denied "a central part of the

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325. *Bowers v. Hardwick*, 478 U.S. 186, 214 (1986) (Blackmun, J., dissenting), *overruled by Lawrence*, 539 U.S. 558.

326. *Id.* at 202 n.2.

327. *Id.* (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 711 (1977)).

328. *Id.* (quoting *Robinson v. California*, 370 U.S. 660, 667 (1962)).

329. Gerard V. Bradley, *Same-Sex Marriage: Our Final Answer?*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 729, 737-38 (2000) (quoting *Bowers*, 478 U.S. at 202-03 n.2 (Blackmun, J., dissenting)).

330. *Bowers*, 478 U.S. at 203 n.2 (Blackmun, J., dissenting).

American dream” because, not being “drawn to different-sex partners,” they are “defined by the State as ‘unmarriageable.’”<sup>331</sup>

A number of opinions recognizing a right to same-sex marriage have picked up the theme of “unmarriageable” homosexuals, more or less directly in response to the argument—called “sophistic” by one court—that same-sex marriage bans do not discriminate on the basis of sexual orientation because the law “permit[s] a gay man or a lesbian to marry someone of the opposite sex.”<sup>332</sup> Citing the California Supreme Court’s determination that “making such a choice would require the negation of a person’s sexual orientation,”<sup>333</sup> the Iowa Supreme Court in turn explained:

[T]he right of a gay or lesbian person . . . to enter into a civil marriage only with a person of the opposite sex is no right at all. Under such a law, gay or lesbian individuals cannot simultaneously fulfill their deeply felt need for a committed personal relationship, as influenced by their sexual orientation, and gain the civil status and attendant benefits granted by the statute. Instead, a gay or lesbian person can only gain [those rights] by negating the very trait that defines gay and lesbian people as a class—their sexual orientation.<sup>334</sup>

Or as Judge Walker succinctly put it in *Perry*, “[m]arrying a person of the opposite sex is an unrealistic option for gay and lesbian individuals.”<sup>335</sup>

It is amid invocations of the Blackmun argument that the image of the heterosexually married homosexual, a longtime object of popular fascination and scorn,<sup>336</sup> rears his head most noticeably in the legal debate over same-sex marriage. One of the image’s benefits is that it strikes powerful chords across lines of sexual politics. The thought of “gay people . . . enter[ing] into unsuitable marriages with different-sex partners to whom they have no innate attraction”<sup>337</sup> is a terrifying thought to many people, including those who have no particular sympathy for gay rights.<sup>338</sup> Indeed, rhetoric about the unmarriageable homosexual derives

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331. *Lewis Appellants’ Brief*, *supra* note 240, at 41, 44.

332. *In re Marriage Cases*, 183 P.3d 384, 441 (Cal. 2008), *superseded by constitutional amendment*, CALIF. CONST. art. 1, § 7.5 (West, Westlaw through Nov. 2008 amendments).

333. *Id.*

334. *Varnum v. Brien*, 763 N.W.2d 862, 885 (Iowa 2009) (citing *In re Marriage Cases*, 183 P.3d at 441); *see also* *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 431 n.24 (Conn. 2008) (concluding that Connecticut’s same-sex marriage ban effectively precludes homosexuals from marrying).

335. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 969 (N.D. Cal. 2010), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

336. *See* BETH BOND, *MY MINISTER HUSBAND IS GAY: CHARLATAN OR SHEPHERD* (2008); JUDY HILL NELSON, *CHOICES: MY JOURNEY AFTER LEAVING MY HUSBAND FOR MARTINA AND A LESBIAN LIFE* (1996); STRAIGHT WIVES: SHATTERED LIVES: STORIES OF WOMEN WITH GAY HUSBANDS (Bonnie Kaye ed., 2006).

337. *Hernandez Appellants’ Brief*, *supra* note 260, at 69.

338. As Judge Richard Posner has noted, “it is no longer widely popular to try to pressure homosexuals to marry persons of the opposite sex.” *Irizarry v. Bd. of Ed. of Chi.*, 251 F.3d 604, 607 (2001); *see also* Russell K. Robinson, *Racing the Closet*, 61

its pathos as much from the plight of an unsuspecting heterosexual spouse as from a homosexual's self-"negati[on]," as *Varnum* imagines it, in the closet of marriage.<sup>339</sup> To invoke one is to evoke the other, and thereby to figure the homosexual as both victim and villain.

Bisexuals' heterosexual marriages, even if chosen under duress, do not necessarily accommodate self-deception, sexual frustration, or infidelity. Just as prohibitions of homosexual sodomy did not condemn law-abiding bisexuals to a "life without any physical intimacy,"<sup>340</sup> same-sex marriage bans do not condemn them to a life without conjugal marriage or a life of unsatisfying conjugality.<sup>341</sup> These particular harms may well support a distinct claim that same-sex marriage bans discriminate against exclusive homosexuals, but they do not explain why those bans discriminate against same-sex couples as a class. A bisexual in a same-sex relationship simply does not have recourse to the claim of identity negation.

Unlike the O'Connor argument for same-sex marriage, which presently excludes bisexuality and need not,<sup>342</sup> the Blackmun argument excludes bisexuality and must do so. This exclusion points to its essential defect—namely, a cramped and inaccurate rendering of the substantive right whose meaningful exercise same-sex marriage bans infringe. The right at issue in these cases is not the right to marry a member of the only sex to which one is attracted, but the right "to join in marriage with the person of one's choice," as the Supreme Court of California put it in *Perez v. Lippold*, its pioneering 1948 decision on interracial marriage.<sup>343</sup> This classic formulation carried the day in Massachusetts's groundbreaking decision on same-sex marriage,<sup>344</sup> and since has been adopted by judges in Connecticut,<sup>345</sup> Maryland,<sup>346</sup> New Jersey,<sup>347</sup> New York,<sup>348</sup>

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STAN. L. REV. 1463, 1482 (2009) (noting "the deep reservoir of sympathy" for women who find themselves married to gay men).

339. *Varnum*, 763 N.W.2d at 885. For first-hand accounts of such marriages, told from a variety of perspectives, see AMITY PIERCE BUXTON, *THE OTHER SIDE OF THE CLOSET: THE COMING-OUT CRISIS FOR STRAIGHT SPOUSES* (1991); DON CLARK, *LOVING SOMEONE GAY* 181–91 (5th ed. 2009); *STRAIGHT WIVES: SHATTERED LIVES*, *supra* note 336; CARREN STROCK, *MARRIED WOMEN WHO LOVE WOMEN* (2d ed. 2008).

340. *Bowers v. Hardwick*, 478 U.S. 186, 203 n.2 (1986) (Blackmun, J., dissenting).

341. See Adam J. MacLeod, *The Search for Moral Neutrality in Same-Sex Marriage Decisions*, 23 *BYU J. PUB. L.* 1, 22–23 (2008).

342. See *supra* Part IV.C.1.

343. *Perez v. Lippold*, 198 P.2d 17, 19, 21, 31 (Cal. 1948).

344. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 957–58 (Mass. 2003); *id.* at 970 (Greaney, J., concurring).

345. See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 461 (Conn. 2008).

346. *Conaway v. Deane*, 932 A.2d 571, 635–36 (Md. 2007) (Raker, J., dissenting).

Washington,<sup>349</sup> and California.<sup>350</sup> Thus the *Perez* formulation has been employed both alongside and independently of the Blackmun argument,<sup>351</sup> as has Justice O'Connor's conduct-status conflation,<sup>352</sup> which can accomplish the same doctrinal purpose without reducing the right of same-sex marriage to a right of marriage between homosexuals. The claim of identity negation is superfluous at best and legally wrong at worst. It does not compel bisexual erasure in same-sex marriage litigation.

### 3. *The Immutability Excuse*

In its specific concern for an individual who is inherently, irreversibly, and exclusively homosexual, the Blackmun argument for same-sex marriage is essentially an extension of the immutability excuse so common to gay rights rhetoric. A plea for civil rights and social tolerance on the ground that “we can’t help it,”<sup>353</sup> advocates have sounded the claim of immutability for over a century.<sup>354</sup> In contemporary American

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347. *Lewis v. Harris*, 875 A.2d 259, 278–79 (N.J. Super. Ct. App. Div. 2005) (Collester, J., dissenting), *aff’d in part and modified in part*, 908 A.2d 196 (N.J. 2006).

348. *Hernandez v. Robles*, 855 N.E.2d 1, 22–23 (N.Y. 2006) (Kaye, C.J., dissenting); *Hernandez v. Robles*, 805 N.Y.S.2d 354, 379–80 (App. Div. 2005) (Saxe, J., dissenting), *aff’d*, 855 N.E.2d 1.

349. *Andersen v. King Cnty.*, 138 P.3d 963, 1022–23, 1026 (Wash. 2006) (Fairhurst, J., dissenting).

350. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 958 (N.D. Cal. 2010), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012); *Strauss v. Horton*, 207 P.3d 48, 74 (Cal. 2009); *In re Marriage Cases*, 183 P.3d 384, 420–21 (Cal. 2008), *superseded by constitutional amendment*, CALIF. CONST. art. 1, § 7.5 (West, Westlaw through Nov. 2008 amendments); *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 731, 764 (Ct. App. 2006) (Kline, J., dissenting) (depublished); *In re Marriage Cases*, No. 4365, 2005 WL 583129, at \*10 (Cal. Super. Ct. Mar. 14, 2005).

351. *See Perry*, 704 F. Supp. 2d at 958, 969; *In re Marriage Cases*, 183 P.3d at 420–21, 440–41; *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 413, 431 n.24, 461 (Conn. 2008).

352. *See Perry*, 704 F. Supp. 2d at 958, 997; *In re Marriage Cases*, 183 P.3d at 420–21, 438 & n.57; *Kerrigan*, 957 A.2d at 424, 461.

353. Susan R. Schmeiser, *Changing the Immutable*, 41 CONN. L. REV. 1495, 1520–21 (2009).

354. *See* JOHN ADDINGTON SYMONDS, A PROBLEM IN MODERN ETHICS: BEING AN INQUIRY INTO THE PHENOMENON OF SEXUAL INVERSION 131–32 app. (1896) (“Scientific investigation has proved in recent years that a very large proportion of persons in whom abnormal sexual inclinations are manifested possess them from their earliest childhood, . . . and . . . are powerless to get rid of them.”); DONALD WEBSTER CORY, THE HOMOSEXUAL IN AMERICA: A SUBJECTIVE APPROACH 184–85 (1951) (arguing that “homosexuality is in the great majority of people affected virtually ineradicable” and it is “futile to attempt to change the homosexual into a heterosexual”); *Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 118 (1996) (statement of Andrew Sullivan, Editor, The New Republic) (“We seek to take away no one’s right to marry; we only ask that those of us who are gay, through no choice of our own, be allowed the same opportunity.”).

politics, avowal of homosexuality's immutability is overwhelmingly correlated with support for gay rights.<sup>355</sup>

In the specifically legal domain, the question of homosexuality's immutability arises in a variety of contexts, from child custody suits to political asylum claims.<sup>356</sup> It is invoked most prominently and controversially in equality-based challenges to laws that discriminate against gay men, lesbians, and bisexuals. Seizing upon scattered suggestions by the Supreme Court that a trait's immutability is relevant to the constitutionality of legal distinctions based on that characteristic, advocates for and against gay rights have debated whether sexual orientation is "determined solely by the accident of birth"—as the Court once said of sex—and is an aspect of selfhood that homosexuals and heterosexuals alike are "powerless to escape or set aside"—as the Court once said of race.<sup>357</sup>

The immutability factor in equal protection analysis may be one reason why same-sex marriage advocates avoid the subject of bisexuality—or, like Ted Olson in *Perry*, actively discount the possibility that a plaintiff's orientation is "this and then it's that and it could be this again."<sup>358</sup> In *Perry* and other cases, opponents of same-sex marriage deploy bisexuality as a touchstone of mutability. Suddenly, the relevant populations are described as heterosexual, homosexual, and bisexual, and courts are briefed on cutting-edge research demonstrating sexuality's "fluidity."<sup>359</sup> It is unclear whether these deployments hit any

355. See Lydia Saad, *Tolerance for Gay Rights at High-Water Mark*, GALLUP (May 29, 2007), <http://www.gallup.com/poll/27694/Tolerance-Gay-Rights-HighWater-Mark.aspx>.

356. See *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1091–96 (9th Cir. 1998) (holding that asylum seeker's "immutable" sexual and gender identity included him in a "particular social group" as required for withholding of deportation); Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEM. 257 (2009) (examining role of gender stereotypes in cases where parental influence on children's sexual orientation is a consideration in custody determinations).

357. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 360 (1978); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); see also Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 115, 138 (David Kairys ed., 3d ed. 1998) (criticizing gay rights advocates for incorporating the Supreme Court's "happenstance" references to immutability into "an indicia of suspectness checklist").

358. Transcript of Proceedings, *supra* note 180, at 166–67.

359. See Brief Amicus Curiae of Paul McHugh, M.D., Johns Hopkins University Distinguished Service Professor of Psychiatry, in Support of Defendant-Intervenors-Appellants Urging Reversal at 25, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (No.

targets. Judges who decline to find sexual orientation immutable make no mention of bisexuality.<sup>360</sup>

In addition to an apparent lack of judicial interest in bisexuality's uncomfortable associations with mutability, there are good doctrinal reasons why those associations should not dictate the terms of same-sex marriage advocacy. To begin with, it is simply untrue that the Supreme Court treats immutability as a sine qua non of heightened scrutiny. Immutability is "merely a factor" in a highly contextual, process-oriented analysis,<sup>361</sup> as the 1985 case of *City of Cleburne v. Cleburne Living Center* made clear.<sup>362</sup> Concluding that the Fifth Circuit had "erred in holding mental retardation a quasi-suspect classification," the *Cleburne* Court specifically noted retardation's immutability in legally "relevant respects" and it quoted with approval Professor John Hart Ely's blunt assertion that "there's not much left of the immutability theory" if "classifications based on physical disability and intelligence" are generally permissible.<sup>363</sup>

Lower courts and litigators, eager for a clear test, have continued despite *Cleburne* to debate sexual orientation's immutability as if discrimination claims hinged on this issue.<sup>364</sup> With time, however, the immutability theory has developed a variation friendlier to gay rights. In a number of cases, courts unsatisfied with the erratically enforced immutability factor either jettisoned it entirely or redefined it to better reflect what's really "invidious" about legal favoritism of heterosexuality.<sup>365</sup> Under the "new immutability," as Professor Susan Schmeiser calls it, the question is not whether a person can change his or her sexual orientation, but whether it is wrong to require or prod someone to change it, as it surely would be with race or sex or indeed religion.<sup>366</sup>

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10-16696); Brief of Amicus Curiae, National Association for Research & Therapy of Homosexuality (NARTH), in Support of the Intervening Defendants-Appellants at 3-4, 25, *Perry*, 671 F.3d 1052 (No. 10-16696); Maryland Families Brief, *supra* note 296, at 13; *Lewis* Psychologists' Brief, *supra* note 295, at 7.

360. *See, e.g.*, *Conaway v. Deane*, 932 A.2d 571, 615 n.57 (Md. 2007); *Andersen v. King Cnty.*, 138 P.3d 963, 974 (Wash. 2006).

361. *Halley*, *supra* note 316, at 927.

362. 473 U.S. 432 (1985).

363. *Id.* at 442 & n.10 (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 150 (1980)).

364. *See, e.g.*, *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990) (declining to apply heightened scrutiny on the ground that "[h]omosexuality is not an immutable characteristic"); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same).

365. *See, e.g.*, *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435, 446 (Or. Ct. App. 1998) (holding that "immutability—in the sense of inability to alter or change—is not necessary" for heightened scrutiny given that suspect classifications like "alienage and religious affiliation may be changed almost at will").

366. *See* Schmeiser, *supra* note 353, at 1496, 1519.



The new immutability first appeared in a 1989 challenge to the military's ban on homosexual and bisexual servicemembers.<sup>367</sup> "Reading the case law in a more capacious manner," Ninth Circuit Judge William Norris construed "immutable" to describe characteristics "so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be."<sup>368</sup> Over the next decade, gay rights advocates successfully urged district courts in Kansas and New York to adopt Judge Norris's approach,<sup>369</sup> and more recently his definition prevailed, as a matter of state constitutional law, in the highest courts of California, Connecticut, and Iowa—all in rulings on same-sex marriage.<sup>370</sup>

The new immutability turns the old immutability on its head, displacing the constitutional inquiry from the realm of empirical fact to that of normative judgment and, in the end, personal conscience. In the spirit of what Professor Yoshino has dubbed the "new equal protection," the new immutability blurs the "distinction between . . . equality claims . . . and . . . liberty claims."<sup>371</sup> *Lawrence*, as noted earlier, is in some respects exemplary of this fusion, and provides independent validation of the new immutability in the specific context of gay rights.<sup>372</sup> As the term's originator recognized, the new immutability, like the Supreme Court's holding in *Lawrence*, is ultimately about individual "self-determination" in the domain of sexuality.<sup>373</sup> Again: "These matters, involving the most intimate and personal *choices* a person may make in a lifetime, *choices*

367. *Watkins v. U.S. Army*, 875 F.2d 699, 701 (9th Cir. 1989).

368. *Id.* at 726 (Norris, J., concurring). Judge Norris's definition language tracks the one adopted by the Board of Immigration Appeals for use in asylum cases in *Matter of Acosta*, 19 I. & N. Dec. 211, 233–34 (B.I.A. 1985).

369. *See Jantz v. Muci*, 759 F. Supp. 1543, 1548 (D. Kan. 1991), *rev'd*, 976 F.2d 623 (10th Cir. 1992); *Able v. United States*, 968 F. Supp. 850, 863–64 (E.D.N.Y. 1997), *rev'd on other grounds*, 155 F.3d 628 (2d Cir. 1998).

370. *In re Marriage Cases*, 183 P.3d 384, 442–43 (Cal. 2008), *superseded by constitutional amendment*, CALIF. CONST. art. 1, § 7.5 (West, Westlaw through Nov. 2008 amendments); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 438 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 893 (Iowa 2009).

371. Yoshino, *supra* note 44, at 749–50, 762 n.104 (counting immutability among several issues the Court bypasses when, resorting to "rational basis with bite[,] . . . it effectively admits that there is no principled test" for determining which classifications warrant heightened scrutiny).

372. *See supra* notes 40–51 and accompanying text.

373. Schmeiser, *supra* note 353, at 1519; *see also* Francisco Valdes, *Anomalies, Warts and All: Four Score of Liberty, Privacy and Equality*, 65 OHIO ST. L.J. 1341, 1398 (2004) (concluding that "*Lawrence*, as the progeny of *Griswold* and *Carey*" protects "self-determination specifically in sexual relations").

central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”<sup>374</sup> This existential language, when taken seriously, dispels any doubt as to mutability’s inconsequence to constitutional debate on gay rights.<sup>375</sup>

Still, the U.S. Supreme Court’s pronouncements in *Cleburne* and *Lawrence* are not binding on judges interpreting state constitutions, who often ignore the federal origins of the heightened scrutiny analysis they claim as their own.<sup>376</sup> If satisfaction of the immutability factor is required in such cases, gay rights litigators will prefer to cover their bases. The efficacy of this lawyerly fastidiousness is debatable, however, as a justification for bisexuals’ low profile in same-sex marriage litigation. Rather than simply failing to persuade, arguments from immutability wrongly assume that certain judges are persuadable. The courts that withhold heightened scrutiny on the dubious ground of sexual orientation’s mutability are the same that withhold it anyway on the still less defensible theory that homosexuals and bisexuals, unlike women and racial minorities, are insufficiently “powerless” to merit special judicial solicitude.<sup>377</sup>

Finally—and no doubt for some readers most importantly—there is no necessary reason why bisexuality itself cannot be an immutable sexual orientation. As one woman puts it, “I call myself bisexual because that’s what I am. I never had a choice, no more than heterosexuals or homosexuals have a choice; we’re born that way.”<sup>378</sup> Though the possibility may be greeted, as in *Perry*, with something like surprise, there is sufficient empirical evidence to support the finding that “the vast majority of lesbians and gay men, and most bisexuals as well, when asked how much choice they have about their sexual orientation say that they have ‘no choice’ or ‘very little choice’ about it.”<sup>379</sup>

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374. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (emphasis added) (quoting *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 851 (1992)).

375. See *Schmeiser*, *supra* note 353, at 1505 (arguing that, since *Lawrence*, “there is no longer any jurisprudential reason to embrace a model of homosexuality as compulsive and ineluctable”).

376. See, e.g., *Andersen v. King Cnty.*, 138 P.3d 963, 973 (Wash. 2006) (citing *Hanson v. Hutt*, 517 P.2d 599, 602–03 (Wash. 1973) (citing *Frontiero v. Richardson*, 411 U.S. 677, 688) (1973)).

377. See, e.g., *Conaway v. Deane*, 932 A.2d 571, 611 (Md. 2007) (withholding heightened scrutiny on both grounds); *Andersen*, 138 P.3d at 974–76 (same); see also William N. Eskridge, Jr., *Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?*, 50 WASHBURN L.J. 1, 30 (2010) (arguing that the supposed political powerlessness factor is “a woeful misreading of American legal and cultural history, U.S. Supreme Court precedent, and political theory”).

378. C.S. Gilbert, in *GETTING BI*, *supra* note 178, at 118; see also KLEIN & SCHWARTZ, *supra* note 157, at 127–28.

379. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 966 (N.D. Cal. 2010), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

## V. BISEXUALITY AND THE POLITICS OF CONTAINMENT

In the age of the new immutability, what remains of the old immutability's allure? Certainly much of its attraction will continue to operate at a deeply personal level. Because most people do not feel they have chosen their sexual orientation,<sup>380</sup> the immutability excuse carries an autobiographical resonance that facilitates both self-acceptance and acceptance from others.<sup>381</sup> Politically, the immutability excuse would do more than extend these private acts of forgiveness into public absolution and tolerance. It also buttresses a promise, usually but not always implicit, that homosexuality and in turn gay rights are essentially minority concerns.<sup>382</sup> If homosexuality is indeed fixed, unchangeable, ineradicable, then liberalization will not increase its incidence beyond a small but significant segment of the population.

As Judge Richard Posner observes, assurance that homosexuals constitute a fraction, not a faction, is important to many heterosexuals: “[I]f the concern about same-sex marriage is that by placing its imprimatur on homosexuality the state would encourage some teenagers to adopt a homosexual orientation (something parents worry about), there is little point in immiserating homosexuals in order to maintain a posture of official disapproval of homosexual activity.”<sup>383</sup> Judge James Burns in Hawaii expressed similarly cautious support. Sympathetic to

380. *Id.*; see also EDWARD STEIN, *THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY, AND ETHICS OF SEXUAL ORIENTATION* 261 (1999) (“[M]ost people do not feel like they chose their sexual orientation [and] most people’s sexual orientations do not seem changeable.”).

381. See Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 *STAN. L. REV.* 503, 567 (1994).

382. See Brief for Appellees at 65, *Perry*, 671 F.3d 1052 (No. 10-16696) (noting, amid discussion of homosexuality’s immutability, that “the Proposition 8 campaign itself . . . assumed voters understood the existence of homosexuals as individuals distinct from heterosexuals”); CORY, *supra* note 354, at 4–5 (justifying homosexuality as a “minority problem” by reference to “the involuntary and inescapable nature of [minority] group belonging”); SYMONDS, *supra* note 354, at 131–33 (arguing that homosexuality is immutable, that homosexuals comprise “a small minority,” and that the spread of “unnatural vices” is not a “formidable” danger of decriminalization).

383. Richard A. Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?*, 95 *MICH. L. REV.* 1578, 1584 (1997) (reviewing ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE*, *supra* note 19); see also *Dean v. District of Columbia*, 653 A.2d 307, 353 (D.C. 1995) (Ferrren, J., concurring in part and dissenting in part) (crediting “the possibility that public policies which can be seen as positively endorsing homosexuality, in contrast with policies . . . limited simply to forbidding discrimination against homosexuals, may have some bearing on how free an impressionable youth may feel to engage in homosexual experiences”).

the state's argument that "allowing same[-]sex couples to marry conveys in socially, psychologically, and otherwise important ways approval of non-heterosexual orientations and behaviors,"<sup>384</sup> he sought further fact-finding on whether sexual orientation is "biologically fated."<sup>385</sup> If not, the Hawaii constitution would "permit the State to encourage heterosexuality and discourage homosexuality, bisexuality, and asexuality by permitting [only] opposite-sex" couples to marry.<sup>386</sup>

To the extent legalization of same-sex marriage will embolden some people "to adopt a homosexual orientation,"<sup>387</sup> Judge Posner and Judge Burns share with Justice Scalia a reason to reject it: containment.<sup>388</sup> As the new immutability suggests, however, and as the Supreme Court's decision in *Lawrence* affirms, containing "the spread of homosexuality"<sup>389</sup> is no longer a viable governmental purpose.

#### A. *Morality, Marriage, and the Spread of Homosexuality*

For many opponents of gay rights, homosexuality's location in the realm of moral choice justifies its prohibition and intolerance across the board: criminalization of homosexual conduct;<sup>390</sup> public and private

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384. Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 577 (1994) (quoting Defendant's Response to Plaintiffs' First Request for Answers to Interrogatories at 7, *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (No. 91-1394-05)).

385. *Baehr*, 852 P.2d at 69–70 (Burns, J., concurring).

386. *Id.* at 70. Two years later, in the District of Columbia, Judge John Ferren likewise called for fact-finding on the plausibility of the "deterrence" rationale. *Dean*, 653 A.2d at 355–56 (Ferren, J., concurring in part and dissenting in part). He speculated that the District might defend its prohibition of same-sex marriage by presenting "scientifically credible evidence" supporting "a concern that such marriages, if deemed legitimate, could influence the sexual orientation and behavior of children." *Id.* at 355. Judge Ferren candidly acknowledged that "[t]he state's interest in deterring homosexual lifestyles, of course, would be premised on the general public's adherence to traditional values favoring heterosexual orientation." *Id.*

387. Posner, *supra* note 383, at 1584.

388. *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) ("The constitutional amendment before us here . . . [seeks] to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.").

389. *Why "Gay Marriage" Is Wrong*, TFP STUDENT ACTION (June 1, 2009), <http://www.tfpstudentaction.org/politically-incorrect/homosexuality/answering-top-10-arguments-used-to-push-homosexuality.html>.

390. *See, e.g., Campbell v. Sundquist*, 926 S.W.2d 250, 262 (Tenn. Ct. App. 1996) (noting the state's argument that its Homosexual Practices Act promoted "the moral values of Tennesseans" and discouraged them from "choosing a [homosexual] lifestyle"); Tim Murphy, *MAP: Has Your State Banned Sodomy?*, MOTHER JONES (Apr. 19, 2011, 7:29 AM), <http://motherjones.com/mojo/2011/04/map-has-your-state-banned-sodomy> (reporting that Kansas, Louisiana, Montana, North Carolina, Texas, and Utah all retained their sodomy laws after *Lawrence* in order to "send a message that homosexuality is officially condemned").

discrimination against self-identified lesbians, gay men, and bisexuals;<sup>391</sup> free speech infringements;<sup>392</sup> disregard or condemnation of homosexuality in public health education, including adolescent sex education,<sup>393</sup> and refusal to recognize or protect same-sex relationships.<sup>394</sup> The moral sentiment underlying these laws is indifferent to immutability. As Joseph Urenek, “a concerned individual residing in the state of Massachusetts,”<sup>395</sup> wrote as an amicus to that state’s high court in *Goodridge*:

Appellants argue that “immutability” is not a requirement . . . and at the same time that homosexuality is indeed [“]beyond the individual’s control.” Although this conclusion has not been settled it does leave us with the fact that “nature or nurture has [foisted] upon some people a tragic burden. How to deal with a tragic burden, however, is very different from whether Judaism, Christianity and western civilization should drop their heterosexual marital ideal.”<sup>396</sup>

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391. See, e.g., S. Journal, 62d Leg., Reg. Sess., at 5–6 (Wash. 2006) (statement of Sen. Robert Eugene Oke), available at [http://www.leg.wa.gov/Senate/SDJ/Documents/2006/SJ\\_06\\_019.pdf](http://www.leg.wa.gov/Senate/SDJ/Documents/2006/SJ_06_019.pdf) (opposing nondiscrimination bill because it “endorse[s] homosexuality,” an “abomination” to God); *Minutes of the S. Fed. & State Affairs Comm.*, 2005–2006 Leg., Reg. Sess., at 4 (Kan. 2005), available at [http://www.kslegislature.org/li/m/historical/committees/minutes/05\\_06/senate/sfedst/Sntfedst03152005.pdf](http://www.kslegislature.org/li/m/historical/committees/minutes/05_06/senate/sfedst/Sntfedst03152005.pdf) (noting opposition to addition of sexual orientation to Kansas Act Against Discrimination on the ground that “homosexuality is an atrocious sin, along with the acceptance of it”).

392. See, e.g., Amended Complaint at 6, *Cent. Ala. Pride v. Langford*, No. 2: 08-cv-1533-KOB (N.D. Ala. Dec. 22, 2008) (challenging Birmingham mayor’s refusal to issue parade permit for gay pride demonstration because he did not “condone the ‘lifestyle choice’ represented by . . . the parade”); *Case v. Unified Sch. Dist. No. 233*, 908 F. Supp. 864, 870 (D. Kan. 1995) (invalidating school libraries’ removal of books that allegedly “glorified a lifestyle that is sinful in the eyes of God”), *aff’d in part and rev’d in part*, 157 F.3d 1243 (10th Cir. 1998).

393. See, e.g., ALA. CODE § 16-40A-2(c)(8) (LexisNexis 2008) (requiring sex education in public schools to “emphasi[ze] . . . that homosexuality is not a lifestyle acceptable to the general public”); ARIZ. REV. STAT. ANN. § 15-716(C)(1)–(3) (2009) (prohibiting public schools from providing AIDS education that “[p]romotes a homosexual life-style,” “[p]ortrays homosexuality as a positive alternative life-style,” or “[s]uggests that some methods of sex are safe methods of homosexual sex”).

394. See, e.g., Brian MacQuarrie, *VT House Approves Bill Allowing Same-Sex Unions*, BOSTON GLOBE, Apr. 26, 2000, at A1, available at 2000 WLNR 2305775 (quoting Vermont legislator’s statement that civil unions are a sign of “moral rot” and another’s worry that they “may encourage homosexuality and lesbianism”); Manuel Perez Rivas, *Montgomery’s GOP Against Partner Benefits*, WASH. POST, Oct 28, 1999, at B2 (reporting on Montgomery County Republican Party’s resolution opposing domestic-partner legislation that sends a “message that homosexual behavior is a valid ‘alternative lifestyle’”).

395. Brief in Support of Appellee of Amicus Curiae Joseph Urenek at 1, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (No. SJC-08660).

396. *Id.* at 5 (quotations and citations omitted).

Bisexuality may or may not be “immutable” in the sense the law has meant it, but it is definitely mutable in the way Urenak and millions of “concerned” citizens care about. If Urenak’s statement leaves no doubt that celibacy is how a homosexual should deal with his “tragic burden,” it seems equally clear that the “marital heterosexual ideal” is society’s aspiration for the bisexual.

The law’s moral example is particularly salient in the case of marriage, an institution widely understood to convey not just tolerance but affirmation. It is said that legalization of same-sex marriage “connotes society’s full approval of homosexuality,”<sup>397</sup> “signif[ies] social acceptance of the moral equality of homosexuality and heterosexuality,”<sup>398</sup> “represent[s] society’s formal endorsement of homosexual activity,”<sup>399</sup> et cetera. Social conservatives seek to stifle these messages because—like Sigmund Freud,<sup>400</sup> Margaret Mead,<sup>401</sup> Alfred Kinsey<sup>402</sup>—they perceive a causal relationship between homophobic cultural ideals, heterosexual social identities, and abstention from homosexual conduct.<sup>403</sup> “As many . . . scholars have noted, and as many parents and teachers instinctively recognize,” said a rabbi testifying in Congress against same-sex marriage, “the laws by which a society chooses to govern itself have (among other things) an educational function.”<sup>404</sup> Hence the fear that “legalization of same-sex marriage . . . will result in more individuals living a homosexual lifestyle.”<sup>405</sup> Or as Professor Douglas Kmiec tersely warns, quoting Judge Robert Bork, same-sex marriage “will lead to an increase in the number of homosexuals.”<sup>406</sup>

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397. William Safire, Op-Ed., *On Same-Sex Marriage*, N.Y. TIMES, Dec. 1, 2003, at A23 (emphasis omitted).

398. George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 581 (1999).

399. Burman Skrable, *Homosexual Marriage: Much to Fear*, CULTURE WARS, Oct. 1996, at 6, 7.

400. FREUD, *supra* note 192, at 229.

401. Mead, *Bisexuality*, *supra* note 177, at 29.

402. ALFRED C. KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE 660 (1948).

403. See, e.g., ANITA BRYANT, THE ANITA BRYANT STORY 115 (1977) (quoting psychiatrist Charles Socarides’s belief that “if homosexuality is further normalized and raised to a level of complete social acceptability, there will be a tremendous rise in the incidence of homosexuality”).

404. *The Defense of Marriage Act: Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 55 (1996) (prepared statement of David Zwiebel, General Counsel and Director of Government Affairs, Agudath Israel of America).

405. Trayce Hansen, *Legalizing Same-Sex Marriage Will Increase Prevalence of Homosexuality*, DR. TRAYCE HANSEN (Sept. 28, 2008), [http://www.drtraycehansen.com/Pages/writings\\_legalizingprt.html](http://www.drtraycehansen.com/Pages/writings_legalizingprt.html).

406. Douglas W. Kmiec, *The Procreative Argument for Proscribing Same-Sex Marriage*, 32 HASTINGS CONST. L.Q. 653, 661 (2004) (quoting Robert H. Bork, *The Necessary Amendment*, FIRST THINGS, Aug.–Sept. 2004, at 17, 19).

From the perspective of thinkers like Professor Kmiec and Judge Bork, the fight to keep marriage heterosexual is less a matter of discrimination against an existing homosexual minority than an effort, perhaps a last-ditch attempt, to deter us all from homosexuality.<sup>407</sup> The deterrence model conceives of homosexuality in terms of conduct and lifestyle, and treats it as an omnipresent threat and temptation. Its premise, sometimes explicit, is bisexuality's universality or unpredictably high prevalence in the population, especially among youth.<sup>408</sup> William J. Bennett, relying on academic findings that "a very substantial number of people are born with the potential to live either straight or gay lives," cautions against the "signals [same-sex marriage] would send, and the impact of such signals on the shaping of human sexuality, particularly among the young."<sup>409</sup> Professor George Dent asserts that "[a] few people are immutably homosexual in that they cannot enjoy heterosexual relations, but many people can enjoy both. . . . In societies intolerant of homosexuality more men with homosexual inclinations will enter traditional marriages."<sup>410</sup>

So long as sodomy prohibitions were the major legal markers of homosexuality's social condemnation, a presumption of universal bisexuality—sometimes reflective of a fundamental human propensity to sin—informed the need for those measures.<sup>411</sup> More recently, bisexuality has provided sodomy laws a justification that was at least partially responsive to Justice Blackmun's concern about their lamentable effects on homosexuals: the few should be sacrificed for the many. Professor Mary Anne Case, for example, recalls a colleague who rejoiced at the Supreme Court's decision in *Bowers* "because," in his words, "we are all

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407. Professor Eskridge describes this model as "no promo homo" and neatly schematizes its logic, but he rejects the possibility that "gay marriage" and other "progay policies" increase the incidence of "homosexual sodomy." William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1365–72 (2000).

408. Joe Sartelle, *Rejecting the Gay Brain (and Choosing Homosexuality)*, BAD SUBJECTS (May 1994), <http://bad.eserver.org/issues/1994/14/> ("It is as though, in the anti-gay right-wing imagination, people are fundamentally bisexual.").

409. William J. Bennett, Op-Ed., . . . *But Not a Very Good Idea, Either*, WASH. POST, May 21, 1996, at A19.

410. Dent, *supra* note 398, at 612–13.

411. See Erwin J. Haeberle, *Bisexuality: History and Dimensions of a Modern Scientific Problem*, in BISEXUALITIES, *supra* note 193, at 13, 13.

inherently bisexual and it saves us from ourselves.”<sup>412</sup> In a similar vein, John Ellington and Professor Arthur Murray, responding in a spirit of “compromise” to widespread academic criticism of *Bowers*, offered a model sodomy statute that would condemn “same-gender sodomy, except between true homosexuals.”<sup>413</sup> Under the proposed law, “[t]he bisexual is directed to make a choice.”<sup>414</sup> Invoking *Bowers*’s affirmation of the legislative prerogative to “define and proscribe deviant behavior in [the] pursuit of secular morality,” Murray and Ellington concluded that “[a] state may frustrate a bisexual’s desire for homosexual intercourse just as it may frustrate any adult’s libidinal hankering for a fifteen year old Lolita, a close adult relative, a prostitute or a willing animal.”<sup>415</sup> Notably, Murray and Ellington took a firm stand against legalization of same-sex marriage; on this issue, the immutability question was irrelevant.<sup>416</sup>

### B. Unconstitutional Containment

In *Bowers v. Hardwick*, the Supreme Court endorsed as a rational basis for Georgia’s sodomy law the “belief of a majority of the electorate . . . that homosexual sodomy is immoral and unacceptable.”<sup>417</sup> “The law,” it said, “is constantly based on notions of morality,” and it declined to find an exception for “majority sentiments about the morality of homosexuality.”<sup>418</sup> Though *Bowers* was, in fact, the Court’s sole opinion in the latter half of the twentieth century to “rel[y] exclusively on an explicit morals-based justification,”<sup>419</sup> the decision’s anomalousness only underscored the Justices’ special solicitude toward disapproval of homosexuality. Such indulgence, however, did not characterize the state supreme courts, including Georgia’s, that continued even after *Bowers* to strike down sodomy laws on the ground that morality alone could not support them.<sup>420</sup>

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412. Mary Anne Case, *A Lot to Ask*, 19 COLUM. J. GENDER & L. 89, 94 (2010) (reviewing MARTHA C. NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW* (2010)).

413. Arthur A. Murphy & John P. Ellington, *Homosexuality and the Law: Tolerance and Containment II*, 97 DICK. L. REV. 693, 697, 701, 709–10 (1993).

414. *Id.* at 698.

415. *Id.*

416. *Id.* at 706.

417. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

418. *Id.*

419. Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1236 (2004).

420. See, e.g., *Jegley v. Picado*, 80 S.W.3d 332, 353–54 (Ark. 2002); *Powell v. State*, 510 S.E.2d 18, 24–25 (Ga. 1998); *Commonwealth v. Wasson*, 842 S.W.2d 487,



Morality, being the only state interest endorsed by the Court in *Bowers*, was in turn the only interest that Texas offered the Court in *Lawrence*: “The prohibition of homosexual conduct . . . represents the reasoned judgment of the Texas Legislature that such conduct is immoral and should be deterred.”<sup>421</sup> But noting its “obligation to define the liberty of all, not to mandate our own moral code,”<sup>422</sup> the Court held that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”<sup>423</sup> Justice O’Connor was similarly dismissive. Having equated homosexual conduct with homosexual status, she went on to equate moral disapproval with the antigay “animus” rejected in *Romer v. Evans*<sup>424</sup>: “Moral disapproval of this group, like a bare desire to harm the group, is . . . insufficient to satisfy rational basis review under the Equal Protection Clause.”<sup>425</sup>

Dissenting in *Lawrence*, Justice Scalia warned that the majority opinion “effectively decrees the end of all morals legislation.”<sup>426</sup> Because nearly all laws can be justified by reference to tangible harms and benefits, his prediction has been tested in only a handful of cases. The results are mixed. In disputes not involving gay rights, courts are split as to whether morality can sustain even the most forgiving standards of judicial review.<sup>427</sup> In cases that do involve gay rights, only the Court of Appeals for the Eleventh Circuit and one court within its jurisdiction have signaled, albeit in dicta, that deterrence of homosexuality may be a

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498–502 (Ky. 1992); *Gryczan v. State*, 942 P.2d 112, 125–26 (Mont. 1997); *Campbell v. Sundquist*, 926 S.W.2d 250, 264–65 (Tenn. Ct. App. 1996).

421. Respondent’s Brief at 48, *Lawrence*, 539 U.S. 558 (No. 02–102).

422. *Lawrence*, 539 U.S. at 571.

423. *Id.* at 577 (quoting *Bowers*, 478 U.S. at 216 (Blackmun, J., dissenting)).

424. 517 U.S. 620, 632 (1996).

425. *Lawrence*, 539 U.S. at 582 (O’Connor, J., concurring).

426. *Id.* at 599 (Scalia, J., dissenting).

427. *See Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 747 (5th Cir. 2008) (rejecting morality rationale for ban on sex toys); *United States v. Extreme Assocs., Inc.*, 431 F.3d 150, 161 (3d Cir. 2005) (applying obscenity jurisprudence, not *Lawrence*, and affirming congressional power to prohibit interstate commerce that “promote[s] immorality”); *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232, 1234 (11th Cir. 2004) (accepting public morality rationale for ban on sex toys); *United States v. Stagliano*, 693 F. Supp. 2d 25, 38–39 (D.D.C. 2010) (upholding conviction for obscenity distribution on the ground that moral justifications are invalid only as to regulations of private conduct); *Martin v. Zihler*, 607 S.E.2d 367, 370–71 (Va. 2005) (rejecting morality rationale for fornication statute).

legitimate legislative purpose.<sup>428</sup> In the specific context of same-sex marriage litigation, morality's constitutional decline is clear from the justification's increasingly hushed and infrequent invocations. In the Hawaii case that inaugurated the contemporary marriage movement, the state's primary interest was "ensuring that [the] marriage laws reflect the moral values" of its citizens.<sup>429</sup> Then *Romer* came down in 1996, and neither Vermont in 1998 nor Massachusetts in 2002 so much as mentioned morality in their briefs to those states' high courts.<sup>430</sup> Open avowal of the marriage laws' deterrent effect on homosexuality was a job left to the states' amici.<sup>431</sup> By the time the Supreme Judicial Court of Massachusetts ruled on the issue in 2003, *Lawrence* was the new law of the land. Citing that decision, Chief Justice Marshall's majority opinion acknowledged the moral dimensions of the same-sex marriage controversy only to call them constitutionally irrelevant.<sup>432</sup> Other post-*Lawrence* cases reveal a similar pattern. State parties defend same-sex marriage bans on grounds other than morality.<sup>433</sup> One or two amici, if any, take up the battered flag.<sup>434</sup> Judges who rule against same-sex marriage decline to wave it.<sup>435</sup> And judges who rule in favor of same-sex marriage

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428. See *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 819 n.17 (11th Cir. 2004) (suggesting that morality rationale would support ban on adoption by homosexuals); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1307, 1309 n.12 (M.D. Fla. 2005) (suggesting that a morality rationale would support the Defense of Marriage Act and citing *Lofton*). But see, e.g., *State v. Limon*, 122 P.3d 22, 34–35 (Kan. 2005) (rejecting morality rationale for harsher punishment of same-sex than different-sex statutory rape).

429. *Baehr* Appellant's Brief, *supra* note 308, at 26–28.

430. See State's Answer Brief, *Baker v. State*, 744 A.2d 864 (Vt. 1999) (No. 98-032); Brief of Defendants-Appellees, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (No. SJC-08860).

431. See, e.g., *Goodridge*, 798 N.E.2d at 967 ("Several amici suggest that prohibiting marriage by same-sex couples reflects community consensus that homosexual conduct is immoral.").

432. *Id.* at 948.

433. In Indiana, for example, "the State conceded at oral argument . . . that *Lawrence* effectively forecloses the possibility of relying upon moral disapproval of homosexual relationships as the sole justification for limiting marriage to opposite-sex couples only. The State, in fact, did not rely at all upon such disapproval in its arguments." *Morrison v. Sadler*, 821 N.E.2d 15, 20–21 (Ind. App. 2005); see also Answer Brief of State of California & the Attorney General to Opening Briefs on the Merits, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); Schwarzenegger Brief, *supra* note 301.

434. Although none of the state's amici in *In re Marriage Cases* justified California's same-sex marriage ban by reference to morality, several did so in *Perry*. See Amicus Brief of American Center for Law & Justice in Support of Appellants & Urging Reversal at 6, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (No. 10-16696); Brief of Amici Curiae, Robert George et al. in Support of Reversal & the Intervening Defendants-Appellants at 3, *Perry*, 671 F.3d 1052 (No. 10-16696).

435. See, e.g., *Conaway v. Deane*, 932 A.2d 571, 635 (Md. 2007) (upholding same-sex marriage ban on other grounds); *Andersen v. King Cnty.*, 138 P.3d 963, 1028 (Wash. 2006) (Bridge, J., dissenting).

emphasize, invoking *Lawrence*, that moral disapproval of homosexuality is out of constitutional bounds.<sup>436</sup>

All this is not to say that the politics of containment plays no role in legal argumentation against same-sex marriage. Explicitly morality-based justifications have given way to subtler but equally potent rhetorics of deterrence. Two interests consistently asserted to support same-sex marriage bans are procreation by heterosexual couples and the heterosexual education of children.<sup>437</sup> Judges who rule against same-sex marriage invariably adopt some variation of the procreation rationale,<sup>438</sup> and several have endorsed the state's prerogative to favor families in which children have different-sex parents as role models.<sup>439</sup> Same-sex marriage advocates currently prefer to rebut these interests, especially the latter, with empirical rather than normative arguments. They claim as matters of fact that same-sex marriage can have no negative effect on heterosexuals' reproduction,<sup>440</sup> and that same-sex parenting has no effect on the sexuality of children.<sup>441</sup> Their briefs note fleetingly if at all that encouraging procreative conduct is a constitutionally dubious proposition,<sup>442</sup> and never do they say this about the inculcation of heterosexuality in children.<sup>443</sup> An argument from bisexuality for same-sex marriage puts pressure on both sides of these exchanges.

436. See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 930–31 (N.D. Cal. 2010), *aff'd sub nom. Perry*, 671 F.3d 1052; *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 389 (D. Mass. 2010); *Hernandez v. Robles*, 855 N.E.2d 1, 32–33 (N.Y. 2006) (Kaye, C.J., dissenting).

437. For a discussion of these arguments' deployment in the political contest over Proposition 8 in California, see Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357, 376, 380–81 (2009).

438. See, e.g., *Deane*, 932 A.2d at 619, 633–35; *Hernandez*, 855 N.E.2d at 7–8; *Hernandez v. Robles*, 805 N.Y.S.2d 354, 359–60 (App. Div. 2005), *aff'd*, 855 N.E.2d 1; *Li v. State*, 110 P.3d 91, 99 (Or. 2005).

439. *Lewis v. Harris*, 908 A.2d 196, 217 (N.J. 2006); *Lewis v. Harris*, 875 A.2d 259, 269 (N.J. Super. Ct. App. Div. 2005), *aff'd in part and modified in part*, 908 A.2d 196; *Hernandez*, 855 N.E.2d at 7–8; *Hernandez*, 805 N.Y.S.2d at 359–60; *Baker v. State*, 744 A.2d 864, 884 (Vt. 1999) (calling argument “conceivable”); *Andersen*, 932 A.2d at 983.

440. For a particularly dogged attempt to prove this claim, see Brief of Amici Curiae Legislators from United States Jurisdictions that Have Legalized Same-Sex Marriage at 14–18, 25–26, *Perry*, 671 F.3d 1052 (No. 10-16696).

441. See Rosky, *supra* note 54, at 944–47.

442. See, e.g., *Varnum* Appellees' Brief, *supra* note 243, at 36–38; *Deane* Appellees' Brief, *supra* note 85, at 59–60; Plaintiffs-Appellees' Answering Brief at 30–32, *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999) (No. 20371).

443. See Rosky, *supra* note 54, at 944–48.

With regard to procreation, this Article's argument implicitly concedes one way in which same-sex marriage bans advance the state's interest: by increasing the number of bisexuals who pursue same-sex relationships, legalization presumably will decrease these individuals' chances of reproducing. The risks of this tacit admission are less consequential than might be supposed. First, judges who deny on factual grounds the prediction that same-sex marriage will affect procreation rates also conclude that this rationale, "[e]ven if possibly true," fails because it is "significantly under-inclusive."<sup>444</sup> As Justice Scalia noted in *Lawrence*, "the sterile and the elderly are allowed to marry."<sup>445</sup> Second, most judges who rule in favor of same-sex marriage reason that privileging some offspring over others by allowing only certain parents to marry, simply in order to encourage procreation, conflicts with the state's more important interests in the well-being of all children and the stability of extant families.<sup>446</sup> Third, because opponents of same-sex marriage must avoid suggesting too strongly that marriage is designed to conscript subjects into reproduction, the procreation argument has been largely supplanted by the "paternity" argument, which recasts "procreation" to refer to the creation of "children who are raised and loved by their own mothers and fathers."<sup>447</sup> A claim from bisexuality for same-sex marriage says nothing to affirm or refute this latter, and now dominant, rendering of the state's interest.

With regard to the sexual education of children, an argument that marriage laws coerce bisexuals into heterosexual relations and relationships obviously offers no direct support to claims about the sexually deviant effects of same-sex parenting. Yet it suggests an analogous instance of sexual mutability's social manipulation: what same-sex marriage bans are to bisexuals, different-sex parents are to children and adolescents. If anything, this analogy seems to tilt in same-sex marriage advocates'

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444. *Varnum v. Brien*, 763 N.W.2d 862, 902 (Iowa 2009) (applying heightened scrutiny); see also *In re Marriage Cases*, 183 P.3d 384, 432 (Cal. 2008) (same), superseded by constitutional amendment, CALIF. CONST. art. 1, § 7.5 (West, Westlaw through Nov. 2008 amendments); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (applying rational basis scrutiny); *Hernandez*, 855 N.E.2d at 31–32 (Kaye, C.J., dissenting) (applying rational basis scrutiny); *Baker v. State*, 744 A.2d 864, 881 (Vt. 1999) (finding "no logical connection to the stated governmental goal").

445. *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting).

446. See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1000 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012); *In re Marriage Cases*, 183 P.3d at 432–33; *Hernandez*, 855 N.E.2d at 32 (Kaye, C.J., dissenting); *Goodridge*, 798 N.E.2d at 961–62; *Baker*, 744 A.2d at 881–82.

447. Brief Amici Curiae of the New Jersey Coalition to Preserve & Protect Marriage et al. in Support of Respondents at 14, *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); see also Abrams & Brooks, *supra* note 111 (describing rise of the "accidental procreation" argument).

favor. Whether or not an argument from bisexuality indirectly affirms the role-modeling rationale's empirical plausibility, it does directly refute the rationale's constitutionality. The sexual development of children is a perilously sensitive issue. Only one federal judge has explicitly disavowed, with specific reference to children, the state's interest in fostering heterosexuality.<sup>448</sup> It may be that bisexuality offers the bench a safer ground than childhood on which to enunciate the principle that it is not for the state to "to dictate or even attempt to influence how its citizens should develop their sexual and gender identities."<sup>449</sup>

## VI. CONCLUSION

This Article has argued that *Lawrence* and other legal developments invite a claim for same-sex marriage grounded in sexual liberty; that bisexuality offers a compelling standpoint from which to apprehend the claim's veracity; and that neither doctrinal nor strategic imperatives justify sacrificing bisexual representation on the altar of homosexual equality, be it through the status-conduct equation, the claim of identity negation, or the immutability excuse. These arguments would be merely academic if the goal of same-sex marriage litigation were simply to secure marriage licenses for the same-sex couples who want them. It seems unlikely, if not altogether impossible, that the bisexual's claim would succeed where all other claims would fail.<sup>450</sup> Yet as gay rights advocates should be the first to know, winning a favorable ruling is not the only impact they seek through litigation. Other important goals include robust and fair representation of a diverse constituency, and development of legal doctrine in directions favorable to other movement goals.<sup>451</sup> An argument from bisexuality clearly gives voice to one gay rights constituency—by some estimates an "invisible majority" of LGBT

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448. *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 377 F.3d 1275, 1300 (11th Cir. 2004) (Barkett, J., dissenting).

449. *Id.* (citing *Lawrence*, 539 U.S. at 578).

450. The argument conceivably has appeal to libertarians who are skeptical of the state's aggressive encouragement of marriage.

451. See Douglas NeJaime, *Marriage, Cruising, and Life in Between: Clarifying Organizational Positionalities in Pursuit of Polyvocal Gay-Based Advocacy*, 38 HARV. C.R.-C.L. L. REV. 511 (2003); see also Douglas NeJaime *Winning Through Losing*, 96 IOWA L. REV. 941, 992-93 (2011) (discussing gay rights advocates' use of sodomy litigation to "lay[] groundwork for future . . . issues").

people<sup>452</sup>—whose very existence is erased in the current fight for same-sex marriage. There are two additional purposes the bisexual’s liberty-based claim might serve.

First, in its decisive break from the immutability excuse—its insistence that same-sex relations and relationships are legitimate choices regardless of whether homosexuality is a fated, fixed, or exclusive condition—the bisexual’s claim stakes a place in gay rights advocacy for “universalizing” as well as “minoritizing” arguments.<sup>453</sup> It emphasizes the difference between liberating homosexuals and liberating homosexuality, acknowledging what is right in the conservative politics of containment—that antigay “discrimination” rests in large part upon an immeasurable and often inchoate homosexual potential in many ostensible heterosexuals.<sup>454</sup> This universalizing approach need not be limited to same-sex marriage. It provides a conceptual basis for rethinking a range of issues, only some of which rank, even in minoritizing form, on the gay movement’s current agenda. Imagine, for example, a claim in constitutional challenges to “No Promo Homo” restrictions on sex education that a preference for heterosexually active citizens cannot justify condemning or ignoring homosexuality and bisexuality.<sup>455</sup> Imagine a claim in custody cases that the variably and variously impressionable psychosexual development of children is a basis for widening, not limiting, the range of “lifestyle choices” to which they are exposed.<sup>456</sup> Or imagine a claim in disputes over gender-segregated space that heterosexist conditioning must not be legally installed into the very

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452. LGBT ADVISORY COMM., S.F. HUMAN RIGHTS COMM’N, *BISEXUAL INVISIBILITY: IMPACTS AND RECOMMENDATIONS* 1–3 (2011), available at [http://www.birequest.org/docstore/2011-SF\\_HRC-Bi\\_Invisibility\\_Report.pdf](http://www.birequest.org/docstore/2011-SF_HRC-Bi_Invisibility_Report.pdf).

453. The universalizing-minoritizing distinction records opposing approaches to the question, “In whose lives is homo/heterosexual definition an issue of continuing centrality and difficulty?” Whereas minoritizing answers posit “a distinct population of persons who ‘really are’ gay,” universalizing ones suggest that “apparently heterosexual persons . . . are strongly marked by same-sex influences and desires.” SEDGWICK, *supra* note 76, at 40, 85.

454. For a boisterous but insightful polemic on bisexuality’s challenge to the politics of containment, see Peter Tatchell, *Breaking the Barriers to Desire*, in *BISEXUAL HORIZONS*, *supra* note 232, at 240, 240–42.

455. See Lisa Duggan, *Queering the State*, *SOC. TEXT*, Summer 1994, at 1, 7–9 (urging “no promo hetero” campaigns in response to “no promo homo” laws like the federal Helms Amendment of 1988, which withheld funding AIDS prevention programs that “promote or encourage . . . homosexual activities”).

456. See Kim H. Pearson, *Mimetic Reproduction of Sexuality in Child Custody Decisions*, 22 *YALE J.L. & FEMINISM* 53, 57 (2010) (urging advocates to affirm that nonheterosexual parents “create an environment in which it is safer for children to openly express their own sexual orientations”).

architecture of our lives.<sup>457</sup> These kinds of arguments, alike in their insistence that sexuality in general and homo/hetero choice in particular are constitutionally privileged sites of individual autonomy, warrant elaboration as the gay rights movement considers long-term goals and strategies for the post-*Lawrence* era.

Second, a claim for same-sex marriage sounding in sexual liberty attends to widespread concern that the freedom to marry is anything but emancipating—that it is a project unworthy of a movement that once marched under the banner of sexual liberation. Adherents of this view protest that marriage represents forms of assimilation and respectability that the gay rights movement should work to destroy, not reify.<sup>458</sup> Yet even Michael Warner, one of the most piercing and influential of those critics, qualifies his numerous objections by conceiving of marriage as a means, not an end:

It is possible, at least in theory, to imagine a politics in which sex-neutral marriage is seen as a step toward the more fundamental goals of sexual justice: not just formal equality before the law, . . . but a substantive justice that would target sexual domination, making possible a democratic cultivation of alternative sexualities. . . . But the advocates of gay marriage have not made this case.<sup>459</sup>

More than a decade after Warner's critique and nearly as long after *Lawrence*, litigators for same-sex marriage still have not made this case. Their omission obfuscates the stakes of their campaign and misses an opportunity to advance a constitutional value whose protection is far from complete. If "principle and logic" do sometimes shape the path of the law,<sup>460</sup> and in turn permeate the aspirations of social movements,<sup>461</sup> then *Lawrence*'s promise of autonomy "in matters pertaining to sex" cannot have been exhausted with the abolition of sodomy laws.<sup>462</sup> The

457. See Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 594 (1976) (suggesting that rules of urinary sex-segregation support heterosexuality).

458. See AGAINST EQUALITY: QUEER CRITIQUES OF GAY MARRIAGE (Ryan Conrad ed., 2010).

459. Michael Warner, *Normal and Normaller: Beyond Gay Marriage*, 5 GLQ 119, 124 (1999) (citations omitted).

460. *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting).

461. See Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do For, and To, Social Movements: An Introduction*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 1, 7, 10 (Austin Sarat & Stuart A. Scheingold eds., 2006) (describing litigation's power to "contribute to the construction of causes and the mobilization of movements," as exemplified by *Brown v. Board of Education*, 347 U.S. 483 (1954)).

462. *Lawrence*, 539 U.S. at 572.

marital institution is surely an ironic battleground on which to vindicate this constitutional promise, but it is—for better or for worse—the signal gay rights issue of our time. What it stands for matters.