"Just" Married?: Same-Sex Marriage and a History of Family Plurality

Judith E. Koons

Barry University School of Law

Follow this and additional works at: https://repository.law.umich.edu/mjgl

Part of the Civil Rights and Discrimination Commons, Family Law Commons, Religion Law Commons, and the Sexuality and the Law Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjgl/vol12/iss1/1

This Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of Gender & Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
"JUST" MARRIED?:
SAME-SEX MARRIAGE AND A HISTORY
OF FAMILY PLURALITY

Judith E. Koons*

INTRODUCTION • 2

I. A Brief History of Sexualities, Marriage, and the State • 14
   A. The Eternal (Male) Heterosexual? • 14
   B. A Brief History of Male Same-Sex Eroticism in Pre-Modernity • 19
   C. Whence Lesbians? • 23
   D. A Brief History of Marriage and the Nuclear Family • 36
   E. A Brief History of Sexual Morality and State Intervention • 43

II. Diversity of Household Forms in the Hebrew Scriptures: The Book of Ruth • 47

III. The House Churches in Ancient Rome and the Jesus Movement: One Household of God • 50

IV. The Patriarch in Early Modernity: James I of England • 56

V. Matrimony, Sanctimony, and American Political Leaders • 63

VI. The Lovings and the Goodridges • 71
   A. The Story of Mildred Jeter and Richard Loving • 71
   B. The Story of Hillary and Julie Goodridge • 76

CONCLUSION • 79

* Associate Professor of Law, Barry University School of Law, Orlando, Florida; B.A., J.D., University of Florida; M.T.S., Harvard Divinity School. Copyright, Judith E. Koons, 2005. I am indebted to the Rev. John Middleton, Joy Metropolitan Community Church in Orlando, Florida, whose sermon on Romans 16:1-16 called me to a new way of considering sexuality, religion, and family formation and to the many feminist scholars, including Bernadette Brooten and Martha Fineman, whose work informs this Article. I am also grateful to Leslie Golembiewski for her research assistance and to Barry University School of Law, particularly the administration and the faculty and staff of the law library, for their ongoing support of my work.
I don't think a white person should marry a black person. I'm from the old school. The Lord made sparrows and robins, not to mix with one another.

—Sheriff R. Garnett Brooks, arresting officer of Mildred and Richard Loving, during an interview on the twenty-fifth anniversary of Loving v. Virginia

There are always conscientious people of deeply held religious conviction who, alas, on the basis of those convictions find themselves on the wrong side of history, such as those in our own Commonwealth who hanged witches in the 17th century and embraced the fugitive slave laws in the 19th century. . . .

—Peter J. Gomes, Plummer Professor of Christian Morals and Pusey Minister in the Memorial Church at Harvard University

INTRODUCTION

Fifty years from the date of the decision in Brown v. Board of Education, Julie and Hillary Goodridge were among the first lesbian couples to legally wed in Massachusetts. In a scene reminiscent of African American children being escorted through cordons of National Guardsmen to newly integrated schools, a phalanx of police escorted the

---

2. 388 U.S. 1 (1967).
5. Same-Sex Couples Rush to the Altar, at http://www.cbsnews.com/stories/2004/05/25/national/main619489.shtml (last visited September 17, 2005) [hereinafter Rush to Altar] (describing the Goodridge wedding, noting that over 1,000 gay and lesbian couples applied for marriage licenses on the first day of legalized same-sex marriage in Massachusetts, and indicating that the Goodridges were among the seven lesbian and gay couples who challenged the exclusion of same-sex couples from civil marriage in Massachusetts). In November of 2003, the Supreme Judicial Court of Massachusetts ruled that the marriage restriction offended the liberty and equality guarantees of the Massachusetts Constitution. Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003). After staying entry of judgment for 180 days to permit legislative action and rejecting a “civil union” proposal of the legislature, the court paved the way for marriage licenses to be issued to same-sex couples on May 17, 2004. Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).
Goodridges as they left Boston City Hall with their application for a marriage license.⁶ The Goodridges were joyous; the children wore the deadly serious look of six year-olds who were entering a new world.⁷

As the gay marriage movement swept from San Francisco to Boston, our nation was captivated by the struggle over the meaning of marriage, sexuality, and family.⁸ Characterizing marriage as the “bedrock of civilization,” the marriage movement (on the conservative aisle) asserted that the institution of marriage was “under attack.”⁹ George W. Yvonne Abraham & Michael Paulson, Wedding Day, BOSTON GLOBE, May 18, 2004, at 1, available at http://www.boston.com/news/specials/gay_marriage/articles/2004/05/18/wedding_day?pg=1 [hereinafter Wedding Day] (detailing the marriage license application process).


8. In February and March of 2004, more than 4,000 gay and lesbian couples wed in San Francisco after Mayor Gavin Newsom ordered the city clerk to issue marriage licenses to same-sex couples. See, e.g., Rush to Altar, supra note 5, at 2. Same-sex weddings also took place in smaller numbers in towns in New York, Oregon, and New Mexico. See, e.g., Gay Marriage: A New Era, at http://www.pbs.org/newshour/bb/law/jan-june04/gaymarriage_5-17.html (last visited September 17, 2005) [hereinafter New Era]. The California Supreme Court nullified the San Francisco marriages in August of 2004, ruling that the Mayor had exceeded executive authority. Dean Murphy, California Court Rules Gay Unions Have No Standing, N.Y. TIMES, Aug. 13, 2004, at A1 (noting, too, the pendency of a separate suit in California that challenged the constitutionality of the ban on same-sex marriage).

Bush joined those calling for a federal constitutional amendment to define marriage as the legal union of “one man and one woman.” On Election Day in 2004, voters in eleven states approved initiatives to amend their state constitutions to prohibit same-sex marriage.

Insisting that marriage is “naturally ordained” as the union between one man and one woman, advocates for traditional marriage framed the contest both in terms of religion (“a holy war”) as well as in terms of culture (“a culture war”). When pressed for authority, “traditionalists”

---

A1 (discussing Horn’s appointment to the position of Assistant Secretary of Health and Human Services for Children and Families); see also Concerned Women for America, Top 10 Reasons to Support the Marriage Affirmation and Protection Amendment, at http://www.cwfa.org/articles/5351/CFI/family/ (last visited September 17, 2005) [hereinafter Top Ten Reasons] (citing, as Reason #3, that “[y]ou cannot redefine a timeless institution” and asserting that marriage is “under attack”).

10. In the wake of Goodridge, 798 N.E.2d at 941, Bush reiterated his call for a federal constitutional amendment to define marriage as the union of a man and a woman. Washington Week in Review (PBS television broadcast, May 21, 2004); see also Proclamation of “Marriage Protection Week,” 68 Fed. Reg. 58257 (Oct. 3, 2003) (in proclaiming Marriage Protection Week, Bush stated, “Marriage is a sacred institution, and its protection is essential to the continued strength of our society... Marriage is a union between a man and a woman.”). Although the Federal Marriage Amendment, which would amend the United States Constitution to recognize only marriages between a man and a woman, was blocked in the Senate and the House in 2004, supporters vowed to press the issue. Sheryl Gay Stolberg, Same-Sex Marriage Amendment Fails in House, N.Y. TIMES, Oct. 1, 2004, at A14 (quoting House Republican leader Tom DeLay: “This is only the beginning, I’m telling you, because this nation will protect marriage.”); Carl Hulse, Senators Block Initiative to Ban Same-Sex Unions, N.Y TIMES, July 15, 2004, at A1.

11. Michael Kranish, Gay Marriage Bans Passed, The Boston Globe, Nov. 3, 2004, at A22 (reporting that state constitutional amendments defining marriage as the union of a man and a woman were approved in Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah).

12. See, e.g., D. James Kennedy, “Time for Congress to Act,” at http://www.coralridge.org/specialdocs/PR_MarriageMassachusetts.htm (last visited May 17, 2004) [hereinafter Kennedy] (“Marriage is the ordinance of God. It is the first institution our Maker gave to the human race.”); see also Jeffrey C. Billman, Who Would Jesus Sue?, OUL WEEKLY, June 3–9, 2004, at 17, 18, 20 [hereinafter Who Would Jesus Sue] (discussing mission of a law firm that defends “traditional values” in a “culture war” and “holy war” to “restore the culture one case at a time, by advancing religious freedom, the sanctity of human life and the traditional family.”).

13. Those who argue for defining marriage in terms of one-man, one-woman often refer to themselves as defenders of “traditional marriage.” See, e.g., Senate Scuttles Gay Marriage Amendment, at http://www.lgri.org/news/article.php?newsID=1792 (last visited July 14, 2004) [hereinafter Senate Scuttles] (quoting statement of President Bush in response to Senate’s defeat of Federal Marriage Amendment: “Activist judges and local officials in some parts of the country are not letting up in their efforts to redefine marriage for the rest of America—and neither should defenders of traditional marriage flag in their efforts”). While observing that the “traditional” family form is, in actuality, the household, this Article will refer to those advocating for opposite-sex
stood on sources such as “the history of Western civilization” for their claim that requiring gender opposition in marriage is “self-evident.” The rhetorical sweep of the traditionalists was repeated when the issue was sexual expression between partners of the same sex. For some jurists, to acknowledge consensual homosexual sodomy as a fundamental right “would be to cast aside millennia of moral teaching.”

Proponents of same-sex marriage made the more restrained and pragmatic argument that the question is simply one of civil equality, as marriage is appropriately understood as a civil, secular matter. In recent cases on sexuality and same-sex marriage, courts spurned political and

---


16. Bowers, 478 U.S. at 196–97 (Burger, J., concurring) (proposing, too, that “the proscriptions against sodomy have very ‘ancient roots.’”).

17. Peter J. Gomes, an American Baptist minister and the Plummer Professor of Christian Morals and Pusey Minister in the Memorial Church at Harvard University, advised in an editorial that the petitioners in Goodridge, 798 N.E.2d at 941, “did not address religious issues, and the court’s ruling was not premised on religious grounds: Marriage, its definition, rights, and responsibilities, was understood here as a civil matter, as it has been since 1621.” Gomes, supra note 3, at 1.

18. Lawrence, 539 U.S. at 571 (invalidating Texas same-sex sodomy statute and citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992) for the principle that “[o]ur obligation is to define the liberty of all, not to mandate our own moral code.”); but see Lawrence, 539 U.S. at 602 (Scalia, J., dissenting) (objecting that the Court “has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed”).

19. Goodridge, 798 N.E.2d at 948 (asserting that religious, moral, and ethical convictions do not answer the question before the court: “Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach.”); Baker v. Vermont, 744 A.2d 864, 886 (Vt. 1999) (holding that same-sex couples are entitled, under the Common Benefits Clause of the Vermont Constitution, to the same benefits afforded by Vermont law to married opposite-sex couples and denoting that the issue “does not turn on the religious or moral debate over intimate same-sex
moral arguments to articulate the necessity of deciding the cases on legal grounds. Marriage, by these cases, is "wholly secular" and sanctioned by statutes that are "licensing" laws. 20

Approaching marriage as purely a civil, legal arrangement may encourage clarity in thinking about the law and legal relationships. 21 However, public debate has not and will not be confined to such neat quarters. Public discourse is alive with arguments coming from Scripture, 22 moral entitlement, 23 psychological profiles, 24 economic

relationships"); see also Baehr v. Miike, 910 P.2d 112, 114 (Haw. 1996) (affirming the denial of the motion for intervention of three members of the clergy because the Hawaii marriage statutes do not require a member of the clergy "to solemnize a marriage that is not in accordance with the usages, rules, and customs of that religious denomination or society").

20. Goodridge, 798 N.E.2d at 952, 954 (advising that, "for all the joy and solemnity that normally attend a marriage," the state marriage statute "is a licensing law"); Baker, 744 A.2d at 888-89 (characterizing the case in terms of "plaintiffs' claim to the secular benefits and protections of a singularly human relationship" rather than "the symbolic or spiritual significance of the marital relation"); Baehr v. Lewin, 852 P.2d 44, 47, 67 (Haw. 1993) (holding that, because sex is a suspect category under the Hawaii Constitution, Hawaii's sex-based marriage statutes are presumptively invalid and observing that "marriage is a state-conferred legal status").


22. See, e.g., Kennedy, supra note 12, at 1 (construing marriage as "the first institution our Maker gave to the human race" and proposing that "He, as the Creator, has the sole authority to define marriage—and he has explicitly done so, having fashioned for Adam a woman to be his helpmate and the mother of their children.").

23. Compare Romer v. Evans, 517 U.S. 620, 644-45 (1996) (Scalia, J., dissenting) (objecting to the Court's invalidation of Colorado's Amendment 2 that prohibited any governmental action to protect gays and lesbians because the people of Colorado are "entitled to be hostile toward homosexual conduct" and to retain "moral and social disapproval of homosexuality"), with Lawrence, 539 U.S. at 583 (O'Connor, J., concurring) ("Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause . . .").

24. Compare Brief for Amici Curiae American Psychological Assn., American Psychiatric Assn., National Assn. of Social Workers, and Texas Chap. of National Assn. of Social Workers in Support of Petitioners at 2, 20, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152338 [hereinafter APA Brief] (advising that children of gay and lesbians "demonstrate no deficits in intellectual development, social adjustment, or psychological well-being as compared to children of heterosexual parents."), with Goodridge, 798 N.E.2d at 1003 (Cordy, J., dissenting) (arguing that it would be appropriate for the legislature "to postpone making fundamental changes" to the structure of marriage "until such time as there is unanimous scientific evidence, or popular consensus, or both, that such changes can safely be made.").
forecasts,25 and bedtime stories.26 Even within the purportedly narrow confines of legal decision-making, the governmental interests asserted in the recent same-sex marriage and civil union cases cover a range of arguments from protecting “the basic family unit” that nurtures children and affirms “the moral values of the community,”27 to “furthering the link between procreation and child rearing,”28 to “conserving scarce State and private financial resources,”29 to protecting marriage from being trivialized or destroyed,30 as well as to preserving marriage “as a stabilizing social structure.”31


26. See, e.g., LESLÉA NEWMAN, HEATHER HAS TWO MOMMIES 2–3 (1989) (“Heather’s favorite number is two. She has two arms, two legs, two eyes. . . . Heather also has two mommies: Mama Jane and Mama Kate.”); see also Lesléa Newman, Heather Has One Decade: The Author of the Controversial Book for Children of Lesbian Parents Looks Back, available at http://www.beliefnet.com/story/70/story_7090.html (last visited Aug. 4, 2004) (recounting that “the book has been awarded and lauded, banned and burned.”); MICHAEL WILHOITE, DADDY’S ROOMMATE (1990) (introducing Nick, Daddy, and his partner Frank); MICHAEL WILHOITE, DADDY’S WEDDING (1995) (describing Daddy’s and Frank’s wedding, at which Nick is the best man and Nick’s mom attends with her new husband, Steven).


28. Baker v. Vermont, 744 A.2d 864, 881; Goodridge, 798 N.E.2d at 961 (denoting the rationales posited by the department of “providing a ‘favorable setting for procreation’” and “ensuring the optimal setting for child rearing”).

29. Goodridge, 798 N.E.2d at 964.

30. Id. at 964–65.

31. Id. at 965. In Romer v. Evans, the Supreme Court determined that Colorado’s Amendment 2, prohibiting governmental action that protected gay and lesbian citizens, ran afoul of the rational basis test of the Equal Protection Clause. 517 U.S. 620, 632 (construing the Amendment to impose “a broad and undifferentiated disability on a single named group” and to be “inexplicable by anything but animus toward the class it affects”). On remand, the Colorado Supreme Court affirmed the permanent injunction restraining the enforcement of Amendment 2. Evans v. Romer, 882 P.2d 1335 (Colo. 1994) (en banc). The court addressed four governmental interests articulated by the state defendants to support the Amendment: “protecting the sanctity of religious, familial, and personal privacy”; permitting “limited resources” to be focused on combating discrimination against “suspect classes”; “allowing the people themselves just married?”
The struggle over the definition of marriage invites consideration of the valences of meaning that attend symbols and social change. Marriage, like family, is a fundamental principle of social organization and an ideological construction that stands at the intersection of religious, political, social, psychological, and economic domains. This location is to establish public social and moral norms" by preserving “heterosexual families and heterosexual marriage” and by sending “the societal message condemning gay men, lesbians, and bisexuals as immoral”; and deterring “factionalism through ensuring that decisions regarding special protections for homosexuals and bisexuals are made at the highest level of government.” Id. at 1342, 1345, 1346, 1348.

32. In discussing the complexity of symbols and how “old symbols can acquire new meanings,” Caroline Walker Bynum adopted the term “polysemic symbol” to emphasize “the multivalent quality of images” in which meaning is appropriated in a process by which “it becomes subjective reality for the one who uses the symbol.” Caroline Walker Bynum, Introduction: The Complexity of Symbols, in GENDER AND RELIGION: ON THE COMPLEXITY OF SYMBOLS 9–10 (Caroline Walker Bynum et al. eds., 1986) [hereinafter Bynum] (referring to the work of anthropologist Victor Turner and philosopher Paul Ricoeur). In considering religious symbols and gender, Bynum proposed that they possess “manifold meanings” in which people with “different gender experiences will appropriate symbols in different ways . . .”. Id. at 2, 9. “Gender symbols” often “seem not so much to communicate information about gender . . . as to conjure up the basic human fact, both glorious and painful, of multiplicity and fragmentation.” Id. at 11.

33. According to sociologist Patricia Hill Collins, the power of the ideal of the traditional family lies in its dual function as both an ideological construction and a fundamental principle of social organization. Patricia Hill Collins, Gender, Black Feminism, and Black Political Economy, 568 ANNALS AM. ACAD. POL. & SOC. SCI. 41, 48 (2000) (recognizing “family” as a moral keyword that surfaces repeatedly across multiple, intersecting systems of oppression). As an ideology, “family rhetoric provides a flexible, interpretive framework that accommodates a range of meanings.” Id. Through its operation as a fundamental principle of social organization, the traditional family ideal generates a host of ideas, practices, institutions, and policies, including hierarchies of gender, race, and class that are organized and perpetuated through family rhetoric. Id. at 48–49. Illustrating the “polysemic” nature of the symbol of marriage (see Bynum, supra note 32, at 9–10), the Marriage Movement has defined marriage in six dimensions: as a legal contract, a financial partnership, a sacred promise, a sexual union, a personal bond, and a family-making bond. The Marriage Movement, A Statement of Principles 8–9, 18, 21, available at http://www.marriagemovement.org/html/report.html (last visited September 17, 2005)[hereinafter Marriage Movement] (a public policy advocacy group and “grassroots” movement that advocates for such policies as denying the social and legal benefits of marriage to couples who cohabit, reconsidering no-fault divorce laws, and finding “innovative ways to give legal weight to the marriage vow.”). An Agape Press writer insisted that marriage is not really “an inner state” defined by a couple, “a stamp conferred by an outside authority,” “a contract made by the families,” “a religious sacrament” entered by two people, or “a state-issued license that orders civil affairs.” Vitagliano, supra note 14, at 4 (citing lesbian author E.J. Graff). The “real answer” is that marriage “is rooted in nature,” predating society and “prior to all concepts of law.” Vitagliano, supra note 14, at 3 (citing religion professor Katherine Young).
highly contested. Throughout history, the interplay of religion and politics has been particularly incendiary. Consequently, a full moral deliberation that invites discussion from all of the domains is one that is most likely to lead to acceptance of complex cultural change.

To contribute to a full moral deliberation about same-sex marriage, this Article inquires into the meanings of marriage, sexuality, and family from historical and narrative perspectives that are situated at the intersection of religious and political domains. That inquiry is funded by three propositions. First, we are called to be "just" in marriage. Constitutional principles of equality and liberty are offended by withholding the benefits of marriage from people who, "but for" the gender of their partners, are eligible for marital status. In considering the question of justice in marriage, the article will demonstrate that much of the outcry against same-sex marriage is based on historically inaccurate understandings of sexuality and marriage. Traditionalists too often assume that heterosexuality and homosexuality are universal ideals, marching

34. Many wars have been waged in the name of religion and for political power. Global security is threatened by terrorism that arises out of religious fundamentalism and western colonialism. See, e.g., Understanding Terrorism: A Harvard Magazine Roundtable, HARVARD MAGAZINE, Jan.-Feb. 2002, at 36-49, 99-103. The extreme friction that characterizes religious and political contests is not unique to contemporary geopolitics. In 1618, Bohemian Protestants protested the policies of King Ferdinand, who was Catholic, by throwing two of the King's advisors out the window. JUSTO L. GONZÁLEZ, THE STORY OF CRISTIANITY, VOLUME 2: THE REFORMATION TO THE PRESENT DAY 136 (1984). The "Defenestration of Prague" led to the Thirty Years' War, "probably the bloodiest and most devastating European war before the twentieth century." Id.

35. See Judith E. Koons, Making Peace with Difference: A Hermeneutic of Inclusive Conversation, 12 TEX. J. WOMEN & L. 1, 19-23 (2002) [hereinafter Making Peace] (offering a methodology based on the work of Harvard Social Ethicist Ralph Potter for a full moral deliberation into the problem of difference as domination and the potentiality of difference as mutuality and inclusion). The type of changes that are afoot about family and marriage has been seen by feminists as part of a "cultural revolution." Patricia Smith, Introduction: Feminist Jurisprudence and the Nature of Law, in FEMINIST JURISPRUDENCE 10 (Patricia Smith ed., 1993) [hereinafter Patricia Smith] ("The elimination of patriarchy would constitute a cultural revolution at least as profound as the Copernican revolution, the Protestant revolution, or the Industrial Revolution."). Explaining the backlash against feminism, Smith advised that "[h]ostility is misplaced when directed against cultural revolutions" because "[c]ultural revolutions are profound but not violent." Id. at 11. According to Smith, what changes in a cultural revolution "is what people think, their basic assumptions about what is normal. So, cultural revolutions are inevitable because they follow from a change of worldview. . . . At a certain point in time, certain ideas become part of history, and they cannot be reversed. . . . This is now the status of the women's movement and feminist thought. It cannot be reversed or erased." Id. at 11.
unchanged throughout time.\textsuperscript{36} However, the ideals of homosexuality and heterosexuality are of very recent vintage, entering common parlance in America in the early twentieth century.\textsuperscript{37} Same-sex eroticism between men has been tolerated, if not accepted, in many cultures and during many historic periods.\textsuperscript{38}

Furthermore, many traditionalists stand on the premise that marriage, defined as the sexual union of one man and one woman in the setting of a nuclear family, has been the prevailing family arrangement throughout western history.\textsuperscript{39} Yet, marriage, as it is known in America, did not exist 2,000 (or even 200) years ago.\textsuperscript{40} The nuclear family has no

\textsuperscript{36} Jonathan Ned Katz, The Invention of Heterosexuality 8, 203 n.20 (1995) [hereinafter Katz]. In tracing the evolution of the idea of the social construction of heterosexuality, Katz notes: “Most researchers still conceive of a timeless essence of homosexuality and heterosexuality marching unchanged through the ages, though they now stress the radically different historical attitudes, responses, and political power arrangements that essence encounters.” \textit{Id.} at 203 n.20.

\textsuperscript{37} \textit{Id.} at 10; David Halperin, One Hundred Years of Homosexuality 22-24 (1990) (arguing that the nineteenth century’s medicalization of homosexuality, along with the rise of the homosexual rights movement, created a historic break from earlier views of eroticism). Feminist theologian Bernadette Brooten criticized Halperin and other scholars for overlooking evidence such as the ancient medical classification of erotic behavior, indicating that ancient sources worked with the concept of homo-eroticism. Bernadette J. Brooten, Love Between Women: Early Christian Response to Female Homoeroticism 8-9, 143, 162 (1996) [hereinafter Brooten].

\textsuperscript{38} See, e.g., APA Brief, \textit{supra} note 24, at 7 (stating that both heterosexuality and homosexuality “have been documented in many different human cultures and historical eras, and in a wide variety of animal species.”); see also Brooten, \textit{supra} note 37, at 16, 49-50 (documenting historic differences in the treatment of male and female homoeroticism).

\textsuperscript{39} E.g., Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 987, 996(Mass. 2003) (Cordy, J., dissenting) (proposing that family is constructed through marriage and that opposite-sex marriages have “deep historic roots”). The nuclear family, defined in terms of a husband-wife-child triad, was “a demographic anomaly. . . . Little empirical evidence exists to support the nostalgic belief that family life in past times was characterized by structural homogeneity and relational harmony.” Failinger, \textit{supra} note 13, at 220 (quoting Glen H. Elder, Jr., \textit{History and the Family: A Discovery of Complexity}, 43 J. of Marriage & Fam. 489, 491-93 (1981)). Former Vice President Dan Quayle offered the following definition of “family”: “We’re not going to redefine the family. Everybody knows the definition of the family . . . A child . . . A mother . . . A father. There are other arrangements of the family, but that is a family and family values.” Dan Quayle on Family Values and the Cultural Elite, \textit{available at} http:l/www.xmission.com/-mwalker/DQ/quayle/qq/fam.values.html [hereinafter Quayle on Family Values].

\textsuperscript{40} Mike Anton, The Evolution of Marriage: Cold-Eyed Business Deal to Idealized Romanitic Union, CHI. TRIB. Apr. 25, 2004, at Q10 [hereinafter Anton] (reporting that marriage has never been as simple as love: “For much of its history, matrimony has been a matter of cold economic calculation. . . . Notions of marriage taken for
valid historical claim to serving as the "bedrock of our civilization." Throughout western history and within patriarchal household and family systems many different family forms in a variety of household constellations have flourished.

Second, we are reminded that the institution that is at the heart of this struggle is "just" marriage. A number of criticisms have been lodged of marriage and the "nuclear family." The American family, as "our most explicitly gendered institution," has been the chief site that produces and reproduces hierarchical social roles and that divides physical, economic, emotional, and sexual labor according to gendered roles and expectations. The sexual division of labor within families has been "inherently unequal"—the non-wage earning tasks of caretaking have been placed with (middle-class, white) women while (middle-class, white) men have had the liberty to pursue careers that are personally and economically rewarding. As a consequence, the construct of "family" has

---

41. John Boswell, Christianity, Social Tolerance, and Homosexuality 26 (1980) [hereinafter Boswell] (studying "gay people" from early Christianity to the fourteenth century and stating: "No marriages in ancient societies closely match their modern equivalents. Most were vastly more informal; some were more rigid. Most cultures regard marriage as a private arrangement negotiated between two families. . . ."); cf. Connor v. Southwest Fla. Reg'l. Med. Ctr., Inc., 668 So.2d 175-77 (Fla. 1996) (abrogating the common law doctrine of necessities and discussing the change in marriage from a "unity theory" to a "partnership theory").

42. Martha L.A. Fineman, Masking Dependency: The Political Role of Family Rhetoric, 81 Va. L. Rev. 2181, 2187 (1995) [hereinafter Fineman, Masking] (also noting "deep divisions" within society about the "traditional family unit" as well as "fundamental shifts in family formation and functioning"); see also Judith Lorber, "Night to His Day": The Social Construction of Gender, in Feminist Frontiers 40 (Laurel Richardson et al. eds, 5th ed. 2001) [hereinafter Lorber] (describing the social institution of gender as: a process of creating social statuses; a part of a stratification system that ranks men and women; and a structure that "divides work in the home and in economic production, legitimates those in authority, and organizes sexuality and emotional life."). In evaluating the "maleness of Reason" in the Enlightenment thought of such philosophers as Jean Jacques Rousseau, Genevieve Lloyd noted that ideas of the family are distinctly gendered and have long been part of the Euro-American philosophical heritage. Genevieve Lloyd, The Man of Reason 119 (2d ed. 1993) [hereinafter Lloyd] (discussing Rousseau's characterization of the private domain in terms of the "nursery of good citizens").

43. Fineman, Masking, supra note 42, at 2183-84 (identifying "women's rejection of the hierarchical family. . . . and the increased participation of women in the paid workforce"
been foundational to the separation of the public from the private sphere and to the sequestration of women as caretakers in the domestic domain.\textsuperscript{44} For women, the rhetoric of family has been “a wedge in a larger effort to reduce women’s freedom and discourage gender equity.”\textsuperscript{45} For society, the “focus on the family” has allowed a preoccupation with individuals and the marital unit, to the detriment of the community.\textsuperscript{46} Because marriage and “traditional family values” have been defined in terms of sexual property rights, gay and lesbian couples have been cautioned to carefully consider whether hierarchies of subordination and privilege may be perpetuated by pursuing marital status.\textsuperscript{47}

\begin{itemize}
  \item \textsuperscript{44} E.g., Failinger, supra note 13, at 198 (proposing that the same-sex marriage movement and the covenant marriage movement “seem only to shore up the modern wall between public life and the private world of the family rather than freeing men and women to live fulfilling lives.”).
  \item \textsuperscript{45} Louise M. Bishop, Remarks at the Fortnightly Club 4-5, 7 (Apr. 4, 2002), available at http://darkwing.uoregon.edu/~lmbishop/research/Family%20values.htm [hereinafter Bishop] (suggesting that, by seeking to impose a return to father-headed families, what becomes lost in “family values” is women’s freedom).
  \item \textsuperscript{46} E.g., Kathy Rudy, “Where Two or More Are Gathered”: Using Gay Communities as a Model for Christian Sexual Ethics, in OUR FAMILIES, OUR VALUES: SNAPSHOTS OF QUEER KINSHIP 209-10 (Robert E. Goss & Amy Adams Squire Strongheart eds., 1997) [hereinafter Rudy] (arguing that “Christians have forgotten how to think about social and sexual life outside the family.”).
  \item \textsuperscript{47} E.g., Robert E. Goss, Queering Procreative Privilege: Coming Out as Families, in OUR FAMILIES, OUR VALUES: SNAPSHOTS OF QUEER KINSHIP 209-10 (Robert E. Goss & Amy Adams Squire Strongheart, eds., 1997) [hereinafter Goss] (contending that “[s]exual property has become the contemporary basis of traditional family values, and Christian marriage has been too long a sexual property right for men and male church leaders.”); Ruthann Robson, Assimilation, Marriage, and Lesbian Liberation, 75 TEMPLE L. REV. 709 (2002) [hereinafter Robson, Assimilation] (arguing that marriage raises “insoluble problems of equality” and that, to move toward a goal of liberation, the queer movement needs to take seriously questions of assimilation that stem from marriage and parenting).
\end{itemize}
Consequently, the article situates itself within a contradiction, a stance common to feminist jurisprudence. While recognizing the tensions inherent in denying gay and lesbian couples equal access to an unjust institution, the article also urges the loosening of the social, legal, economic, political, and religious ties that bind us to the privileged status of the spousal dyad.

Third, to shift to a moral analysis, this Article suggests that our recent obsession with family form obscures issues that lie at the heart of sexual morality. It is not the structure of a relationship that makes it worthwhile. Monogamy, for example, can be for good or ill—the site of human caring or “a prison of abuse.” It is not the gender of the participants that renders a relationship moral. The line that needs to be policed is not the fictive boundary between heterosexuality and homosexuality, but the line that separates positive human sexuality from forms of sexuality that are abusive.

From its historical axis, the article will support these propositions by offering a historical survey of sexualities, family forms, and state

48. Negotiating contradictions is central to feminist jurisprudence. To illustrate one helpful approach, feminist liberation theologian Elisabeth Schüssler Fiorenza insisted on a “doubled vision” as necessary to accomplish transformative goals of critical feminist hermeneutics. Elisabeth Schüssler Fiorenza, Feminist Hermeneutics, in THE ANCHOR BIBLE DICTIONARY 783, 785 (David Noel Freedman ed., 1992.) A doubled vision provides a means of allowing a reader to recognize the contradictory and subordinate position of women that is constructed by androcentric language and texts and to imagine a different interpretation and historical construction. Id; Making Peace, supra note 35, passim (employing a double hermeneutic to expose the contradictory sides of difference as domination and difference as potentiality); see also Lucinda M. Finley, Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning, 64 NOTRE DAME L. REV. 886, 896 (1989) [hereinafter Finley] (explaining that the “language of individuality and neutrality keeps law from talking about values, structures. . . . There are few ways to express within the language of law and legal reasoning the complex relationship between power, gender, and knowledge.”); Robson, Assimilation, supra note 47, at 727–30 (discussing disagreements within minority communities about assimilation and the contradictions inherent in any stance).

49. E.g., Rudy, supra note 46, at 213 (arguing that “[w]e obstruct our own inquiries about sexual morality . . . with unnecessary dictums about identity and organizational structure”); Fineman, Masking, supra note 42, at 2200–03 (urging a rethinking of family “in terms of the functions we want the family to perform and to leave behind our obsession with form”).

50. Rudy, supra note 46, at 209.

51. Id. at 212; see also IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 146 (1990) [hereinafter IRIS MARION YOUNG] (explaining homophobia as “the paradigm of . . . border anxiety” because “the border between gay and straight is constructed as the most permeable; anyone at all can become gay, especially me, so the only way to defend my identity is to turn away with irrational disgust”).
regulation of sexual expression. From its narrative axis, the article will offer vignettes of the diversity of family forms and sexual expression that have persisted in religious and political domains. The first series of vignettes arise from the religious domain and reflect stories of household life in the Hebrew and Christian Scriptures—stories of Ruth and Naomi, the house churches in Rome, and the Jesus movement in Palestine. The second series of vignettes are located in the political domain and focus on the families, shadow families, and sexual lives of three political figures—King James I, Thomas Jefferson, and Bill Clinton. The article will conclude with the stories of two couples who challenged the racial and cultural animus underlying bans on marriage—Mildred and Richard Loving and Julie and Hillary Goodridge.

I. A Brief History of Sexualities, Marriage, and the State

A. The Eternal (Male) Heterosexual?

An official, dominant different-sex erotic ideal—a heterosexual ethic—is not ancient at all, but a modern invention. Our mystical belief in an eternal heterosexuality—our heterosexual hypothesis—is an ideal distributed widely only in the last three quarters of the twentieth century.

In entering a discussion of the history of sexualities, one is advised to tread cautiously. Modern conceptions that polarize sexual categories into ideals of heterosexuality and homosexuality simply did not exist in other times and places. Ancient writers saw “a matrix of erotic orienta-

55. KATZ, supra note 36, at 14 (arguing that, while “reproductive necessity, distinction between the sexes, and eroticism among the sexes have been around for a long time,” the notions of “sexual reproduction, sex difference, and sexual pleasure have been produced and combined in different social systems in radically different ways.”).
56. Mary Coombs, Between Women / Between Men: The Significance for Lesbianism of Historical Understandings of Same-(Male)Sex Sexual Activities, 8 YALE J.L. & HUMAN. 241, 241 n.1 (1996) [hereinafter Coombs] (decrying the use of the word “homosexuality” to describe same-sex erotic relationships in other cultures and historical period); see also Laurie Rose Kepros, Queer Theory: Weed or Seed in the Garden of Legal Theory?, 9 LAW & SEX. 279, 285 (1999–2000) [hereinafter Kepros] (arguing that the “tidy binary” of heterosexual / homosexual not only “inaccurately describes the mul-
In ancient Greece, sexuality did not fit into hypostatized opposing ideals of "eternal" heterosexuality and homosexuality. 59 To explain the origins of sexuality, Aristophanes offered the myth of the "double creatures," in which the ancestors of human beings were powerful beings who had two heads, two sets of legs and arms, and two sets of sexual organs. 60 Some of the beings were half male and female ("androgynes"), but others were double females and double males. 61 Vibrant and proud, the creatures tried to climb into heaven and attack the gods. 62 To make them weaker, Zeus split the creatures "as you slice hard boiled eggs with a hair." 63 After their splitting, the beings spent the remainder of their lives searching out their other halves—the androgynes looked for their opposite sex mates while the halves of the female beings looked for their...
female mates and the male halves pursued their male mates.\textsuperscript{64} It was on this cultural template, at least in part, that Greek understandings of sexual desire were constructed.

Consequently, the vocabulary of sex, gender, and sexual orientation that is employed in contemporary society must not be transposed onto past societies.\textsuperscript{65} As a modern idea and phenomenon, \textquotedblleft sexuality\textquotedblright{} was not conceived until the last 200 years.\textsuperscript{66} In this Article, sexuality is recognized as a status that is socially constructed, culturally mediated, and politically maintained.\textsuperscript{67}

Homosexuality and heterosexuality are terms that are unique to the late nineteenth and early twentieth centuries.\textsuperscript{68} Even the meaning of

\begin{itemize}
\item \textsuperscript{64} Aristophanes noted that these men \textquotedblleft naturally do not trouble about marriage and getting a family but that law and custom compels them.	extquotedblright{} \textit{Id.} at 10 (quoting \textit{Symposium}, supra note 60, at 88).
\item \textsuperscript{65} Coombs, supra note 56, at 241 n.1.
\item \textsuperscript{66} Katz, supra note 36, at 172 (discussing the proposal in \textit{Foucault}, supra note 59, at 105 that \textquotedblleft sexuality\textquotedblright{} is a \textquotedblleft historical construct\textquotedblright{} that dates to the late eighteenth and early nineteenth centuries).
\item \textsuperscript{67} \textit{Making Peace}, supra note 35, at 7 (characterizing race, gender, and class as \textquotedblleft socially constituted, culturally mediated, and politically maintained"); see also Lorber, supra note 42, at 42 (arguing that \textquotedblleft [w]hatever genes, hormones, and biological evolution contribute to human social institutions is materially as well as qualitatively transformed by social practices\textquotedblright{}). The degree to which sexuality may be considered a social construct is contested. Some scholars have argued that \textquotedblleft [s]exual orientation seems to follow too many biological \textquoteleft rules\textquoteright{} for homosexuality to be nothing but a social \textquoteleft construction\textquoteright{}.\textsuperscript{1} Mondimore, supra note 60, at 157 (summarizing biology, psychology, and history as a practicing psychiatrist); see also Chandler Burt, \textit{Homosexuality and Biology}, The ATLANTIC MONTHLY, March 1993, at 65 (concluding that \textquoteleft[fl]ive decades of psychiatric evidence demonstrates that homosexuality is immutable, and non-pathological, and a growing body of more recent evidence implicates biology in the development of sexual orientation\textquoteright{}). Some gay activists began asserting that \textquoteleft We\textquoteright re born that way\textquoteright{} and \textquoteleft It\textquoteright s not a choice\textquoteright{} in the 1990\textquoterights. E.g., Paula Martinac, \textit{Born Gay vs the Sexual Continuum} (April 24, 2002), at http://www.q.co.za/2001/2002/04/24-lesbian notions.html [hereinafter Martinac]. At the same time, a number of scholars began drawing from the work of Michel Foucault to challenge sexuality as \textquoteleft biologically given and ahistorical\textquoteright{} and to conceive of sexuality as a socio-historical construct. E.g., Katz, supra note 36, at 172. More recently, other scholars have attempted to avoid the essentialist / constructionist debate as presenting a false \textquoteleft either-or\textquoteright{} dichotomy. Ruthann Robson, \textit{Lesbianism in Anglo-European Legal History}, 5 Wis. WOMEN\textapos;s L.J. 1, 3 n.9 (1990) [hereinafter Robson]; see also Kepros, supra note 56, at 286 (summarizing the debate between \textquoteleft essentialists\textquoteright{} that \textquoteleft sexual orientation is an objective, culturally independent (but not necessarily biological or immutable) characteristic\textquoteright{} and \textquoteleft constructionists\textquoteright{} that \textquoteleft sexual orientation as identity is a recent cultural product\textquoteright{} and suggesting that \textquoteleft constructionists agree with essentialists that sexuality may still be beyond individual \textquoteleft choice\textquoteright{} because society makes available a limited selection of identities\textquoteright{}).
\item \textsuperscript{68} Katz, supra note 36, at 10 (proposing that, \textquoteleft if words are clues to concepts, people did not conceive of a social world polarized into heteros and homos\textquoteright{}). Unlike the
those terms in American contemporary culture is complex and contested.  

To underscore the social construction of homosexuality, the very term was unknown in antiquity and early modernity. In fact, the word “homosexual” originated in Prussia in 1869. In the United States, the terms “homosexual” and “heterosexual” were employed for the first time by Dr. James G. Kiernan in 1892. At that time, neither homosexuality nor heterosexuality was associated with “normal sexuality.” Homosexuals were constructed by Kiernan as persons whose “general mental state is that of the opposite sex” while heterosexuals were associated with the mental condition of “psychical hermaphroditism” that was characterized by erotic attraction to both sexes.

In 1893, Dr. Richard von Krafft-Ebing employed the term “heterosexual” in a text on pathological sexuality. Krafft-Ebing constructed his “hetero-sexual” by splicing together three different elements: sex-differentiation, procreative purpose, and erotic sexual instinct. To Krafft-Ebbing, unlike Kiernan, this hetero-sexual did not desire two sexes, but only one different sex. Several years later, Sigmund Freud

term “homosexual,” the word “lesbian” has considerable terminological longevity. Brooten, supra note 37, at 23 (also proposing that other terms for female homo-erection —tribas, frictrix, and fricatrix—have had long linguistic lives). For further discussion on historic distinctions between male and female homoeroticism, see infra section I.C.

69. Coombs, supra note 56, at 241 n.1.

70. See Neil Miller, Out of the Past 13 (1995) [hereinafter Miller] (“The term homosexuality (Homosexualität) was actually used for the first time in 1869 by Karl Maria Kertbeny, a German-Hungarian campaigner for the abolition of Prussia’s laws that criminalized sexual relations between men”); see also Katz, supra note 36, at 10 (suggesting that the year “has now been moved back to” 1868). Kertbeny coined four new terms—monosexual, homosexual, heterosexual, and heterogenit. Id. at 52 (explaining that “monosexual” referred to masturbation, “heterogenit” referred to “erotic practices of human beings with animals,” “homosexual” to erotic acts between men or between women, and “heterosexual” to erotic acts between men and women).

71. Katz, supra note 36, at 19 (referring to James G. Kiernan, Responsibility in Sexual Perversion, 3 Chicago Med. Recorder 185 (May 1892)).

72. Id. at 19-20.

73. Id. at 20 (denoting that “[h]eterosexuals experienced so-called male erotic attraction to females and so-called female erotic attraction to males”).

74. Id. at 21 (referring to Richard von Krafft-Ebing, Psychopathia Sexualis, with Especial Reference to Contrary Sexual Instinct: A Medico-Legal Study (Charles Gilbert Chaddock trans., 1893), which introduced the word “hetero-sexual” to many Americans).

75. Id. at 21-22 (suggesting that Krafft-Ebing “created a small, obscure space in which a new pleasure norm began to grow”).

76. Id. at 22. According to Katz, “heterosexuality” had not “attained the status of normal.” Id. at 86. In 1901, Dorland’s Medical Dictionary continued to define
referred to "heterosexual individuals" and, later, to "heterosexuality."\textsuperscript{77} Freud's work had enormous influence in constructing eroticism between different sexes (via the new idea of heterosexuality) as contemporary society's dominant sexual norm.\textsuperscript{78} The \textit{raison d'etre} of the twentieth century "heterosexual person," however, was to talk about his "evil twin," the "homosexual person."\textsuperscript{79} In that project, he has been most successful.

From the turn-of-the-century medical texts, heterosexuality and homosexuality made an awkward debut into common jargon.\textsuperscript{80} Heterosexuality first appeared in a non-medical dictionary in 1923 as "morbid sexual passion for one of the opposite sex."\textsuperscript{81} Homosexuality had appeared fourteen years earlier as "morbid sexual passion for one of the same sex."\textsuperscript{82} In 1934, heterosexuality was first defined in the United States as "normal sexuality."\textsuperscript{83} After a half-century of cultural elaboration, heterosexuality entered American life as the dominant sexual norm.\textsuperscript{84} But the cultural creation of sexualities did not stop at the New Deal—it continued in a complex cultural paroxysm of making meaning.

To pay homage to the cultural and historic contingency of specific terms, this Article will make an effort to avoid a transhistorical and cross-cultural use of the terms homosexual, heterosexual, and lesbian.

\begin{itemize}
\item \textsuperscript{77} Freud referred to "heterosexual individuals" in 1905. \textit{Id.} at 219 n.31 (citing Sigmund Freud, \textit{Three Essays on the Theory of Sexuality}, in 7 \textit{The Complete Psychological Works of Sigmund Freud} 125 (James Strachey ed., 1953--)). The term "heterosexuality" was first used by Freud in 1909. \textit{Id.} at 219 n.33 (citing Sigmund Freud, \textit{Hysterical Phantasies and Their Relation to Bisexuality}, in 9 \textit{The Complete Psychological Works of Sigmund Freud} 165 (James Strachey ed., 1953--)).

\item \textsuperscript{78} \textit{Id.} at 65--66 (noting the "great rapidity" with which the word "heterosexual" was appropriated into the discourse of doctors indicates that the term "signaled an idea and ideal whose time had come—a norm that medical men' were eager to adopt").

\item \textsuperscript{79} \textit{Id.} at 65 (observing the dependency of the heterosexual on the subordinate homosexual and stating: "Heterosexual and homosexual appeared in public as Siamese twins, the first good, the second bad, bound together for life in unalterable, antagonistic symbiosis.").

\item \textsuperscript{80} \textit{Id.} at 83.

\item \textsuperscript{81} \textit{Id.} at 92, 225 n.28 (referring to \textit{Webster's New International Dictionary} xcii (1923 Supp.)).

\item \textsuperscript{82} \textit{Id.} (referring to \textit{Webster's New International Dictionary} 1030 (1909)).

\item \textsuperscript{83} \textit{Id.} (referring to \textit{Webster's New International Dictionary} (2d ed., 1934)).

\item \textsuperscript{84} \textit{Id.} at 92.
\end{itemize}
Instead, the article will use phrases such as “same-sex eroticism” and “opposite-sex eroticism.”

B. A Brief History of Male Same-Sex Eroticism in Pre-Modernity

Heterosexual and homosexual behavior are both normal aspects of human sexuality. Both have been documented in many different human cultures and historical eras, and in a wide variety of animal species.

Same-sex eroticism has been a prominent feature of human sexuality “for thousands of years in vastly different times and cultures.” In

85. See generally Brooten, supra note 37, at 8 (1996) (using the term “homoerotic” rather than “homosexual” because it has “less fixed meaning” and is “better suited to studying texts of a culture very different from the contemporary cultures of industrialized nations”). However, several limitations are apparent in the phrases “same-sex eroticism” and “opposite-sex eroticism,” including the flattening of intimate relationships to “eroticism” and the potential conflation of female and male homoeroticism. Cf. Coombs, supra note 56, at 241, n.1 (offering the term “lovemaking” to refer to “the congeries of erotic attractions and practices between men or between women”).

86. APA Brief, supra note 24, at 7.

87. Mondimore, supra note 60, at 20 (arguing that there is agreement on several facts about human sexuality, including the existence of same-sex eroticism across time and cultures and the acceptance in some cultures of same-sex eroticism as a “normal aspect of human sexuality”). Some historians of sexuality have gone much further. Historian John Boswell contended that same-sex unions were “widespread in the ancient world.” Boswell, Same-Sex, supra note 60, at 280–81 (noting the variety of forms of such relationships and describing Christian same-sex unions that functioned as “gay marriage” ceremonies); see also William N. Eskridge, Jr., The Case for Same-Sex Marriage 16 (providing documentation of same-sex unions and “even marriages” as having been “common” in other times and cultures); but see Peter Lubin & Dwight Duncan, Follow the Footnote or the Advocate as Historian of Same-Sex Marriage, 47 CATH. U. L. REV. 1271 (1998) (asserting that Boswell’s work on same-sex unions has “lost much of its luster” and that Eskridge, who dissociated himself from many of Boswell’s claims, has made “omissions, distortions, and misstatements” in The Case for Same-Sex Marriage); see generally Paul Halsall, People with a History: An Online Guide to Lesbian, Gay, Bisexual and Trans History: John Boswell Page (last visited July 7, 2004), available at http://www.fordham.edu/halsall/pwh/index-bos.html (offering a bibliography of Boswell’s writings, annotated reviews of books, and annotated monographs that focus on Boswell). Feminists criticized Boswell for neglecting to undertake a gender analysis of his data, including failing to discuss male same-sex unions “within the context of male ecclesiastical privilege.” E.g., Brooten, supra note 37, at 12. For an illustration of the points that have been made in the “Boswell” debate, see Ralph Hexter & Brent Shaw, “Same-Sex Unions in Premodern Europe”: An Exchange, The New Republic, Oct. 3, 2005, available at http://www.fordham.edu/halsall/pwh/bosrev-hexter.html, in which
ancient Greece, for example, there were two kinds of love for young men: earthly love that was based in male and female qualities and heavenly love that sprang from a goddess whose attributes were “altogether male.”

To Plutarch, all humans were attracted to people of both sexes. The relationship of Socrates with his male lover, Alcibiades, attracted more attention than his relationship with his wife and children. Xenophon commented that same-sex eroticism was part of “human nature.” Plato equated acceptance of same-sex eroticism with democracy. While the American notion of “sexuality” is substantially different from the Greek “aphrodisia,” eroticism between men was commonly accepted in ancient Greece.

Romans inherited Greek ideas about sex. Of the first fifteen emperors of the Roman empire, only one preferred sex with women. The most famous male lovers in the Roman world were Hadrian and Antinous. Hadrian, “the most outstanding” of the good Emperors, ruled from 117–38 C.E. Hadrian fell in love with the young Greek, who drowned while crossing the Nile in 130 C.E. In addition to establishing oracles and games in the name of his beloved, Hadrian honored

Hexter asserted that Boswell provided abundant resources to support rendering medieval adelphopoiesis ceremonies as same-sex unions and not simply ceremonies for “making of brothers,” and Shaw replied that Boswell did not establish a connection between the liturgical texts for “blessing for the making of a brother and any sort of same-sex union that might reasonably be construed as a marriage.”


Boswell, supra note 40, at 50–51.

Id. at 10.

Id. at 49.

Id. at 5, 13–14 n. 22 (referring to Plato, Symposium, but noting the reference to homoerotic relations as “against nature” in Plato’s final work, the Laws); see also Robson, supra note 67, at 21, n. 79 (explaining Plato’s Laws as “pragmatic jurisprudence,” as contrasted with more inspirational dialogue in The Republic, in which a state of “true wisdom prevails” that “does not need laws” (quoting P. FRIEDLANDER, PLATO 116 (1958)).

Katz, supra note 36, at 172.

Boswell, supra note 40, at 25.

Id. at 61, n.2 (referring to EDWARD GIBBON, HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE 1:313, n.40 (Dean Milman et al. eds, 1898) and affirming that Gibbon was “correct” if Julius Caesar is understood as the first emperor). Consequently, “the Roman Empire was ruled for almost 200 consecutive years by men whose homosexual interests, if not exclusive, were sufficiently noteworthy to be recorded for posterity.” Id. at 61.

Id. at 84.

Id. at 85.
Antinous by founding a city on the Nile and constructing statues throughout the empire.\textsuperscript{98}

Acceptance of male same-sex eroticism was not confined to ancient Greece and Rome. One commentator pointed to “a rich documentation of the ‘ancestors’ of the modern homosexual,” not only in Grecian and Roman antiquity, but also in the Middle Ages in Western Europe.\textsuperscript{99} A wealth of literature celebrating same-sex love relationships abounded in Europe between the years 1050–1150.\textsuperscript{100} Ralph, the Archbishop of Tours, ruled long and effectively for many years after his lover, John, was consecrated as Bishop of Orléans in 1098.\textsuperscript{101} Richard the Lionhearted, who ruled England from 1189–1199, was passionately attached to Philip, the King of France.\textsuperscript{102} The “true love” of Edward II, who ruled England from 1307–1327, was not Queen Isabella, but Piers Gaveston, who was referred to in historical accounts as Edward’s “favorite.”\textsuperscript{103}

In Near Eastern cultures, same-sex relationships were used as exemplars of moral love in poetry and fiction.\textsuperscript{104} Islamic Sufi literature relied on same-sex eroticism as the central metaphor for the relationship between God and humanity.\textsuperscript{105} After invading Spain in the early eighth century, Muslims not only reinvigorated Roman cities, but they also established a culture that extended respect or “casual acceptance” to people who engaged in same-sex eroticism.\textsuperscript{106} Hostility was rare.\textsuperscript{107} Addressing another male erotically was “the standard convention of Arabic

\begin{itemize}
  \item \textsuperscript{98} Id.
  \item \textsuperscript{99} Miller, supra note 70, at xxii.
  \item \textsuperscript{100} Boswell, supra note 40, at 243.
  \item \textsuperscript{101} Id. at 213–14.
  \item \textsuperscript{102} “Richard, [then] duke of Aquitaine, son of the king of England, remained with Philip, the king of France, who so honored him for so long that they ate every day at the same table and from the same dish, and at night their beds did not separate them. And the king of France loved him as his own soul; and they loved each other so much that the king of England was absolutely astonished at the passionate love between them and marveled at it.” Id. at 231 (quoting chronicler Roger of Hovedon, The Annals of Roger of Hovedon 2:63–64 (Henry Riley trans., 1853)) (alteration in original).
  \item \textsuperscript{103} Mondimore, supra note 60, at 25 (contrasting the “unfortunate life and gruesome death” of Edward with the life of Richard the Lionhearted, whose sexual life did not generate great interest during his lifetime, “nor did it in any way tarnish his reputation as the embodiment of the valiant and chivalrous knight.”).
  \item \textsuperscript{104} Boswell, supra note 40, at 27.
  \item \textsuperscript{105} Id.
  \item \textsuperscript{106} Id. at 195.
  \item \textsuperscript{107} Id.
love poetry.” Erotic verses about all varieties of same-sex relationships were written by persons of every rank in Hispano-Muslim society. The eleventh century King of Seville, al-Mutamid, wrote of his page: “I made him my slave, but the coyness of his glance has made me his prisoner, so that we are both at once slave and master to one another.” Teachers of the Qur’an, religious leaders, and judges also penned same-sex erotic verse.

In ancient China, same-sex love was referred to as “the love of the cut sleeve” because the last emperor of the Han dynasty, Ai-Ti, preferred to cut off his sleeve when he was called to court business rather than wake his lover, Tung-Hsien, who had fallen asleep across it. In Japan, homoeroticism was accepted among medieval samurai warriors and in the teahouses of the Edo period (1603–1868).

Many native cultures in North America, Polynesia, and Siberia explicitly included social roles that countenanced same-sex relations. For example, among North American Indian tribes, there were “berdaches”—biological males (and sometimes biological females) who dressed as the opposite sex, took spouses of members of the same sex, and occupied sacred roles in ceremonies. Berdaches, like hijras and xaniths, were treated as a third gender: “male women” or “female men.”

108. Id. (noting that, “[t]he Arabic language contains a huge vocabulary of gay erotic terminology, with dozens of words just to describe types of male prostitutes”).
109. Id. at 196.
110. Id. (quoting ‘ABD AL-WAHID AL-MARRAKUSHI, AL-MU’JIB FI TALKHIS TA’RIKH AL-MAGHRIB 73 (1906)).
111. Id. at 197 (suggesting that this society “combined the freewheeling sexuality of Rome with the Greek tendency to passionate idealization of emotional relationships”).
112. Id. at 27.
113. Id. at xxii.
114. Id.; see also MONDIMORE, supra note 60 at 12 (characterizing the berdache custom in America as “widespread” and “present in every major cultural group from the Iroquois in the Northeast and along the eastern seaboard to the Pima, Navajo, Illinois, Arapaho, and Mohave tribes of the Great Plains; the Yanqui and Zapotecs of Mexico; several South American tribes; and the Alaskan Eskimos”).
115. Lorber, supra note 42, at 42, 49.
116. Lorber, supra note 42, at 42 (also asserting that third genders show us that gender is “not attached to a biological substratum,” but is “breachable”).
Few men are interested in lesbians. The purpose of showing two women in apparent sexual embraces is to display the charms of two women.\footnote{118}{A lesbian is a woman who loves another woman and wants to be in a relationship with her. Love Makes a Family: Portraits of Lesbian, Gay, Bisexual, and Transgender Parents and Their Families 57 (Peggy Gillespie ed., 1999) [hereinafter Love Makes a Family] (quoting Keely, a third-grade student and daughter of two lesbian mothers).}

In a society in which men do not oppress women, and sexual expression is allowed to follow feelings, the categories of homosexuality and heterosexuality would disappear.\footnote{119}{Douglass v. Hustler Magazine, 769 F.2d 1128, 1135 (7th Cir. 1985) (Posner, J.).}

In comparison with historical data of male homoeroticism, the historic records of female same-sex eroticism are relatively sparse.\footnote{120}{Radicalesbians, The Woman-Identified Woman, in Radical Feminism 241 (Anne Koedt et al. eds, 1973).} However, recent interest in lesbian history has resulted in a “burst of research” in which historians have unearthed historic data (and reinterpreted extant data) that demonstrates a “widespread awareness” in the Roman world of same-sex eroticism between women.\footnote{121}{BROOTEN, supra note 37, at 25; see also E. Ann Matter, My Sister, My Spouse, J. Feminist Stud. in Religion, 81, 92 (1986) [hereinafter Matter] (advising that inquiring into the history of lesbians in medieval Christian Europe is “a venture into a realm of silence and contradiction.”).} The data also indicates divergences in the treatment of male and female homoeroticism.\footnote{122}{BROOTEN, supra note 37, at 2, 24, 49, 71.} Greater cultural tolerance was exhibited toward male same-sex eroticism (particularly toward the active male partner) than toward female-female sexual love.\footnote{123}{Id. Many of the accounts that have survived of Greco-Roman female same-sex eroticism are either mocking or pornographic. For example, in the first century B.C.E., Roman author Martial ridiculed eroticism between women as a laughable gender inversion. Boswell, supra note 40, at 77. “Pornographic” eroticism among female prostitutes was portrayed on a number of vase paintings from ancient Greece.} For reasons such as this, several feminist
scholars have cautioned against conceptualizing female same-sex eroticism as a subcategory of male homoeroticism.\textsuperscript{124}

Women of ancient Greece, particularly during the sixth century B.C.E. on the island of Lesbos, expressed eroticism freely toward women and men.\textsuperscript{122} Information from the poetry of Sappho suggests that relations among women occurred within all-female social groups, such as the \textit{thiasoi} and \textit{maenads}.\textsuperscript{126} In the \textit{thiasoi}, young women were led by teachers such as Sappho in sharing “passionate love, experienced with exceptional sensibility and ecstasy.”\textsuperscript{127} While the same-sex eroticism may have been a rite of passage for the young maidens, it was likely a way of life for the teachers.\textsuperscript{128} The \textit{maenads} were groups of married women who, while temporarily away from their husbands, participated in Dionysian rituals as a sort of “initiation of women by women into women’s own sexuality. . . .”\textsuperscript{129}

From the classical Greek period to the Roman era, Sappho was widely appreciated for her intellectual and artistic abilities.\textsuperscript{130} Writers during the Roman period expressed not only increasing preoccupation with Sappho’s love for women, but also disapproval of that love.\textsuperscript{131} The

---

\textsuperscript{124} Mondimore, \textit{supra} note 60, at 10 (proposing that much of the historic material that has survived is “frankly pornographic”).

\textsuperscript{125} E.g., Mondimore, \textit{supra} note 60, at 11.

\textsuperscript{126} Coombs, \textit{supra} note 56, at 254.

\textsuperscript{127} Id. (quoting Eve Cantarella, \textit{Bisexuality in the Ancient World} 79 (1992)).

\textsuperscript{128} Id. (also suggesting that the bonds within the \textit{thiasoi} were less educational relationships and more equal relationships with expression of reciprocal feelings).

\textsuperscript{129} Id. (quoting Christine Downing, \textit{Myths and Mysteries of Same-Sex Love} 194 (1989)).

\textsuperscript{130} Brooten, \textit{supra} note 37, at 31–33 (observing that in the Greco-Roman world, Sappho was the “premier poet,” quoting sixth century historian Joannes Malalas, \textit{Chronographia} 72.2). During Sappho’s lifetime, there is no evidence of disapproval of her erotic activities. Id. at 34. However, in later centuries, “wild speculation ruled the day.” Id.

\textsuperscript{131} Id. at 36. Illustrating the groundwork that was laid for this tradition, the earliest extant biography of Sappho, dated from the second or third century, C.E., states: “She has been accused by some of immorality [literally: ‘of being disorderly with respect to her mode of life’] and of being a lover of women.” Id. at 35, n.26 (quoting \textit{Papyrus}}
negative representations of Sappho's homoeroticism were employed to discredit her intellectual achievements. From the Roman period forward, many historians attempted to "rescue" Sappho from disrepute through methods that included the re-casting of Sappho as a prostitute who fell in love with Phaon, a handsome ferryman. Through this legendary bifurcation of Sappho, any homoerotic activity on her part was neatly denied, and her sexual virtue was purportedly restored.

The word "lesbian" is linked to inhabitants of the Island of Lesbos. An early use of the Arabic word for "lesbian" has been traced to a first century astrologer who proposed that, when Venus and the Moon were in a particular alignment, the female "will be a Lesbian, desirous of women. . . ." The first use of the Greek word "Lesbia" has been attributed to Clement of Alexandria (circa 150-220 C.E.), an early church father who commented on women marrying other women in a medieval marginal note. Contemporaries of Clement also referred to marriages between women, including the astrologer Ptolemy of Alexandria, the second-century author Iamblichos, the satirist Lucian of Samosata, and authors of an early rabbinical commentary on Leviticus.

---

132. Id. at 38 ("Discrediting the intellectual achievements of Sappho by attacking her sexual life may well have contributed to the loss of nearly all of Sappho's writings, as well as those of other women associated with her in any way.").

133. Id. at 38-41.

134. Id. at 39-40.

135. Id. at 22 (recounting that, for ancient writers, "lesbiazein and lesbizein (to behave like inhabitants of the Island of Lesbos) generally meant 'to perform fellatio' "). In her masterful study of lesbian history, Brooten used the term "lesbian" in the medieval sense (to behave like men and to orient toward female companions for sex) and acknowledged historic differences in the meaning of "lesbian" over time and within any particular culture. Id. at 17 (suggesting, too, the use of "lesbian" in the Kantian sense, so as to permit a distinction between the content of concepts and the concepts themselves). In contrast with a number of male scholars, Brooten did not find a "historic break" in the concepts of lesbian and homoeroticism to mandate the use of different terms for different times or regions. Id. at 8-9, 17-25, 156-62.

136. Id. at 119 (referring to Dorotheos of Sidon's astrological poem, Carmen Astrologicum 2.7.6, and the translation of the Arabic term sahāqa as "lesbian"). For evidence of female homoeroticism in the Greco-Roman world, Brooten drew from erotic spells that were commissioned by women to attract other women, astrological texts, medical treatments, and dream interpretation. Id. at 73-113, 115-41, 145-73, 175-86.

137. Id. at 22-23 (also noting the use of the phrase "Errina the Lesbian" by second century church father Tatian).

138. Id. at 51, 106-07, 127, 139, 332-33. Ptolemy referred to public tribades who called their partners their "lawful wives." Id. at 22, 139 (also observing that an early term for female homoeroticism, tribas, and its derivatives tribad, tribadic, and tribadism, was used from the Roman period into the twentieth century). In Babyloniaka, written
A Roman funerary relief that dates from 27 B.C.E.–14 C.E. depicts two women who are clasping their right hands in the manner of dextra-rum iunctio, or “joining of the right [hands],” a gesture of married persons. 139 Several centuries later, the stone was recut to transform one of the women into a man. 140 An earlier Greek plate painting (circa 620 B.C.E.) shows two women in the classic courting position in which one woman is placing her hand below the chin of the other. 141 A Grecian kylíx from 515 - 495 B.C.E. represents two women in sexual activities. 142 In an amphora dating from 490 B.C.E., two inebriated women are shown walking with their arms around each other. 143 Two clothed women are depicted in more discrete homoerotic activity on a South Italian vase that dates from around 350 B.C.E. 144 The seated woman is reaching up, touching the breast of a woman who is standing. 145

While there were few artistic representations and literary references to female homoeroticism in the pre-Roman era, the awareness of sexual love between women increased manifold in the Roman period. 146 Early Christian writers lived in a cultural environment in which there was a heightened awareness of female homoeroticism. 147 Texts from early Christianity demonstrate that church fathers “knew more about sexual relations between women than previous scholars have assumed.” 148

---

139. See Brooten, supra note 37, at 59 (also reporting that the inscription identified one woman as Fonteia Eleusis, a freedwoman (an emancipated slave) and the other woman as Fonteia Helena, also a freedwoman).
140. See id. at 60.
141. See id. at 57.
142. See id. (noting that the kylíx, or drinking vessel for wine, was crafted by Apollodoros).
143. See id. at 58.
144. See id.
145. See id. at 58–59 (advising that, unlike Roman period writers, most of the vase painters did not depict women as masculine and that adult women are shown on the vases, in contrast with most of the Greek vases of male couples in which one partner was a bearded adult and the other was a beardless youth).
146. See id. at 1.
147. See id.
148. Id.
In the Middle Ages, religious life offered a space for the expression of love between women. A twelfth-century manuscript from a monastery in Bavaria includes verses that express the anguish of a nun at being parted from her beloved: “When I recall the kisses you gave me,/ and how with tender words you caressed my little breasts/ I want to die because I cannot see you.” While the poem presupposes a physical relationship that was passionate, scholars have placed it within the tradition of “spiritual friendship” or “amicitia” that was brought into the heart of medieval society by influential monks such as Saint Anselm of Bec, Saint Bernard of Clairvaux, and Saint Aelred of Rievaulx.

In the thirteenth century, Hadewijch, a Flemish Beguine, became a spiritual authority among the Beguines of Flanders due to her elegant rendering of a series of visions. Hadewijch experienced God in a love relationship that paralleled human love. In her letters, Hadewijch urged her sister Beguines to aim for the spiritual love of God. The letters also open a window into Hadewijch’s human love relationships, including the pain of being separated from her sisters. Sara was the “best beloved,” who returned the fervor of Hadewijch with indifference. Yet, “whether I am anything to her or nothing . . . however she may treat me,” Hadewijch wrote that she would love Sara without “blame or reproach.”

In the courts of Provence during the thirteenth century, women poets sang alongside male troubadours. One of these trobairitz, Bieris de Romans, pledged her love to another woman, Lady Maria:

---

149. Mondimore, supra note 60, at 53; see also Matter, supra note 120, at 83.
150. See Matter, supra note 120, at 83–84; see also Boswell, supra note 40, at 240 (stating that “love in a thousand guises invaded the landscapes, townships, and monasteries of Europe in the eleventh and twelfth centuries. . . . It transformed the ascetic spirituality of the desert fathers into the passionate mysticism of Saint Bernard, breached the barriers of Basil’s isolated monastic cells with the tender friendships of Saints Anselm and Aelred. . . .”). While Anselm was devoted to celibacy, he also had “extraordinary emotional relationships” with a number of pupils. Id. at 218. To Aelred, because “God is friendship,” human love and friendship were the basis for monastic life. Id. at 222.
151. Hadewijch was one of the preeminent figures in medieval Dutch literature. See Matter, supra note 120, at 84 (also explaining that a Beguine is not a nun, but “one of many women in the thirteenth century who chose to live in piety and apostolic poverty without making monastic vows.”).
152. See id. at 85.
153. See id.
154. See id.
155. Id.
156. Id. at 85–86.
157. See id. at 86.
Thus I pray you, if it please you that true love and celebration and sweet humility should bring me such relief with you, if it please you, lovely woman, then give me that which most hope and joy promises for in you lie my desire and my heart and from you stems all my happiness and because of you I'm often sighing.¹⁵⁸

Due to the sophistication of Provençal courtly society, this love message was able to be expressed directly, outside of the “monastic habit of spiritual amicitia.”¹⁵⁹

Evidence of same-sex eroticism between women is also reflected in cautionary statements of church leaders and in the “penitentials” of the sixth through twelfth centuries.¹⁶⁰ In an instructional epistle from the fifth century, St. Augustine reminded nuns that their love must be spiritual, not carnal, and warned them against “shameful playing with each other.”¹⁶¹ The eighth century penitentials of Pope Saint Gregory III reflected the institutional hierarchy of sins of the day; penances were specified of 160 days for sexual activities between women, one year for sexual acts between men, and three years for priests who went hunting.¹⁶²

Accounts of same-sex eroticism are also found in records of ecclesiastical and secular trials.¹⁶³ Records from 1619-1623 document the sexual relations of Benedetta Carlini, Abbess of the Covenant of the Mother of God in Pescia, Italy, with another nun, Bartolomea Crivelli.¹⁶⁴ The defense of Benedetta was gender-based spirituality. She claimed that she had been possessed by an angel named Splenditello, a boy of eight or

¹⁵⁸. Id. at 86 n.15 (citing THE WOMEN TROUBADOURS 132-33 (Meg Bogin ed. & trans., 1976) and relaying Bogin’s description of the efforts that some scholars have made “to interpret this as anything but a poem by a woman to a woman”).

¹⁵⁹. Id. at 86.

¹⁶⁰. Id. at 87 (describing penitentials as “handbooks for confessors which catalogue sins and their respective penances”).

¹⁶¹. Boswell, supra note 40, at 158, 180 (cautioning, too, that homosexuality is not given any greater attention in penitentials).

¹⁶². See id. at 180; see also Matter, supra note 120, at 87-88 (observing that penances were listed in units of time and that punishment, usually fashioned in terms of fasting, could be worked off more quickly by prayers, vigils, and giving of alms).

¹⁶³. See Robson, supra note 67, at 29–31 (detailing secular trials of women in the Netherlands between 1606 and 1769).

¹⁶⁴. See Matter, supra note 120, at 91.
nine, who performed these sexual acts. For her crime, Benedetta spent the rest of her life (thirty-five years), in prison.

The magistrates who tried Catherina Margaretha Linck in 1721 were not so lenient. Posing successfully as a man for many years, Linck married Catherina Mühlhahn in 1717. Linck committed forbidden sexual acts with an instrument described as “a penis of stuffed leather with two stuffed testicles made from pig’s bladder attached to it.” To the magistrates, there was no question that the crimes warranted a death sentence. The only question was how the sentence would be carried out. Burning was the method of execution for sodomy. Since there was “no genuine sodomy . . . with a lifeless leather device,” the magistrates settled on death by the sword.

Although the foregoing records demonstrate the existence throughout history of same-sex relationships between women, a compelling issue remains of the relative paucity of historical data on love between women. A “commitment to silence” is reflected in historic texts that

165. See id. at 91–92.
166. See Robson, supra note 67, at 29.
167. See Matter, supra note 120, at 91.
168. See id.
169. Id. (quoting the trial record of Oct. 13, 1721, in Brigitte Eriksson, A Lesbian Execution in Germany, 1721: The Trial Records, 6 J. OF HOMOSEXUALITY 27–40 (1980–1981)). Linck escaped detention not only by her fellow soldiers, but also by her wife. The latter was attributed to “skillful use” of the instrument.
170. See id. (noting that the death sentence was considered appropriate as much for Linck’s crimes of religious apostasy arising out of repeated baptisms and affiliation with different religious sects in each town in which she lived); see also Robson, supra note 67, at 19 (citing R. Miles, The Women’s History of the World 219 (1989) for the assertion that the real crime of Linck was usurpation of male attire; lesbian sexuality was minimalized).
171. See Matter, supra note 120, at 91.
172. See id.; see also Robson, supra note 67, at 18 (advising that the magistrates spent much of the trial record debating whether the punishment would be “hanging with the body burned afterward versus [being] put to death by the sword versus burning alive.”).
173. Matter, supra note 120, at 91 (also noting that Catherina Mühlhahn was sentenced to three years, followed by banishment).
174. See BROOTEN, supra note 37, at xi (documenting ancient responses to love between women); see also Robson, supra note 67, at 21 (asserting that “there is an Anglo-European legal history of lesbianism.”).
175. BROOTEN, supra note 37, at 25 (proposing that “the male silence about the possibility of sexual love between women expressed in the relative paucity of the sources becomes itself a historical datum to be explained.”). For resources on lesbian history and the history of female same-sex attraction from the medieval period to the present, see id. at 20 n.39. For resources on Anglo-American history of lesbianism, see Robson,
describe sexual activity between women as "[a] crime so horrible and against nature . . . and because of the horror of it, it cannot be named." That sexuality between women has been considered a "love which has no name" opens the way for consideration of the reasons for this command of historic silence. Four explanations for this phenomenon merit attention.

First, historical records have not accurately portrayed the prevalence of female same-sex eroticism because sexuality between women has been seen through different lenses. For example, women's sexual offenses were often punished as lewd and lascivious behavior. Just as men were often prosecuted for sexual transgressions under the framework of sodomy, women who engaged in sex with other women may have been prosecuted under the "umbrella" of prostitution.

Sexual activities between women were subsumed not only within the criminal structure of prostitution, but also within the "legal sociology" of witchcraft. Legally, evidence of sexuality between women was also considered evidence of the crime of witchcraft. Sociologically, witches were stereotyped as women who lived independently from men. The connections between female sexual activity and witchcraft can be seen in several historical texts, including a tract from 1460 that described "outrages . . . by order of the presiding devil, by passing on a woman to other women and a man to other men. . . .

supra note 67. For sources contributing to the history of female lovemaking, see Coombs, supra note 56, at 257 n.76.

176. Robson, supra note 67, at 27 (quoting sixteenth century jurist Germain Colladon in Monter, Sodomy and Heresy in Early Modern Switzerland, 6 J. of Homosexuality 41 (1980-81)).

177. Id. In the fifteenth century, rector Jean Gerson described lesbianism as a sin by which "women have each other by detestable and horrible means which should not be named or written." Robson, supra note 67, at 27 (quoting from J. Brown, Immodest Acts 7, 19 (1986)).

178. Id. at 15.

179. See id. (citing, for an example, the story of Mabel Hampton, a "woman's woman" who was arrested for prostitution in 1920 as relayed in J. Nestle, Lesbians and Prostitutes: A Historical Sisterhood, in J. Nestle, A Restricted Country 169 (1987)).

180. Id. at 31 (also encouraging further investigation of the class dimensions of the connection between witchcraft and lesbians, as well as the connection between criminal sanctions and lesbian sexuality).

181. See id. at 34.

182. See id.

183. Id. at 34 (referring to R. Robbins, Encyclopedia of Witchcraft and Demonology 468 (1959), cited in Arthur Evans, Witchcraft and the Gay Counterculture 76 (1978)).
Second, what counts as “history” is commonly understood as records written by men about men.\textsuperscript{184} Patriarchy was firmly established in ancient political cultures.\textsuperscript{185} In patriarchal societies, women are recognized in terms of their relationships to men. Consequently, in patriarchies, sex between women is “inconceivable.”\textsuperscript{186} When contemplated in ancient Rome, for example, sex between women was considered a form of adultery, an intrusion into the sexual prerogatives of a married man, if one of the women was married.\textsuperscript{187} In other accounts, the “real” crime that was often implicated in relations between women was cross-dressing and the concomitant usurpation of male identity.\textsuperscript{188} A key element in the trial of Joan of Arc, for example, was

\begin{itemize}
  \item \textsuperscript{184} Brooten, supra note 37, at 16. In a text documenting sexual love between women in antiquity, Brooten observed that “in no case,” did she have access to “the direct, unmediated voice of one of these women.” Instead, “we have a multitude of male sources that portray female homoeroticism in distinctively male terms.” \textit{Id.; see also} Robson, supra note 67, at 41 (offering, as a plea for the future, that “we are living legal history and we must not allow lesbianism to be obfuscated in that history”).
  \item \textsuperscript{185} See, e.g., Barnett, supra note 88, at 277 (asserting that the writings of Plato and Aristotle illustrate “deep ambivalences regarding the position of women in society.”). Elisabeth Schüssler Fiorenza argued that understanding systemic oppression in the simple dualistic sense of patriarchy is problematic in that such an approach obscures the multiplicative interstructuring of relations of domination that positions women of different races and social statuses differently. \textit{Elisabeth Schüssler Fiorenza, Wisdom Ways} 117–18 (2001) [hereinafter SCHtYSSLER FIORENZA, WISDOM]. Drawing from classical antiquity, Schüssler Fiorenza reconceived “patriarchy” as “kyriarchy,” a neologism (\textit{kyrios}: lord, master, father, husband; \textit{archein}: to rule, dominate) characterized by “the rule of the lord, slave master, husband, elite freeborn, educated gentleman to whom disenfranchised men and all wo/men were subordinated.” \textit{Id.} at 118, 108 (writing “wo/men” in broken form to complicate the category of woman as a social construct and also to note that women “are not a unitary social group but are fragmented by structures of race, class, ethnicity, religion, heterosexuality, colonialism, and age.”).
  \item \textsuperscript{186} Mondimore, supra note 60, at 61 (referring to the Woods and Pirie case of 1811 in which two mistresses at a girls’ boarding school in Scotland were cleared of having had a lesbian encounter “at least in part because the judges found the idea of sex between women simply inconceivable”); \textit{see also} Robson, supra note 67, at 9 (referring to Lillian Faderman, \textit{Surpassing the Love of Men} 153 (1981) for a more complex appraisal of the case, including a class analysis: “If the women had been actresses or prostitutes or of the decadent aristocracy, it would have been conceivable that they were prone to any sort of debauchery.”).
  \item \textsuperscript{187} Boswell, supra note 40, at 82–83 (advising that the death penalty was considered appropriate by Seneca the Elder where the women were discovered by a husband); Robson, supra note 67, at 21–22.
  \item \textsuperscript{188} Robson, supra note 67, at 19–20 (suggesting that lesbian sexuality was not as significant as cross-dressing in the condemnation of Catharina Linck).
\end{itemize}
her adoption of male attire. Transvestism served as evidence of criminality.

Third, the extant records are from societies that were based not only on male domination, but also on patterns of domination and submission in sexual relations. In these societies, the key consideration was not gender, but whether the male took the active or passive sexual role. While gender was culturally correlated with these categories, with masculinity associated with “active” and femininity associated with “passive,” Roman writers saw every sexual exchange as requiring one active and one passive partner, “regardless of gender.”

Fourth, to draw the thread a bit tighter, sexual expression between women not only has been subsumed within prostitution and witchcraft and erased in patriarchal societies, but it has also been lost in a Euro-American conflation of gender, sex, and sexual orientation. In this conflation, all people are assumed to fall into two categories of sex (male and female), which correspond to two gender categories (masculine and feminine) and two sexual orientations (active and passive).

189. Id. at 35.
190. Id. at 35 (relaying that Inquisition judges also questioned her relationships with women and that “Joan of Arc's lesbianism remains an unsolved historical inquiry.”).
191. Boswell, supra note 40 at 55 (also noting differences in sexual behavior related to class, wealth, and education).
192. Mondimore, supra note 60, at 10.
193. Broet, supra note 37, at 1-2, 116, 126-28, 140, 157 n.43 (advising that the “foundational categories” in ancient Mediterranean concepts of eroticism were “active” and “passive”). The ancient framework for classifying sexual behavior was also much more complex than the two orientations that captivate contemporary discourse. Astrologers such as Ptolemy, the second-century astrologer, created a broad range of erotic inclinations, based on active and passive roles and other factors such as age, wealth, and foreign status. Id. at 140.
194. Id. at 2.
195. E.g., Francisco Valdes, Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society, 83 CAL. L. REV. 1 (1995) [hereinafter Valdes]. The conflation of gender, sex, and sexuality has been tracked to classical Greece. Francisco Valdes, Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender, and Sexual Orientation to its Origins, 8 YALE J. L. & HUMAN. 161, 179-200 [hereinafter Valdes, Unpacking]. The conflation was not complete for adult male Greek citizens. Id. at 192. An adult male was required to assume the gender of masculinity and the sexuality of performing active intercourse either with a passive young male or with a female who was considered perpetually passive. Id. at 189-93. The relative fluidity of gender for men in ancient Greece may be seen in the culturally accepted transition of males from passive (gendered feminine) sexual roles in their youth to active (gendered masculine) sexual roles in adulthood. Id. at 189-93. The conflation, however, was complete for females who were gendered feminine and were considered perpetually passive. Coombs, supra note 56, at 251.
feminine) that are bound together in a heterosexual ideal. In this con-
flated world, gay men and lesbians are all the same (not heterosexual). 196

With this conflation, important distinctions have been lost. For ex-
ample, recent cases on same-sex marriage and civil unions have taken
pains to note that same-sex marriage is not necessarily about homosex-
uality. 197 Just as some people who marry people of the same sex may have
a heterosexual preference, some who marry people of the opposite sex
may have a homosexual orientation. 198

Furthermore, some historians of sexuality have made the common
error of subsuming lesbianism within male homosexuality. 199 Conse-
quently, significant differences in the histories of male and female
homoeroticism have been erased in the collapse of gender, sex, and sex-
ual orientation. 200 While “manly” homoeroticism has been tolerated in
many societies, sexual expression between women has been con-
demned. 201 Men who sexually dominated anyone, male or female, were
not subject to criticism. 202 Adult men who were sexually submissive were
generally subject to disapproval. 203 Women, expected to be submissive,
were sexually invisible. Thus, women who engaged in erotic relations
with women were condemned. 204 The disparity in treatment between

196. Coombs, supra note 56, at 255.
197. See, e.g., Baehr, 852 P.2d at 51 n.11 (stating, in a decision holding that Hawai‘i’s sex-
based marriage statutes were presumptively invalid under the state constitution, that
“[h]omosexual’ and ‘same-sex’ marriages are not synonymous”).
198. Id. (advising that “[p]arties to a union between a man and a woman’ may or may not
be homosexuals. Parties to a same-sex marriage could theoretically be either homo-
sexuals or heterosexuals.”); cf. Goodridge, 798 N.E.2d at 953 n.11 (questioning the
accuracy of the terms “homosexual” and “heterosexual” when applied to marriage, as
“[n]othing in our marriage law precludes people who identify themselves (or are iden-
tified by others) as gay, lesbian, or bisexual from marrying persons of the opposite
sex.”).
199. BROOTEN, supra note 37, at 361 (asserting that sexual love between women is not a
“minor subcategory of male homoeroticism” and critiquing theories of John Boswell,
Michel Foucault, and David Halperin that sweep female same-sex eroticism into
analyses of sexual relations between men); see also Robson, supra note 67, at 41 (not-
ing the “tendency to collapse lesbianism into male homosexuality when treating legal
issues other than ‘lesbian motherhood’ and ‘lesbian custody.’”).
200. BROOTEN, supra note 37, at 24; Coombs, supra note 56, at 255.
201. BROOTEN, supra note 37, at 49.
202. MONDIMORE, supra note 60, at 10.
203. Valdes, Unpacking, supra note 195, at 200 n.136; BROOTEN, supra note 37, at 49
(noting that male slaves were expected to bear penetration); see also BOSWELL, supra
note 40, at 27, 62 (depicting Greeks as tolerating and even idealizing male homo-
eroticism, while Romans were “extraordinarily dispassionate” about male sexuality).
204. BROOTEN, supra note 37, at 71 (advising that Roman writers represented female
homoeroticism as “bizarre, foreign, and unspeakable” in contrast with the “far greater
male and female homoeroticism, with tolerance exhibited toward male same-sex eroticism, particularly toward active penetrators, and condemnation of sexual love between women reflects the "fundamental asymmetry" between masculine and feminine sexual roles in antiquity.\(^ {205} \)

Focusing on data about male homoeroticism, some historians have proposed that there was a historic break in the twentieth century from prior centuries in which relative tolerance was expressed toward male homoeroticism.\(^ {206} \) Yet, feminist historians have asserted a much greater historic continuity in attitudes toward female homoeroticism.\(^ {207} \) The reason for this distinction between male and female homoeroticism may be seen in the one thread that continues across time: the ongoing premise of subordination of women by gender in patriarchal societies from antiquity to contemporary society.\(^ {208} \)

It is only upon disentangling gender from sex and sexual orientation that another world comes into focus. Among the revelations is the centrality of patriarchy to the oppression of gay men and lesbians.\(^ {209} \) In patriarchy, gay men and lesbians are guilty of violating carefully policed gender roles.\(^ {210} \) Their crime is gender disloyalty.\(^ {211} \) However, gay men and lesbians violate differing gender role expectations in different ways.\(^ {212} \) For example, the trope and privilege of masculinity is coded differently for males and females. Some gay men embrace cultural indicia of maleness, while violating the cultural link that is forged to hetero-

---

\(^ {205} \) Id. at 49.
\(^ {206} \) *E.g.*, Halperin, supra note 37, at 15–53 (arguing that the medicalization of homosexuality and the rise of the gay rights movement represented a historic break from prior eras); *see also* Boswell, supra note 40, at 333 (stating that Roman society viewed homosexuality "as an ordinary part of the range of human eroticism" and that the church in early Christianity "does not appear to have opposed homosexual behavior per se.").

\(^ {207} \) *E.g.*, Brooten, supra note 37, at 21–24, 360–61 (criticizing scholarship that applies the history of male sexuality to women and suggesting that "sexual love between women may have experienced fewer turning points in history than that between women and men or between men and men.").

\(^ {208} \) Coombs, supra note 56, at 257 ("Patriarchy is one thread that links together Greece and contemporary Euro-American society"); *see also* Brooten, supra note 37, at 24 (suggesting that "condemnation of sexual love between women is tied to social structures of male domination and female subordination").

\(^ {209} \) Coombs, supra note 56, at 261 (asserting that "patriarchy is the deeper root around which heterosexism has entwined itself").

\(^ {210} \) Id. at 257–59.
\(^ {211} \) Id. at 259.
\(^ {212} \) Id. at 259 (noting that, for gay men and lesbians, "the genders to which they are disloyal are different").
sexuality. Other gay men reject “the mantle of maleness” and the privileges of male gender. For lesbians, there is no privilege of gender, sex, or sexual orientation to reject. While some lesbians don a “social gender” of maleness, in American culture they do not reap the privileges of gender. Consequently, lesbians commonly experience multiplicative oppression by virtue of gender, sex, and sexual orientation.

Over the centuries, patriarchal societies have maintained dominance and privilege over errant women through a host of silencing practices, including demonization and criminalization. For example,

213. While gays and lesbians can seek to downplay their sexual orientation by conforming to gender stereotypes (e.g., the masculine gay man or the “lipstick” lesbian), some performances of gender associated with one’s sex will be coded as gay. Kenji Yoshino, Covering, 111 Yale L.J. 769, 844–45 (2002) [hereinafter Yoshino]. “[T]he couture of the leather daddy or the muscles of the Chelsea queen” suggest that “there may be nothing more effeminate than a hypermasculine man, and, perhaps, nothing more gay.” Id. at 845.

214. Coombs, supra note 56, at 257–58 (observing that, in patriarchy, “male homosexuality will draw hostility because it suggests the refusal of the dominant role that society offers and thus threatens the naturalness and legitimacy of male superiority”).

215. Cf. Stephanie Wildman & Adrienne Davis, Making Systems of Privilege Visible, in Privilege Revealed: How Invisible Preference Undermines America 9–24 (Stephanie Wildman et al. eds., 1996) [hereinafter Wildman] (arguing that antidiscrimination focuses only on one part of the power system, the characteristic that is subordinated, “rather than seeing the essential links between domination, subordination, and the resulting privilege”).

216. In some societies, males who take on the gender of womanhood possess greater social status than females who take on the gender of manhood. Lorber, supra note 42, at 49 (advising that, in some North American Indian cultures, the gender hierarchy was “male men, male women, female men, female women.”); but see Valdes, Unpacking, supra note 195, at 24–25 (proposing that male-identified attributes are valorized, as is demonstrated in the asymmetry of solicitous treatment of “tomboys” and opprobrious reception of “sissies”); see also Coombs, supra note 56, at 258 (stating that the rejection of female social gender may be considered inappropriate, but it is also understandable, and that women in the workaday world are expected to exhibit masculine characteristics (e.g., assertiveness) as well as feminine traits).

217. Iris Marion Young, supra note 51, at 38–65 (pluralizing the phenomenon of oppression by posing five “faces of oppression” that are experienced in diverse ways by different social groups and individuals who are oppressed). In refusing to be sexually available to men and by removing other women from the sexual pool, lesbians violate a condition of patriarchal societies in which the sexuality of women is subordinated to the interests of men. Cf. Judith Plaskow, Standing Again at Sinai: Judaism from a Feminist Perspective 192 (1990) [hereinafter Plaskow] (suggesting that “control of women’s sexuality is the cornerstone of patriarchal control of women”).

218. E.g., Brooten, supra note 37, at 143–73 (recounting the brutal medical treatments that were administered in the Roman and Byzantine eras to women who exhibited “masculine desires”); see also Michael Omi & Howard Winant, Racial Formation in the United States from the 1960s to the 1990s 67, 71 (1994)
women were demonized in overtly sexual terms during the seventy-two years between 1848 and 1920 when first-wave feminists demanded access to political rights. Turn-of-the-century anxieties about shifting social roles and power dynamics between men and women produced a discourse in which women who sought political rights were characterized as “female psycho-sexual aberrants.” In 1897, a theologian proposed that women who “aped” things that belonged to manhood were “andromaniacs,” while a biologist asserted in 1913 that the status being sought by women in the campaign for suffrage was “nothing more or less than a ‘female man.’” In this discourse, women who dared to have an independent existence were characterized as “hideous monsters.” First-wave feminists understood the link between gender and sexual politics. The outcry that they produced 150 years ago bears great resemblance to the switches now being raised at gay and lesbian activists who are breaching the code of patriarchal silence and taking their relationships into chapels and city halls.

D. A Brief History of Marriage and the Nuclear Family

Throughout most of human history, a man married a woman out of desire—for her father’s goats, perhaps.

Marriage is too often falsely assumed to be a “timeless institution” of unchanging family form: a male-female dyad at the center of an

219. Katz, supra note 36, at 89 (referring to Dr. James Weir, Jr., *The Effect of Female Suffrage on Posterity*, 24 THE AMERICAN NATURALIST 823–25 (Sept. 1995). Prominent men such as Dr. Weir issued dire warnings: If women got the vote, they would change “physically and psychically and pass along pathologies to their children.” *Id.*


222. “Woman was created to be a wife and a mother; that is her destiny.... She has all the qualities that fit her to be a help-meet of man, to be the mother of his children, ... but as an independent existence, free to follow her own fancies and vague longings, her own ambition and natural love of power, without masculine direction or control, she is out of her element, and a social anomaly, sometimes a hideous monster....” Orestes A. Brownson, *The Women Question, Articles I and II* (1885), reprinted in Stephen B. Presser & Jamil S. Zainaldin, *Law and Jursiprudence in American History* 558 (2nd ed. 1989).

223. Anton, supra note 40, at 10.
equally ageless "nuclear family." A historical analysis demonstrates that marriage is, and has been, a fluid social institution. Furthermore, the prominent family arrangement throughout the ages is not the nuclear family, but the household. A “pluriform” household has been the key legal and social institution in many different cultures and historic periods.

The millennia do not witness marriage only as a monogamous, opposite-sex dyad. Abraham, the great patriarch of the Hebrew Scriptures, took Sarah as his wife and was given Hagar as a surrogate wife. To King David’s two wives, he added “more concubines and wives out of Jerusalem,” including a married woman, Bathsheba. Solomon, the wise jurist of nearly 3,000 years ago, “loved many strange women” in addition to his “seven hundred wives, princesses, and three hundred concubines.”

Marriage, throughout the ages, did not arise out of love and romance between people of the opposite sex, but out of economic and political considerations. Marriage was chiefly a “business

224. See, e.g., Top Ten Reasons, supra note 9, at 1 (asserting that “[y]ou cannot redefine a timeless institution. Marriage is what it is.”); Failinger, supra note 13, at 235 (advising that “the nuclear family as the major option for structuring household responsibility is clearly mythic.”).

225. See, e.g., Anton, supra note 40 passim; see also Clarissa Atkinson, The Oldest Vocation: Christian Motherhood in the Middle Ages 4, 243 (1991) [hereinafter Atkinson] (asserting that motherhood is not “a universal category equated with nature,” but a vocation as well as a socio-historical institution). In tracing the symbol of “the good mother” in medieval Europe, Atkinson asserted that the historicity of motherhood, in which motherhood is constructed and reconstructed throughout time, provides a place “to begin to assume responsibility for the character of its reconstruction.” Anton, supra note 40, at ix, 246.

226. “In reality, in many societies, pluriform households have formed under a wide variety of rules for identifying legal and social responsibility to near and distant kin as well as unrelated members of the household.” Failinger, supra note 13, at 199–200, 235 (also stating that “the household form has been with us all along, if we only care to relearn and embrace our tradition on this form.”).

227. Genesis 16:2–3 (King James).

228. 1 Samuel 25:42–43 (describing David’s taking Abigail and Ahinoam as his wives); 2 Samuel 5:13–16 (summarizing David’s taking concubines and wives and naming eleven children born to him); 2 Samuel 11 (relaying David’s sinning with Bathsheba).


230. Victoria S. Kolakowski, The Concubine and the Eunuch: Queering Up the Breeder’s Bible, in Our Families, Our Values: Snapshots of Queer Kinship 37 (Robert E. Goss & Amy Adams Squire Strongheart eds., 1997) (also noting that marriages were not simply individual relationships, but they also brought clans and tribes into relationship with each other).
arrangement”—“The bride was a commodity, her dowry a deal sweetener. And the groom was likely to be an unwitting pawn in an economic alliance between two families.”

Marriage was not a monolithic cultural practice. For example, three different types of marriage were prevalent in the Roman era. Attention was primarily focused on matrimonium, in which elite male citizens married elite women. However, matrimonium was not accessible to most people in the Roman Empire, notably slaves, soldiers, and people from the lower classes. Slaves created a marital-like relationship called contubernium. Elite male citizens entered into a marriage-like union called concubinatus with lower status women who were ineligible for matrimonium.

Marital forms within Roman Egypt were also quite diverse. Greek speakers in Roman Egypt entered into unwritten marriages through cohabitation. These undocumented marriages were as valid as those that were documented. While partners could draw up documents that identified the details of the union, these documents were a matter of private law. Public officials were not needed to acknowledge or ratify a marriage; the marriage was created solely by the action of the parties.

The Catholic Church did not take control of marriage law until the thirteenth century. A priest was not required to validate a marriage

231. Anton, supra note 40, at 1. In ancient Greece, fathers saw their daughters as property and engaged in bartering to cement political or economic alliances. Id. at 2; see also Failinger, supra note 13, at 284–85 (explaining the significance of bloodlines in pre-modern families to ensure stability in biologically-linked generations and to protect the central economic institution of property).
232. Brooten, supra note 37, at 335.
233. Id. at 334.
234. Id. (noting the interest of the Roman state “in creating the next generation of elite citizen rulers and in regulating the transmission of property from one generation of elites to the next.”).
235. Id.
236. Id. (relating that the marital relationships between master and female slave and those between a free-person and a slave were also identified as contubernium).
237. Id.
238. Id. at 335.
239. Id.
240. Id.
241. Id. at 333.
242. Id. at 333, 335 (also advising that woman-woman marriage, as reflected by a number of sources from the Roman era, fit within the diversity of marital forms).
During the Reformation, Martin Luther was instrumental to the development of the theology of marriage. To Luther, the “golden and noble works” of parenthood were the purpose of existence for women. To supplant medieval hagiography that idealized virginity, Luther praised the wives of the Jewish patriarchs as “saints” who “recognized their duty to the patriarchy” to bear children.

In our common law heritage, the state also “came late to marriage.” With the adoption of Lord Hardwicke’s Marriage Act in 1753, the state became a “significant player” in the union of its citizens in marriage. In Blackstonian-era marriage, the legal identity of the wife was merged into that of her husband. In the operation of the fiction of merger, married women were dispossessed of their property. This set of disabilities remained an incident of marriage until states began to adopt Married Women’s Property Acts in the mid-nineteenth century.

244. Id. at 29–34 (also critiquing Halpern v. Canada (A.G.), [2003] O.J. No. 2268, in which the Ontario Court of Appeal declared that the common law definition of marriage as “the voluntary union for life of one man and one woman to the exclusion of all others” erected a bar to same-sex marriage that violated section 15 of the Canadian Charter of Rights and Freedoms); see also Barbeau v. British Columbia (A.G.), [2003] B.C.C.A. 406 (following Halpern, supra, in granting immediate relief with the consent of the Attorney General of Canada).


247. Id. at 210–11. While asserting in *Estate of Marriage* that women were designed for motherhood, Luther did not romanticize pregnancy and birth: “He lived with Katie through six pregnancies . . . .” Id. at 209 (referring to Luther’s wife, Katherine von Bora). Martin and Katherine also lost two of their children, one in infancy and a daughter at the age of thirteen. Id. at 212.

248. DeCoste, supra note 243, at 622.

249. Id.

250. “By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband . . . .” 1 WILLIAM BLACKSTONE, COMMENTARIES *430.

251. “[W]hatever personal property belonged to the wife, before marriage, is by marriage absolutely vested in the husband.” 2 WILLIAM BLACKSTONE, COMMENTARIES *433 (also denoting that, as to real estate, title to rents and profits during coverture belonged to the husband).

252. Maxwell Bloomfield, *American Lawyers in a Changing Society* 112–13 (1976) (observing that a major motive for the legislation “was the desire to rationalize land transactions so that creditors might be better able to collect debts out of real estate owned by husband, wife, or both. Lawmakers certainly did not intend to effect any radical changes in the relations between the spouses.”).
Other disabilities, also constitutive of marriage and the doctrine of merger under the common law, continued well into the twentieth century.\textsuperscript{253}

Some traditionalists err in thinking of the nuclear family either as the pre-eminent family structure in Western civilization or as the “latest and best permutation in a process of an evolving form of family.”\textsuperscript{254} Neither of these assumptions is accurate. Studies of the family have demonstrated that the history of the family is “a story of diversity and complexity.”\textsuperscript{255} Family life in the past was not structured in terms of a nuclear family.\textsuperscript{256}

The concept of the “nuclear family” was first employed in 1949 by an anthropologist, George Peter Murdock.\textsuperscript{257} In Dr. Murdock’s study, the nuclear family was neither the prevailing structure of most historic and modern families nor the model against which various family forms should be compared.\textsuperscript{258} Of 250 cultures studied by Murdock, the nuclear family was the norm in one-quarter of the societies, the polygamous family was normative in another one-quarter, and fully one-half of the cultures were centered around extended family forms.\textsuperscript{259}

While the family is an enduring social construction across cultures, the key organizing structure throughout history has been the household.\textsuperscript{260} For example, the \textit{oikos} was the setting for family life in ancient Greece. However, to define the \textit{oikos} as “family” would be reductive.\textsuperscript{261}

\begin{itemize}
\item \textsuperscript{253} E.g., New Jersey v. Smith, 372 A.2d 386 (Essex Co. 1977) (holding that a husband could not be prosecuted for the rape of his wife because the statutory provision codified pre-existing common law); see also 1 Sir Matthew Hale, \textit{The History of the Pleas of the Crown} 629 (1736) (stating the common law principle that a husband could not be guilty of spousal rape because “by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract . . .”).
\item \textsuperscript{254} Failinger, \textit{supra} note 13, at 217.
\item \textsuperscript{255} \textit{Id.} at 220 (quoting Katherine R. Allen et al., \textit{Older Adults and Their Children: Family Patterns of Structural Diversity}, 48 FAM. REL. 151 (1999)).
\item \textsuperscript{256} \textit{Id.} at 218–19 (referring to interpretations of George Peter Murdock, \textit{Social Structure} 1 (1949)).
\item \textsuperscript{257} \textit{Id.} at 218.
\item \textsuperscript{258} Murdock’s effort sought to expose “the variety of family patterns in which the husband-wife-child triad was at the center of household formation throughout history.” \textit{Id.} at 218–19 (referring to the interpretation of the work of Murdock by Bron B. Inngoldsby, \textit{Family Origin and Universality in Families in Multicultural Perspective} 84 (1995)). To Murdock, the nuclear family may have been “the ‘central mass’ around which the family is structured, but it is not the model against which all forms of family should be studied.” \textit{Id.} at 219.
\item \textsuperscript{259} \textit{Id.} (defining “extended family” in terms of a married adult, spouse, children, and members of their parents’ nuclear family, such as parents or siblings).
\item \textsuperscript{260} \textit{Id.} at 235 \textit{passim}.
\item \textsuperscript{261} \textit{Id.} at 223.
\end{itemize}
The Greek *oikos* was a complex social institution, combining an extended family with units of production, consumption, reproduction, and wealth. According to Aristotle, a household first arose "out of the association formed by men with these two, women and slaves." Aristotle advised the "poor man" to "[g]et first a house and a wife and an ox to draw the plough," with the understanding that an "ox is the poor man's slave.

The multi-tiered patriarchal household of ancient Greece served as an exemplar for households of early Christianity. In medieval Europe, households were "legal entities" from which enforceable obligations stemmed. European medieval households were models of complexity. A medieval household often included poor people, servants who may or may not be blood relatives, short-term guests, long-term lodgers, and concubines. Large aristocratic households that included hundreds of servants were sometimes separated into smaller households: a "great" household that was the "permanent" establishment, a foreign or "riding" household, and a "secret" household that accompanied the noble when he did not wish to extend hospitality. As Europe made the transition from the feudal system to early capitalism, the kinship-based society was

262. *Id.* at 218, n.105. The *oikos* "referred to any number of groupings including the physical space occupied by the household unit, which might contain a shop, factory, bank," dwellings with different wives, and landed estates. *Id.* at 229–30. In ancient Greece, as well as in later European, African, and Asian cultures, "concubines were in certain respects an extension of the household." *Id.* at 230.


265. *Id.; see also Bread Not Stone, supra* note 263, at 73 (advising that Aristotle "insisted that the discussion of political ethics and household management begin with marriage, defined as the union of natural ruler and natural subject").

266. *Bread Not Stone, supra* note 263, at 73 (discussing the Aristotelian philosophical and political underpinnings of the household codes).

267. Failinger trans., *supra* note 13, at 231 (explaining that heads of households had legal obligations to servants in documents of indenture or arising out of the status of some servants as blood relations).

268. *Id.* at 229.

269. *Id.* at 229 (citing C.M. Woolgar, *The Great Household in Late Medieval England* 9–10, 15–16 (1999)).
replaced by extended household arrangements that centered more on the conjugal family.\textsuperscript{270}

Extended households that included nonfamily members and servants were prevalent in England and the United States until the late 1930's.\textsuperscript{271} Nonrelatives were present in significant numbers in households in the United States, and in other countries, until the late nineteenth century, when numbers of single-person households began to rise.\textsuperscript{272} An irony of history is reflected in this transformation of the Western concept of the "family" from pluriform households that met many social, familial, economic, political, and religious needs to a "shrunken nucleus" of "husband, wife, and children floating in an apparent plasma of less important relationships."\textsuperscript{273} This shriveled nucleus is the current object of devotion and nostalgic longing.\textsuperscript{274}

While some social needs are met by the nuclear family, this family arrangement is far from representing the familial model for the ages.\textsuperscript{275} A number of visions have been offered for the transformation of families in the twenty-first century to meet social, economic, and familial needs.\textsuperscript{276}

\textsuperscript{270} Atkinson, supra note 225, at 197–98.
\textsuperscript{271} Failinger, supra note 13, at 231.
\textsuperscript{272} Id. (citing Kiyomi Morioka, A Japanese Perspective on the Life Course: Emerging and Diminishing Patterns, in Family History at the Crossroads: A Journal of Family History Reader 247 (Tamara Haraven & Andrejs Plakans eds., 1987)).
\textsuperscript{273} Id. at 204.
\textsuperscript{274} Id.
\textsuperscript{275} Id. at 217–18 (reinvestigating the claim that the nuclear family is the "traditional" form of family life and suggesting that social debate in America about the nuclear family is characterized by its "historical myopia"); see also Norland, supra note 43, at 322 (drawing on the historical precedent of France, circa 1792 to 1816, to critique the contemporary Marriage Movement).
\textsuperscript{276} E.g., Martha Alberston Fineman, Our Sacred Institution: The Ideal of the Family in American Law and Society, 1993 Utah L. Rev. 387, 402 (1993) [hereinafter Fine- man, Sacred Institution] (arguing that "society should focus on the needs of nurturing units exemplified in the caretaker / dependent diad" and transfer material and ideological subsidies away from the sexual family unit to nurturing units); Nancy D. Polikoff, Ending Marriage As We Know It, 32 Hofstra L. Rev. 201 (2003) [hereinafter Polikoff, Ending Marriage] (urging the "dethroning" of marriage by recognizing the diversity of adult relationships that are characterized by emotional intimacy and economic interdependence through a methodology such as that adopted by Canada in Law Comm'N of Canada, Beyond Conjugal: Recognizing and Supporting Close Personal Adult Relationships (2001)); Rudy, supra note 46, at 202–03 (suggesting that the communal model reflected in some gay male urban communities is neither dissimilar to, nor incompatible with, the tradition of unitivity in Christianity); Martha M. Ertman, Reconstructing Marriage: An InterSEXional Approach, 75 Deny. U. L. Rev. 1215 (1998) [hereinafter Ertman] (advocating the commercialization of marriage by establishing a debtor / creditor relationship between spouses to capture and value homemaker contributions and suggesting that
Yet, those who extol the nuclear family seem to be “in tears about the marvelous past that is about to disappear, without having so much as a smile for the young future.”

**E. A Brief History of Sexual Morality and State Intervention**

The governmental policy of classifying and discriminating against certain citizens on the basis of their homosexual status is an unprecedented project of the twentieth century.

For the past twenty centuries, the morality of sexuality has been determined by two considerations: unity and procreativity. Some gay and lesbian theologians have rejected the traditional moral inquiry and have based their affirmations of homosexuality on other grounds. Other theologians have sought to recapture and renew definitions of unity and procreativity for gay communities. These reconstructions have reoriented the meaning of sexuality for gays and lesbians in terms of unitivity, calling people to join in one body, in communion, and in community. Procreativity has been envisioned in terms of the renewal and transformation of society, not as wed to restrictive notions of biological reproduction.

---


280. *Id.* at 198.

281. *Id.* at 212; see also Goss, *supra* note 47, at 12.


283. *Id.* at 206; see also Goss, *supra* note 47, at 12 (“[p]rocreativity may refer to the literal renewal of the earth through human reproduction . . . or it may also refer to contributions made for renewal and transformation of society.”). Furthermore, advances in technology are quickly rendering obsolete arguments based on reproductive procreativism. For example, one of the developing methods of assisted reproduction is cytoplasmic transplant, in which a child is created without sperm. See Kyle C. Velte, *Egging On Lesbian Maternity*, 7 Am. U. J. Gender Soc. Pol’y & L. 431, 433 n.11 (1999). In the procedure of cytoplasmic transplant, eggs are provided by two women. The nucleus of one egg is removed and placed in the other egg, which has been denucleated. *Id.* The child, who is the physical, biological, and genetic combination of the two women, possesses the DNA of one woman and the cytoplasm with mitochondrial
Throughout western history, the concern of religious and political fathers was non-procreativity, not same-sex eroticism, to justify religious disapproval and state regulation of certain sexual acts. When sodomy came to be emphasized by medieval theologians in the eleventh century, the term was inconsistently applied to diverse set of androcentric non-procreative sexual practices. In 1533, the English Reformation Parliament temporarily criminalized “buggery” as the secular counterpart of “sodomy.” Buggery was understood to include anal intercourse between a man and a woman, anal intercourse between two men, and sexual intercourse between a man and an animal. From colonial America through the mid-nineteenth century, the “regulatory philosophy” underlying state intervention in sexual relations was not only to foster procreative sex within the confines of marriage, but also to protect vulnerable citizens against sexual assault and to provide a means to enforce compliance with expected gender roles.

In the United States, discrimination against men engaging in same-sex eroticism began to arise in the late nineteenth and early twentieth

DNA from the other woman. Id.; see also Michael E. Eisenberg, What’s Mine is Mine and What’s Yours is Mine—Examining Inheritance Rights by Intestate Succession from Children Conceived Through Assisted Reproduction Under Florida Law, 3 BARRY L. REV. 127, 128 (2002) (discussing inheritance issues stemming from assisted reproduction and concluding that “procreative liberty should not be limited by laws that discriminate against sexual preferences.”); John A. Robertson, Liberty, Identity, and Human Cloning, 76 TEX. L. REV. 1371, 1372 (1998) (noting that cloning “forces us to rethink in the most basic way the meaning of individuality, personal identity, family, and reproductive liberty.”).

284. Professors’ Brief, supra note 278, at 2–3. According to second century Christian father Clement of Alexandria: “The end [of marriage] is good breeding of children . . ., just as the reason for the farmer’s scattering seed is the provision of nourishment . . . All land is not suitable for cultivation . . . For there can be no sowing upon rocks, nor should seed be wasted, since it is the source of generation and comprises both the substance of procreation and the design of nature.” CLEMENT OF ALEXANDRIA, PÆDAGOGUS 2.10 (reprinted in BOSWELL, supra note 40, at 355–56). While procreation may have been emphasized, the underlying preeminent concern of the patriarchs was to maintain a “gender-stratified social order.” BROOTEN, supra note 37, at 361.


286. Id. at 6.

287. Id. at 6; see also William N. Eskridge, Jr., Hardwick and Historiography, 1999 U. ILL. L. REV. 631, 643–44 (1999) [hereinafter Eskridge].

288. Eskridge, supra note 287, at 646–49. In Goodridge, the chief rationale of the department to prohibit same-sex marriage was to provide a “favorable setting for procreation.” Goodridge, 798 N.E.2d at 961. In rejecting that rationale, the court noted that the attempt to isolate procreation as the basis of a fundamental right to marry is an untenable narrow jurisprudential focus that “overlooks the integrated way in which courts have examined the complex and overlapping realms of personal autonomy, marriage, family life, and child rearing.” Id. at 962.
centuries. Based on gender and racial assumptions, sexual “inversion” was developed as a category of sexual deviance. The “growing visibility” of “inverts” in the developing urban centers of America was met by some with sympathy and fascination and by others with dread and uneasiness. Dramatic shifts were being experienced at the turn of the century, including changes to gender roles. A new “discourse of degeneracy” arose out of this cultural transformation. To Richard van Krafft-Ebing, the highest anthropological status was evident in “penile-vaginal intercourse between a masculine male and a feminine female.”

Restrictions on gay men and lesbians intensified in the Great Depression and reached a zenith after World War II. During the McCarthy era, homosexual men became “scapegoats” for a “brutal campaign of repression” in which local, state, and national governments invested enormous resources to identify “sex perverts.”

Due to widespread discrimination, including raids by police on “suspect” bars, gay men and lesbians took up the banner of political activism

289. Professors’ Brief, supra note 278 at 11.
290. Eskridge, supra note 287, at 652 (noting that early sexologist Richard von Krafft-Ebing started with “profound gender differences and linked them to racial eugenics”).
291. Professors’ Brief, supra note 278, at 12.
292. Id.; see also Koons, Welfare, supra note 245, at 25–41 (evaluating America’s pro-marriage welfare policy by tracing moral keywords to early Protestant reform, the origin of poor relief in the United States, the two-channel welfare state, and the race-based discourse of legitimacy).
294. Id. at 652.
295. Professors’ Brief, supra note 278, at 14–16. Gay men, wearing the pink triangle for identification as Jews wore the Star of David, were incarcerated by the Nazis to do work in the clay pits of the brick works at Sachsenhausen, “until 1942 the ‘Auschwitz for homosexuals.’” Miller, supra note 70, at 223–24. While fewer gays found their way into the concentration camps and the professed aim of the Nazi’s was “reeducation” and not extermination, those who did enter the camps faced horrors. Id. Death rates were particularly high—“fifty-three percent of homosexual prisoners died, as opposed to 40 percent among political prisoners and 34.7 percent among Jehovah’s Witnesses. Richard Plant estimates that five to fifteen thousand gays perished in the camps, although the number may be significantly higher.” Id. at 223; see also Richard Plant, The Pink Triangle (1986). While paragraph 175 of the Nazi Code banning homosexual conduct did not apply to women, lesbians were also persecuted under the Third Reich, perhaps “wearing the black triangle of the asocials, as did the prostitutes.” Robson, supra note 67, at 40 (also citing Plant, supra, at 295 for data that some prisoners of war were promised a “bottle of schnapps” for every lesbian they penetrated).
296. The witch hunts of the McCarthy era included investigations into “the employment of homosexuals and other sex perverts in government.” Professors’ Brief, supra note 278, at 15 (quoting S. REP. No. 241 (1950)).
in the Stonewall riots of 1969. In the 1970s, many states began to decriminalize consensual sodomy laws. Recognizing that scientific data did not support homosexual orientation as a psychopathology, the American Psychiatric Association voted in 1974 to remove homosexuality from the Diagnostic and Statistical Manual of Mental Disorders.

However, the 1970s also witnessed a backlash of recriminalization and discrimination. Attacked by “family values” activists such as Anita Bryant, local ordinances that prohibited discrimination based on sexual orientation were repealed in vitriolic campaigns that summoned fear and hostility toward gay men and lesbians. By the 1970s, however, the period of greatest repression of gays and lesbians was over. As people in America shifted into attitudes of acceptance toward gays and lesbians, the Supreme Court signaled that laws “born of animosity” toward gays and lesbians “believe any legitimate justifications” for their adoption. More recently, the Supreme Court asserted that the liberty interest of the Constitution encompasses the realm of sexual autonomy, ensuring that gays and lesbians are entitled to dignity and respect in their intimate relationships.

297. On June 27, 1969, detectives with the New York City Police Department made a routine raid on the Stonewall Inn, a gay bar in Greenwich Village. MONDIMORE, supra note 60, at 238. As officers released the patrons one by one to wait to be taken to the police station, one of the customers, a lesbian, began struggling with the police. Id. The crowd, angry at police oppression, turned on the officers. Id. Rioting continued into the next day, with four hundred police battling a crowd estimated at more than two thousand gays and lesbians: “Gay Liberation had been born.” Id.


299. APA Brief, supra note 24, at 11. In 1975, the American Psychological Association endorsed the action of the American Psychiatric Association and “urged all mental health professionals to help dispel the stigma of mental illness that had long been associated with homosexual orientation.” Id.


302. Id. at 2 (advising that discrimination based on sexual orientation “peaked from the 1930s to the 1960s”); see also Cato Brief, supra note 298, at 24 (referring to the “anti-homosexual repression of 1945–1969” as “an aberration in our history of liberty”).

303. Romer v. Evans, 517 U.S. 620, 634–35; see also Professors’ Brief, supra note 278, at 20–21 (noting that “[s]ince the 1960s, official and popular attitudes toward homosexuals have changed significantly, with a dramatic attitudinal shift since Bowers was decided in 1986.”).

304. Lawrence, 539 U.S. at 558.
Laws targeting same-sex sexual acts in the mid-twentieth century was "an invention of our time."305 Because discrimination was so widespread by the 1960s, many people of the World War II and Baby-Boomer eras have imagined that antipathy toward homosexuality is the verdict of the ages.306 Consequently, homosexuality is erroneously depicted in public discourse as prohibited "throughout the history of Western civilization."307 That sweeping historical condemnation is often accompanied by religious injunctions.308 The Bible is often misused as the source of authority for defining marriage as the union of one man and one woman.309 As the following sections illustrate, the Hebrew and Christian Scriptures affirm a plurality of family forms, including families composed of adults of the same sex.

II. DIVERSITY OF HOUSEHOLD FORMS IN THE HEBREW SCRIPTURES: THE BOOK OF RUTH

And God said, "That's good."310

Each June, thousands of brides and grooms exchange wedding vows that include this promise from the Hebrew Scriptures:

Entreat me not to leave thee, or to return from following after thee: for whither thou goest, I will go; and where thou lodgest, I will lodge; thy people shall be my people, and thy God my

305. Professors’ Brief, supra note 278, at 9; but see Brooten, supra note 37, at 24, 361 (demonstrating greater opposition to love between women in antiquity as a function of persisting gender domination and subordination).

306. Professors’ Brief, supra note 278, at 20.


308. Id. (Burger, J., concurring)(asserting that condemnation of homosexual sodomy "is firmly rooted in Judeo-Christian moral and ethical standards.").

309. A prominent minister released a statement about "the onset of homosexual marriage in Massachusetts" that included the following: "Marriage is the ordinance of God. It is the first institution our Maker gave to the human race. He, as the Creator, has the sole authority to define marriage—and he has explicitly done so, having fashioned for Adam a woman to be his helpmate and the mother of their children. That pattern has been followed in the centuries since history began. No culture, no civilization, has embraced homosexual marriage—until now." Kennedy, supra note 12, at 1.

310. Patricia L. Hunter, Women’s Power-Women’s Passion, in A TROUBLING IN MY SOUL: WOMANIST PERSPECTIVES ON EVIL AND SUFFERING 189 (Emilie M. Townes ed., 1996); see also Genesis 1:31 (King James) ("And God saw every thing that he had made, and, behold, it was very good.").
Ironically, this passage is the declaration of Ruth to her former mother-in-law, Naomi. Their husbands had died, leaving them without children and vulnerable in pre-exilic Hebrew culture. In the ancient Near East, childless widows were considered worthless and placed on the margins of society.

Ruth's declaration not only expressed same-sex love and devotion, but also represented the determination to create a family that was at some variance with prevailing cultural norms. After Ruth followed Naomi back to Bethlehem, they engaged in several survival strategies to maintain their household. Out of their strategies arose another family. Ruth married Naomi's kinsman, Boaz, and gave birth to Obed, the father of Jesse and the grandfather of King David. As Naomi nursed the child (and was also viewed as his mother), the women of Bethlehem gathered to praise this new family and Ruth's love for Naomi.

While ancient Hebrew culture imposed strict rules on sexuality to guarantee patrilineal inheritance, social realities sometimes required rules to be blurred. Fictions were created to accommodate life's variances. For example, levirate marriage was developed to address the circumstance of a man's dying childless. In this arrangement, the most closely related male relative of the deceased man married his widow. The sons of the levirate marriage were considered sons of the dead man,

---

312. "In her words of devotion, Ruth names her relationship to Naomi, using words that depict a relationship that crosses the boundaries of age, nationality, and religion." Mona West, *The Book of Ruth: An Example of Procreative Strategies for Queers, in Our Families, Our Values: Snapshots of Queer Kinship* 51, 54 (Robert E. Goss & Amy Adams Squire Strongheart eds., 1997) [hereinafter West] (also noting that Ruth "comes out" and expresses her true feelings for Naomi).
313. *Id.* at 53.
314. *Id.* (advising that women were valued as unmarried virgins in their fathers' households and as child-producing wives in their husbands' households).
315. *Id.* at 57.
316. *Id.* at 55 (proposing that strategies of Ruth and Naomi to survive in a hostile world are useful to sexual minorities because, "[c]ontrary to the straw-man stereotype of the wealthy, gay, white man," many sexual minorities are underemployed or unemployed due to homophobia).
317. *Id.* at 56–57; *Ruth* 4:17 (King James).
320. *Id.* at 38; see also Plaskow, *supra* note 217, *passim* (conceiving a feminist reconstruction of Judaism to give new understandings to Torah, Israel, and God).
not of the new husband. Consequently, the name of the dead man was preserved.

Another fiction was created when a wife could not bear a child.\textsuperscript{323} In ancient Near East societies, a man was permitted to have a secondary wife who functioned as a surrogate for the first wife.\textsuperscript{324} An example of this arrangement is reflected in the story of Abraham, Sarah, and Hagar.\textsuperscript{325} Due to the barrenness of Sarah, Abraham took Hagar as his concubine. Hagar gave birth to Ishmael, who was to be considered the son of Sarah.\textsuperscript{326}

These examples of levirate marriage and surrogacy represented exceptions to the rules of marriage and inheritance. Such legal fictions were created to allow the needs of people to be met and to serve important social purposes. The blurring of the rules, as reflected in the story of Ruth and Naomi, led to the formation of a loving family whose life-giving qualities were not diminished by its variance from the norm. Indeed, variances from cultural norms were explicitly called for so that everyone could be part of a family.\textsuperscript{327} The Book of Ruth closes on an inclusive note as the townswomen of Bethlehem praised God for the new family created by Ruth and Naomi: “Blessed be Yahweh who has not left you this day without family.”\textsuperscript{328}

\begin{itemize}
\item 322. Kolakowski, \textit{supra} note 230, at 38.
\item 323. \textit{Id.} at 39.
\item 324. \textit{Id.}
\item 325. \textit{Id.} at 40.
\item 326. \textit{Id.} at 40; \textit{see also} Delores Williams, \textit{Sisters in the Wilderness: The Challenge of Womanist God-Talk} 15–23 (Orbis Books, 1993) (noting, in a woman-centered African-American biblical tradition, that Hagar was the “first female in the Bible to liberate herself from oppressive power structures” and that Hagar was also the only person in the Bible who was given the power of “naming” God (“El Roi,” “God of seeing”).
\item 327. Kolakowski, \textit{supra} note 230, at 40.
\item 328. Goss, \textit{supra} note 47, at 8 (relaying that the “Hebrew Scriptures indicate a range of patriarchal families and the construction of some alternative families and diverse households.”).
\item 329. West, \textit{supra} note 312, at 60 (referring to Ruth 4:14 (King James): “Blessed be the Lord, who hath not left thee this day without a kinsman. . . .”).
\end{itemize}
III. The House Churches in Ancient Rome and the Jesus Movement: One Household of God

There is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female... Paul's *Letter to the Romans* sets forth one of the “hard texts” that are sometimes rhetorically wielded as “evidence” of the Biblical condemnation of homosexuality. Some theologians propose that the text in *Romans* must be understood in terms of the central political issue that dominates Pauline writings: the relationship between Jewish and non-Jewish converts. Paul's letters addressed the Jewish and Gentile house...

330. Galatians 3:28 (King James).
331. Peter J. Gomes, *The Good Book: Reading the Bible with Heart and Mind* 69 (1996) [hereinafter *The Good Book*] (providing an exegesis of the “hard texts” of the Bible—those texts that are cited by those who wish to alienate others from the Bible); Brooten, *Paul's Views*, supra note 61, at 61 (noting that fundamentalist groups quote *Romans* as authority for condemning homosexuality).
332. “For this cause God gave them up unto vile affections; for even their women did change the natural use for that which is against nature; And likewise also the men, leaving the natural use of the woman, burned in their lust one toward another, men with men working that which is unseemly, and receiving in themselves that recompense of their error which was meet.” Romans 1:26–27 (King James). Brooten argued that, because Paul and his culture understood maleness and femaleness hierarchically, the condemnation of female sexual acts in verse 26 cannot be subsumed within the condemnation of male sexual acts in verse 27. Brooten, *Paul's Views*, supra note 61, at 63, 80. According to Brooten, “Paul could allow a woman to devote herself solely to Christ, thereby circumventing a male head in the form of a spouse. What he could not accept was women experiencing their power through the erotic in a way that challenged the hierarchical ladder: God, Christ, man, woman.” *Id.* at 78. Taking another perspective on the passage in *Romans*, Rev. Gomes asserted that Paul was not addressing homosexuality, but the fallen nature of humanity. *The Good Book*, supra note 331, at 156–57. Nor was Paul addressing any law of nature, but the notion of what was “customary.” *Id.* at 158. Further, to Gomes, Paul's condemnation was directed toward the abusive homosexual practices of pederasty and male prostitution as well as to heterosexual men and women who assumed homosexual practices. *Id.* In Gomes' view, the biblical writers were not contemplating loving, monogamous relationships in this or the other texts. *Id.* at 162. The problem, according to Gomes, is not the Bible, but the “doctrinaire prejudices” of those who use the Bible as an alienating device. *Id.*; see also Boswell, *supra* note 40, at 335–53 (contending that there is no reason to believe that *arsenokoitai* or *malakoi*-iáρσενοκόοφται or μαλαικοί—in the Pauline texts connoted “homosexuality” at the time of Paul or for centuries thereafter and that *arsenokoitai* referred to a form of male prostitution and not to “homosexuality”); compare David F. Wright, *Homosexuals or Prostitutes: The Meaning of ARSENOKOITAI*, 38 *Virgiliae Christianae* 125–53 (1984) (rejecting Boswell's translation and arguing that it does refer to homosexuals).
333. Daniel J. Helminias, *What the Bible Really Says About Homosexuality* 13 (1994) (concluding “same-sex acts that are the focus of biblical concern were not
churches that developed in the first century in the northern Mediterranean area. Controversy flared in some of the house churches over the role in newly forming Christianity of Jewish law and rules of ritual purity.

Paul sought to dissuade the Jewish converts of the significance of Jewish law in Christianity. In Romans, Paul first addressed the Jewish Christians and diplomatically acknowledged not only that God saved the Jews before the Greeks but also that God directed anger at pagans for ritual and ethical impurities. After turning to the Gentiles, Paul then offered the primary message of Romans: “Let us not therefore, judge one another any more.... [T]here is nothing unclean of itself....” In the context of Romans, Paul urged Jewish Christians to put aside judgments about ritual purity and “follow after the things which make for peace.”

Because the political conflict between Jews and Greeks remained a key issue in the early Christian house churches, Paul’s theology on this issue continued to develop. In the Letter to the Ephesians, Paul expressed what we mean by ‘homosexuality’ today. The Bible conceived of the matter very differently in a very different world. Even more, this research shows that the Bible is basically indifferent to homosexuality in itself. The Bible is concerned, as with heterosexuality, only when practices violate other moral requirements.”. Helminiak, a Roman Catholic priest who holds a Ph.D. in systematic theology, considered the issue of homogenitality in Romans as raising only a matter of ritual impurity and not moral judgment. Id. at 72–73. The passage in Romans, seen in the context of the whole letter to the Romans, also served a “rhetorical function”: “It is part of Paul’s plan to win the good will of his Jewish Christian readers. Then he uses the same issue to make his point: the ritual requirements of the Jewish law are irrelevant in Christ.” Id. at 81; see also L. WILLIAM COUNTRYMAN, DIRT, GREED AND SEX: SEXUAL ETHICS IN THE NEW TESTAMENT AND THEIR IMPLICATIONS FOR TODAY (1988).


335. Introduction to the Letters of Saint Paul, in THE JERUSALEM BIBLE 258–59 (Alexander Jones ed., 1966) [hereinafter JERUSALEM BIBLE]; see also ELISABETH SCHÜSSLER FIORENZA, IN MEMORY OF HER: A FEMINIST THEOLOGICAL RECONSTRUCTION OF CHRISTIAN ORIGINS 62–68 (hereinafter MEMORY OF HER) (discussing the conflict between the Hebrews and Hellenists in terms of the Hebrew ministry (or diakonia) of the word and the Hellenist ministry of the table).

336. JERUSALEM BIBLE, supra note 335, at 259 (posing that Paul was trying “to correct the unbalance of the Greek outlook that relied too exclusively on reason” while trying “to correct the unbalance of the Jewish outlook that relied too heavily on the Law.”).

337. Romans 1:16–17, 24–32 (King James).

338. Romans 14:13–14 (King James).

339. Romans 14:19 (King James).

340. JERUSALEM BIBLE, supra note 335, at 261.
a more refined and powerful synthesis of his theological approach to the issue. Admonishing readers not to forget that there was a time when they were excluded from Israel, Paul asserted that he had become reconciled in Jesus: “For he is the peace between us, and has made the two into one and broken down the barrier which used to keep them apart.”

Paul’s theology of political inclusion is underscored by the composition of the Roman house churches to which the letter was addressed. Five Christian house churches had sprung up in Rome in the winter of 57–58, C.E. Jewish Christians and Gentile believers were in conflict within the house churches. Due to the danger of the factions splitting the house churches, Paul dictated the letter in Corinth and sent it by messenger to Rome.

In the commendation and greeting of *Romans* 16, Paul referred to twenty-nine persons. Three communities were reflected in those greeted: women, poor people and slaves, and a group that may best be described as “gender-benders.” Of the ten women named, seven were commended for their leadership in the church, while only three of the nineteen men were designated as church leaders. Some Biblical scholars have concluded that the five house churches in Rome were founded and led by women.

The political egalitarianism of Paul’s message in *Romans* 16 was also demonstrated by Paul’s commending the messenger to whom he entrusted the letter: Phoebe, the minister of her church in Cenchrea, near Corinth in Greece. Paul then singled out Prisca (Priscilla), along with Aquila, as the first to be greeted. Prisca preached in Rome and dis-

---

341. *Id.* at 262.
343. Hanks, *supra* note 334, at 139; *Jerusalem Bible, supra* note 335, at 258.
345. *See id.* at 140; *Jerusalem Bible, supra* note 335, at 258.
347. *Id.* at 140.
348. *Id.* at 141.
349. *Id.* at 140; *see also* MEMORY OF HER, *supra* note 335, at 161 (advising that women were not merely rich patrons of the early Christian missionary movement, but “prominent leaders . . . in their own right.”).
350. MEMORY OF HER, *supra* note 335, at 170, 181 (noting that in addition to “sister,” Phoebe was given two titles—*diakonos* and *prostatis*—or “minister” and “leading officer.”).
351. *Romans* 16:3–4 (King James).
played the “manly virtue of courage,” risking her life to save Paul. In *Romans* 16:7, Paul also greeted a married couple, Andronicus and Junia, and described them as “apostles,” the highest title in the Christian Scriptures.

Two-thirds of those greeted by Paul bear names common to the slave class, reflecting the likelihood that most members of the early house churches in Rome came from lower social strata. Moreover, Jews in Rome were politically persecuted and socially marginalized. Paul sought to identify himself with poor debtors and supported house churches to proclaim solidarity with the poor.

It is the household composition of the house churches that most reflected Paul’s affirmation of a “sociological zoo of domestic arrangements.” Of the persons greeted, only six were married. None of the couples was representative of a patriarchal “nuclear” marriage. Prisca was listed as the dominant partner; Junia had a marriage that was egalitarian. In the third couple, the male partner, Philologus, and his spouse lived with a bachelor, Nereus, the bachelor’s sister, and another single man, Olympas.

The remaining persons greeted by Paul were unmarried. They included two unmarried men who lived together (Urbanus and Stachys), two “coworkers” (Tryphaena and Tryphosa, who have been characterized as sisters), the bachelor Rufus (and his mother), five single men who lived with unnumbered Christian brothers (most likely slaves or servants), and unnamed Christian slaves (who were in households headed by men who were not Christians). Of the fifteen single men

---

352. Hanks, supra note 334, at 141; see also MEMORY OF HER, supra note 335, at 175 (advising that wherever they moved, Prisca and Aquila supported a “church in their house” that did not divide the ministry of the word and the ministry of the table).
353. *Romans* 16:7 (King James); Hanks, supra note 334, at 141 (noting that Junia was a woman and an apostle, “but medieval scribes changed her name to masculine form [Junius] to censure this fact.”).
354. Hanks, supra note 334, at 141.
355. *Id.* at 142.
356. *Id.*
357. *Id.*
358. *Id.; MEMORY OF HER, supra* note 335, at 183 (asserting that an “egalitarian community” structure served as the model for the early Christian movement).
359. MEMORY OF HER, supra note 335, at 172 (observing that partnership “seems to have been the rule in the Christian movement”).
360. Hanks, supra note 334, at 143.
361. *Id.* (noting in *Romans* 16:8 that “Urbanus is a ‘co-worker,’ while Stachys is a ‘beloved’”).
362. *Id.*
who were named, Paul greeted three of them because they were “beloved” (Epaenetus, Amplias, and Stachys).  

To conclude his greeting, Paul directed those listed to kiss each other. This apostolic command, requiring people of the same sex to publicly kiss each other, offered a fitting conclusion to a list of people who set up households in a dazzling array of configurations. Paul’s commendation and greetings to the house churches in Rome illustrate Paul’s support of a “shocking variety” of domestic arrangements in early Christian households. The house churches in Rome were concrete expressions of the “new family of God” that was not patterned after the Greco-Roman patriarchal household.

Paul offered a theology of political inclusion that was drawn from the radical egalitarianism of Jesus. The distinction between Paul and Jesus is perhaps best understood in terms of the differences between the early Christian movement in the Greco-Roman world and the Jesus movement in Palestine. Early Christianity may be understood as a religious missionary movement that preached an alternative religious vision and practiced a “countercultural communal lifestyle.” In contrast, the Jesus movement was a “inner-Jewish renewal movement” that

363. Id. at 142 (referring to Romans 16:5, 8-9).
364. Id. at 143 (referring to Romans 16:16).
365. Id. at 143.
366. MEMORY OF HER, supra note 335, at 184, 199.
367. Id. at 105-59 (discussing the Jesus Movement as a “discipleship of equals”). That Paul’s egalitarianism ran deep has been questioned by feminist theologians in their exegesis of several Pauline texts, including Paul’s injunction to submissiveness in his Letter to the Corinthians, in which he reiterated the household codes. BREAD NOT STONE, supra note 263, at 71-72 (observing that the key interest of the household codes “lies in the enforcement of the submission and obedience of the socially weaker group—wives, slaves, and children—on the one hand, and in the authority of the head of household, the pater familias, on the other.”); 1 Corinthians 11:3-16 (King James) (stating at 1 Corinthians 11:3 that “the head of every man is Christ; and the head of the woman is the man; and the head of Christ is God.”). In Corinthians, Paul insisted on women being silent in church and on head coverings for women. 1 Corinthians 11:5, 14:34 (King James). A feminist theologian offered a rhetorical analysis of Corinthians to propose that Paul’s purpose may have been political: the women prophets in Corinth had become powerful and Paul sought to restore his basis of power by silencing the women prophets. ANTOINETTE CLARK WIRE, THE CORINTHIAN WOMEN PROPHETS: A RECONSTRUCTION THROUGH PAUL’S RHETORIC (1990). Observing the “tension” in Paul’s theology, Brooten proposed that several themes pointed toward equality between the sexes while other passages reiterated gender hierarchy. Brooten, Paul’s Views, supra note 61, at 78-81.
368. MEMORY OF HER, supra note 335, at 99-101.
369. Id. at 100.
preached the imminent coming of the kingdom of God (basileia) and that presupposed a common religious-cultural milieu.\textsuperscript{370}

Expressing the vision of Jesus, the basileia shifted the focus from the Temple and the Torah to the people of Israel as the site of God's power and presence.\textsuperscript{371} To Jesus, the God of Israel created and offered salvation to all human beings.\textsuperscript{372} The “humanizing praxis” of the basileia was reflected in the table community of Jesus, to which everyone was invited.\textsuperscript{373} Jesus sat at the table with tax collectors and prostitutes, the sick and maimed, and the destitute poor.\textsuperscript{374} In this inclusive table community, everyone was invited into a “discipleship of equals.”\textsuperscript{375}

The message of the basileia was reinforced by the teachings of Jesus about poverty and injustice. Patriarchal structures were confronted by Jesus in several dialogues about marriage.\textsuperscript{376} In saying, “[w]hoever does the will of God is my brother and sister and mother,” Jesus defined his “true family” as the circle of equal disciples.\textsuperscript{377} The assault of Jesus on the patriarchal family is evident by his command to “call no man your father upon the earth.”\textsuperscript{378} Jesus challenged the sexual property and power arrangements of the state and kinship systems.\textsuperscript{379} Followers were encouraged to leave the patriarchy behind and to form a new family of God outside of traditional lines of kinship.\textsuperscript{380} This new family, based on a “hunger for justice,” was part of the vision of Jesus of the kingdom of God.\textsuperscript{381}

As the foregoing illustrates, the family norm in the domain of religion has been one of plurality. Far from disauthorizing multiplicity in

\begin{footnotes}
\item 370. Id. at 99–101.
\item 371. Id. at 111, 120.
\item 372. Id. at 120.
\item 373. Id. at 120–21.
\item 374. Id. at 121–22.
\item 375. Id. at 135.
\item 376. Id. at 143; see also Goss, supra note 47, at 9 (discussing Mark 10 as a “theological excursion on the family, sexual property, issues of power, and hierarchy.”).
\item 377. MEMORY OF HER, supra note 335, at 147 (referring to Mark 3:31–35 and, proposing that, because the “true family” of Jesus includes no fathers, this “new family” implicitly rejects patriarchal power).
\item 378. Matthew 23:9 (King James); see also Goss, supra note 47, at 8 (observing that “[p]atriarchal fathers are left behind in God’s reign.”).
\item 379. Goss, supra note 47, at 9.
\item 380. Id. at 8–9 (asserting that “Jesus redefined the family of God outside kinship lines.”); see also MEMORY OF HER, supra note 335, at 147.
\item 381. Goss, supra note 47, at 10 (quoting DOROTHEE SOELLE, TO WORK AND TO LOVE: A THEOLOGY OF CREATION 133 (1984)); see also MEMORY OF HER, supra note 335, at 120–21.
\end{footnotes}
family arrangements, the Bible should be read as endorsing a constellation of family structures, including same-sex marriage.

Shifting to the domain of politics, a number of leaders stand as symbols of sexual and family plurality. Kings and presidents, those patriarchs of early and late modernity, defied conventions of monogamous heterosexuality for male lovers, mistresses, and shadow families.

IV. THE PATRIARCH IN EARLY MODERNITY:
JAMES I OF ENGLAND

I am the Husband, and all the whole Isle is my lawfull Wife.

—Speech of King James I in 1603

King James I of England stands as one of history’s most quixotic figures. James assumed the English throne at the dawn of modernity. Europe was poised on the threshold of the Enlightenment, with its eventual spawning of modes of thinking that categorized the world according to binaries. But in the early years of the seventeenth century, philosophers were not entrenched in neatly polarized ways of thinking about life and sexual behavior. The sexual and familial life of King James is at odds with tidy dualistic and evolutionary understandings of sexuality, marriage, and family forms.

382. ATKINSON, supra note 225, at 198 (citing Speech of James I in 1603 in THE POLITICAL WORKS OF JAMES I (Charles H. McIlwain ed., 1918 (reprint 1616)).

383. James ruled Scotland as King James VI and England as King James I. E.g., ANTONIA FRASER, KING JAMES 8 (1974) [hereinafter FRASER]. James has been characterized as “intelligent and complex.” MICHAEL B. YOUNG, KING JAMES AND THE HISTORY OF HOMOSEXUALITY 6 (2000) [hereinafter YOUNG] (noting, among other qualities, that James was “a poet, a patron of the arts and the author of learned treatises on an impressive array of subjects, including politics, religion, tobacco and witchcraft.”).

384. The Enlightenment ushered in modernity, which has been characterized as the massive change in European thought dating from the mid-sixteenth century which rejected the dogma and substantive rationality of religious and metaphysical worldviews. ELISABETH SCHÜSSLER FIORENZA, RHETORIC AND ETHIC 35 (1999) [hereinafter SCHÜSSLER FIORENZA, RHETORIC] (also describing modernity in terms of belief in procedural rationality which gives credence to objective knowledge, moral practical insight, and aesthetic judgment); see also LLOYD, supra note 42, at 77–78 (discussing the binarist thought of Enlightenment philosophers, including Jean Jacques Rousseau who considered the “disorder of women” to be “associated with undisciplined passion” and the “threat to the public life of citizenship” as the justification for the exclusion of women from citizenship).
King James was secretly Catholic and openly homoerotic.\textsuperscript{385} James was also married and the father of six children.\textsuperscript{386} To sharpen the point of irony, James commissioned the translation of the Bible in 1604.\textsuperscript{387} Published in 1611, the “King James Bible” is a favorite weapon in anti-gay polemics.\textsuperscript{388}

James began ruling Scotland from the cradle.\textsuperscript{389} His early family life has been characterized as “disturbed” and “dysfunctional.”\textsuperscript{390} Of his early life, James would later write: “I was alane, without fader or moder, brither or sister, king of this realme, and heir apperand of England.”\textsuperscript{391} One of the central themes of the life of James was “a search for family.”\textsuperscript{392} In one of the ironies of his life, James marginalized his “official” family to absorb others, particularly male lovers, into a broader and more meaningful concept of family.\textsuperscript{393}

---

385. James came to the English monarchy with some “inherent disadvantages,” including being the King of Scotland, which raised the suspicion of some of his English subjects who were “on full alert to protect the nationalism of the common law.” Daniel R. Coquillette, The Anglo-American Legal Heritage 311 (1999) [hereinafter Coquillette]. However, more damaging were rumors “that James was secretly Catholic and partial to the ‘Spanish faction’ at court. That James was almost openly gay, and appointed his male consorts to high positions, bothered the English much less.” Id. at 311.

386. Fraser, supra note 383, at 52–53.


388. Id. at xi; Young, supra note 383, at 6 (noting that James was “the sponsor of the Authorized Version of the Bible that bears his name, a rich irony when one considers how often the King James version of the Bible is invoked to condemn homosexuality.”).

389. After the forced abdication of his mother, Mary Queen of Scots, James was crowned at the age of 13 months on July 29, 1567. Alan Stewart, The Cradle King: The Life of James VI and I 31(2003) [hereinafter Stewart]; Fraser, supra note 383, at 21.

390. James’ childhood was “deeply disturbed.” Nicolson, supra note 387, at 6. David Rizzio, secretary and lover of his mother, was murdered when James was in her womb. Id. James’ father, Henry Darnley, was murdered by his mother’s next lover, the Earl of Bothwell. Id.; see also Young, supra note 383, at 8 (“It was a dysfunctional family from the outset.”). James did not see his mother after the age of one and was raised by “a string of terrifying Presbyterian governors.” Nicolson, supra note 387, at 6–7. As an infant king, “he had been a trophy in the hands of rival noble factions in Scotland, kidnapped, held, threatened and imprisoned.” Young, supra note 383, at 7.

391. Young, supra note 383, at 7.


393. Id. at 113 (discussing James’ recreating familial bonds with his male lovers).
Raised by guardians and stern tutors, James became a learned man, "a true scholar," who spoke four languages and was grounded in ancient and contemporary theology and politics. After the death of Queen Elizabeth in 1603, James ascended to the English throne. The changes wrought from Tudor England to Stuart England were profound. The Tudor reign was based on feudal arrangements between subject and ruler, characterized by reciprocal obligations that were founded on ancient contracts and rituals. In contrast, the Stuart reign of James introduced absolute monarchy as "the cornerstone of the modern centralized state." James articulated "the Divine Right of Kings" as the political theory underlying this form of government. For England in 1603, these theories were revolutionary, representing a break from feudalism and religious dogma as well as presenting a promise of a new "rationalism" in a "new deal" of centralized government.

At the time of his coronation, James was the husband of Anne and the father of "an heir and a spare." James fathered six children, of whom three survived infancy. However, parallel to his royal family were a series of male lovers, three of whom captured James' heart. The

394. YOUNG, supra note 383, at 9. Scholars have suggested that James' life centered around a search for family and that he reached outside of his natural family to absorb others, particularly male lovers, into the concept of family.

395. FRASER, supra note 383, at 89, 95.

396. COQUILLETTE, supra note 385, at 312.

398. Id. at 311. In 1598, James wrote an essay entitled The Trew Law of Free Monarchies in which he asserted that monarchs who attained thrones by hereditary right were entitled to absolute power by virtue of God's will and the natural order of things. SCOTT GORDON, CONTROLLING THE STATE: CONSTITUTIONALISM FROM ANCIENT ATHENS TO TODAY 246-47 (1999) [hereinafter GORDON] (also noting that James reiterated his theory upon assuming the English throne, by advising Parliament in 1610 that "The State of MONARCHY is the supremest thing upon earth: For Kings are not only God's Lieutenants upon earth, and sit upon God's throne, but even by God himself they are called Gods"). The clash between James' Divine Right of Kings and Sir Edward Coke's assertion of Bracton's principle that the King is "under God and the law" has been recognized as a great constitutional confrontation and "a symbol of the rule of law courageously defying totalitarianism" that was invoked one hundred and sixty years later by revolutionaries in Colonial America. COQUILLETTE, supra note 385, at 316 (referring to the Prohibitions del Roy in 1608).

399. COQUILLETTE, supra note 385, at 312.

400. Anne had "discharged her principal duty as queen: the production of 'an heir and a spare.' " YOUNG, supra note 383, at 17; see also FRASER, supra note 383, at 52 (detailing the wedding of James and Anne, the fourteen year-old daughter of the King of Denmark).

401. YOUNG, supra note 383, at 16 (detailing Anne's frequent pregnancies, the survival of three children—Prince Henry, Princess Elizabeth, and Prince Charles—and the ending of physical intimacy after the loss of two children in 1606 and 1607).
first male lover of James was his cousin, Esmé Stuart Sieur d'Aubigny. The thirteen-year old James fell “violently in love” with this handsome and sophisticated French gentleman. A middle-aged man who was married with five children, Esmé Stuart also possessed a joie de vivre that was a relief to the sternness of James’ tutors and guardians. James finally had some fun—drinking, writing poetry, and joking into the night. James rewarded his cousin with money and titles, making Esmé Stuart the Duke of Lennox. Esmé Stuart was also appointed to serve in the King’s Bedchamber as Lord Great Chamberlain and First Gentleman of the Chamber. In this office, Lennox slept in the room with James and oversaw the dressing of the king.

It cannot seriously be argued that James and Lennox did not engage in sexual relations. The imagination of observers was fed by James’ openly embracing and kissing Lennox. James and Lennox worked to consolidate the king’s power. But opposing nobility, resentful at the influence of Lennox, kidnapped James and banished Lennox. Back in France, Lennox died the following year, leaving word “that his heart should be embalmed and sent to James.”

James’ relationship with Lennox established a lifelong pattern in which James bestowed favors on his male lovers, some of whom grew to

402. Fraser, supra note 383, at 36.
403. Id. at 37; see also Young, supra note 383, at 10.
404. Young, supra note 383, at 10.
405. Id.
406. Id.; see also Fraser at 37 (advising that the titles were accompanied by “rich gifts such as the Abbey of Arboath and the custody of Dumbarton Castle.”).
407. Young, supra note 383, at 10.
408. Id. (noting that Lennox “enhanced the political importance of the Bedchamber”).
409. Id. at 135 (proposing that “it is nonsense to deny” that James had sex with his male favorites); Fraser, supra note 383, at 37 (describing the “romantic passion” of James for Lennox, which set James “firmly in the pattern” of associating sexual love with men).
410. Young, supra note 383, at 10; see also Stewart, supra note 389, at 53 (“The very openness of his affections prompted some observers to suggest that their relationship contained something more personal and intimate, or ‘inward’ in the language of the times.”).
411. Young, supra note 383, at 10.
412. Id. at 11 (discussing the Ruthven Raid, in which nobility opposed to Lennox kept James in custody for ten months); see also Fraser, supra note 383, at 38–39 (relating the raid in 1582 by the Earl of Gowrie, “head of the house of Ruthven and a prominent Ultra-Protestant” and, after a rescue in 1583, the resumption of the throne by James at the age of seventeen).
413. Young, supra note 383, at 11 (also describing James’ grief, expressed in a poem that was titled “Metaphoricall Invention of a Tragedie Called Phoenix”).
have enormous power in the Jacobean court. The chief distinction in James' later years, however, was an age reversal. James became "the older man" who took young men under his wing (and into his bed) as his protégés. In the English court, James' two greatest favorites were Robert Carr, subsequently given the title of Earl of Somerset, and George Villiers, bestowed the title of Duke of Buckingham. Lesser favorites in Scotland and England included Alexander Lindsay (whom James called "Sandie"), George Gordon (the Earl of Huntly and captain of the guard), Philip Herbert (the Earl of Montgomery), and James Hay (the Earl of Carlisle).

Robert Carr, who was also appointed Groom and Gentleman of the Bedchamber, Knight of the Garter, and Viscount Rochester, became the first Scot to take a seat in the English House of Lords. Demonstrating the inadequacy of twentieth-century sexual pigeon-holes to appreciate family and sexual lives in history, Carr fell in love with the Countess of Essex and decided to marry her. James facilitated this liaison by exerting tremendous influence to overcome a number of obstacles to the marriage.

George Villiers, knighted and appointed to the position of Gentleman of the Bedchamber, subsequently became the King's favorite. Villiers rose from Viscount to Earl, Marquis, and Duke. James stated that he "loved the Earl of Buckingham more than all other men."

414. During James' reign in England, he bestowed fifty-six baronies, nineteen viscounties, thirty-two earldoms, one marquisesate, and three dukedoms. NICOLSON, supra note 387, at 19.
415. YOUNG, supra note 383, at 12.
416. Id. at 12, 29, 31; see also STEWART, supra note 389, at 257–71 (advising that James "fell in love" with Carr in 1607, but that Carr eventually became obstinate with the King and also "withdrew" from James' bed, leading to his replacement by the "exceptionally handsome and charming" Villiers in 1615).
417. Young, supra note 383, at 13, 147.
418. Id. at 30.
419. Id.
420. Id. (summarizing the obstacles that were surmounted, including political opposition to Lady Essex and her pre-existing marriage to the Earl of Essex); see also STEWART, supra note 389, at 257, 263 (detailing that James "footed the bill" for Carr's wedding, arranged for a "lavish marriage" for Lindsay, and married Herbert to the daughter of the Earl of Oxford in a "lavish court wedding").
421. YOUNG, supra note 383, at 32; see also BERGERON, supra note 392, at 99–103 (recounting the efforts of the clergy, some of whom were "smitten" by Villiers, to introduce Villiers to James' bedchamber).
422. Young, supra note 383, at 32 (noting that the highest office given Villiers was Lord High Admiral of England).
423. Id. at 44 (quoting a 1617 report from the Spanish Ambassador, Documentos inéditos para la historia de España I, 101–02 (1936), that James had summoned his Privy Council and had made it clear that he loved Buckingham); see also BERGERON, supra
James asserted that no blame should be found in this because Jesus had done the same thing—just as “Christ had his John,” so “he had his George.” In letters, James referred to Buckingham as his “sweet child and wife” and himself as “dear dad and husband.” James considered himself married to Buckingham, wishing for “a new marriage ever to be kept in the hereafter.” For James, living without Buckingham would be “a sorrowful widow’s life.”

Buckingham married, like Somerset, with the assistance of the king. James’ love extended to Buckingham’s wife Kate and to their daughter Mary. In one of the apparent contradictions of James’ life, he was more solicitous toward Buckingham’s family than he had been toward Anne and his own children. James’ attitude toward his royal family was characterized by distance. At the same time, James resignedified the concept of family to create a familial bond with Buckingham (as well as Somerset and Lennox).

Another one of the contradictions in the life of James was that, although it cannot be doubted that he engaged in sodomy with men, he also singled out sodomy as an example of a horrible crime that should

note 392, at 104 (also reciting that James loved Buckingham “more than anyone else”).

424. Young, supra note 383, at 44; Bergeron, supra note 392, at 104; Fraser, supra note 383, at 168.

425. Young, supra note 383, at 45 (quoting an undated letter, apparently written between late 1622 and late 1624, in G.P.V. Akrigg, Letters of King James VI and I 431–32 (1984)); Fraser, supra note 383, at 168. James’ style of “extended tropes of kinship” and metaphors of adoption have been characterized as part of James’ effort to reshape “the structures of kinship to meet the requirements of his political economy.” Bergeron, supra note 392, at 113 (quoting BRUCE THOMAS BOEHRER, MONARCHY AND INCEST IN RENNAISSANCE ENGLAND 88, 90 (1992) [hereinafter BOEHRER]).

426. Young, supra note 383, at 45 (quoting the undated letter from Akrigg, supra note 425, at 431–32).

427. Id. at 45.

428. Id. at 33; see also Bergeron, supra note 392, at 114 (reciting the King’s blessing of the “profitable marriage,” which secured Buckingham’s economic base, “augmented, of course, by generous gifts from James.”). With the marriage, Buckingham became “one of the wealthiest men in the Jacobean court.” Id. The marriage did not lessen James’ demands on Buckingham. The day after his wedding, Buckingham accompanied the King on a trip. Id.

429. Young, supra note 383, at 33.

430. Id.

431. Bergeron, supra note 392, at 113 (referring to DAVID BERGERON, ROYAL FAMILY, ROYAL LOVERS: KING JAMES OF ENGLAND AND SCOTLAND (1991) for the proposition that “James’ true family often existed on the margins for him”).

432. Id. at 113. James’ “attachments to Esmé Stuart, Robert Carr, and Buckingham fit the pattern of an expanding kinship.” Id. (noting the recreation of a familial bond with Buckingham as perhaps completing James’ relationship with his kinsman, Lennox).
not be forgiven by a ruler. 433 Among the explanations for the gap between James' words and actions is that he simply did not make the connection between his behavior and the dreaded word "sodomy." 434 Because the church had characterized sodomy as a sin "not to be named," there were ambiguities in the concept of sodomy which were not clarified by centuries of circumscribed speech. 435

Another explanation harkens back to Greco-Roman sexual patterns in which age-differentiated sexual relations between men were socially accepted. 436 Some scholars have proposed that sexual relations "between active men and passive adolescents" were common in Europe until the early eighteenth century. 437 This pattern is apparent with James, as he passed from the adolescent role in his relationship with Esmé Stuart, to the role of the older man with Somerset and Buckingham. 438

With the contradictions in the life of James and his restructuring of the concept of family to include his male lovers, he is well-suited to serve as a symbol of sexual and familial plurality coexisting in a historical setting of patriarchal political power. 439 Other political leaders

433. Young, supra note 383, at 28, 49. James undertook to write a book, Basilikon Doron ("royal gift") to instruct his son, Prince Henry, and as a "practical manual for successful kingship that reflected the way James viewed himself and, equally important, wished others to view him." Id. at 19. James advised Henry that sodomy was one of the "horrible crimes that yee are bound in conscience never to forgive." Id. at 28, 49 (also exhorting his son to "make your Court and companie to bee a parterne of godlinesse and all honest vertues" and to "beware of drunkennesse, which is a beastlie vice, namely in a King"). Yet, James' behavior was "often at odds with his high-minded pronouncements." Id. at 28.

434. Id. at 38, 49 (referring to Alan Bray, Homosexuality in Renaissance England (1982) for the argument that Englishmen of James' era were unlikely to view themselves as sodomites because of "extreme formulations" that made sodomy unrecognizably heinous).

435. Id. at 38. England turned the "religious injunction against sodomy into the secular crime of buggery" in 1533. Professors' Brief, supra note 278, 298, at 6. "Buggery" was interpreted "to apply to sexual intercourse between a human and animal and anal intercourse between a man and woman as well as anal intercourse between two men." Young, supra note 383, at 38. The "imprecision in the definition of the offense" was carried into statutes in Colonial America. Id.

436. Young, supra note 383, at 148; see also Mondimore, supra note 60, at 10.

437. Young, supra note 383, at 149; see also Miller, supra note 70 at xxii (noting that the "molly houses" of England in the eighteenth century were frequented by gay men).

438. Young, supra note 383, at 149-50 (observing that James was 41 when he became infatuated with Carr, who was about 20, and that James was 48 when he began sexual relations with Buckingham, who was 23).

439. Bergeron, supra note 392, at 113 (citing Boehrer, supra note 425, at 88-90, for James' reshaping "the structures of kinship"). Several English monarchs engaged in same-sex relationships. Edward II (1307-1327) maintained a sexual relationship with Piers Gaveston that lasted thirteen years. Boswell, supra note 40, at 298-300. William III (1689-1702) had male sexual favorites who waited on him in his
throughout modernity have defied the tight box by which traditionalists seek to define sexuality and marriage. A number of American Presidents, including Bill Clinton and Thomas Jefferson, maintained “traditional” marriages in the public sphere and “shadow” families and relationships in the private sphere.

V. Matrimony, Sanctimony, and American Political Leaders

Contradictions are always on display.440

While a law student at Yale, William Jefferson Clinton spotted Hillary Rodham in a class: “She had thick dark blond hair and wore eyeglasses and no makeup, but she conveyed a sense of strength and self-possession I had rarely seen in anyone, man or woman.”441 Reluctant to tap her on the shoulder, Clinton noticed her later in the library. Observing Clinton staring at her (and admitting to staring back at him), Rodham walked across the library and introduced herself. After taking jobs in different states (him as a law professor in Arkansas and her as an attorney for the Children’s Defense Fund in Massachusetts), the couple finally married in October of 1975.442

Clinton met Gennifer Flowers in 1977 and later wrote that “back in the 1970s [he] had a relationship with her that [he] should not have had.”443 Biographers and journalists have asserted that Clinton regularly engaged in affairs with women.444 Some have proposed that Clinton’s

bedchamber. Young, supra note 383, at 155 (quoting Tim Hitchcock, English Sexualities, 1700–1800 66–67 (1997) for the proposition that William “escaped the stigma of effeminacy that was attached to James, chiefly because of ‘his rather ma-cho image as a military hero.’”). Queen Anne, last of Stuart monarchs, was introduced to Sarah Jennings at the age of five and maintained a passionate romantic relationship with her that lasted nearly fifty years. Mondimore, supra note 60, at 53–54 (discussing the intensity of Anne’s love for Sarah, despite their marital status, and noting the absence of an explicit documentation of sexual relationship between them).

442. Id. at 273.
443. Id. at 387.
444. Jerome D. Levin, The Clinton Syndrome: The President and the Self-Destructive Nature of Sexual Addiction xi, 4 [hereinafter Levin] (proposing, in a “psychobiography” of Clinton, that “his extramarital affairs have been “intense, numerous, and varied”).
“womanizing” amounted to a “sexual addiction.” The public is most familiar with Clinton’s trysts (or “inappropriate encounters”) with Monica Lewinsky, which formed the dramatic backdrop for impeachment proceedings in the House and Senate.

Politicians on the right were “outraged” at Clinton’s “assault on American ideals” and chided the public for failing to hold Clinton accountable for his offenses. Feminists, in particular, were scolded for continuing to support Clinton's presidency. Yet, the American public did judge Clinton guilty of demeaning the dignity of the presidency by having a “tawdry affair” and by lying about it. In the end, however, the issue was construed by the American public as being about sex and, therefore, “of limited legal and political significance.”

The coherency of the resolution of the Clinton scandal in the minds of the American public may be understood by reference to the

445. Id. at 4, 13–19, 64–65 (1998) (describing the factors that drove Clinton to a “virtually suicidal relationship with Monica Lewinsky.”); see also Clinton, supra note 441, at 811 (discussing his “lifelong effort to lead parallel lives” and his struggle “to hold the old demons at bay.”).

446. In his autobiography, Clinton admitted to three “inappropriate encounters” with Lewinsky and advised: “What I had done with Monica Lewinsky was immoral and foolish. I was deeply ashamed of it and didn’t want it to come out. . . . I stonewalled.” Clinton, supra note 441, at 774–75. In objecting to Clinton’s characterization of their relationship, Lewinsky asserted that it was one of mutual affection. Nicholas Pyke, Lewinsky Just Wants to Move On, But She Can’t Halt the Clinton Bandwagon, INDEPENDENT ON SUNDAY (LONDON), June 27, 2004, at 19 (also stating that what Clinton wrote and said was “horrible”): “The adjectives he used . . . made me feel as any woman would feel, like an insignificant piece of dirt.”

447. David E. DeCosse, All the Rage, 7 REL. & VALUES IN PUBLIC LIFE 12 (Winter / Spring 1999) [hereinafter DeCosse] (reviewing William J. Bennett, The Death of Outrage: Bill Clinton and the Assault on American Ideals (1998)).

448. Richard L. Berke, Testing of a President: Political Memo; Women’s Groups in a Bind Over Willey, N.Y. TIMES, March 18, 1998, at A18 (reporting that Kathleen Willey’s allegations against Clinton presented “a conundrum for feminists who were so eager to condemn Judge Thomas: Should they attack Mr. Clinton, a champion of their issues, or risk being attacked themselves as hypocrites?”); see also Christina E. Wells, Hypocrits and Barking Harlots: The Clinton-Lewinsky Affair and the Attack on Women, 5 WM. & MARY J. WOMEN & L. 151 (1998) (arguing that women could support Clinton’s job performance while denouncing his behavior: “The notion that women cannot support the President without somehow leaving their principles or intellect behind is simply absurd. Such an idea is also dangerous. At its core, much of this criticism is rooted in and reinforces outmoded notions regarding the role of women in the public and political realm.”).

449. DeCosse, supra note 447, at 12.

450. Id.; see also Anita L. Allen, Lying to Protect Privacy, 44 VILL. L. REV. 161 (1999) [hereinafter Allen, Lying] (reasoning that “lying, and in particular, lying to protect sexual privacy, is not a categorical moral wrong—not even when the liar is a high-ranking public official.”)
doctrine of sin articulated by mid-twentieth century theologian Reinhold Niebuhr. Not all sin is equal, according to Niebuhr. In the Niebuhrian typology, sin is divided into two categories: sensuality and pride. Sensuality, of which Clinton was guilty, is a "second-order type of sin" in which the self is lost to desire and impulse. Sensuality involves a mixture of qualities that invite not only judgment, but also mercy.

The ongoing support for Clinton was buoyed, in large part, out of a sense of "misgiving about the partisan intensity of his opponents." To the public, this intensity took the form of lust for power for its own sake. Pride, as lust for power, is a sin of the first order. In Niebuhr's view, this pride is self-justifying by "falsely appealing to impossibly absolute values." Inevitably, the sin of pride manifests itself in injustice. Clinton's opponents not only used the case for political gain, they did so while wrapped in a rhetorical cloak of virtue. The public saw that the mantle was full of holes, revealing pride underneath. Hypocrisy, one of the "fruits of moral pride" was particularly apparent among members of the Republican Right whose extramarital and gay affairs became exposed.

451. DeCosse, supra note 447, at 12.
452. Id.
453. Id.
454. Id. (noting that "sensuality necessarily involves a mix of impulse, desire, love, truth, and deceit that invites judgment and mercy").
455. Id. In an "email" from the senior attorney in the Lewinsky matter ("I. Satan, Esq.") to one of his subordinates ("Lucifer Dunkelstern, Esq."), Satan chastised Dunkelstern for his moral bungling of the affair: "Your Starr has done for perjury in this century what Hugo's Javert did for petty theft in the past." Rob Atkinson, Lucifer's Fiasco: Lawyers, Liars, and L'Affaire Lewinsky, 68 Fordham L. Rev. 567, 575, 582 (also advising that, to most Americans, Clinton's persecutors "came to look mean, in both meanings of the word—low and malicious.").
456. DeCosse, supra note 447, at 12 (proposing that "spiritual pride ... is the ultimate form of sin.").
457. Id.
458. Id.
459. Id.
460. Id.
461. Id. Dan Burton of Indiana, the Republican chairman of the committee that investigated Clinton's campaign finances, admitted an extramarital affair and an out-of-wedlock child. Anita L. Allen, Privacy and the Public Official: Talking About Sex as a Dilemma for Democracy, 67 Geo. Wash. L. Rev. 1165, 1180 n.65 (1999) [hereinafter Allen, Privacy] (citing Rep. Burton Admits He Fathered Son in an Affair, N.Y. Times, Sept. 5, 1998, at A9). As Henry Hyde prepared to chair the House Judiciary Committee's impeachment hearings of Clinton, he admitted an affair with a married woman that he also dismissed as a "youthful indiscretion." Id. at 1181, n.67 (citing
The attack by moralists on same-sex marriage smacks of hypocritical sexual stone-throwing.\textsuperscript{462} If the sodomy laws of the states were enforced, experts have estimated that ninety-five percent of the white men in America would be subject to prosecution.\textsuperscript{463} Newt Gingrich, leading advocate for family values, married his high school math teacher when he was nineteen, reportedly carried on an adulterous affair with a campaign worker, served his first wife with divorce papers while she was suffering from uterine cancer, was subsequently sued for not paying alimony on time, and was fined by his colleagues for ethics violations.\textsuperscript{464} Michael Bowers, the Attorney General who defended the application of Georgia's sodomy law to Michael Hardwick's private consensual sex, admitted to having an adulterous affair for more than a decade with a subordinate in his office.\textsuperscript{465} Rush Limbaugh, whose mean-spirited tirades

\textsuperscript{462} Cf. Clinton, supra note 441, at 846 (relating that he has two stones in his study, bearing the inscription “John 8:7,” in reference to the story of community leaders asking Jesus to approve the stoning of an adulterous woman and the reply of Jesus: “He that is without sin among you, let him first cast a stone at her.”).

\textsuperscript{463} APA Brief, supra note 24, at 21, n.37 (stating that the observation that there are a variety of forms of sexual contact important to heterosexual couples “is not new in the field of sex research” and citing A. Kinsey et al., Sexual Behavior in the Human Male 390–93 (1948)).

\textsuperscript{464} Molly Ivins, You Got to Dance With Them What Brung You 140 (1998) [hereinafter Ivins] (reporting that Gingrich, “strong on family values,” went to see his first wife, Jacqueline, in the hospital where she was recovering from cancer surgery to discuss the terms of their divorce); see also Allen, Privacy, supra note 461, at 1173 (urging that “aggressively anti-philandering philanderers should be outed” and posing the example of a Gingrich campaign worker’s telling of her adulterous affair with Gingrich).

\textsuperscript{465} Kevin Sack, Georgia Candidate for Governor Admits Adultery, N.Y. Times, June 6, 1997, at A29; see also Ruthann Robson, The Missing Word in Lawrence v. Texas, 10 Cardozo Women’s L.J. 397, 402–03 (2004) (recounting apologies that should have been made due to Bowers, including apologies to Michael Hardwick as well as to Robin Shahar, whose offer of employment with the Georgia Attorney General’s Office was revoked by Michael Bowers due to her relationship with another woman); Peter Irons, The Courage of Their Convictions 379–400 (1988) (relaying the
against feminists, the NAACP, “limosine liberals,” homeless men, and “militant” homosexuals has been the stuffing of a successful media career, found himself in need of privacy (and mercy) during an investigation for abuse of prescription drugs.  

Adultery has been an unstated norm for our country’s male political leaders. Even the father of our country, George Washington, was “romantically devoted” to another woman, Sally Fairfax, the wife of his best friend. Indeed, the family form that has been modeled in the White House (and by other political leaders) has been one man, one woman, and many mistresses.

first-person account of Michael Hardwick regarding his arrest, conviction, and suit against Bowers).

466. Rush Limbaugh Loses Appeal on Privacy, N.Y. TIMES, Oct. 7, 2004, at A1 (noting that prosecutors seized Limbaugh’s medical records after learning that Limbaugh received 2,000 painkillers prescribed by four doctors in six months); see also IVINS, supra note 464, at 134 (proposing that Limbaugh offers his “Ditto-heads” scapegoats of “feminazis,” minorities, “limosine liberals,” and “people with all these wacky social programs”); Maybe There’s Something in the Juice, TIME, Feb. 28, 1994, at 14 (quoting Limbaugh (and noting his selection as spokesperson for the Florida Citrus Commission): “I say to you of the leftist, militant, homosexual crowd: Take it somewhere else. Get out of our schools. Get out of our churches. Take your deadly, sickly behavior and keep it to yourselves.”).

467. “Controversial sexual conduct and misconduct are so commonplace that the fingers of shame inevitably are pointed by men and women who themselves, by their own standards of judgment, have cause for shame.” Allen, Privacy, supra note 461, at 1174–75, 1180 (also noting that the “code of shielding the private sexual conduct of officials from public view” was a “distinct feature of public life from World War II until the 1970s”). The “turning point” for toleration of marital infidelity and secrecy may have come in 1974 when Rep. Wilbur Mills posed an “absurd, insincere explanation” for brawling with Fanne Foxe near the Tidal Basin in Washington, D.C. Id. at 1175 (referring to the public statement reported in Stephen Green & Margot Hornblower, Mills Admits Being Present During Tidal Basin Scuffle, WASH. POST, Oct. 11, 1974, at A1 (in which Mills described Ms. Foxe as a friend of the family and blamed the appearance of impropriety on his wife’s inability to accompany him because of a broken foot)).

468. MICHAEL JOHN SULLIVAN, PRESIDENTIAL PASSIONS (1991) [hereinafter SULLIVAN] (documenting affairs of Presidents Clinton, L.B. Johnson, Kennedy, Eisenhower, F.D. Roosevelt, Harding, and Jefferson as well as scandals regarding Cleveland, Tyler, B. Harrison, and Wilson). Another five Presidents were in unhappy marriages of appearance (Nixon, J.Q. Adams, Pierce, Lincoln, and Garfield). Id. at 112, 193, 197, 213, 222. Questions about the sexuality of four Presidents (Nixon, Buchanan, Lincoln, and T. Roosevelt) have been raised. Id. at 117, 205, 215, 230.

469. Id. at 241–52 (observing that there is no evidence of sexual infidelity, but that an “involuntary passion” for Ms. Fairfax persisted during Washington’s lifetime).
There is credible evidence that another father of our country, Thomas Jefferson, carried on a lengthy love affair with one of his slaves, Sally Hemings, with whom he fathered at least one child. In 1772, at the age of twenty-eight, Jefferson fell in love with and married a young widow, Martha Wayles Skelton. After ten happy years of marriage and six children, Martha became ill during childbirth and died. On Martha's deathbed, Jefferson pledged that he would never remarry. Jefferson kept that pledge.

During Jefferson's tenure as Ambassador to France in 1787, his daughter Patsy arrived with their fourteen year-old slave, Sally Hemings. While in France, Jefferson reputedly began a romantic relationship with Hemings that lasted for many years. Although the Hemings affair has been disputed and debated by historians for many years, recent DNA tests have confirmed that Sally Hemings' youngest son, Eston Hemings Jefferson, was most likely fathered by Jefferson.

470. Eugene A. Foster et al., Jefferson Fathered Slave's Last Child, 396 NATURE 27 (Nov. 5, 1998) [hereinafter Foster] (reporting results of DNA tests that provided evidence that Thomas Jefferson was the biological father of the Eston Hemings Jefferson, the youngest son of Jefferson's slave, Sally Hemings).

471. SULLIVAN, supra note 468, at 178. Martha Wayles Skelton had been widowed after two years of marriage to Bathurst Skelton. MICHAEL KNOX BERAN, JEFFERSON'S DEMONS: PORTRAIT OF A RESTLESS MIND 15-16 (2003) [hereinafter BERAN]. Martha was also an heiress; in 1773 she inherited eleven thousand acres of land and more than one hundred slaves (including the Hemings) from her father, John Wayles. Id. at 16.

472. SULLIVAN, supra note 468, at 178.

473. Id.

474. GORDON-REED, supra note 440, at 160. Sally's father was John Wayles (also the father of Thomas Jefferson's wife, Martha) and her mother was Wayles' slave, Elizabeth Hemings. Id. at 23 (noting that Sally was the half-sister of Martha Jefferson).

475. Id. at 1 (reporting that the relationship between Jefferson and Hemings lasted for thirty-eight years).

476. Rumors had circulated in the 1800's that Jefferson and Hemings were lovers. Id. In 1974, Fawn Brodie published a biography that concluded that Jefferson and Hemings had a long-term relationship that produced six children. FAWN M. BRODIE, THOMAS JEFFERSON: AN INTIMATE HISTORY 292-96 (1974) [hereinafter BRODIE]; GORDON-REED, supra note 440, at 4. Mainstream Jeffersonians dismissed the claim. E.g., ALF. J. MAPP, JR., THOMAS JEFFERSON: PASSIONATE PILGRIM 34 (1991) [hereinafter MAPP] (asserting that “[t]he charge that Sally Hemings was Jefferson's mistress was lent a specious credence by the undeniable fact that some of her children resembled Jefferson and other members of his family” and noting “confessions of paternity by Jefferson's nephews Peter and Samuel Carr.”).

477. Foster, supra note 470, at 27. The DNA report in the November 5, 1998, issue of Nature set off a firestorm among Jefferson historians. After the Thomas Jefferson Memorial Foundation (TJMF) appointed a research committee to gather evidence on the relationship between Jefferson and Hemings, the committee issued a report that concluded: “The DNA study, combined with multiple strands of currently available
Because Jefferson's Y chromosome had a distinctive set of mutations that were a "perfect match" to descendants of Eston Hemings Jefferson, many historians and scientists no longer dispute that Jefferson was the father of Eston. Consequently, there is another "truth that should be self-evident": "Our heroes—and especially Presidents—are not gods or saints, but flesh-and-blood humans."
During the period of Jefferson’s long-term relationship with his slave, the state of Virginia adopted statutes that penalized interracial marriages. During the period of Jefferson’s long-term relationship with his slave, the state of Virginia adopted statutes that penalized interracial marriages.480 Yet, Jefferson’s liaison with Hemings also represented a prevailing convention of the times. Sexual relations between masters and female slaves were commonplace in Virginia and other colonies.481 Perhaps out of a sense of guilt and hypocrisy, Jefferson’s attitudes toward African-Americans were decidedly ambivalent.482 Due to his roles as author of the Declaration of Independence, scribe of the Constitution, slave-owner, advocate for anti-miscegenation statutes, lover of Sally Hemings, and father of at least one mixed-race child, Jefferson serves as another appropriate historical symbol for extending the blessings of liberty and the assurance of equality to gays and lesbians in matters of love and marriage.483 Despite the contradictions between public policy and

480. Loving, 388 U.S. at 6 (stating that “[p]enalties for miscegenation arose as an incident to slavery and have been very common in Virginia since the colonial period”).

481. In a remarkable slave narrative, Harriet Jacobs (through her protagonist, narrator Linda Brent) relayed the ways that she prevented her North Carolina master from raping her, including hiding in a crawlspace above a storeroom in her grandmother’s house for nearly seven years. Harriet A. Jacobs, Incidents in the Life of a Slave Girl Written by Herself 35, 148 (Jean Fagan Yellin ed., Harvard University Press (1987) (1861) (also asserting that her master was the father of eleven slaves).

482. Jefferson advocated the emancipation and repatriation of slaves to Africa, rather than incorporating them into the white population because: “Deep-rooted prejudices entertained by the whites; ten thousand recollections, by the blacks, of the injuries they have sustained; new provocations; the real distinctions which nature has made . . . will probably never end but in the extermination of the one or the other race.” Thomas Jefferson, Notes on the State of Virginia (1781), reprinted in Stephen B. Presser & Jamil S. Zainaldin, Law and Jurisprudence in American History 122-23 (2nd ed. 1989). Contrasting the consequences of emancipation of American slaves to freeing white Roman slaves, Jefferson stated: “Among the Romans emancipation required but one effort. The slave, when made free, might mix without staining the blood of his master. But with us a second is necessary, unknown to history. When freed, he is to be removed beyond the reach of mixture.” Id. at 125; see also Annette Gordon-Reed, Was the Sage a Hypocrite?, Time, July 5, 2004, at 69 (contrasting Jefferson’s pronouncement that “all men are created equal” in the Declaration of Independence and his proclamations of white supremacy in Notes on the State of Virginia). Gordon-Reed proposed that “the Jefferson-Hemings connection places Jefferson firmly within the world of Southern plantation society, where the rules of the game featured public denunciations of ‘amalgamation’ but the private practice of it at all levels of white society.” Id.

483. Jefferson’s views were complex, contradictory, and constitutionally “progressive”: “[L]aws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made,
the private behavior of government leaders, the prohibitions in Virginia against the “mixing of the races” and the prosecutions for miscegenation continued for the next 170 years.

VI. THE LOVINGS AND THE GOODRIDGES

A. The Story of Mildred Jeter and Richard Loving

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

—Judge Leon M. Bazile, State Trial Judge in *Loving v. Virginia*

Mildred Jeter Loving, a new bride of 18, awoke at 2:00 AM one July morning to find three law enforcement officers from Caroline County, Virginia, standing over the bed she shared with her husband. “What are you doing in bed with this lady?” demanded the flashlight-wielding Sheriff R. Garnett Brooks of Richard Loving. Because her husband was too startled to reply, Mildred replied that she was his wife. Meanwhile, Richard pointed to the marriage certificate from the...
District of Columbia that was hanging on the wall of their bedroom.\textsuperscript{489} “That’s no good here,” replied Sheriff Brooks.\textsuperscript{490} The Lovings were arrested, charged with unlawful cohabitation, and taken to the Bowling Green jail where they stayed for five days.\textsuperscript{491} Because Richard was white and Mildred was not (she was part-black and part-Cherokee), the couple was indicted by the grand jury in the October term of 1958 for violating Virginia’s prohibition against interracial marriage.\textsuperscript{492}

The Lovings waived their rights to trial by jury and pleaded guilty to the offenses.\textsuperscript{493} The trial judge, Leon M. Bazile, sentenced them to one year in jail, but suspended the sentences on the condition that they leave the state and not return together for twenty-five years.\textsuperscript{494} The Lovings paid their court fees of $72.58 and moved to Washington, D.C.\textsuperscript{495}

Mildred Delores Jeter and Richard Perry Loving grew up in the same rural community of Central Point, Virginia, and had known each other since childhood.\textsuperscript{496} In that area of Virginia, sexual relations between blacks and whites had produced a number of light-skinned people of color.\textsuperscript{497} Although blacks and whites attended different schools and churches, the two communities were close-knit and interdependent.\textsuperscript{498} Richard’s family, part-English and part-Irish, was one of the white families that did not assert the prerogatives of white supremacy.\textsuperscript{499} Richard’s father worked for Boyd Byrd, a wealthy black farmer, for twenty-three years.\textsuperscript{500} When Richard, at seventeen, began courting Mildred, at age eleven, their relationship attracted very little attention from the black or white communities.\textsuperscript{501}

Mildred was called “Bean” or “Stringbean” because of her slim figure.\textsuperscript{502} Richard, a gangly bricklayer, spent his spare time drag-racing a car that he co-owned with two black friends.\textsuperscript{503} Both shy but well-liked in

\begin{enumerate}
\item Pratt, supra note 1, at 236.
\item Id.
\item Id.; see also Margolick, supra note 486, at 3.
\item Pratt, supra note 1, at 235–36 (advising that the Lovings were charged with violating Virginia’s 1924 Racial Integrity Act).
\item Id.
\item Id.
\item Id. at 236–37.
\item Id. at 234.
\item Id.
\item Id. at 235.
\item Id.
\item Id.
\item Id.
\item Id.; Gearan, supra note 488, at 2 (noting that Richard would come to Mildred’s family’s farmhouse “to hear her seven brothers play hillbilly music.”).
\item Pratt, supra note 2, at 235.
\item Id.
\end{enumerate}
their communities, Mildred and Richard courted for seven years until they decided to get married.504 Mildred did not know of Virginia’s prohibition of interracial marriage, but Richard did.505 On June 2, 1958, Richard drove Mildred to Washington, D.C., to be married.506 They lived with her parents until that morning in July when, acting on a tip, the law enforcement officers entered the unlocked house, walked into their bedroom, and arrested them.507 For the next six months, Mildred and Richard lived separately with their parents.508

After sentencing, they lived in Washington, D.C. for five years.509 The couple was unhappy in those years, living in a cramped apartment with their three infants and Mildred’s married cousin.510 Because Mildred was “crying the blues all of the time,” missing her family and wanting her children to grow up in the country, Richard’s cousin suggested that she write to Robert Kennedy, the Attorney General of the United States.511 Kennedy, through the Department of Justice, referred her to the American Civil Liberties Union.512 Two young attorneys, Bernard S. Cohen and Philip J. Hirschkop, accepted the case on a pro bono basis.513

Cohen and Hirschkop filed a petition in the state court to vacate the judgment and set aside the sentence.514 Over a year later, Judge Bazile denied the motion.515 The case was heard by the United States Supreme Court in April of 1967. At oral argument, Cohen repeated to the Justices a message from Richard Loving: “Tell the Court I love my wife, and it is just unfair that I can’t live with her in Virginia.”516

In its decision, the Supreme Court rejected the arguments of the state that the statutes were equally applied to blacks and whites and that the framers of the Fourteenth Amendment “did not intend the

504. Id.
505. Id. at 236.
506. Id.
507. Id.
508. Margolick, supra note 486.
509. Pratt, supra note 1, at 237.
510. Id.
511. Id. at 237–38; Margolick, supra note 486.
512. Pratt, supra note 1, at 238.
513. Id. at 238, 242 (also recounting the price paid by Cohen and Hirschkop: cold shoulders from members of the bar, obscene phone calls, references to them as “the two Jew lawyers,” and sugar dumped into the gas tanks of their cars).
514. Loving v. Virginia, 388 U.S. 1, 3 (1967) (also noting the filing of a federal class action after the state court judge had not ruled on the motion).
515. Id.
516. Pratt, supra note 1, at 239.
Amendment to make unconstitutional state miscegenation laws.\textsuperscript{517} Finding that the statutes must be assessed on their own justification “as measures designed to maintain White Supremacy,” the court determined that restricting freedom to marry due to race violated “the central meaning of the Equal Protection Clause.”\textsuperscript{518} Because “[m]arriage is one of the ‘basic civil rights of man,’” the Virginia statutes also violated the guarantee of liberty of the Due Process Clause.\textsuperscript{519} After advising that “freedom of choice to marry may not be restricted by invidious racial discriminations,” the court concluded by stating, “Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”\textsuperscript{520}

After the decision, Richard and Mildred returned to Virginia, where Richard finally built the white cinderblock house he had envisioned for his family.\textsuperscript{521} Eight years later, the marriage that was validated by the Constitution came to a tragic end when the car that Richard was driving was broadsided by a drunk driver who had run a stop sign.\textsuperscript{522}

Nearly forty years have passed since the Supreme Court’s decision. As is evident by the number of interracial couples in the United States, social attitudes among many people have undergone “a major transformation.”\textsuperscript{523} However, racial attitudes among other groups of people also remain entrenched. Interviewed in 1992 on the twenty-fifth anniversary of the Supreme Court’s decision, Sheriff Brooks said:

I was acting according to the law at the time, and I still think it should be on the books. I don’t think a white person should marry a black person. I’m from the old school. The Lord made sparrows and robins, not to mix with one another.\textsuperscript{524}

Brooks added that he had rarely thought about the case over the years: “If they’d been outstanding people, I would have thought something about it. But with the caliber of those people, it didn’t matter. They were both low-class.”\textsuperscript{525}

\textsuperscript{517} Loving, 388 U.S. at 9.
\textsuperscript{518} Id. at 11–12.
\textsuperscript{519} Id. at 12 (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).
\textsuperscript{520} Id.
\textsuperscript{521} Pratt, supra note 1, at 240.
\textsuperscript{522} Id. at 241.
\textsuperscript{523} Id.; see also Margolick, supra note 486, at 3 (relaying that, in 1992, there were “a million interracial couples in the United States”).
\textsuperscript{524} Pratt, supra note 1, at 241–42.
\textsuperscript{525} Margolick, supra note 486, at 3 (also quoting Robert D. McIlawin, the Assistant State Attorney General who argued the case before the Supreme Court, who stated
Mildred, over 60 and hobbled by arthritis, has avoided publicity. She has continued to live in the cinderblock house built by her husband. Mildred admitted that she never read the decision of the court, but when asked about the case, she said: “I believe that’s why we were put here. That’s why we were married.”

A number of scholars and jurists have made the analogy between Loving v. Virginia and same-sex marriage. Indeed, Loving has been cited as the “moral force” affirming the right of gays and lesbians to equality and liberty in marriage. Just as Mildred and Richard Loving attacked the racial animus that underlay the prohibition against interracial marriage, Julie and Hillary Goodridge challenged the cultural animus underlying the restrictions against same-sex marriage.

...
B. The Story of Hillary and Julie Goodridge

'We won and we're going to be equal.' All of a sudden, all my anxiety about being treated as a second-class citizen, having to prove myself all the time, having to say we are a legitimate family at Annie's school—it all fell away.

—Julie Goodridge, on the announcement of the decision in Goodridge v. Dept. of Public Health

Julie Wendich and Hillary Smith met at a Harvard lecture in 1985. Some years prior to that time, when they were in their twenties, both Julie and Hillary had realized that they were lesbians. Julie asked Hillary out for a year and a half before Hillary finally relented. Over the next few years, the couple formed a committed partnership. One night while they were watching television, Hillary asked whether Julie had ever thought about having children. Julie said, “We can’t have kids. We’re lesbians.” However, after lesbian friends had a baby, Julie and Hillary decided to have a child.

As they bought a house and prepared to have a child, a number of legal obstacles became apparent. Julie and Hillary drew up living wills, took for their surname “Goodridge,” the maiden name of Hillary’s grandmother, and prepared a host of legal documents that spelled out their relationship. Although Julie and Hillary considered themselves married, it was not until Julie gave birth to Annie by emergency caesar-ean that the couple realized the differences that are forged by the legal bond of marriage.

---


534. Wolfson, supra note 532, at 1.

535. Id.

536. Id.

537. Id.

538. Id.; see also *Love Makes a Family*, supra note 117, at 18–19 (discussing the “fashion crisis” for “butch moms” and proposing that “the revelation of overalls was the biggest thing [that] contributed to lesbian motherhood”).

539. Emery, supra note 533, at 2.

540. Wolfson, supra note 532, at 1; Unitarian Universalist Service Comm., *Same-Sex Marriage Advocate Goodridge Interviewed by UUSC* (Nov. 18, 2003), at http://www.uusc.org/info/article111803.html [hereinafter UUSC] (noting the “thousands of dollars of paperwork” created by the Goodridges to “try to make up for . . . what one marriage license provides.”).

541. Emery, supra note 533.
During the birth, Annie inhaled some fluid and went into respiratory distress.\textsuperscript{542} Annie was quickly taken into the neonatal intensive care unit, followed by Hillary.\textsuperscript{543} After realizing that Julie, recovering from the surgery, did not know that Annie was recovering, Hillary went to the recovery unit and told the nurse that she was Julie's partner.\textsuperscript{544} The nurse said that only immediate family members were allowed to see patients.\textsuperscript{545} Hillary went back to the neonatal intensive care unit, where she told the nurse that she was Annie Goodridge's mother.\textsuperscript{546} "No you're not," said the nurse. "Her mother is downstairs in recovery. Who are you?"\textsuperscript{547} Hillary burst into tears and begged them to find the nurse who was in the delivery room.\textsuperscript{548} That nurse identified her, allowing Hillary to be with Annie. Later, Hillary decided to try to see Julie again. A different nurse was on duty. Hillary told the nurse that she was Julie's sister. The nurse said that she could go "right in."\textsuperscript{549}

Years after "crying and lying" her way to see Annie and Julie in the hospital, Hillary said, "Sadly, it's during moments of crisis—death, disability, economic hard times—that we see what a difference it is not to have marriage."\textsuperscript{550} The "thousands of dollars of paperwork" that the Goodridges created did not begin to form the legal relationship that was constituted by one marriage license.\textsuperscript{551} According to Hillary, "Every gay and lesbian couple I know has a story like that."\textsuperscript{552}

Annie had no lasting effects from the birth trauma and grew into an active and friendly child ("completely adorable," according to her moms) who takes ballet and swims on the "wee gators" team at the YMCA.\textsuperscript{553} When Annie was five, she was listening to "All You Need is

\begin{enumerate}
\item \textsuperscript{542} Wolfson, \textit{supra} note 532, at 2.
\item \textsuperscript{543} \textit{Id.}
\item \textsuperscript{544} \textit{Id.}
\item \textsuperscript{545} \textit{Id.}
\item \textsuperscript{546} \textit{Id.}
\item \textsuperscript{547} \textit{Id.}
\item \textsuperscript{548} \textit{Id.}
\item \textsuperscript{549} \textit{Id.}
\item \textsuperscript{550} UUSC, \textit{supra} note 540, at 2.
\item \textsuperscript{551} \textit{Id.; see also} Goodridge, 798 N.E.2d at 955–56 (advising that the "benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death" and recounting some of the statutory benefits given by the state legislature to married couples); John Cloud, \textit{1,138 Reasons Marriage is Cool}, \textit{TIME}, March 8, 2004, at 32 (discussing the 1,138 federal laws that apply to Americans who are married).
\item \textsuperscript{552} Wolfson, \textit{supra} note 532, at 2.
\item \textsuperscript{553} Gay and Lesbian Advocates and Defenders, \textit{Julie and Hillary Goodridge}, at http://www.glad.org/marriage/Julie&Hillary.shtml (last visited May 23, 2004) [hereinafter GLAD].
\end{enumerate}
Love” by the Beatles. Hillary, listening to the song with Annie, asked Annie to name people who love each other. Annie listed a lot of people, all of whom were opposite-sex married couples. Because Annie did not name Julie and Hillary, Hillary asked, “What about Ma and Mummy?” “You don’t love each other,” Annie said. “If you loved each other, you’d be married.” That exchange sparked Julie and Hillary to join the legal battle that sought affirmation of marriage for same-sex couples in the Commonwealth of Massachusetts.

Six months after the historic ruling by the Massachusetts Supreme Court, Julie and Hillary were married on May 17, 2004, at a Unitarian Universalist ceremony attended by friends, family, and representatives of media from around the world. Led by a grinning Annie, who served as ring bearer and flower girl, Julie and Hillary entered the room to the familiar wedding march, but with the following words sung by the guests:

Here come the brides
So gay with pride
Isn’t it wondrous
They somehow survived. . . .
Long may you be
Legally free
Finally hitched by a 4-3 decree.

Reflecting on receiving their marriage license and exchanging vows, Julie said, “Next to the birth of our daughter Annie, this is the happiest day of our lives.” To those who oppose same-sex marriage, Hillary advised,

554. Emery, supra note 533, at 2.
555. Wolfson, supra note 532, at 2.
557. Id. at 1.
558. Id.
559. Emery, supra note 533, at 2. As of April 11, 2001, the seven couples who were plaintiffs in Goodridge had been in committed relationships from four to thirty years. Goodridge, 798 N.E.2d at 949 (stating that four of the couples have children).
562. Rush to Altar, supra note 5, at 1.
563. Wedding Day, supra note 6, at 2.
"Come on over to our house for dinner and find out how loving and normal and boring we are."\(^{564}\)

In response to the ruling of the Massachusetts Supreme Court, the Massachusetts legislature adopted a proposed amendment to the state constitution that, if ratified by the voters in 2006, would ban same-sex marriages in the state.\(^{565}\) Contemplating the ongoing struggle for legal change, Hillary quoted Frederick Douglass, who wrote in 1857:

> If there is no struggle there is no progress. Those who profess to favor freedom and yet depreciate agitation ... want crops without plowing up the ground, they want rain without thunder and lightening. They want the ocean without the awful roar of its many waters. ... Power concedes nothing without a demand. It never did and it never will.\(^{566}\)

Another celebrant in Massachusetts, when asked about the possibility that her marriage might someday be overturned, responded that it was not something to think about on their wedding day because "today is a day for love."\(^{567}\)

**CONCLUSION**

[W]e shan't fall off the edge of the world.\(^{568}\)

The present-day debate around same-sex marriage is ferocious. The legal contest is fueled by an incendiary political and religious struggle. In America, that the church is separated from the state does not mean that faith is separated from politics.\(^{569}\) While same-sex couples may be crossing

---

564. Id.


568. "And it would be, I think, a large pity if, now that the distances we have established and the elsewheres we have located are beginning to bite, to change our sense of sense and our perception of perception, we should turn back to the old songs and the older stories in the hope that somehow only the superficial need alter and that we shan't fall off the edge of the world." *Clifford Geertz, Available Light: Anthropological Reflections on Philosophical Topics* 65 (2000).

the threshold into legal propriety, the American public is more slowly embracing social and religious change.\textsuperscript{570} The contestations along the passage from legal sanction to social acceptance promise to be convulsive.\textsuperscript{571}

To be “just” in marriage mandates expanding rights and benefits, including those that attend marriage, to same-sex couples who are eligible for marital status. Principles of equality and liberty are unequivocal.\textsuperscript{572} As Alexis de Tocqueville noted in 1840, it would be untenable to think that people in America could remain “forever unequal upon a single point, yet equal on all others.”\textsuperscript{573} Our history is one of extending rights and protections to people who have been ignored or excluded.\textsuperscript{574}

The claims of “traditionalists” to history, religion, and politics are unavailing. The categories of heterosexuality and homosexuality are not timeless, universal biological facts.\textsuperscript{575} Marriage is not a frozen historic form—a same-race, opposite-sex couple atop a frosty cake of state and federal benefits. The elasticity of marriage, as other social institutions, is manifest in its many transformations. Although alarms were sounded in the nineteenth and twentieth centuries at extending rights to married women, permitting interracial couples to marry, and allowing no-fault

\textsuperscript{570} Michael J. Klarman, Brown and Lawrence, University of Virginia: University of Virginia Public Law and Legal Theory Working Paper Series. Working Paper 4, at http://law.bepress.com/uvalwps/uva_publiclaw/art4/ [hereinafter Klarman] (arguing that Goodridge, as Brown v. Board of Education, outpaced public opinion on issues of social reform and that the cases produced “backlashes by commanding that social reform take place in a different order than might otherwise have occurred”).

\textsuperscript{571} Professors’ Brief, supra note 278, 298, at 26 (observing that the “growing openness of gay people and the lessening of discrimination . . . have not gone unchallenged, . . . Their growing visibility and acceptance have prompted a sharp reaction by some groups, just as the gains of the black civil rights movement did in the 1950s and 1960s.”).

\textsuperscript{572} Cf. LEILA AHMED, WOMEN AND GENDER IN ISLAM 245 (1992) (noting that women in western societies have been able to draw on the unequivocal polirical language of democracy that was “developed by white male middle classes to safeguard their interests” and that the language was not intended to be emancipatory for others).

\textsuperscript{573} ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1840), reprinted in STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 260 (4th ed. 2000) (“It is impossible to believe that equality will not eventually find its way into the political world, as it does everywhere else. To conceive of men remaining forever unequal upon a single point, yet equal on all others, is impossible; they must come in the end to be equal upon all.”).

\textsuperscript{574} “The history of constitutional law ‘is the history of the extension of constitutional rights and protections to people once ignored or excluded.’” Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 944, 966 (quoting United States v. Virginia, 518 U.S. 515, 557 (1996)).

\textsuperscript{575} See Katz, supra note 36, at 203, n.19.
divorce, the institution of marriage has persisted.\textsuperscript{576} Same-sex couples who pursue marital status do not seek to demean or destroy marriage, but to affirm its significance to themselves and other couples.\textsuperscript{577}

Religion does not support the invective aimed at same-sex couples. In \textit{The Book of Ruth}, the women of Bethlehem recognized that God blessed two women who, without some blurring of convention, would be without a family.\textsuperscript{578} In the Christian Scriptures, Paul warmly greeted the twenty-nine members of the house churches in Rome that included women leaders, egalitarian couples, and same-sex households.\textsuperscript{579} In the teachings of Jesus, disciples were called on to leave their patriarchal families and to join his discipleship of equals.\textsuperscript{580}

Political arguments and muscle-flexing that invoke sexual purity cannot withstand even a cursory glance at the sexual engagement of political leaders throughout modernity. Politicians have eagerly donned mantles of virtue that, upon inspection, are rent with holes.\textsuperscript{581} In the debate on same-sex marriage, the rhetoric of traditional marriage is cloaked with “holey” sanctimony. Moreover, the ultimate authority for politics—opinion polls—demonstrates the turning of the tide of popular opinion. Just as tolerance for (if not acceptance of) homosexuality has steadily increased over the last twenty years, support for same-sex marriage continues to meet with greater public approval.\textsuperscript{582}

Justice in marriage mandates recognizing the harm that is being caused by denying rights and benefits to people due to the gender of their partners. Homophobia hurts.\textsuperscript{583} It imposes “deep and scarring”.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{576} Goodridge, 798 N.E.2d at 967.
\item \textsuperscript{577} The plaintiffs in \textit{Goodridge} did not attack “the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law.” \textit{Id.} at 965.
\item \textsuperscript{578} \textit{Ruth} 4:14 (King James).
\item \textsuperscript{579} Hanks, \textit{supra} note 334, at 141–43.
\item \textsuperscript{580} \textit{Memory of Her}, \textit{supra} note 335, at 135, 147.
\item \textsuperscript{581} DeCosse, \textit{supra} note 447, at 12.
\item \textsuperscript{582} “The demographics of public opinion on issues of sexual orientation virtually ensures that one day in the not-too-distant future a substantial majority of Americans will support gay marriage.” Klarman, \textit{supra} note 570, at 60; see also Jeff Rosen, \textit{Immodest Proposal: Massachusetts Gets it Wrong on Gay Marriage}, \textit{New Republic}, Dec. 22, 2003 (reporting that “two-thirds of Americans now say they believe that same-sex marriage will be legal within the next hundred years”); David Paul Kuhn, \textit{GOP Grapples With Gay Unions}, May 18, 2004, at http://www.cbsnews.com/stories/2004/05/17/politics/main618003.shtml (discussing Gallop poll that showed a rise in support for same-sex marriage from 31 percent in December 2003 to 42 percent in May 2004).
\item \textsuperscript{583} \textit{See Love Makes a Family}, \textit{supra} note 117, at ix (relaying the story of a mother who was declared “unfit” because she is a lesbian); Robson, \textit{Assimilation}, \textit{supra} note 47, at 820 (advising “not to underestimate the pain of being excluded”).
\end{itemize}
\end{footnotesize}
hardships on a "minority" based on irrational prejudice. 584 Most troubling is the argument that the interests of children are safeguarded by denying marital status to same-sex couples. 585 A number of studies have shown that the sexuality of parents is irrelevant to child-rearing. 586 Denying gay and lesbian couples the benefits of marriage directly and profoundly harms their children. Estimates of gay and lesbian couples range from two to eight million, while estimates of children of gay and lesbian couples range from eight to ten million. 587 Depriving nine million children of the innumerable advantages that flow from marriage is irrational and cruel. Not one child of an opposite-sex married couple is made better off by denying marital status to gays and lesbians, but millions of children are harmed. 588

Our inquiry also extends to the justice of marriage. 589 A number of criticisms have been directed toward marriage, as the "principal institution" that maintains patriarchy. 590 In marriage, patriarchal property systems have been perpetuated. 591 In marriage, women have assumed the role of the "servant gender" for patriarchy. 592 In marriage, women have been confined to the domestic sphere and defined in terms of biological

585. Id. at 962 (discussing the department's rationale for prohibiting same-sex marriage: that confining marriage to opposite-sex couples ensures that children are raised in the "optimal" setting).
586. APA Brief, supra note 24, at 20 (citing studies to support the proposition that, over the past twenty years, "research about children of gay parents has yielded the consistent conclusion that these children demonstrate no deficits in intellectual development, social adjustment, or psychological well-being as compared to children of heterosexual parents").
588. Cf. Goodridge, 798 N.E.2d at 963–64 (noting that excluding same-sex couples from marriage does not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the advantages that flow from marital status).
589. Millspaugh, supra note 556, at 7 (reflecting on political and religious values in the same-sex marriage debate).
590. Polikoff, Why Read Fineman, supra note 41, at 170 (noting the criticism by second-wave feminists that "[marriage was the principal institution that maintained the patriarchy.").
591. Goss, supra note 47, at 7 (critiquing "the last stronghold of Christian patriarchal culture—that of procreative privilege"—as linking "marriage to patriarchal property arrangements" in which women "remained the sexual property of their husbands.").
592. SCHÜSSLER FIORENZA, WISDOM, supra note 185, at 121–22. To more accurately reflect the nature of oppression, Schüssler Fiorenza reconceived "patriarchy" as "kyriarchy," characterized by the rule of the elite freeborn male to whom everyone else was subordinated. Id. at 108, 118. As a complex pyramidal system of domination that works through economic exploitation and lived forms of subordination, kyriarchy "needs" for its functioning a servant class, a servant race, a servant gender, and a servant religion. Id. at 121–22.
sexual property.\textsuperscript{593} While "justice" has been the norm of the public sphere, "care" has prevailed in the private sphere.\textsuperscript{594} Due to the absence of the guarantee of justice in the private sphere, a great deal of violence toward women and children has been permitted to run unchecked.\textsuperscript{595}

In the legal system of marriage, the spousal dyad is given privileged status.\textsuperscript{596} Among the consequences of a marital dyadic approach to relationships is isolation and loss of community.\textsuperscript{597} Furthermore, from a policy perspective, it is not the marital unit that needs support, but family units that care for people who are young and old—the "inevitable" dependencies that fall through the cracks of the legal blocks that sustain marriage.\textsuperscript{598} The impetus of gays and lesbians to "mimic heterosexual relational structures" should be closely inspected.\textsuperscript{599} While legitimizing same-sex marriage would broaden those eligible to partake of the privileged

\textsuperscript{593} Lloyd, \textit{supra} note 42, at 77–79 (discussing Enlightenment thinkers such as Rousseau, who viewed the "disorder of women" and their closeness to Nature as justifying their containment in the domestic sphere and their exclusion from public citizenship); but see Patricia Hill Collins, \textit{Black Feminist Thought} 47 (1991) (posing that, because women of color have "never fit" the model of the dichotomous split between work (public) and family (private), a "more fruitful approach" is that of "challenging the very constructs of work and family themselves.").

\textsuperscript{594} E.g., Carol Gilligan, \textit{In a Different Voice: Women's Conceptions of Self and of Morality}, 47 Harv. Educ. Rev. 481, 517 (1977) (conceptualizing an ethic of care associated with women and articulating moral values of contextuality, relatedness, and responsibility); see also Barbara Hilkert Andolsen, \textit{Agape in Feminist Ethics}, 9 J. Religious Ethics 69 (1981) (critiquing the dominant ethical position in theology that separated the personal and public sphere and reserved the norm of agape—defined as "other-regard often epitomized by self-sacrifice"—for women in the private realm while preserving the norm of justice for men in the public realm).

\textsuperscript{595} As an example of the application of the "discourse of affective privacy" that prevailed in the nineteenth century, the Supreme Court of North Carolina affirmed the acquittal of a husband for assault and battery on his wife, asserting that the court would "not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence." State v. Rhodes, 61 N.C. 453, 159 (1868); see also Reva B. Siegel, \textit{The Rule of Love: Wife Beating as Prerogative and Privacy}, 105 Yale L.J. 2117, 2119 (1996) (discussing discourse of affective privacy that was engaged by nineteenth century jurists).

\textsuperscript{596} Martha Fineman, \textit{The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies} 229–30 (1995) [hereinafter Fineman, \textit{Neutered Mother}] (asserting that marital relationships should not be given institutionalized, privileged status in the law).

\textsuperscript{597} Rudy, \textit{supra} note 46, at 210 (arguing that the "hegemony of the nuclear family renders those living outside this structure 'alone'; even within the families, loneliness abounds.").

\textsuperscript{598} Fineman, \textit{Neutered Mother}, \textit{supra} note 596, at 231–32; see also Fineman, \textit{Sacred Institution}, \textit{supra} note 276, at 402; Fineman, \textit{Masking}, \textit{supra} note 42, at 2200.

\textsuperscript{599} Rudy, \textit{supra} note 46, at 201.
status of marriage, it would also perpetuate a system of “compulsory matrimony,” with attendant obscurantism and injustices.\footnote{Robson, *Assimilation*, supra note 47, at 781 (characterizing marriage as the “cover” that “obscures the realities of deeper inequalities,” such as the lack of universal health care, by diverting attention to narrower injustices, such as disallowing benefits to same-sex partners); Fineman, *Masking*, supra note 42, at 2210–11 (arguing that family rhetoric operates to obscure the economic deprivation of women and the needs of caretakers of children, people who are aging, and people with disabilities).}

To consider the justice of marriage is also to invite questions that are much more pressing than the form of legal relationships. Our preoccupation with the structure of family has kept us from thinking about the quality of our relationships, our interconnectedness with community, and what it means to be united in sex—to “receive the soul of another.”\footnote{Rudy, supra note 46, at 210–14.} These terrifying questions ensure the superficial circularity of the debate.\footnote{“A comment is in order with respect to the insistence of some that marriage is, as a matter of definition, the legal union of a man and a woman. To define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question we are asked to decide. This case calls for a higher level of legal analysis.” Goodridge Dep’t of Pub. Health, 798 N.E.2d 944, 972–73 (Greany, J., concurring) (proposing that the court must “confront ingrained assumptions with respect to historically accepted roles of men and women within the institution of marriage” and reexamine the assumptions in light of the “unequivocal language” of the state constitution).}

Traditionalists are correct on one point. Morality is deeply implicated in same-sex marriages. The questions, however, are not those of form, but of the substance of morality, defined in terms of justice.\footnote{Millspaugh, supra note 556, at 7 (reflecting on political and religious values, including moving beyond double-standards and “toward a sexual ethic based on relationships, on caring, and on justice.”).}

Will courts, legislative bodies, and voters extend the scope of equality to embrace same-sex marriages?\footnote{See, e.g., Dean E. Murphy, *San Francisco Married 4,037 Same-Sex Pairs from 46 States*, N.Y. Times, Mar. 18, 2004, at A26 (quoting a lawyer for the Lambda Legal Defense and Education Fund that the marriages in San Francisco were “a snapshot that there is an enormous desire for equal treatment”); but see Fineman, *Masking*, supra note 42, at 2198–2202 (charting the transformation of the family from its common law form to its “egalitarian” incarnation and advising that equality is a “conceptual trap” that harms women in terms of labor, economics, and custody determinations).}

Will liberty be defined to include the freedom to marry the person of one’s choice, regardless of gender?\footnote{Perez v. Sharp, 198 P.2d 17, 21 (Cal. 1948) (stating that “the essence of the right to marry is freedom to join in marriage with the person of one’s choice”); see also Zablocki v. Redhail, 434 U.S. 374 (1978) (holding that a statute that prevented mar-}
With the expansion of the definition of marriage, will gay and lesbian couples simply replicate patriarchal families and the oppressive and disconnected ways of living that have attended such families? Or will gay and lesbian couples offer “unity and procreation” to bring life to the larger communities in which they are embedded? The “judgment of the ages” will be based on our answers to these questions of justice. 

---

607. Id. at 212.