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## Irrational Exuberance for Babies: The Taste for Heterosexuality and its Conspicuous Reproduction

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# IRRATIONAL EXUBERANCE ABOUT BABIES: THE TASTE FOR HETEROSEXUALITY AND ITS CONSPICUOUS REPRODUCTION

JOSÉ GABILONDO\*

**Abstract:** This article targets a flying buttress of normative heterosexuality: its physical reproduction via procreation and its symbolic propagation through parents' pre-natal preferences for heterosexuality in future children. While the parental "taste for heterosexuality" is often asserted for the sake of future children themselves, this justification overlooks the role of parental self-interest, including anticipated social gains to parents from heterosexuality in children. Hence the taste sets the stage both for sexual orientation-based abuse of future children and the devaluation of sexual minority adults. Courts too have a taste for heterosexuality, shown here in two state court cases denying gays and lesbians the right to marry. These courts hold that homosexuals reproduce deliberately while heterosexuals may do so recklessly, leading the courts to conclude that only heterosexuals require marriage to ensure stable homes for children. These decisions "subsidize" normative heterosexuality and its reproduction by conferring symbolic capital on both. Apart from the burdens it places on sexual minorities, this symbolic privilege comes at a cost to heterosexuals and children alike. By privileging the reproduction of normative heterosexuality, this symbolic economy discourages heterosexuals from fully appreciating the long-term consequences of reproduction. This economy also gives them a pretext for avoiding lifestyle competition with homosexual parents, to the detriment of children who might benefit from the improved parenting technique that such competition would encourage.

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\* © 2008, José Gabilondo, Associate Professor, Rafael Díaz-Balart Hall, College of Law, Florida International University, Miami, Florida, Jose.Gabilondo@fiu.edu. B.A., Harvard College, 1987, J.D., University of California, Berkeley, 1991. Feedback I received at the University of Jvaskala's (Helsinki) conference on the philosophy of gender and at Georgetown Law Center's Socioeconomics Conference improved these arguments, as did readers who helped with mortification of the text: ¡Schlegel!, Tom Gallanis, Ruthann Robson, Penny Pether, Larry Catá Backer, Nan Hunter, Bill Turner, Heather Hughes, Hannibal Travis, Tim Canova, Adele Morrison, Natalia Gerodetti, Joe Dayball, and, in particular, Diane Klein, John Gordon, Jorge Esquirol, and Bob Chang. I dedicate this article to the integrity of Chief Judge Kaye's dissent in *Hernandez v. Robles*.

## TABLE OF CONTENTS

TABLE OF CONTENTS .....	2
INTRODUCTION .....	2
I. HETEROSEXUALITY OFFSPRING PREFERENCE .....	11
A. <i>The Parental Taste for Heterosexuality and Its Reproduction</i> .....	11
B. <i>A Judicial Analogue: Morrison and Hernandez</i> .....	21
1. Reproduction in the Culture Wars over Marriage.....	21
2. Judicial Alchemy: <i>Morrison and Hernandez</i> .....	26
3. <i>Copula Copularum</i> : Understanding Judicial Incoherence Through Paranoia.....	35
II. PERFECTING OBSERVER STATUS IN HETEROSEXUAL REPRODUCTION .....	42
A. <i>Bourdieu: the Individual as Cell of Social Reproduction</i> .....	42
B. <i>Heterosexual Time-Inconsistency in the Habitus</i> .....	46
C. <i>Children as Capital</i> .....	51
III. IMPLICATIONS .....	61
A. <i>Lifestyle Competition: Managing Eugenic Disappointment in the         Family</i> .....	62
B. <i>The Wages of Coitus: Heterosexual Counterdemand</i> .....	65
CONCLUSION .....	72

## INTRODUCTION

People have babies for many reasons and sometimes for no apparent reason at all. We tend to celebrate having babies with equal zeal, though, regardless of whether the baby is intended or accidental. Indeed, we celebrate even the abstract idea of having babies. Economist Gary Becker introduced an economic model to explain why heterosexuals, in particular, have babies. He suggests that babies, like other commodities, give their parents “income” in the broad sense in which economists use that term.<sup>1</sup> He asserts that, just as with other commodities, the number and type of children one has are functions of the would-be parent’s “tastes.”<sup>2</sup>

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<sup>1</sup> Gary S. Becker, *An Economic Analysis of Fertility*, in NAT’L BUREAU OF ECON. RESEARCH, DEMOGRAPHIC AND ECONOMIC CHANGE IN DEVELOPED COUNTRIES 209, 209–40 (1960) [hereinafter Becker, *Fertility*]; GARY S. BECKER, A TREATISE ON THE FAMILY 138 (1991) [hereinafter BECKER, FAMILY]; see also Bernard M. S. Van Praag & Marcel F. Warnaar, *The Costs of Children and the Use of Demographic Variables in Consumer Demand*, in 1A HANDBOOK OF POPULATION AND FAMILY ECONOMICS 241, 245–50 (Mark Rosenzweig & Oded Stark eds., 1997) (summarizing alternative methods of estimating the costs of children).

<sup>2</sup> Becker, *Fertility*, *supra* note 1, at 211. Becker notes that ultimately it is personal (and class) taste that determines the demand for children: “The utility from children is com-

Putting to one side the morality of thinking about human life in the instrumental terms which Becker attributes to parents, Becker's view that reproduction is a lifestyle choice helps illustrate how market dynamics bear on reproduction and, in particular, on parental preferences about outcomes in children.<sup>3</sup> One place to see such reproductive tastes at work is in the over-the-counter markets for babies that legal and business scholars have noted.<sup>4</sup> These "baby markets" reflect a wide range of parental tastes, including the race discount which Michele Goodwin has noted in the adoption market.<sup>5</sup>

Might there also be a taste for heterosexuality in offspring, like the racialized taste addressed by Goodwin? Indeed. It is my contention that some heterosexual would-be parents apply a "gay discount" or a "straight premium" when thinking about future children and that the prospect of capturing social approval through the anticipated heterosexuality of children encourages reproduction. In other words,

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pared with that from other goods via . . . a set of indifference curves. The shape of the indifference curves is determined by the relative preference for children, or, in other words, by 'tastes.'" *Id.*

<sup>3</sup> For example, Becker suggests that "[t]he net cost of children is reduced if they contribute to family income by performing household chores, working in the family business, or working in the marketplace." BECKER, *FAMILY*, *supra* note 1, at 138–39. Then an increase in the "earning" potential of children would increase the demand for children. *See id.*

<sup>4</sup> *See, e.g.,* DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION*, at xi (2006) (describing the market structure for realizing would-be parents' prenatal preferences for offspring); Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 7, 35 (2003) (arguing that market operations in parenthood may contribute to self-realization by sexual minorities, and noting that "[a]cademic hand wringing about whether selling parenthood would be a good thing implies that we do not already buy and sell it. But the practice is alive and well in various guises, direct and indirect."); Michele Goodwin, *The Free-Market Approach to Adoption: The Value of a Baby*, 26 B.C. THIRD WORLD L.J. 61, 62 (2006) (documenting the existence of market valuation—and a race discount for children—in the adoption market).

<sup>5</sup> *See* Goodwin, *supra* note 4, at 66–69. Goodwin observes that:

[D]irectly and indirectly, market forces or economic considerations influence adoptions . . . . Conventional wisdom and early legislation held the best interest of children at the center of all adoptions . . . . Contemporary adoption services, however, resemble free markets where aesthetic profiles of race, hair texture, eye color and other market variables determine the welfare of children or, at least, their likelihood of placement.

*Id.* at 62. Specifically, Goodwin points out that black infants may be adopted for only \$4000 while the costs of adopting a similar white infant can exceed \$50,000. *Id.* at 67; *see also* Ruthann Robson, *Our Children: Kids of Queer Parents & Kids Who Are Queer: Looking at Sexual Minority Rights from a Different Perspective*, 64 ALB. L. REV. 915, 932–36 (2001) (discussing parental efforts to impose heterosexuality upon their children).

for some, the demand for children involves a demand for heterosexuality and its symbolic pay off of social approval. There is nothing natural about this straight premium; its value gets soft-wired through cultural conditioning as reinforced by legal and economic rewards. This article supports these claims and examines their implications.<sup>6</sup>

Although the trend in baby markets is towards accommodating would-be parents' commodity preferences about children, pre-implantation genetic determination of sexual orientation has yet to develop, and data is not yet available about how sexual minority children fare in adoption markets.<sup>7</sup> Therefore one must look elsewhere for information about any prenatal preferences for heterosexuality. One way to observe a straight premium is to see how much people would "pay" for the trait of heterosexuality in their kids in what is called a "when-, if-, and as-issued market"—one in which buyers and sellers price a forthcoming asset.<sup>8</sup> I informally simulate such a pricing environment in a game that I made up for use in our school's "Women and the Law" course. The game simulates an auction in which I am the auctioneer and the students are "purchasers" who must choose between alternative trade-offs in their future children. The game encourages bidders to make their

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<sup>6</sup> Because differences in the reproductive economies and legal standing between homosexuals and heterosexuals exist, substantive consideration of homosexual reproduction requires a separate analysis, beyond the scope of this article. Heterosexuals and homosexuals face different reproductive economies because heterosexuals may choose between coital or other means of reproduction and because homosexuals face legal hurdles as well. GARY J. GATES, ET AL., *ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES* 3 (Mar. 2007), [http://www.urban.org/UploadedPDF/411437\\_Adoption\\_Foster\\_Care.pdf](http://www.urban.org/UploadedPDF/411437_Adoption_Foster_Care.pdf) (summarizing state law restrictions on adoption and fostering by gays, lesbians, and bisexuals). For example, legal obstacles to reproduction—including obstacles such as the Florida statute providing that "[n]o person eligible to adopt under this statute may adopt if that person is a homosexual"—can place substantial barriers in the way of homosexual would-be parents. See FLA. STAT. ANN. § 63.042(3) (2005).

<sup>7</sup> See SPAR, *supra* note 4, at 99–100, 118–27. Spar notes the initial resistance to facing up to parents' commodity preferences about their children:

As people—as parents—we don't like to think of children as economic objects. They are products, we insist, of love, not money; of an intimate creation that exists far beyond the reach of any market impulse. And yet, over the past thirty years, advances in reproductive medicine have indeed created a market for babies, a market in which parents choose traits, clinics woo clients, and specialized providers earn millions of dollars a year.

*Id.* at xi.

<sup>8</sup> For example, in the context of the U.S. government securities market, the "when issued" market "occurs during the period between the time a new Treasury issue is announced and the time it is actually issued." H.R. Rep. No. 102-722, pt. 1, at 12 (1992). What a government security trades for in the "when issued" market suggests what its price will be when it is actually issued.

preferences explicit and precisely quantified. To test for the gay discount, I use heterosexuality in offspring as a unit of account to measure competing trade-offs in offspring.

Round one: I announce what is going to be priced—“Would you rather have a gay baby or a straight one missing a \_\_\_\_\_?” The bidding starts with the extremities, which are divisible and easy to compare. I ask whether the players would—all else being equal—prefer a straight baby missing a small toe over a gay one with ten toes. Eventually, a player will say: “Well, who needs *two* little toes?” Then I make heterosexuality more “expensive” by removing enough of the straight baby’s toes until the players prefer the gay one. I next look for the price points against what are commonly perceived to be other reproductive trade-offs, for example, sterility, ugliness, cleft-lip, and blindness or deafness (in one eye or ear, first, and then in both).

It was the pattern of price points that caught my attention. An opposable thumb seemed to be a price point; a mere pinkie, like a small toe, was not. So it seemed that some people had a “taste” for straight children and that the taste was elastic, in that it would yield if the price were right, for example, a thumb. Don’t take my word for any of this. The auction makes a good party game, so play it in the company of friends.

People may distance themselves from responsibility for the taste by saying: “It’s for the child’s sake, not my own.” Given what players might be willing to inflict on future children for *their* sake, though, the auction left me wondering about the meaning of this preference: could it lend legitimacy to devaluing existing homosexuals? And does the taste suggest that the prospect of social approval plays an important role in one’s demand for children? Despite the tentativeness of empirical data on these claims, my answer to both questions is “yes.” I wrote this article to expose these claims to scholarly contestation or affirmation. Granted, we know little about the meaning of pregnancy to individuals, so appreciating this nuance may be out of the question until our general knowledge about pregnancy grows.<sup>9</sup> For example, many people seem not to appreciate the actual costs which are associ-

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<sup>9</sup> It is even difficult to measure females’ intentions about reproduction—intentions that are themselves highly variable. See, e.g., John Santelli et al., *The Measurement and Meaning of Unintended Pregnancy*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 94 (2003) (noting problems such as the limited usefulness of retrospective measures of intent to reproduce, the need to adjust research approaches used for aggregate data to the individual level, and the importance of taking into account the preferences of the male partner).

ated with having a baby.<sup>10</sup> So, as with other pricing anomalies, I am less “bullish” about reproduction as an abstract concept, as suggested by the title’s paraphrase of former Federal Reserve Chairman Alan Greenspan’s warning about “irrational exuberance” (leading to over-investment) in a rising stock market.<sup>11</sup>

The taste shows up in law too, including two recent state court decisions which this article examines.<sup>12</sup> These cases exclude homosexuals from marriage because of that institution’s supposed special role in helping heterosexuals mitigate the unintended effects of their coitus.<sup>13</sup> In *Morrison v. Sadler*, the Indiana Court of Appeals claimed that heterosexuals needed marriage to procreate “responsibly” and to avoid “child abuse, educational failure, and poverty.”<sup>14</sup> In *Hernandez v. Robles*, New York’s Court of Appeals followed a similar rationale.<sup>15</sup> In effect, the court proposed that the New York legislature could bribe

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<sup>10</sup> As an example, you may have heard jokes about the “\$250,000 baby” but the costs of a baby vary significantly by class, as reflected in the U. S. Department of Agriculture’s annual report on expenditures by families on children. CTR. FOR NUTRITION POL’Y PROMOTION, U.S. DEPT. AGRIC., EXPENDITURES ON CHILDREN BY FAMILIES, 2005, at 13 (2005), available at <http://www.cnpp.usda.gov/Publications/CRC/crc2005.pdf>. The study divides children born in 2005 into three income groups and estimates annual expenses from birth through age seventeen. Not adjusted for the time-value of money and rounding to thousands, the estimates are: \$183,000 for the lowest income families, \$251,000 for middle income families, and \$366,000 for the highest income families. *Id.*

<sup>11</sup> See Alan Greenspan, Chairman of the Fed. Reserve Bank, Remarks at the Annual Dinner and Francis Boyer Lecture of The American Enterprise Institute for Public Policy Research, (Dec. 5, 1996) (“But how do we know when irrational exuberance has unduly escalated asset values, which then become subject to unexpected and prolonged contractions as they have in Japan over the past decade?”).

<sup>12</sup> See *infra* notes 75–183 and accompanying text.

<sup>13</sup> See *Morrison v. Sadler*, 821 N.E.2d 15, 25 n.13 (Ind. Ct. App. 2005); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006).

<sup>14</sup> 821 N.E.2d at 24 n.11, 25. The court understands “responsible procreation” to mean “the procreation and raising of children by persons who have contemplated, and are well-suited for, the required commitment and challenges of child-rearing. . . . Opposite-sex couples who can reproduce ‘naturally’ need not, and often do not, engage in such contemplation before having intercourse.” *Id.* at 25 n.13.

<sup>15</sup> 855 N.E.2d at 7. It is not a pretty picture: “The Legislature could also find that [heterosexual] relationships are all too often casual or temporary. . . . The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples. . . .” *Id.* (rejecting state equal protection and due process arguments that the exclusion of same-sex couples from marriage violates New York’s constitution); see also Yvonne A. Tamayo, “I Just Can’t Handle It”: *The Case of Hernandez v. Robles*, 28 WOMEN’S RTS. L. REP. 61, 64 (2007) (analyzing *Hernandez* as an exercise of heteronormative judicial dominance).



heterosexuals into getting their impulses under control for the sake of their children.<sup>16</sup> It is pure alchemy.

Courts invent many reasons for excluding homosexuals from marriage, but in these cases it is the carelessness of heterosexuals which founds their title to the institution. Statistics on unintended pregnancy and abortion vindicate the factual predicate for these holdings.<sup>17</sup> But what struck me about these cases—apart from their cheekiness—was how each took reckless coitus as a fact of heterosexual life, a fact which justified the special rights of marriage.<sup>18</sup> This is what humanities scholar Lee Edelman has wryly called heterosexuality's "Ponzi scheme of reproductive futurism," an analogy which suggests that parents may not fully appreciate what drives them to reproduce until it is too late to do anything about it.<sup>19</sup>

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<sup>16</sup> See *Hernandez*, 855 N.E.2d at 7.

<sup>17</sup> See GUTTMACHER INST., FACTS ON INDUCED ABORTION IN THE UNITED STATES (2006), [http://www.guttmacher.org/pubs/fb\\_induced\\_abortion.html](http://www.guttmacher.org/pubs/fb_induced_abortion.html). About half of each year's roughly six million pregnancies in the United States are unintended. AM. PREGNANCY ASS'N, STATISTICS, <http://www.americanpregnancy.org/main/statistics.html> (last visited Jan. 24, 2008) (citing six million figure); GUTTMACHER INST., *supra* (citing Lawrence B. Finer & Stanley K. Henshaw, *Disparities in Rates of Unintended Pregnancy in the United States, 1994 and 2001*, 38 PERSP. ON SEXUAL & REPRODUCTIVE HEALTH 90–96 (2006)). According to some estimates, as many as forty percent of these unintended pregnancies are terminated by abortion. GUTTMACHER INST., *supra*. For 2003, the Centers for Disease Control recorded over eight hundred thousand legal abortions which had been reported voluntarily by health authorities. LILO T. STRAUSS ET AL., U.S. CTRS. FOR DISEASE CONTROL, ABORTION SURVEILLANCE—UNITED STATES, 2003 (2006), <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5511a1.htm>. The actual number is no doubt higher given incentives not to report and the availability of illegal abortions. See NAT'L RIGHT TO LIFE COMM., OVER 40 MILLION ABORTIONS IN U.S. SINCE 1973, <http://www.nrlc.org/abortion/aboramt.html> (last visited Jan. 24, 2008). The actual figure may be closer to the 1,328,000 used as the standing annual estimate by the National Right to Life Committee. See *id.* For 2004, the number of live births was about four million, as measured by birth certificates issued. U.S. CTRS. FOR DISEASE CONTROL, *Births: Final Data for 2004*, 55 NAT'L VITAL STAT. REP. 1, 2 (2006). Research suggests that at least one-third of all live births result from unintended pregnancies. See U.S. Ctrs. for Disease Control, Pregnancy Risk Assessment Monitoring System (PRAMS): PRAMS and Unintended Pregnancy, <http://www.cdc.gov/PRAMS/UP.htm> (last visited Jan. 24, 2008).

<sup>18</sup> See *Morrison*, 821 N.E.2d at 30–31; *Hernandez*, 855 N.E.2d at 7.

<sup>19</sup> LEE EDELMAN, NO FUTURE: QUEER THEORY AND THE DEATH DRIVE 4 (2004). Lee Edelman takes the credit for introducing this useful phrase in his polemic against reproduction. *Id.* ("[W]e might do well to attempt what is surely impossible—to withdraw our allegiance, however compulsory, from a reality based on the Ponzi scheme of reproductive futurism . . ."). A Ponzi scheme is a venture which funds payments to current investors using the proceeds of new investors rather than from operating profits of the venture. JERRY W. MARKHAM, A FINANCIAL HISTORY OF MODERN U.S. CORPORATE SCANDALS FROM ENRON TO REFORM 23–25 (2006) (describing Charles Ponzi's original fraud using postal coupons). The arrangement creates an illusion of profit from what is really just recycling of new capital. *Id.*

There is no accounting for taste or its reproduction, granted, but let me try nonetheless. Katherine Bartlett has noted about feminist methods that a question repeated *becomes* a method.<sup>20</sup> That is the hope of this article, that it be an example of “situated theory”—written as a system outsider, despite owing my own existence to heterosexual coitus, and demonstrating that the taste for heterosexuality reflects an inappropriate over-valuation of heterosexuality and its reproduction.<sup>21</sup> I may not persuade you of these claims; it is enough that you take them seriously.

Part I argues that the taste exists in the minds of would-be parents and in courts. First I relate the prenatal gay discount to existing critical and feminist scholarship about “heterosexual reproductivism.” It is an *-ism* not because it includes “existence-inducing acts”<sup>22</sup> like coital and other forms of reproduction but because it privileges so-called “heterosexual complementarity” as a moral and legal rationale. I then show how *Morrison* and *Hernandez* reflect and perpetuate a taste for heterosexuality when resolving the central dilemma each case presents: how to extol heterosexuality as a reproductive norm despite judicial declarations against interest about the social costs of heterosexual coitus.

After explaining these two manifestations of the taste—the parental one and the judicial one—Part II offers one explanation for what drives its reproduction, generation after generation. The argument about causation rests on Pierre Bourdieu’s theory of social reproduction, which explains individual action as a function of the pursuit of economic capital according to one’s taste.<sup>23</sup> A whistle-blower on the elite, Bourdieu has an analytical model ideal for examining (and teasing) the moneyed classes, whose reproductive projects often escape

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<sup>20</sup> Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990) (“A question becomes a method when it is regularly asked.”).

<sup>21</sup> “Situated theory” is another way to refer to the way that Marxian theory locates the generation of theory itself in dynamic social processes which connect political aspirations with lived experience. See, e.g., KNOWLEDGE AND CLASS: A MARXIAN CRITIQUE OF POLITICAL ECONOMY 2 (Stephen A. Resnick & Richard D. Wolff eds., 1987) (“Marxian theory has a distinctive concept of what theory is . . . Theory is a process in society. It comprises the production, deployment, and organization of concepts.”). Resistance to this type of dialogue is most likely to come from those with something to lose if the power to generate norms from their position was called into question: “The anxiety about engaged theory is particularly marked among those whose particularities formed the prior universal. What they face from this critique is not losing a dialogue but beginning one, a more equal and larger and inclusionary one.” CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, at xv–xvi (1989).

<sup>22</sup> The phrase belongs to Melinda Roberts. See generally Melinda A. Roberts, *Present Duties and Future Persons: When Are Existence-Inducing Acts Wrong?* 14 L. & PHIL. 297 (1995).

<sup>23</sup> See *infra* notes 185–205, 218–222 and accompanying text.

adequate scrutiny.<sup>24</sup> Rules of the game like those suggested by *Morrison* and *Hernandez* establish the symbolic value of heterosexuality (and its reproduction) and facilitate social competition by gain-seeking parents through their offspring.<sup>25</sup> In this social economy, the income return from a straight child exceeds that from a gay one, helping to keep Edelman's Ponzi scheme in perpetual motion.<sup>26</sup>

Once the central argument has been stated, Part III considers some implications, mostly for heterosexuals.<sup>27</sup> First, the prenatal taste for heterosexuality is a eugenic preference which may portend sexual orientation abuse by parents and other forms of "conceptual liquidation" of homosexuals and other sexual minorities.<sup>28</sup> Straight couples might be able to avoid complicity in such gender cleansing campaigns by taking some cues from same-sex couples. Unfortunately, though, *Morrison* and *Hernandez* (and other forms of law like them) help to keep heterosexuals in the dark about reproduction by giving them a

<sup>24</sup> See *infra* notes 197–202 and accompanying text.

<sup>25</sup> See *Morrison*, 821 N.E.2d at 30–31; *Hernandez*, 855 N.E.2d at 7.

<sup>26</sup> See EDELMAN, *supra* note 19, at 4.

<sup>27</sup> This article is the second in a research series on heterosexual subject formation, the scope of which was announced in the first article. José Gabilondo, *Asking the Straight Question: How to Come to Speech in Spite of Conceptual Liquidation as a Homosexual*, 21 Wisc. WOMEN'S L.J. 1, 29 (2006) ("[T]he point of critical heterosexual studies is to focus more closely and comprehensively on the relationship between heterosexuality and heteronormativity with an eye to improving the quality and moral stature of heterosexuality."). That article argued that academic scrutiny of these questions should be embedded in the study of heterosexuality rather than being sidelined to gay and lesbian or queer studies. *Id.* at 29–31. This article expands on these themes by considering the relationship between heterosexuality and reproduction. The next piece in this series will examine the ways in which heterosexuality lets different fundamentalist religious sects overcome collective action problems in order to form multi-sectarian alliances that operate in globalized religious markets.

<sup>28</sup> See GLENDA M. RUSSELL, VOTED OUT: THE PSYCHOLOGICAL CONSEQUENCES OF ANTI-GAY POLITICS 5 (2000) (analyzing the psychological impact on gay people of an amendment to the Colorado Constitution that made antidiscrimination protections for sexual minorities unconstitutional). Conceptual liquidation is a totalizing strategy to erase an identity:

[A] group is conceptually liquidated—or demolished in a culture's thoughts—when its members are seen as less than human, as massively confused about the right order of things, and as lost in a hopeless cognitive and spiritual morass. . . . [There are] four steps in the process of the conceptual liquidation of LGBs [lesbians, gays, and bisexuals] by anti-gay campaigns. The first step involves portraying LGB people as a threat. Step two focuses on equating LBG orientation with pathology. The third step is the construction of an explanation for their orientations. . . . [The] final step is the social construction of a cure for the presumed pathology of LBG orientations.

*Id.* at 5.

legal pretext to avoid constructive norm competition with homosexual parents, from whom their straight counterparts could learn much. Second, and more generally, the symbolic and legal over-valuation of reproduction—of which the taste for heterosexuality is a lynchpin—leads many heterosexuals to regret reproduction after-the-fact. Feminist economic methods might do a better job of helping heterosexuals to resist the gravitational pull of compulsory pregnancy. The surface resemblance of this part of the argument to eugenics may raise hackles, so it is important to note that any such resemblance is illusory. Eugenics advocates strategic reproduction based on racialized preferences, which is the furthest thing from my mind.<sup>29</sup>

Don't get me wrong: I love straight people and children, and babies less so because they lack irony. It is just that my affinities extend only to those already in being. What alarms me is making—as *Morrison* and *Hernandez* do—the normative status of heterosexuality a social engineering project in need of legal subsidies. It is as though this majority orientation would perish but for our efforts on its behalf. It is the patterned unreflectiveness of heterosexual reproduction that concerns me most. Our moral clarity about racism and anti-Semitism may one day extend to marriage discrimination.<sup>30</sup> While we wait, read on for a textual contraceptive against the propagation of normative heterosexuality.<sup>31</sup>

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<sup>29</sup> Eugenic programs brought together constituencies with widely divergent interests and ideologies. For example, in Switzerland, social reformer Auguste Forel promoted eugenics as part of a movement of "rational sexuality." Natalia Gerodetti, *From Science to Social Technology: Eugenics and Politics in Twentieth-Century Switzerland*, 13 *SOC. POL.: INT'L STUD. IN GENDER, ST. & SOC'Y* 59, 69–72 (2006) (analyzing the impact of Forel's *The Sexual Question* on Swiss eugenic policies in the Swiss Criminal and Civil Codes). Gerodetti points out that the success of the eugenics movement in Switzerland lay in its comprehensive appeal to "conservative conceptions of sexuality as well as to social reformist and even feminist conceptions of sexuality." *Id.* at 82.

<sup>30</sup> See JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* 6 (1980).

As long as the religious beliefs which support a particular prejudice are generally held by a population, it is virtually impossible to separate the two [religious belief and prejudice]; once the beliefs are abandoned, the separation may be so complete that the original connection becomes all but incomprehensible. For example, it is now as much an article of faith in most European countries that Jews should not be oppressed because of their religious beliefs as it was in the fourteenth century that they should be.

*Id.*

<sup>31</sup> Suzanna Danuta Walters, *Threat Level Lavender: The Truthiness of Gay Marriage*, *CHRON. HIGHER EDUC.* (Wash., D.C.), Jan. 19, 2007, at B12. The link between reproductive

## I. HETEROSEXUALITY OFFSPRING PREFERENCE

Given the animus visited on sexual minorities by judges, legislators, clerics, teachers, and, most poignantly, their own families, preferring that one's child be straight may seem merely paternalistic.<sup>32</sup> Let me convince you otherwise. Section A situates the parental taste for heterosexuality in the context of critical legal and feminist scholarship and connects it to natalist policies in law. Moving from parents to courts, Section B analyzes how *Morrison* and *Hernandez* reflect the same taste in their legal reasoning.

### A. *The Parental Taste for Heterosexuality and Its Reproduction*

Michele Goodwin has shown how, in the adoption market, the racialized preferences of would-be parents "tier" children available for adoption by pricing them according to pigmentation and other racial features.<sup>33</sup> Were the race of one's own children more contingent, racialized preferences might appear not only in secondary markets for children—like adoption—but also in the primary birth market which is my focus.<sup>34</sup> My specific contention is that, were heterosexuals to think it through, many would prefer heterosexuality to homosexuality in a

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norms and the gay rights movement is too seldom made express. "The real lavender threat, perhaps symbolized by marriage but certainly not subsumed by it, is that gay kinship, gay sexual frontiers, gay intimacies will disrupt heterosexual familialism." *Id.*

<sup>32</sup> I recognize the difference between heterosexuality and heteronormativity, but until heterosexuals-at-large internalize and sustain this working distinction, it may be more effective to collapse the two, as some do. See Gabilondo, *supra* note 27, at 29.

<sup>33</sup> See Goodwin, *supra* note 4, at 66–69.

The concept of a free market in children is rejected based on what it symbolizes, including its argued resemblance to slavery or the auction block. Yet, directly and indirectly, market forces or economic considerations influence adoptions in the United States to a greater extent than traditionally acknowledged. . . . Contemporary adoption services, however, resemble free markets where aesthetic profiles of race, hair texture, eye color and other market variables determine the welfare of children or, at least, their likelihood of placement.

*Id.* at 62–63.

<sup>34</sup> The taste for heterosexuality is different from the race discount in that the former occurs routinely *within* the same racial group (which is not to suggest, of course, that the race discount never appears within the same racial group in the form of a preference for lighter-colored children). Were race more broadly contingent—in the sense that a white couple might be faced with having a black child—one would expect would-be parents to express racialized preferences similar to that for heterosexuality in children.

child.<sup>35</sup> Indeed, the preference for heterosexual offspring may be so great as to trump the taste for “own children” that Gary Becker’s work on the socioeconomics of the family posits as the “distinguishing characteristic of families.”<sup>36</sup> Ruthann Robson points out Richard Posner’s casual recognition of parental preferences in existing children and his seeming hope that science will manage to eradicate homosexuality in the future when she quotes him directly:

Maybe we should just be patient; science, which has worked so many wonders, may someday, perhaps someday soon, discover a “cure” for homosexuality . . . . [I]f the hypothetical cure for homosexuality were something that could be administered—costlessly, risklessly, without side effects—before a child had become aware of his homosexual propensity, you can be sure that the child’s parents would administer it to him, believing, probably correctly, that he would be better off, not yet having assumed a homosexual identity.<sup>37</sup>

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<sup>35</sup> See generally Juan Battle & Michael Bennett, *Research on Lesbian and Gay Populations Within the African American Community: What Have We Learned?* 6 AFR. AM. RES. PERSP. 35 (2000) (summarizing research examining the extent and dynamic of homophobia in the African-American community). This article invites any would-be parent to consider the role of his or her own preferences on this matter. The justification asserted in polite company for the preference—concern for a future child’s prospects in a straight-preferred world—assumes and relies upon exactly that which it is intended to substantiate.

<sup>36</sup> See BECKER, FAMILY, *supra* note 1, at 45 (“One could postulate a ‘taste for own children,’ which is no less (and no more) profound than postulating a taste for good food or for any commodity entering utility functions. Fortunately, the demand for *own* children, the distinguishing characteristic of families, need not be postulated but can be derived.”). Becker explains this socially-valued narcissism as a savings in information costs from sharing genes—because one knows the “intrinsic characteristics” of one’s own children, they are less risky than alien babies. *Id.* Belief in the value of genetic self-interest may flow as much from socialization as from any “natural” inclination to favor the reproduction of one’s genes, so narratives about genetic affinity deserve the kind of critical analysis underway about evolution. See generally MISIA LANDAU, NARRATIVES OF HUMAN EVOLUTION (1991) (applying Vladimir Propp’s theory about the morphology of folk-tales to identify the narrative structure of scientific accounts of evolution); MELANIE G. WIBER, ERECT MEN UNDULATING WOMEN: THE VISUAL IMAGERY OF GENDER, “RACE” AND PROGRESS IN RECONSTRUCTIVE ILLUSTRATIONS OF HUMAN EVOLUTION (1997) (analyzing how illustrations about evolution reflect contemporary assumptions about race and gender).

<sup>37</sup> RUTHANN ROBSON, SAPPHO GOES TO LAW SCHOOL 202 (1998) (quoting RICHARD A. POSNER, SEX AND REASON 308 (1992)). Robson draws attention to Posner’s comments as part of her analysis of his economic commentary on lesbians. Pharmaceutical companies might find more lucrative the development of a cure for coercive normativity in heterosexuals, for which there is a much greater need than for a supposed “cure” addressed to stray sexual minority children. See *id.*

Again, my premise is that the preference Posner mentions precedes birth and, indeed, creates demand for reproduction by holding out the promise of social approval and the enhanced status that comes from being a parent. Admittedly, little social science research exists on parents' prenatal preferences as to the sexual orientation of their offspring.<sup>38</sup> That is one reason why the Introduction asked the reader to do some basic research in his or her own social milieu. Another way of testing my hypothesis would be to ask prospective parents some version of the following: "Assume that you are genetically capable of producing only homosexual children. How would such a condition influence your interest in having a baby?"<sup>39</sup> In any event, this data gap is predicted by Catharine MacKinnon when she points out that organized social dominance can make some social facts seem so "natural" that they never become the object of methodological inquiry in research or criticism.<sup>40</sup> The auction, anecdotal conversations, and the anthropology of everyday life are enough to convince me.

A consensus of other legal scholars on post-natal preferences for heterosexuality also supports my assertion—both directly and by implication. For example, Robson has recognized the harm which post-natal preferences for heterosexuality on the part of heterosexual parents can visit on sexual minority children.<sup>41</sup> She notes that "[w]hether conservatives proceed from an essentialist (biological and immutable) basis for sexuality, a constructionist (psychological and environmental) basis for

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<sup>38</sup> No social science research of which I am aware links a would-be parent's prenatal demand for children with preferences about the sexual orientation of offspring. The relationship between the two is suggested, though, in two of twenty-five questions included in a survey instrument used to measure homophobia: "I would feel that I had failed as a parent if I learned that my child was gay" and "I would feel disappointed if I learned that my child was homosexual." Wendell A. Ricketts & Walter W. Hudson, *Index of Homophobia*, reprinted in CLIVE M. DAVIS ET AL., *HANDBOOK OF SEXUALITY-RELATED MEASURES* 367–68 (1998).

<sup>39</sup> The question can also be modified to test for gender preferences by clarifying that all males born would be "sissies" and all females would be "stone butch" tots.

<sup>40</sup> See MACKINNON, *supra* note 21, at 106. The lack of methods to study heterosexuality is another expression of the power of knowledge production that MacKinnon associates with the liberal state:

Method organizes the apprehension of truth. It determines what counts as evidence and defines what is taken as verification. Operatively, it determines what a theory takes to be real. . . . [M]ethod in this broader sense—approaches to searching for and apprehending the real—both produces and proceeds from substantive conclusions on questions like relevance (what questions count? what evidence supports answers?), structure (what is connected with what, and how?), and reliability (when is information worthy of belief?).

*Id.*

<sup>41</sup> See Robson, *supra* note 5, at 932–48.

sexuality, or some combination of the two, the message is one of exclusion and hostility.<sup>42</sup> Teemu Ruskola, Karolyn Ann Hicks, Devon Carbado, and Sonia Renee Martin, among others, have also criticized the post-natal manifestations of heterosexual offspring preference.<sup>43</sup> In the same vein, Eve Kosovsky Sedgwick has pointedly addressed the risks to sexual minority children from parental enforcement of heterosexuality.<sup>44</sup> And heterosexuality offspring preference is, in the mind of a would-be parent, the prenatal manifestation of the "compulsory heterosexuality" that Adrienne Rich observed.<sup>45</sup>

The prenatal taste for heterosexuality is also an implication of the "straight mind" theorized by Monique Wittig in 1978.<sup>46</sup> So too Michael Warner has noted how normative heterosexuality crowds out all other conceptions of the social and sexual order.<sup>47</sup> Advocates of reparative

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<sup>42</sup> *Id.* at 932 (citation omitted).

<sup>43</sup> Devon W. Carbado, *Straight Out of the Closet*, 15 BERKELEY WOMEN'S L.J. 76, 120 (2000) ("The parents of heterosexuals do not love them "in spite of" their sexual orientation, and parents do not blame themselves for their children's heterosexuality." (citation omitted)); Karolyn Ann Hicks, "Reparative" Therapy: Whether Parental Attempts to Change a Child's Sexual Orientation Can Legally Constitute Child Abuse, 49 AM. U. L. REV. 505, 534 (1999) ("[A] court ruling or legislative interpretation that "reparative" therapy is a form of child abuse, or more likely a form of neglect, would be constitutional because the child abuse and neglect laws that a court would interpret are passed for the protection of children and society." (citation omitted)); Sonia Renee Martin, Note, *A Child's Right to Be Gay: Addressing the Emotional Mistreatment of Queer Youth*, 48 HASTINGS L.J. 167, 192 (1996) ("The state does not have an interest in protecting parents' rights to ensure that their children are heterosexual, especially when it is clear that a significant proportion of the children in our society will not grow to be heterosexual adults. In contrast, the state has a great interest in ensuring the emotional, and thereby physical, health and safety of children."); Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy That Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 269, 285 (1996) ("The fantasy and wish that gay people not exist imbues every major institution of our culture. Law plays a central, although not independent, role in the construction and regulation of homosexuality.").

<sup>44</sup> See generally Eve Kosovsky Sedgwick, *How to Bring Your Kids Up Gay*, 29 SOC. TEXT 18 (1991).

<sup>45</sup> See generally Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631 (1980).

<sup>46</sup> See MONIQUE WITTIG, *The Straight Mind*, in *THE STRAIGHT MIND AND OTHER ESSAYS* 27 (1992). Addressing the symbolic composition and imposition of hetero, Wittig writes: "In spite of the historic advent of the lesbian, feminist, and gay liberation movements, whose proceedings have already upset the philosophical and political categories of the discourses of the social sciences, [heteronormativity continues to] function like primitive concepts in a conglomerate of all kinds of disciplines, theories, and current ideas that I will call the straight mind." *Id.*

<sup>47</sup> See Michael Warner, *Introduction to FEAR OF A QUEER PLANET*, at xxi (Michael Warner, ed. 1993). This is a corollary of Michael Warner's observation that: "Het[erosexual] culture thinks of itself as the elemental form of human association, as the very model of inter-gender relations, as the indivisible basis of all community, and as the means of reproduction without which society wouldn't exist." *Id.*



therapy for homosexuals, like Dr. Joseph Nicolosi, would no doubt agree, as suggested by his guide for parents on preventing homosexuality in (existing) children.<sup>48</sup> What this article adds to these research clusters is the contention that part of what precipitates these post-natal manifestations begins long before the birth of any child and, relatedly, that the prospect of increasing one's social approval by producing "more" heterosexuality contributes to demand for children.

No discussion about the normative value of reproduction would be complete without entering the thicket of disagreement between Katherine Franke and Mary Becker on that subject. As I try to do in this article, Katherine Franke has urged feminists to think more critically about "repronormative forces."<sup>49</sup> Claiming that some forms of feminism have cabined female sexuality through maternalist debates about motherhood and dependency, Franke objects to the way in which "legal feminists have ceded to queer theorists the job of imagining the female body as a site of pleasure, intimacy, and erotic possibility."<sup>50</sup> Though aligned with much of Franke's project, I have two objections. First, she defers too quickly to the phantom fear of extinction which is often used to justify natalism.<sup>51</sup> My instinct would be to interrogate even the

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<sup>48</sup> See generally JOSEPH NICOLOSI & LINDA AMES NICOLOSI, A PARENT'S GUIDE TO PREVENTING HOMOSEXUALITY (2002). Dr. Nicolosi notes: "As one prominent psychoanalyst, Dr. Charles Socarides, says, 'Nowhere do parents say, 'It makes no difference to me if my child is homosexual or heterosexual.'" Given a choice, most parents would prefer that their children not find themselves involved in homosexual behavior." *Id.* at 12. Dr. Nicolosi is president of the National Association of Research and Therapy of Homosexuality (NARTH) and the author of numerous books on reparative therapy. Homosexuality: Current Trends in Research and Therapy, <http://www.narth.com/docs/2003conference.html> (last visited Jan. 24, 2008). He also runs the Thomas Aquinas Psychological Clinic in Encino, California, where he advises parents, their children, and adult homosexuals on how to establish and preserve heterosexuality, particularly in males. *Id.*

<sup>49</sup> Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 184 (2001). Correctly, Franke notes that even heterosexuality gets more scrutiny than reproduction: "Why is it that we are willing to acknowledge that heteronormative cultural preferences play a significant role in sexual orientation and selection of sexual partners, while at the same time refusing to treat repronormative forces as warranting similar theoretical attention?" *Id.* In a somewhat harsher tone, Kerry Quinn concurs with Franke: "In addition to failing on feminists' own terms, the child idolatry and family values of the debate has productive and destructive effects . . . [T]heir rhetoric reinforces the normalcy and desirability of the traditional family model." See Kerry L. Quinn, *Mommy Dearest: The Focus on the Family in Legal Feminism*, 37 HARV. C.R.-C.L. L. REV. 447, 465 (2002).

<sup>50</sup> See Franke, *supra* note 49, at 182.

<sup>51</sup> See *id.* at 186. When examining objections to challenges of repronormativity, Franke correctly notes that its proponents tend immediately to assert a collective interest in reproducing the species: "Certainly this must be right, but the conversation-stopping power of this natalist objection should not be overstated. The fact that the future of the species

grounding of such a species interest more skeptically, although that is beyond the scope of this article. Second, I object to her proposal that the conflict between deemphasizing reproduction and preserving society could be mitigated with foreign labor.<sup>52</sup> As I do, she notes the regressivity of repronormativity—for example, when she alludes to the “monied womb.”<sup>53</sup> Her reliance on immigration to serve a national interest in reproduction, however, would seem merely to shift the burden of reproductive labor onto those abroad.<sup>54</sup>

Mary Becker has objected to Franke’s critique, particularly as it relates to the poor.<sup>55</sup> She queries what “Franke [would] do with poor children (who will continue to be born)? Without supports, they will not be able to develop their capabilities to become the productive citizens they could be.”<sup>56</sup> On this point, I urge a sharp distinction between the interests of lives-in-being (including the right to economic support) and those of future people, along the lines of the “minimum birthrights” argument discussed later.<sup>57</sup> The distinction flows from my experience with dependency as the brother of a developmentally-disabled man. Advocating for him, his dignity, and his care is not inconsistent with the philosophical conviction that—all else being equal—it might be better for all concerned to avoid future lives as seriously compromised as that of my brother. Unsentimental? Perhaps, but it is hardly the logic of Sparta. Reproducing dependency is no virtue, but caring for dependents is.

And the issue goes to the heart of how the cases discussed in the next section create dependency in heterosexuals by providing a legal subsidy of social approval for questionable reproductive practices.<sup>58</sup> This question matters because—as I consider in more detail later in the context of how children provide symbolic capital—how we “price” reproduction as a symbol may influence the demand for children.

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depends upon ongoing reproduction does not relieve us from devoting critical attention to the manners in which this biological demand becomes culturally organized.” *Id.*

<sup>52</sup> See *id.* at 193. Franke is right, of course, in recognizing the substitutability of foreign workers for citizens: “The need to maintain a certain corps of tax-paying workers could be met through manipulation of our immigration laws—as we have done in the past to meet demand in particular sectors of the economy.” *Id.*

<sup>53</sup> *Id.* at 195.

<sup>54</sup> See *id.*

<sup>55</sup> See Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495, 1533 (2001).

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

<sup>57</sup> See *infra* notes 279–280 for a discussion of minimum birthrights.

<sup>58</sup> See *infra* notes 118–133 and accompanying text.

Franke observes that “repronormativity remains in the closet” while critiques of compulsory heterosexuality have gotten more traction.<sup>59</sup> Agreeing, my argument expands on her point that “reproduction of society takes place constantly through countless reiterative practices, many of which are structured as simultaneously productive and consumptive in nature.”<sup>60</sup> My specific contention (developed in greater detail in the following Part) is that heterosexuality “makes a market” for reproduction and vice-versa, although these links are not immediately apparent because of the “invisibility” to some of heterosexuality as a norm. By drawing attention to reproduction, I try to combat the unreflectiveness which Devon Carbado has noted about heterosexuals.<sup>61</sup> This patterned unawareness is an example of what one Marx scholar has called “reproductive praxis”:

People engaged in reproductive praxis are *born into* certain social relations, modes of existence, which they accept as natural, even inevitable. They fail to question these and, therefore, reproduce the type of consciousness and conditions of social being that are already in existence. *Minor changes* or reforms may be attained, but these are not of a type that challenges or threatens the *fundamental social relations*.<sup>62</sup>

Thus does normative heterosexuality come to seem “natural” in the formulation above.<sup>63</sup> Should discordant facts appear—like a gay child—some “minor changes” are possible, like the often belated reconciliation of disappointed parents who come to “love” their gay child nonetheless, and the growing but resisted (which resistance becomes more notable with time) recognition that parental opprobrium can contribute to elevated suicide rates among gay teens.<sup>64</sup> Merely tweaking

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<sup>59</sup> See Franke, *supra* note 49, at 185.

<sup>60</sup> *Id.* at 189. Franke objects to the “bourgeois framing of an issue that gives the larger public the tab for the marketing-induced ‘needs’ of children.” *Id.* at 192. I do too.

<sup>61</sup> Carbado, *supra* note 43, at 95 (“[R]arely do heterosexuals critically examine their identities as heterosexual, their sexual identity privilege. Indeed, even pro-gay rights heterosexuals conceive of sexual identity as something other(ed) people have, something that disadvantages other(ed) people.”).

<sup>62</sup> Paula Allman, *Antonio Gramsci’s Contributions to Radical Adult Education*, in GRAMSCI AND EDUCATION 201, 203 (Carmel Borg et al. eds., 2002) (emphasis added).

<sup>63</sup> See *id.*

<sup>64</sup> See Martin, *supra* note 43 at 167–78. Sonia Renee Martin notes several factors that lead parents to repudiate gay and lesbian children and that result, among other things, in elevated suicide levels of gay and lesbian youth. *Id.* “Family problems contribute heavily to the disproportionate number of gay and lesbian teen suicide attempts and deaths.” *Id.* at 175 (citing discussion of gay and lesbian youth suicide in Paul Gibson, *Gay Male and Les-*

the norm system, though, does nothing to end either the “fundamental social relation” which underlies it or the reproduction of these social relations.<sup>65</sup>

On this point, Catharine MacKinnon’s early work on links between radical feminism and Marxian thought bears on how the parental taste for heterosexuality comes to be made invisible.<sup>66</sup> (Indeed, my argument is a corollary of her thesis that heterosexuality founds patriarchy.) In *Toward a Feminist Theory of the State*, Catharine MacKinnon explains the subordination of women by men as part of an “epic theory” about “male power as an ordered yet deranged whole.”<sup>67</sup> The reproduction of normative heterosexuality—both materially in children and more widely in law and culture—also structures law and social life in an ordered and deranged way. By substituting “heterosexual reproductivist” for “male” in key passages of MacKinnon’s work, one sees the force of the analogy:

In [heterosexual reproductivist] societies, the [heterosexual reproductivist] standpoint dominates civil society in the form of the objective standard—that standpoint which, because it dominates in the world, does not appear to function as a standpoint at all. . . . The state incorporates these facts of social power in and as law. Two things happen: law becomes legitimate [that is, by following the pattern of social dominance], and social dominance becomes invisible. Liberal legalism is thus a medium for making [heterosexual reproductivist] dominance both invisible and legitimate by adopting the [het-

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*bian Youth Suicide*, in U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES REPORT OF THE SECRETARY’S TASK FORCE ON YOUTH SUICIDE 110 (1989)). These youths are two to three times more likely to attempt suicide than other kids their age and constitute thirty percent of the country’s completed suicides. *Id.*; see also Elvia R. Arriola, *The Penalties for Puppy Love: Institutionalized Violence Against Lesbian, Gay, Bisexual and Transgendered Youth*, 1 J. GENDER RACE & JUST. 429, 455 (1998) (citing research on parental influence on the self-esteem of gay and lesbian youth) (“[T]he inner turmoil and isolation for LGBT teens resulting from unsupportive homes, churches and schools have emotional costs with physical side effects (for example, insomnia, fatigue, ulcers) that create a situation ripe for the possibility of attempted suicide.”).

<sup>65</sup> See Allman, *supra* note 62, at 203.

<sup>66</sup> See generally MACKINNON, *supra* note 21.

<sup>67</sup> Quoting the work of Sheldon Wolin, MacKinnon points out that epic theory does not merely describe the world but explains structural reproduction in the hopes of intervening not only in theory but in the condition of the world itself: “An epic theory identifies basic principles in political life which produce errors and mistakes in social ‘arrangements, decisions, and beliefs’ and which cannot be dismissed as episodic. . . . [E]pic theories provide ‘a symbolic picture of an ordered whole’ that is ‘systematically deranged.’” See *id.* at x.

erosexual reproductivist] point of view in law at the same time as it enforces that view on society.<sup>68</sup>

The auction and judicial tastes for heterosexuality discussed below in the context of *Morrison* and *Hernandez* form only one head of the heterosexual reproductivist hydra in law. Although I will discuss only its link to marriage, let me outline its overall structure. It is formed by several deductive premises—some explicit, others implicit. These premises include the following: (i) existence—whatever the subjective qualities of that experience—is preferable to nonexistence, as reflected in legal decisions about wrongful life,<sup>69</sup> suicide,<sup>70</sup> and in-

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<sup>68</sup> See *id.* at 237. Another good passage for substitution that considers the role of law reads: “Through legal mediation, [heterosexual reproductivist] dominance is made to seem a feature of life, not a one-sided construct imposed by force for the advantage of a dominant group. To the degree it succeeds ontologically . . . control over being produces control over consciousness, fusing material conditions with consciousness . . . . Coercion legitimated becomes consent.” See *id.*

<sup>69</sup> Consider state courts’ unwillingness to recognize a hedonic interest in nonexistence through wrongful life claims. See, e.g., Kurtis J. Kearl, Note, *Turpin v. Sortini: Recognizing the Unsupportable Cause of Action for Wrongful Life*, 71 CAL. L. REV. 1278, 1287–88 (1983) (rejecting legal arguments about the preferability of nonexistence in the context of a California Supreme Court decision granting special damages for wrongful life to a child born deaf). Only three states recognize any form of wrongful life claim. Deana A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, 55 ALA. L. REV. 327, 329 & n.12 (2004) (arguing that state tort law uses incorrect concepts of damage recovery when denying recognition of wrongful life causes of action). However, even those states limit damage recovery to special damages and do not permit recovery for any interest in not having been born at all. *Id.* at 329 & n.12. This is so despite a good proposal for measuring general damages that avoids the conceptual hurdle in recognizing an interest in nonexistence. See Bonnie Steinbock, *The Logical Case for “Wrongful Life,”* HASTINGS CTR. REP., Apr. 1986, at 15, 17 (comparing wrongful life damages assessments to those made in wrongful death claims and finding that in both, the jury must make valuations comparing an impaired or healthy life with non-existence).

<sup>70</sup> This reflects Immanuel Kant’s sin in “Christianizing” much of Stoic philosophy. Early Stoics took suicide in stride: “Suicide was viewed as a simple alternative when faced with certain situations, and nothing to spend one’s time thinking or worrying about. The early Stoics followed this lead, allowing for and even recommending suicide in certain circumstances, but not giving the topic any inordinate attention.” Michael Seidler, *Kant and the Stoics on Suicide*, 44 J. OF THE HIST. OF IDEAS 429, 430 (1983) (discussing Stoic ideas about suicide). See generally Daniel M. Crone, *Historical Attitudes Toward Suicide*, 35 DUQ. L. REV. 7, 16 (1996) (discussing Seneca’s support for suicide and reviewing the praise of Cato’s suicide for “fear of dishonor”). A lifelong student of Stoic philosophy, Kant rejected the Stoic view that suicide was morally acceptable and, at times, morally superior than continuing to live. Seidler, *supra*, at 440–41. Consistent with my thesis that reproductivism forms part of a consolidated mental system, Seidler suggests a potential link in Kant’s writings between nonreproductive sex and suicide. See *id.* at 442 (“Kant’s revulsion against suicide is as intense as his nausea at sexual perversion . . . .” (citation omitted)). I explore this idea later using Lee Edelman’s argument that heterosexuality represents generative life and homosexuality death. See *infra* notes 206–214 and accompanying text.

voluntary sterilization;<sup>71</sup> (ii) reproduction tends to further self-interest, including through saving for old age in the form of children's anticipated future support and through the satisfaction of feeling that one has contributed to society;<sup>72</sup> (iii) without reproduction, society would perish;<sup>73</sup> and, given the foregoing; (iv) courts must enable parents to inculcate their children with reproductivist values (as well as many others).<sup>74</sup>

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<sup>71</sup> Similar debates have erupted in the recent revival among state courts of *Buck v. Bell*, a case that affirmed the constitutionality of a state sterilization statute for individuals with hereditary mental illness. 274 U.S. 200, 207 (1927) ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind." (citation omitted)). In these cases, state courts have upheld the constitutionality of state statutes that require sterilization of profoundly mentally retarded persons. Norman Cantor, *The Relation Between Autonomy-Based Rights and Profoundly Mentally Disabled Persons*, 13 ANNALS HEALTH L. 37, 53 (2004).

Today, most of the states that had refused in the 1970s to find inherent jurisdiction to authorize sterilization of a mentally disabled person have changed their law; statutes now permit sterilization where a court finds that the surgery will serve the incapacitated person's best interests. Only one state appears to continue to exclude all surrogate authorization of sterilization.

*Id.* (citation omitted).

<sup>72</sup> The existence of other income security schemes, like national retirement plans, undermines the savings rationale. T. Paul Schultz, *Demand for Children in Low Income Countries*, in HANDBOOK OF POPULATION AND FAMILY ECONOMICS, *supra* note 1, at 349, 388. As for leaving a legacy through children, one tongue-in-cheek commentator noted the downside: "The import of your existence can be validated by whoever you bring into the world. But this doesn't always work. In fact, sometimes it makes things worse. . . . [T]here's now an innocent woman whose one-sentence newspaper bio will forever be, 'She was Timothy McVeigh's mother.'" CHUCK KLOSTERMAN, SEX, DRUGS, AND COCOA PUFFS: A LOW CULTURE MANIFESTO 194 (2004).

<sup>73</sup> The court in *Anderson v. King County* explicitly based part of its holding on this rationale. 138 P.3d 963, 969 (Wash. 2006) ("[T]he legislature was entitled to believe that limiting marriage to opposite-sex couples furthers procreation, essential to survival of the human race . . ."); see also *Skinner v. State*, 316 U.S. at 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."). Non-reproductive dystopia is the premise of the recent film, *THE CHILDREN OF MEN* (Universal 2006). See *The Children of Men*, <http://www.paramountpictures.co.uk/childrenofmen/> (last visited Jan. 24, 2008).

<sup>74</sup> A prominent and especially unfortunate example of this is parental over-involvement in a young daughter's reproductive autonomy. See Kathryn D. Katz, *The Pregnant Child's Right to Self-Determination*, 62 ALB. L. REV. 1119, 1162-67 (1999) (concluding that statutes giving parents power over their children's reproductive autonomy fail to consider the untoward effects of pregnancy, birth, and childrearing when weighing the best interests of pregnant children). J. Shoshanna Ehrlich's excellent discussion of reproduction by young women combines legal analysis with a behavioral perspective. See generally J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision Without Involving Their Parents*, 18 BERKELEY WOMEN'S L.J. 61 (2003) (presenting results of

The argument below about *Morrison* and *Hernandez* targets this wider reproductivist system by zeroing in on one of its key aspects: heterosexual coitus. While the analysis may raise more questions than it resolves, my point is to lay more of a theoretical foundation in law for skepticism about reproduction. As a first step, this article examines how these cases privilege the taste for heterosexuality and its reproduction in the way that they attempt to resolve their central contradiction: affirming the superiority of heterosexuality and *its* reproduction while admitting that heterosexual coitus is fraught with risks to both parents and children alike.

### B. A Judicial Analogue: *Morrison* and *Hernandez*

The parental taste for heterosexuality finds its echo in law too. After briefly reviewing the context for reproduction in the culture wars about marriage, I look at how *Morrison* and *Hernandez* impose the traditional legal disability on homosexuals in marriage with a new twist based on the wages of heterosexual coitus. I conclude this section by situating my argument in some of the conceptual problems faced by legal feminism.

#### 1. Reproduction in the Culture Wars over Marriage

*Morrison* and *Hernandez* arise out of a national culture war about the normative status in law of heterosexuality, part of which involves the link between marriage and reproduction. One of the most salient legal aspects of the culture war over heterosexuality is the differential standards of review which courts apply based on whether plaintiffs are heterosexuals or homosexuals.<sup>75</sup> Consistent with this differential treatment, the only significant constitutional cases striking down laws that targeted homosexuals, *Lawrence v. Texas* and *Romer v. Evans*, involved failures to satisfy low or ambiguous standards of review.<sup>76</sup> And, even

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empirical study of the reproductive decision-making of pregnant teenage females in state requiring parental notification).

<sup>75</sup> See *infra* notes 76–81, 113–115 and accompanying text.

<sup>76</sup> *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting) (“I turn now to the ground on which the Court squarely rests its holding: the contention that there is no rational basis for the law here under attack.”); *Romer v. Evans*, 517 U.S. 620 634–35 (1996) (finding no rational basis in a constitutional amendment barring access to democratic processes in order to secure anti-discrimination provisions against certain sexual minorities). Laurence Tribe notes that it is difficult to characterize the standard of review in *Lawrence v. Texas*: “To search for the magic words proclaiming the right protected in *Lawrence v. Texas* to be “fundamental,” and to assume that in the absence of those words mere rationality

then, courts have construed the scope of *Lawrence* and *Romer* relatively narrowly.<sup>77</sup>

The same is true when it comes to reproduction. Let me briefly point out how courts generally deploy “heterosexual” and “homosexual” as legal categories with respect to reproduction. The constitutional dimensions of state law on both marriage<sup>78</sup> and reproduction<sup>79</sup> remain

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review applied, is to universalize what is in fact only an occasional practice.” Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1917 (2004). This article argues that the “occasional practice” that Tribe points to is, in fact, part of a coherent set of categorization practices that systematically try to erase homosexual identity by giving heterosexual identity a preference as a norm. See *infra* notes 228–235, 281–284 and accompanying text.

<sup>77</sup> The *Romer* majority does not foreclose a finding that the right to participate equally in the political process is a fundamental one—for sexual minorities or any one else—or that heightened scrutiny could apply to state action that may violate equal protection of sexual minorities. But most subsequent cases have cited *Romer* to uphold antigay laws so long as they satisfy mere rationality. See, e.g., *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006) (reversing a district court’s finding that the Nebraska’s Defense of Marriage Act failed to meet *Romer*’s rational review standard); *Able v. United States*, 155 F.3d 628, 634–35 (2d Cir. 1998) (distinguishing *Romer*’s inability to find a rational basis for Amendment Two from the military’s “acceptable” rationale for excluding known homosexuals from military service); *Equal. Found. of Greater Cincinnati v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997) (upholding anti-gay referendum amending Cincinnati’s charter); *Smelt v. County of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005) (applying rational basis review to California and federal restrictions on marriage by homosexuals despite the “tenuous” rationality of the laws); *Bailey v. City of Austin*, 972 S.W.2d 180 (Tex. App. 1998) (upholding city initiative barring city from extending employee benefits to same-sex partners). But see *Finstuen v. Edmondson*, No. CIV-04-1152-C, 2006 U.S. Dist. LEXIS 32122 (W.D. Okla. May 19, 2006, *aff’d*, 2007 U.S. App. LEXIS 18500, (10th Cir., August 3, 2007) (citing *Romer* to declare unconstitutional an Oklahoma statute forbidding the recognition of foreign adoptions by same-sex parents); *Dep’t of Human Servs. v. Howard*, No. 05-814, 2006 Ark. LEXIS 418 (Ark. June 29, 2006) (upholding a lower court decision that cited *Romer* to overturn Arkansas regulations that kept homosexuals from serving as foster parents).

<sup>78</sup> As one scholar has noted:

[W]e know astonishingly little about the constitutional parameters of marriage. We do know that individuals enjoy a right to marry under the “liberty” interest of substantive due process . . . . We do not know how far this liberty to marry extends, what level of scrutiny should be applied in a particular case, or whether laws restricting marriage based on classifications other than race (e.g., sexual orientation) would violate equal protection.

ELIZABETH PRICE FOLEY, *LIBERTY FOR ALL: RECLAIMING INDIVIDUAL PRIVACY IN A NEW ERA OF PUBLIC MORALITY* 68 (2006).

<sup>79</sup> Procreative liberty remains in a haze rivaling that of the copulating heterosexuals postulated by *Morrison* and *Hernandez*: “Despite recent concerns about population control, the right to procreate remains relatively *ambiguous in contrast* to the right not to procreate, which in the abortion context is limited by the interest of the fetus.” Elizabeth Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 828 (citation omitted).



largely unsettled. Yet, consistently, patterns of differential judicial review emerge based on the sexual orientation of the plaintiff class. Stricter standards of review are applied to restraints on heterosexual marriage, reproduction, and intimacy.<sup>80</sup> In contrast, lower standards of review tend to be applied to analogous restraints on homosexuals.<sup>81</sup> To date, over a dozen judicial challenges have been made to state laws restricting marriage to heterosexuals.<sup>82</sup> Only in Massachusetts has any of these challenges met with success.<sup>83</sup> The federal Defense of Marriage Act, however, ensured that these same-sex marriages would be stripped of the big-dollar federal benefits straight marriages receive.<sup>84</sup> The same discrepancy appears in adoption and custody proceedings.<sup>85</sup>

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<sup>80</sup> See generally *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (affirming *Roe v. Wade*); *Roe v. Wade*, 410 U.S. 113 (1973) (applying strict scrutiny to restriction on fundamental right to abortion based on due process); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free [heterosexual] men"); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (applying increased scrutiny to Connecticut law prohibiting the sale of contraceptives); *Skinner v. Oklahoma*, 316 U.S. 535, at 541 (1942) (classifying marriage as one of the "basic civil rights of [a heterosexual] man").

<sup>81</sup> See *Morrison v. Sadler*, 821 N.E.2d 15, 24 (Ind. 2005); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006). These judges use the word "rational" to refer to levels of review that require less than what would be considered minimally rational in other fora where legal rationality is rehearsed and tested, such as the Law School Admissions Test, law school examinations, and in-class discussions.

<sup>82</sup> A complete chronological list of thirteen judicial decisions from 1971 to 1995 rejecting homosexual plaintiffs' assertions of the right to marry may be found in WILLIAM N. ESKRIDGE & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 1065 n.c. (2004). For the most current information on these challenges, see Human Rights Campaign, *Marriage & Relationship Recognition*, <http://www.hrc.org/issues/marriage.asp> (last visited Jan. 24, 2008).

<sup>83</sup> See generally *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>84</sup> *Defense of Marriage Act*, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 28 U.S.C. § 1738 C (2000)).

<sup>85</sup> With respect to adoption, courts apply a more deferential standard of review to state action that restricts the right to adopt because the institution of adoption itself flows from statute, not common law. See *Lindley v. Sullivan*, 889 F.2d 124, 130-31 (7th Cir. 1989) ("The adoption process is entirely a creature of state law, and parental rights and expectations involving adoption have historically been governed by legislative enactment.") However, courts may go to extravagant lengths to find rationality when the state acts against homosexuals. See, e.g., *Lofton v. Sec'y of Dep't of Children Family Servs.*, 358 F.3d 804, 825 (11th Cir. 2004) ("Also, we must credit any conceivable rational reason that the legislature might have for choosing not to alter its statutory scheme in response to . . . recent social science research [in support of same-sex parenting]."). A similar pattern emerges in custody proceedings, especially when courts follow the Uniform Marriage and Divorce Act's distinction between homosexual identity and behavior, such that the latter may be considered against the best interests of the child. See generally Matt Larsen, Note, *Lawrence v. Texas and Family Law: Gay Parents' Constitutional Rights in Child Custody Proceedings*, 60 N.Y.U. ANN. SURV. AM. L. 53 (2004).

In state equal protection doctrine, many categorizations of heterosexuals based on reproduction affirm the legally privileged status of heterosexuality without looking closely at heterosexual coitus as a reproductive reality. The concurrence in *Lewis v. Harris* is one example:

The simple fact is that the very existence of marriage does “privilege procreative heterosexual intercourse.” . . . Procreative heterosexual intercourse is and has been historically through all times and cultures an important feature of that privileged status, and that characteristic is a fundamental, originating reason why the State privileges marriage.<sup>86</sup>

Confirming its centrality in these legal conflicts about marriage, the issue of reproduction helped to produce one of the relatively more favorable precedents for homosexuals in the conflict over marriage, *Baker v. State*.<sup>87</sup> The Vermont court affirmed the link between marriage and the state interest in regulating procreation, noting that the state has a “legitimate and long-standing interest in promoting a permanent commitment between couples for the security of their children.”<sup>88</sup> Since the Vermont Legislature had already eliminated legal restrictions on adoption and childrearing by homosexuals, the court reasoned that, “to the extent that the state’s purpose in licensing civil marriage was, and is, to legitimize children and provide for their security, the [heterosexual marriage] statutes plainly exclude many same-sex couples who are no different from opposite-sex couples with respect to these objectives.”<sup>89</sup>

In other words, once the Legislature has allowed homosexuals to play in the “Ponzi scheme” of reproductivism, all players—even homo-

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<sup>86</sup> *Lewis v. Harris*, 875 A.2d 259, 276 (N.J. Super. Ct. App. Div. 2005) (Parrillo, J., concurring), *aff’d as modified*, 908 A.2d 196 (N.J. 2006).

<sup>87</sup> 744 A.2d 864 (Vt. 1999). *Baker* involved an appeal by three same-sex couples of a trial court dismissal of their complaint for declaratory judgment that the town clerks’ refusal to issue the plaintiffs marriage licenses violated the Vermont Constitution. *Id.* at 867. The plaintiffs claimed that the trial court had misconstrued Vermont’s marriage statute and asserted, in the alternative, that any statutory exclusion of homosexuals from marriage violated the Common Benefits Clause of the Vermont Constitution. *Id.* at 868, 870. The plaintiffs failed on the statutory claim. *Id.* at 869. The Court held that the Common Benefits Clause required Vermont to extend the substantive protections of marriage to plaintiffs. *Id.* at 886. As remedy, the court directed the legislature to revise statutory marriage to include homosexuals or to fashion a parallel status for homosexuals. *Id.* The legislature chose the latter. See 2000 Vt. Acts & Resolves 91 (act relating to civil unions). See generally State of Vermont, House of Representatives, *Questions and Answers About H.847 as Passed by the General Assembly*, <http://www.leg.state.vt.us/baker/h-847q&a.hum>.

<sup>88</sup> *Baker*, 744 A.2d at 881.

<sup>89</sup> *Id.* at 882.

sexuals—must have equal access to the rights incident to marriage.<sup>90</sup> Nevertheless, even this relatively evenhanded approach to marriage access for homosexuals betrays an unreflectiveness about how normative heterosexuality works. Startlingly, the *Baker* court is unable to find an “intent” in heterosexual-only marriage regimes to discriminate against homosexuals:

It is one thing to show that long-repealed marriage statutes subordinated women to men within the marital relation. It is quite another to demonstrate that the authors of the marriage laws excluded same-sex couples because of incorrect and discriminatory assumptions about gender roles or anxiety about gender-role confusion. That evidence is not before us.<sup>91</sup>

Nor could such evidence ever be made to appear in the swirling logic of heterosexual marriage, which starts—and ends—by foreclosing the possibility of such evidence without appearing ever to have done so. In post-modernist diction, evidence of this sort is “always already” excluded.<sup>92</sup> Evidence of “intent” to discriminate here would presuppose the existence of “homosexual” as a category. It is, however, only after homosexuals gained some degree of visibility that legislators bothered organizing against sexual minorities as a class—a dynamic reflected in the “defense of marriage” movements.<sup>93</sup> *Hernandez* draws on a sister

<sup>90</sup> *See id.*

<sup>91</sup> *Id.* at 880 n.13.

<sup>92</sup> *See* STANLEY FISH, THERE’S NO SUCH THING AS FREE SPEECH . . . AND IT’S A GOOD THING TOO 196 (1994). This adverb phrase reveals an effect of a social condition or practice which, although it is a “given,” may not be apparent. For example, Stanley Fish uses it to show how a legal authority that privileges one sensibility over another is as a matter of course linked and, indeed, defined by what is excluded:

A politically earned authority is *always already* in a relation to the Other it is accused of scorning, and the problem (as some see it) of opening the law’s self-referential procedures to the pressures of the “real world” is no problem at all because that very self-referentiality (autonomy, unity, integrity, etc.) has been constructed (re-constructed) in response to those pressures.

*Id.*

<sup>93</sup> Consider the agility with which Congress and the states have (independently) enacted substantially uniform legislation prohibiting same-sex marriage once the specter of it appeared. At present, forty-five states have either constitutional amendments, statutes, or other laws restricting marriage to heterosexuals. Human Rights Campaign, *Statewide Marriage Prohibitions* (as of Sept. 19, 2007), *available at* [http://www.hrc.org/documents/marriage\\_prohibit\\_20070919.pdf](http://www.hrc.org/documents/marriage_prohibit_20070919.pdf). Twenty-six of those are state constitutional amendments. *Id.* Twenty-two of these constitutional amendments were enacted in the two years after Massachusetts legalized gay marriage (2004–2006), a rate of almost one state constitutional amendment a month. *Id.* What is most useful to legal scholars is the rich record of legisla-

tautology: that homosexual marriage is not rooted in tradition or custom.<sup>94</sup> As the next section shows, these odd and circular forms of argument are the norm when courts look at heterosexuality and homosexuality, especially where reproduction is concerned.

## 2. Judicial Alchemy: *Morrison* and *Hernandez*

Although judicial rationales based on reproduction have assumed new importance in recent litigation, David Cruz notes that such arguments appear in the earliest cases confirming the exclusion of homosexuals from marriage.<sup>95</sup> Although they are squarely in this tradition, what is most interesting and original about *Morrison* and *Hernandez* is their candor about what is wrong with reproductive coital intercourse. Despite the blithe assertion of heterosexual privilege in *Lewis v. Harris*, the facts seem less simple to the courts in *Morrison* and *Hernandez*.<sup>96</sup> This is so despite the standard of review common to both adjudications: mere rationality.<sup>97</sup>

Let me briefly summarize these cases before turning to their unflattering accounts of heterosexual coitus. *Morrison* involved an appeal from an Indiana trial court's dismissal of a request for a declaratory judgment that plaintiffs, three same-sex couples, could obtain marriage licenses from the circuit clerks of Hendricks and Marion Counties.<sup>98</sup> The suit challenged Indiana's Defense of Marriage Act (DOMA), which provides that "[o]nly a female may marry a male. Only a male may marry a female."<sup>99</sup> The three couples had each entered into a civil union in Vermont.<sup>100</sup> Indiana law also withheld Full Faith and Credit to

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tive agility to codify heterosexual animus in response to the perceived threat of gay marriage. See generally American Bar Association Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L. Q. 339 (2004) (summarizing state and federal law of marriage disability on sexual minorities). Given this strong history of animus appearing contemporaneously with legal conceptions of homosexuality, it does not seem like a stretch to admit that, had drafters of marriage statutes conceived of homosexuals, their reaction would have been to exclude them, if not worse. The concurrence by Justice Dooley in *Baker* suggests as much. See *Baker*, 744 A.2d at 890–91 (Dooley, J., concurring).

<sup>94</sup> See *Hernandez*, 855 N.E.2d at 9, 10.

<sup>95</sup> See David B. Cruz, *Heterosexual Reproductive Imperatives*, 56 EMORY L.J. 1157, 1164 (2007) ("This brings us to the kinder, gentler face of heterosexism today: reproduction.").

<sup>96</sup> *Morrison*, 821 N.E.2d at 24; *Lewis*, 875 A.2d at 276; *Hernandez*, 855 N.E.2d at 8.

<sup>97</sup> *Morrison*, 821 N.E.2d at 24; *Hernandez*, 855 N.E.2d at 8.

<sup>98</sup> *Morrison*, 821 N.E.2d at 19.

<sup>99</sup> IND. CODE. § 31-11-1-1(a) (1997).

<sup>100</sup> *Morrison*, 821 N.E.2d at 19.

same-sex marriages legal under the laws of a sister state.<sup>101</sup> The plaintiffs claimed that Indiana's DOMA violated provisions of the Indiana Constitution.<sup>102</sup> The court failed to recognize any of the plaintiffs' claims under these provisions.<sup>103</sup>

*Hernandez* confronted New York's highest court, the Court of Appeals, with the claim of forty-four same-sex couples that the restriction of marriage to opposite-sex couples violated the due process and equal protection clauses of the state constitution.<sup>104</sup> New York's marriage statute provided that "the parties must solemnly declare . . . that they take each other as husband and wife."<sup>105</sup> The plaintiffs sought a declaratory judgment that the statute, to the extent it prevented them from marrying, was unconstitutional.<sup>106</sup> The trial court granted the plaintiffs' summary judgment motion.<sup>107</sup> On appeal, the Appellate Division rejected the plaintiffs' arguments and reversed the motion.<sup>108</sup> On final appeal, the Court of Appeals affirmed the reversal.<sup>109</sup>

Had a consistent standard of judicial scrutiny applied to both homosexuals and heterosexuals, the relationship between reproduction and marriage would not have sustained a legally material difference between same-sex and opposite-sex unions.<sup>110</sup> Let me point out some asymmetrical exercises of legal reasoning from the cases. First, consider the "one-drop rule" *Hernandez* adopts for deciding whether legal curbs on marriage and reproduction by homosexuals pass muster: so long as a potential legislative rationale—however remote—includes even one drop of reason, the court will acquiesce to the restriction.<sup>111</sup> The *Hernandez* court notes, for instance, that "Plaintiffs have not persuaded us that this long-accepted restriction [of marriage to opposite-sex couples] is a wholly irrational one, based *solely* on ignorance and prejudice

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<sup>101</sup> IND. CODE. § 31-11-1-1(b) (1997).

<sup>102</sup> *Morrison*, 821 N.E.2d at 19. The provisions in question were Indiana's Equal Privileges and Immunities Clause, text in Article I about the meaning of a "core value," and language in Article I guaranteeing effective access to justice. *Id.* at 21, 31, 34; *see* IND. CONST. art. 1, §§ 1, 12, 23.

<sup>103</sup> *Morrison*, 821 N.E.2d at 35.

<sup>104</sup> *Hernandez*, 855 N.E.2d at 5.

<sup>105</sup> *Id.* at 6.

<sup>106</sup> *Id.* at 5. New York State's Due Process Clause provides that "[n]o person shall be deprived of life, liberty or property without due process of law." N.Y. CONST. art. I, § 6. New York State's Equal Protection Clause provides that "[n]o person shall be denied the equal protection of the laws of this State or any subdivision thereof." § 11.

<sup>107</sup> *Hernandez*, 855 N.E.2d at 5.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *See supra* notes 78–85 and accompanying text.

<sup>111</sup> *Hernandez*, 855 N.E.2d at 8.

against homosexuals. This is the question on which these cases turn."<sup>112</sup> While animus may not be the sole reason for marriage discrimination, it—and the social and legal traditions which flow from it—certainly are the primary ones.

Consider also the springing scrutiny in *Hernandez* for any measure that would better link marriage and reproduction at the expense of heterosexuals: “[L]imiting marriage to opposite-sex couples likely to have children would require grossly intrusive inquiries, and arbitrary and unreliable line-drawing. A legislature . . . could rationally find that an attempt to exclude childless opposite-sex couples from the institution would be a very bad idea.”<sup>113</sup>

*Morrison* makes a similar move. The court first states unambiguously that, because the Indiana DOMA need pass only the “most basic rational relationship test” to be upheld, the burden of persuasion rests entirely on the plaintiffs to “negative every conceivable basis which might have supported the classification.”<sup>114</sup> After noting that the plaintiffs do not meet *this* standard, the court adds that the “key question” is, also, whether same-sex marriage would satisfy “all” of the interests that cross-sex marriage furthers.<sup>115</sup> So homosexuals in Indiana face a double burden of persuasion—not only must they refute all conceivable legislative rationales for exclusion, but they must also show that letting homosexuals marry would serve all the interests of heterosexual marriage.<sup>116</sup> In any event, the point is gratuitous, since neither over-inclusivity nor under-inclusivity would threaten the constitutionality of the state DOMA given *Morrison*’s construction of the standard of the review.<sup>117</sup>

Both courts support their holdings by stipulating to some important advantages for children from same-sex households—an admission against interest which makes their otherwise unqualified legal support for heterosexuality as a norm more paradoxical.<sup>118</sup> *Morrison* does this in the context of evaluating the plaintiffs’ claim that the Indiana DOMA violates the state’s Equal Privileges and Immunities Clause by privileging heterosexual reproduction above that of others.<sup>119</sup> The court re-

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<sup>112</sup> *Id.* (emphasis added).

<sup>113</sup> *See id.* at 11–12.

<sup>114</sup> *Morrison*, 821 N.E.2d 1, 22 (quoting *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994)).

<sup>115</sup> *Id.* at 23.

<sup>116</sup> *See id.*

<sup>117</sup> *See id.* at 22.

<sup>118</sup> *See id.* at 24; *Hernandez*, 855 N.E.2d at 7–10.

<sup>119</sup> *Morrison*, 821 N.E.2d at 21.

sponds with a back-handed compliment to reproductive homosexuals, whom it presumes can provide—unaided—the sorts of “stable environments” the state seeks for all children.<sup>120</sup> These homosexual parents are presumed to be “financially and emotionally” invested, committed to childrearing, and, importantly, good at planning and thinking ahead.<sup>121</sup> A recent study does find that the demographics of same-sex households who adopt (and foster) children are different: “Same-sex couples raising adopted children are older, more educated, and have more economic resources than other adoptive parents.”<sup>122</sup> Same-sex couples raising foster children have the highest level of education; their incomes, too, are higher than those of unmarried cross-sex foster parents, though cross-sex married couples have the highest incomes among foster parents.<sup>123</sup> So, the court is on to something.

Because this is an equal protection claim being evaluated at the lowest level of scrutiny, the court also must consider how heterosexuals measure up.<sup>124</sup> They leave something to be desired: heterosexual reproduction can occur “with no foresight or planning” from “one instance of sexual intercourse” between heterosexuals who have shown “little or no contemplation of the consequences that might result.”<sup>125</sup> Logic would expect that such a side-by-side comparison would lead

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<sup>120</sup> *See id.* at 24.

<sup>121</sup> *Id.* The Court also notes that

[Homosexuals and others] wanting to have children by assisted reproduction or adoption are, by necessity, heavily invested, financially and emotionally, in those processes. Those processes also require a great deal of foresight and planning.

...

Members of a same-sex couple who wish to have a child . . . have already demonstrated their commitment to child-rearing, by virtue of the difficulty of obtaining a child through adoption or assisted reproduction, without the State necessarily having to encourage that commitment through the institution of marriage.

*Id.* at 24, 26.

<sup>122</sup> GATES, ET AL., *supra* note 6, at 12, 26–28 (culling statistics on adoption and foster care by gays, lesbians, and heterosexuals using data from the U.S. Census 2000, the National Survey of Family Growth (2002), and the Adoption and Foster Care Analysis and Reporting System (2004)). For example, the mean income for cross-sex married couples who adopt is \$81,900, while that of lesbian couples is \$102,508 and that of gay male couples is \$102,331. *Id.* at 11. When considering all child-rearing—not just adoption—same-sex couples have lower income and educational levels than do married heterosexual couples. *Id.* at 12.

<sup>123</sup> *Id.* at 16.

<sup>124</sup> *Morrison*, 821 N.E.2d at 24–25.

<sup>125</sup> *Id.* at 25–26.

these courts to conclude that same-sex marriage would enhance the state's interest in procreation; instead, a *deus ex machina* in the form of marriage emerges to save heterosexuals from themselves. It is marriage, *Morrison* holds, which can mitigate the problems caused by "time-inconsistency" in casual heterosexual coitus.<sup>126</sup> Marriage, says the court, encourages heterosexuals "to procreate within the legitimacy and stability of a state-sanctioned relationship and to [avoid] unplanned, out-of-wedlock births resulting from 'casual' intercourse."<sup>127</sup> How marriage accomplishes this is not clear, given that it is apparently just an afterthought to a coital accident.<sup>128</sup> Nor does the court consider the obvious: if it is barriers to entry, as it were, that make homosexuals undertake reproduction deliberately and properly, then why not consider mechanisms to encourage heterosexuals to be more deliberate about reproduction?<sup>129</sup>

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<sup>126</sup> See *id.* Some behavioral law and economics research finds that people's preference are much less stable (or "time consistent") than previously thought, perhaps explaining, as Manuel Utset has proposed, the peskiness of many self-control problems, including those related to sexual decision-making.

First, even small self-control problems due to time-inconsistent preferences can produce large aggregate welfare losses, particularly when decisions are made and actions are taken in an incremental fashion over time—for example the decision each day to smoke another pack of cigarettes or procrastinate enrolling in a retirement account. Second, even when aware of their self-control problems, people tend to miscalculate the true magnitude of those problems and thus underestimate the need to adopt commitment devices in response.

See Manuel A. Utset, *Time-Inconsistent Management & the Sarbanes-Oxley Act*, 31 OHIO N.U. L. REV. 417, 419–20 (2005).

<sup>127</sup> *Morrison*, 821 N.E.2d at 24. Neither do the other reasons given by the court address the ex ante risks from impulsive coital intercourse. *Id.* at 24–25.

<sup>128</sup> Michael Lee Aday memorialized the time-inconsistency dilemma of heterosexual coitus in his song *Paradise by the Dashboard Lights*. MEATLOAF, *Paradise by the Dashboard Lights*, on BAT OUT OF HELL (Cleveland Int'l Records 1977) (dramatizing conflict between ex ante negotiations about sex and regret ex post).

<sup>129</sup> See *Morrison*, 821 N.E.2d at 24. The Court notes:

Those persons who have invested the significant time, effort, and expense associated with assisted reproduction or adoption may be seen as very likely to be able to provide such an environment [that is, one conducive to child rearing], with or without the "protections" of marriage, because of the high level of financial and emotional commitment exerted in conceiving or adopting a child or children *in the first place*.

*Id.* (emphasis added to draw attention to the implications of time-inconsistent behavior).



*Hernandez* makes the same dodge: noting the recklessness of heterosexual coitus and asserting marriage as a risk mitigant *ex post*.<sup>130</sup> *Hernandez* notes that a rational legislature could find that heterosexual relationships are “all too often casual or temporary” and that they “present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples.”<sup>131</sup> Marriage, the court alleges, can “create more stability and permanence in the relationships that cause children to be born.”<sup>132</sup> As in *Morrison*, *Hernandez* blurs the time-inconsistency problem it identifies (impaired rationality during coitus) and the remedy it extols (marriage *ex post*).<sup>133</sup> What *Wickard v. Filburn* did to expand the outer limits of “rationality” in federal legislation based on the Commerce Clause, these cases do for the strained ends-means arguments resorted to by those seeking to keep marriage straight.<sup>134</sup>

One could infer a preference for heterosexuality—like the one discussed in the previous section about the auction—solely on the basis of this asymmetrical analysis. *Hernandez*, though, makes an express case for it (as do the players in the auction) in its second reason for why a rational legislature could limit marriage to heterosexuals: the notion that children are better off being raised in a cross-sex, heterosexual

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<sup>130</sup> *Hernandez*, 855 N.E.2d at 6–8. Section III of the *Hernandez* opinion includes the court’s analysis of the rationality of limiting marriage to heterosexuals on account of their often irresponsible reproductive dynamics. *Id.* The court’s later consideration and rejection of the plaintiffs’ equal protection arguments incorporate Section III’s categorization discussion by implication when observing that the New York legislature could limit marriage to heterosexuals “for the reasons we have explained . . . based on the different characteristics of opposite-sex and same-sex relationships. Our earlier discussion [in Section III] demonstrates that the definition of marriage to include only opposite-sex couples is not irrationally underinclusive.” *Id.* at 11. Another demonstration of the incoherence of the court’s standard of review is that it justifies the admitted under-inclusivity, an argument which is surplus if the standard of review is mere rationality.

<sup>131</sup> *Id.* at 7.

<sup>132</sup> *Id.*

<sup>133</sup> See *supra* notes 124–129 and accompanying text.

<sup>134</sup> See *Wickard v. Filburn*, 317 U.S. 111 (1942). *Wickard* involved the constitutionality, under the Commerce Clause, of the Agricultural Adjustment Act of 1938 (“Act”), a piece of New Deal legislation which assessed fines on agricultural production in excess of established quotas. *Id.* at 113. A farmer who had grown 239 bushels of wheat for use by his family and as cattle feed was fined under the Act for excess production. *Id.* at 114. He appealed the fine. *Id.* at 113–14. Finding that even this negligible amount of excess production designed for personal use could exert a “substantial effect” on the federal scheme for regulating interstate commerce, the Supreme Court upheld the Act. *Id.* at 128–29. It is a strained construction of “substantial effect” on interstate commerce. It seems no more plausible that marriage as a “morning after” device for unintended pregnancy necessarily adds stability to that kind of family unit.

household.<sup>135</sup> “Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like,” says the court.<sup>136</sup>

It is this move which resolves, for the court at least, the central contradiction faced by the court. Presumably, it is heterosexuality’s inherent superiority which offsets the instability that necessitates accident-induced marriage. Could a minimally rational legislature really favor child-rearing by cross-sex couples as an essentialized class when that same legislature has also recognized that heterosexual marriages may be little more than damage control after impulsive coitus? I do not see how the two thoughts could be held at once: reckless reproduction due to problems of time-inconsistency in regulating sexual impulses, on the one hand, and the inherent superiority of heterosexuality as a model, on the other.<sup>137</sup> So I conclude that it must be some kind of visceral taste for heterosexuality that permits the courts to countenance these irregularities in reasoning.

The *Hernandez* plurality suggests some personal discomfort, on the part of the judges, with the conclusion that is compelled, in their opinion, by the legal doctrine.<sup>138</sup> Not so Judge Graffeo’s concurrence, which deserves particular consideration as the most primitive in its reassertion of heterosexual normativity.<sup>139</sup> Judge Graffeo writes to “elaborate” after the plurality has denied the plaintiffs’ request for a marriage license.<sup>140</sup> The concurrence voices more support for the state’s asserted link between procreation and marriage than does the plurality’s more balanced consideration.<sup>141</sup> First, the concurrence approvingly references

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<sup>135</sup> *Hernandez*, 855 N.E.2d at 7.

<sup>136</sup> *Id.*

<sup>137</sup> Over one-third of adoption agencies in one study stated that they would reject a gay or lesbian applicant because of the agency’s religious ideologies or marriage requirements, or the director’s personal enmity against homosexuality. See GATES, ET AL., *supra* note 6, at 9.

<sup>138</sup> The plurality makes clear that it is their concept of judicial duty which compels their support for keeping marriage heterosexual:

We emphasize once again that we are deciding only this constitutional question. It is not for us to say whether same-sex marriage is right or wrong. We have presented some (though not all) of the arguments against same-sex marriage because our duty to defer to the Legislature requires us to do so. We do not imply that there are no persuasive arguments on the other side—and we know, of course, that there are very powerful emotions on both sides of the question.

*Hernandez*, 855 N.E.2d at 12.

<sup>139</sup> See *id.* at 13.

<sup>140</sup> *Id.* at 12–13.

<sup>141</sup> *Id.* at 14–17.

the portion of a Minnesota Supreme Court opinion that points to the book of Genesis as support for the historic link between procreation and heterosexuality.<sup>142</sup> Next, it wields *Lawrence* as an animus cap, not as that lever of equality which some giddy jurists have seen in it.<sup>143</sup> Judge Graffeo gleans from *Lawrence* that its prohibition on criminalizing homosexuality based on moral disapproval does not inhibit civil legal disabilities on homosexuals.<sup>144</sup> It is a good point.

The capstone of the concurrence is that—and this is where he tips his hand—the statute does not really keep homosexuals from marrying: it is just that they cannot marry *other* homosexuals.<sup>145</sup> “[I]ndividuals who seek marriage licenses are not queried concerning their sexual orientation and are not precluded from marrying if they are not heterosexual. Regardless of sexual orientation, any person can marry a person of the opposite sex.”<sup>146</sup> And here we have spent *all* this wasted time and court costs. It is not the first time that the argument has been made.<sup>147</sup> It is another example of symbolic violence in law, one so absurd that it could not have been arrived upon through reason.<sup>148</sup>

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<sup>142</sup> See *id.* at 17, n.4 (citing *Baker v. Nelson*, 191 N.W.2d 185, 186 (1971)).

<sup>143</sup> See *Hernandez*, 855 N.E.2d at 17–18. *Lawrence* should not be seen as a radical change because its holding is narrowly bounded. See generally Katherine M. Franke, Commentary, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1399–1400 (2004) (“The ACLU proclaimed: ‘It gave us the constitutional right to form intimate relationships and to sexual expression. For that, *Lawrence* changes everything.’ *Everything?* That may overstate the significance of the case somewhat.” (citation omitted)); Berta E. Hernández-Truyol, *Querying Lawrence*, 65 OHIO ST. L.J. 1151, 1240–50 (2004) (noting the heteronormative limits of the privacy and equality rationales advanced by *Lawrence*).

<sup>144</sup> *Hernandez*, 855 N.E.2d at 18. It is a good example of “death by distinction”:

The right affirmed by the Supreme Court in *Lawrence* is not comparable to the new right to marry plaintiffs assert here, nor is the Texas statute criminalizing homosexual sodomy analogous to the marriage statutes under review. The Domestic Relations Law is not a penal provision and New York has not attempted to regulate plaintiffs’ private sexual conduct or disturb the sanctity of their homes. And, in contrast to the Texas statute, New York’s marriage laws are part of a longstanding tradition with roots dating back long before the adoption of our State Constitution.

*Id.*

<sup>145</sup> *Id.* at 20.

<sup>146</sup> *Id.*

<sup>147</sup> Other cases considering equal protection have put forth similar arguments. See, e.g., *Lewis*, 875 A.2d at 263 (quoting trial court: “Plaintiffs, like anyone else in the state, may receive a marriage license, provided that they meet the statutory criteria for marriage, including an intended spouse of the opposite gender. . . . The State makes the same benefit, mixed-gender marriage, available to all individuals on the same basis.”).

<sup>148</sup> See *infra* note 235.

The dissent by Chief Justice Kaye responds well not only to the plurality opinion but to the sharp concurrence too.<sup>149</sup> Chief Justice Kaye concludes that the exclusion of homosexuals from marriage is subject to heightened scrutiny for three reasons: homosexuals are a suspect class; their exclusion from marriage flows from a sex-based distinction; and the right in question—marriage—is a fundamental one.<sup>150</sup> Nevertheless, applying an evenhanded minimal rationality review for argument's sake, she concludes that the exclusion of homosexuals from marriage serves no legitimate state interest, including the interests typically used to justify such exclusion: fostering reproduction, furthering moral disapproval of homosexuals, keeping with tradition, and maintaining uniformity with the marriage law of sister states.<sup>151</sup>

With the notable exception of Chief Justice Kaye's dissent, the judicial reasoning in *Morrison* and *Hernandez* has more in common with religious doctrine than with the secular reasoning one expects from these courts.<sup>152</sup> These cases do rely on some non-tautological arguments, but they are few and far between.<sup>153</sup> As the next section shows, unstable standards of review and incoherent modes of differentiation are the rule where legal categorizations of heterosexual and homosexual are concerned.

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<sup>149</sup> *Hernandez*, 855 N.E.2d at 22–34.

<sup>150</sup> *Id.* at 27–30.

<sup>151</sup> *Id.* at 30–34.

<sup>152</sup> Indeed, the arguments in *Morrison* and *Hernandez* are in line with the shift from reason to religious orthodoxy that Charles Freeman describes in his excellent book on the consolidation of Christian power in the Roman Catholic church beginning in the third century:

The imposition of orthodoxy went hand in hand with a stifling of any form of independent reasoning. By the fifth century, not only rational thought had been suppressed, but there has been a substitution for it of “mystery, magic, and authority,” a substitution which drew heavily on irrational elements of pagan society that had never been distinguished. Pope Gregory the Great warned those with a rational turn of mind that, by looking for cause and effect in the natural world, they were ignoring the cause of all things, the will of God.

See CHARLES FREEMAN, *THE CLOSING OF THE WESTERN MIND: THE RISE OF FAITH AND THE FALL OF REASON*, at xviii–xix (2002) (tracing the active suppression of the Greek intellectual tradition from Constantine to Aquinas).

<sup>153</sup> See Tamayo, *supra* note 15, at 64 (“[The] court’s reliance on the link between heterosexual intercourse and procreation to exclude same-sex partners’ relationships from recognition as state-sanctioned marriages displays stagnant tautology closely mirroring early decisional law.”).

### 3. *Copula Copularum*: Understanding Judicial Incoherence Through Paranoia

Despite losing, the plaintiffs in *Morrison* and *Hernandez* (and their advocates) have helped to get these courts on the record about legal heterosexuality. The court of history will do its job. By considering the legal doctrine, I was not suggesting that there was much chance that the plaintiffs could prevail. I offered the legal doctrine not for its truth, but only for the *fact* of its utterance in order to examine its meaning.<sup>154</sup>

For that, let me start with Janet Halley's analysis of how courts classify heterosexuality in federal equal protection doctrine. She has noted that it is the "*practices of categorization*" rather than the coherence of the categories themselves which matter.<sup>155</sup> She points out the "diacritical" relationship between legal categories for heterosexuality and homosexuality, such that each depends on the other for its identity.<sup>156</sup> Halley also has observed that, while law marked homosexuals in different ways—sodomy being a typical mark because, at the time, *Bowers v. Hardwick* let states criminalize gay sex<sup>157</sup>—heterosexuals were not categorically defined or otherwise legally marked: they were just "nonhomosexuals."<sup>158</sup> The invisibility of heterosexuals as a "default class" depended on what Halley called the "coercive dynamics of its incoherence" as a class.<sup>159</sup>

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<sup>154</sup> Those who would exclude homosexuals from marriage can rest easy for another generation or so, although the moral standing of their claims will keep slipping. My money says that the federal Defense of Marriage Act will not be repealed or abolished for at least fifteen years.

<sup>155</sup> See Janet Halley, *The Construction of Heterosexuality*, in *FEAR OF A QUEER PLANET*, *supra* note 47, at 82, 83. Halley's point about equal protection analysis should be extended to legal constructions of heterosexuality generally: "Indeed, it seems to me to be a timely moment to argue that equal protection theorizing should focus not, as it has until the last few years, on *categories*, but on *practices of categorization*." *Id.*

<sup>156</sup> *Id.* ("The two classifications [i.e., heterosexual and homosexual] are diacritical in the sense that they acquire definition and meaning in relation to one another: the fact that the more privileged class [heterosexuals] habitually hides its existence *as a class* doesn't mean that legal decision makers can afford to ignore it.")

<sup>157</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>158</sup> See Halley, *supra* note 155, at 83. Halley notes how this indeterminacy does, however, constitute "nonhomosexuals" as a default class, one that by implication includes heterosexuals: "[L]egal definitions of the class of homosexuals persistently involve equally decisive, but far less visible, practices of constituting a class of heterosexuals. . . . Despite its representation as monolithic in its nonhomosexuality, heterosexuality as it operates in federal equal protection cases is a highly unstable, default characterization. . . ." *Id.*

<sup>159</sup> *Id.* at 86. As Halley points out, as a legal category heterosexuality is "profoundly heterogeneous, unstable, and provisional. . . . [I]t owes its glory days as a coherent social

When two things are diacritically defined against each other, each one must be distinct enough from the other to sustain the difference. The same principle—in theory, at least—underlies the state equal protection doctrine analyzed here. Equal protection doctrine offers useful side-by-side comparisons of “heterosexual” and “homosexual” because its function is to test the logical quality of legal classification. The diacritical relationship which Halley noted earlier continues in *Morrison* and *Hernandez*, albeit in different terms. There are, however, only so many relevant characteristics which can sustain a legal difference between heterosexuality and homosexuality; now that sex is off the table after *Lawrence*, reproduction does the heavy lifting.

The new methods of jural marking deployed in *Morrison* and *Hernandez* are obvious if one knows what to look for: evidentiary standards for relevance and “intent” that ensure that same-sex plaintiffs are always already precluded from making the necessary showings; the “one drop rule”—deferring to anti-gay state action so long as the animus is not the sole motive; the failure to consider some obvious advantages which same-sex households may provide to children; the unreflective irony of elevating heterosexual reproduction to an end-in-itself immediately after recognizing its frequent recklessness; and, finally, the glib insults which find a safe harbor in legal doctrine.<sup>160</sup>

These legal categorization practices may have all the self-awareness of a Sasha Baron Cohen character, e.g., Borat, but they embody a distinct moment in the categorization practices used by courts with respect to heterosexuality and homosexuality.<sup>161</sup> In *Morrison* and *Hernandez* the legal category of “homosexual” is blurring while that of “heterosexual”

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category to its members' own *failure to acknowledge* its discursive constitution, the coercive dynamics of its incoherence.” *Id.*

<sup>160</sup> See *supra* notes 40, 90–94, 111–112, 118–133, 145–148 and accompanying text.

<sup>161</sup> Sex, reproduction, and marriage have been de-linked in practice, but remain bound in law:

Contraception and abortion are now readily available. Many married women are financially capable of supporting themselves and their children. The social stigma attached to single parenthood has essentially disappeared. Children are no longer viewed as financial assets but financial burdens, creating a strong incentive toward fewer children. The availability of adoption and artificial reproductive technologies . . . have expanded parental possibilities to single persons and same-sex couples in ways unimaginable only a few decades ago.

See FOLEY, *supra* note 78, at 76.

is coming into focus, making it easier to examine, challenge, and, eventually, refute.<sup>162</sup>

The next Part offers one explanation for what causes these categorization practices and the parental taste for heterosexuality. My argument is “structuralist” in that it suggests a system with relatively stable properties which interact with each other in recurrent, predictable ways.<sup>163</sup> Because it focuses on consciousness, it is also Marxian, a tradition of explaining “organized social dominance” and its reproduction in human action.<sup>164</sup> The argument is an example of what Janet Halley, following Judith Butler, designates the “copula” of structural feminist arguments: it is a rhetorical strategy that links social conditions and

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<sup>162</sup> The quickening of reproductive heterosexuality through marriage into a legal category exposes it to rational review, as illustrated by the recent Washington state referendum that would have conditioned ongoing marital status on the production of children. See Washington Defense of Marriage Alliance, Initiative 957, <http://www.secstate.wa.gov/elections/initiatives/text/i957.pdf> (last visited on Jan. 24, 2008). Gay activists challenged the rationality of reproductive heterosexual marriages in Initiative 957. See *id.* This state referendum, put forward by the Washington Defense of Marriage Alliance, was meant to better conform state marriage law to its stated legislative intent of furthering procreation. See *id.* Initiative 957 proposed to do this through several legal requirements intended to improve the enforcement of marriage’s asserted procreative imperative. See *id.* The proposed bill added the phrase, “who are capable of having children with one another” to the legal definition of marriage; required that couples married in Washington file proof of procreation within three years of the date of marriage; required that couples married out of state file proof of procreation within three years of the date of marriage or have their marriage classed as “unrecognized”; established a process for filing proof of procreation; and made it a criminal act for people in an unrecognized marriage to receive marriage benefits. *Id.* However this initiative was not enacted and was later withdrawn by its sponsor. Proposed Initiatives to the People—2007, <http://www.secstate.wa.gov/elections/initiatives/people.aspx> (last visited Jan. 24, 2008).

<sup>163</sup> A structural approach describes a formal system of interdependent parts, which behave in predictable and recurrent ways. Levi-Strauss defines the concept clearly (and structurally):

[A] structure consists of a model meeting with several requirements. . . .

First, the structure exhibits the characteristics of a system. It is made up of several elements, none of which can undergo a change without effecting changes in all the other elements.

Second, for any given model there should be a possibility of ordering a series of transformations resulting in a group of models of the same type.

Third, the above properties make it possible to predict how the model will react if one or more of its elements are submitted to certain modifications.

CLAUDE LEVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* 279 (Claire Jabosen & Brooke Grundfest Schoepf trans., Basic Books 1963).

<sup>164</sup> See MACKINNON, *supra* note 21, at ix. “Marxism is the contemporary theoretical tradition that—whatever its limitations—confronts organized social dominance, analyzes it in dynamic rather than static terms, identifies social forces that systematically shape social imperatives, and seeks to explain human freedom both within and against history.” *Id.*

causes by setting up identities between them that keep elements of the structural model together.<sup>165</sup>

Let me conclude this Part by anticipating some objections to my approach, particularly from critical communities in which I participate and which are properly suspicious of this sort of argument. For one, my argument rejects post-modernity's Nicene Creed against essences by using what Janet Halley and Duncan Kennedy have classified as "paranoid structuralism."<sup>166</sup> Indeed, the copula is the deep structure of paranoid logic.<sup>167</sup> Halley notes that the copula may leave its users "energized, emboldened, fortified . . . indignant and determined."<sup>168</sup> She warns, though, that the approach can alienate others: "its hammering insistence, its righteous wrath, will sound to you like scary, even crazy zeal."<sup>169</sup> So, while noting their value, Halley rejects the strongest versions of structuralism, including feminism.<sup>170</sup>

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<sup>165</sup> JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 193 (2006).

<sup>166</sup> The argument in this article is chargeable with the "paranoid structuralism" that Halley and Kennedy describe. See Duncan Kennedy, *A Semiotics of Critique*, 22 *CARDOZO L. REV.* 1147, 1169 (2007) ("The paranoid structuralist asks how unwanted things get reproduced, rather than how the organism sustains itself through time. The answer is paranoid because it emphasizes that "out there" forces or people or structures operate behind our backs . . ."); see also HALLEY, *supra* note 165, at 191 ("[Presupposing] the covert importance of one's favorite paranoid idea—or claiming to see it precisely [because of] its absence—can have the big downside of being, well, paranoid."). Halley notes the risk of theoretical paralysis from feminist paranoid structuralism and provides a self-examination to test for paranoid structuralism. *Id.* at 187–207.

<sup>167</sup> I set out the copula around conceptual liquidation of sexual minorities most fully in my last article when outlining the structure of conceptual liquidation:

[It includes] overt acts like physical harassment and ridicule, as well as the strategic omissions of straight supremacy: the shameful excitement of early sexual interest, the siege during adolescence, the search for self in literary and historical subtext, parental opprobrium and the resulting splitting of the self, institutionalized religious hostility, hostility from peers, one's own hostility towards "militant" gays who implicate one's own internalized repudiation, the risk that a national border will come between one and the object of one's affection, heightened management of the quite real risks to career, frustrated family formation, deflationary progress narratives, ego conflicts from reconciling self to professional commitments, and, although only anticipated during life, the final insults at death. A complete taxonomy of [conceptual liquidation] is impossible because its genius lies in its ability to turn any social moment into a theater for stigma.

See Gabilondo, *supra* note 27, at 21–22 & nn.66–79 (citations omitted).

<sup>168</sup> HALLEY, *supra* note 165, at 194.

<sup>169</sup> *Id.* at 195.

<sup>170</sup> Halley notes:



By essentializing, structuralist arguments also risk overlooking the range of constituencies in a legal question. For example, Angela Harris notes that a structural approach may essentialize women of color out of a theory of women.<sup>171</sup> It is the danger of any single “monolithic” conception of “women’s experience.”<sup>172</sup> Women of color, says Harris, are likely to be excluded from strategically reductionist accounts of women’s experience.<sup>173</sup> Bertha Hernandez has noted that critiques of reproductionism may also conflict with the values of Latina Catholics.<sup>174</sup>

For example, although neither *Morrison* nor *Hernandez* explicitly mention race, their disapproval of casual (and causal) coitus may include a veiled endorsement of the racist reproductive policies denounced by Dorothy Roberts.<sup>175</sup> Roberts objects to population polices

Of course it is no longer acceptable to “be a structuralist” in the strongest sense—that would be hopelessly naïve, almost as bad as being “essentialist”—and almost no one does either any more if he or she can help it. Nevertheless subordination theories across the board, feminist ones being no exception, continue to have persistent recourse to an attitude of paranoid structuralism.

*Id.* at 189.

<sup>171</sup> See generally Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

<sup>172</sup> *Id.* at 588 (“The notion that there is a monolithic ‘woman’s experience’ that can be described independent of other facets of experience like race, class, and sexual orientation is one I refer to . . . as ‘gender essentialism.’”).

<sup>173</sup> See *id.* at 589. Harris states:

In my view, however, as long as feminists, like theorists in the dominant culture, continue to search for gender and racial essences, black women will never be anything more than a crossroads between two kinds of domination, or at the bottom of a hierarchy of oppressions; we will always be required to choose pieces of ourselves to present as wholeness.

*Id.*

<sup>174</sup> Hernandez explains, “the potential (and unavoidable) conflict that can confront a predominantly Catholic group in being asked to embrace sexual minorities or to accept certain population-control based solutions to hunger and poverty.” Berta Esperanza Hernández-Truyol, *Latina Multidimensionality and LatCrit Possibilities: Culture, Gender, and Sex*, 53 U. MIAMI L. REV. 811, 813–14 (1999) (citation omitted).

<sup>175</sup> For example, Roberts has shown how racist control over African Americans has—depending on the historical context—favored either more or less reproduction depending on the interests of the dominant white class:

Race completely changes the significance of birth control to the story of women’s reproductive freedom . . . . While slave masters forced Black women to bear children for profit, more recent policies have sought to reduce Black women’s fertility. Both share a common theme—that Black women’s child-bearing should be regulated [for] social objectives.

DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 56 (1997).

based on race rather than reproductivism, the latter being a value she endorses when arguing that black women have a special claim to the symbolic capital that comes from reproductivism “because they have historically been denied the dignity of their full humanity and identity.”<sup>176</sup> She does object to the use of “citizens as instruments of the state” but this is not a general rejection of the reproductivism.<sup>177</sup> In this view, reproduction is an exercise in collective self-help in the face of sustained, concerted attacks on dignity.<sup>178</sup>

The charge of essentialism might legitimately be brought against my argument too. Reproduction *is* over-determined: different heterosexuals may or may not reproduce for any number of reasons. And it means different things to different people. My goal here, though, is only to identify one source of demand for children—demand for symbolic value through heterosexuality. Presumably, other structural elements are also at work, including racialized differences in the taste for heterosexuality, something which I invite other scholars to consider.

Critiquing structuralist approaches, Halley also notes how they have contributed to a “deadlock in feminism” by leading to a form of intellectual paralysis.<sup>179</sup> For example, she analyzes the emergence of

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<sup>176</sup> *Id.* at 302. Roberts sees reproduction as a transcendent human value: “The right to bear children goes to the heart of what it means to be human. The value we place on individuals determines whether we see them as entitled to perpetuate themselves in their children.” *Id.* at 305.

<sup>177</sup> *Id.* at 306. Her view may leave room to some restraint on procreative liberty in the name of a future child’s welfare but the argument focuses on how racial opprobrium drives the social interpretation given to harm to offspring:

Poor crack addicts and welfare mothers are punished for having babies because they fail to measure up to the state’s ideal of motherhood . . . not penalized simply because they may harm their unborn children or because their childbearing will cost taxpayers money . . . [but rather] because the combination of their poverty, race, and marital status is seen to make them unworthy of procreating.

*See id.* at 305.

<sup>178</sup> Roberts notes the psychic and political value of reproductive self-determination for overcoming the psychic sequellae of slavery: “The process of defining one’s self and declaring one’s personhood defies the denial of self-ownership inherent in slavery. This affirmation of personhood is especially suited for challenging the devaluation of Black motherhood underlying the regulation of Black reproduction.” *See id.* at 303.

<sup>179</sup> HALLEY, *supra* note 165, at 192. The crisis Halley describes is familiar to anyone active in critical jurisprudential movements:

Structuralist ambitions figure in these gestures as an ultimate fealty to transcendence, a utopia, or a harmonic convergence that, if we were only smart and good enough, we would be able to produce out of the terrible conflictual material we have to work with.

“governance feminism,” which involves the reception of mediated forms of feminism into the official sector as an example of the porosity of power.<sup>180</sup> She is right to note that “[b]y positing themselves as *experts* on women, sexuality, motherhood, and so on, feminists walk the halls of power.”<sup>181</sup> The official sector, however, has not digested advocacy for sexual minorities to the same degree. Although structural claims may seem shrill or quaint in the context of women’s experience generally, they may still be relevant for sexual minorities. Being paranoid does not mean that they are not out to get you.<sup>182</sup>

Because of *when* critiques of heterosexual normativity became institutionalized in the academy, these critiques are sometimes seen as postmodernist. Relegating the analysis of heterosexuality to postmodernism might imply that heterosexual complementarity fits into modernity. In fact, though, pre-modern views can “pass” as modern conceptions, as suggested in a recent Supreme Court case in which one Justice objected to the majority’s “ancient notions about women’s place in the family” when upholding the federal Partial-Birth Abortion Ban Act.<sup>183</sup> I use some post-modern sources to make what is really a conventionally modern argument, albeit one designed to oust pre-modern conceptions of modernity masquerading as the real thing.

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So it’s not just that the “race, class . . .” mantra, deployed prescriptively, often obscures rather than illuminates the complexity of power in the social world. The moralized crisis that sustains it is so ritualized—is performed again and again with such Kabuki-like precision—that one could call it a deadlock in feminism. Paralysis again.

*Id.*

<sup>180</sup> *See id.* at 20–22.

<sup>181</sup> *Id.* at 21.

<sup>182</sup> Nearly one-half of the world’s countries criminalize gay or lesbian sex between consenting adults. INT’L LESBIAN AND GAY ASS’N, STATE-SPONSORED HOMOPHOBIA A WORLD SURVEY OF LAWS PROHIBITING SAME SEX ACTIVITY BETWEEN CONSENTING ADULTS 4 (2007), [http://www.ilga.org/statehomophobia/State\\_sponsored\\_homophobia\\_ILGA\\_07.pdf](http://www.ilga.org/statehomophobia/State_sponsored_homophobia_ILGA_07.pdf) (identifying such laws in eighty-five member countries of the United Nations).

<sup>183</sup> *See* 18 U.S.C. § 1531 (Supp. 2004); *Gonzalez v. Carhart*, 127 S. Ct. 1610, 1649 (2007) (Ginsburg, J., dissenting). Justice Ginsburg’s dissent uses the word “ancient” rather than “premodern” but the idea is the same. *Id.* at 1649. She notes that the majority’s decision in *Carhart* is “alarming” and “reflects ancient notions about women’s place in the family and under the Constitution—ideas that have long since been discredited.” *Id.* at 1641, 1649. Admonishing the decision, Ginsburg states, “If there is anything at all redemptive to be said of today’s opinion, it is that the Court is not willing to foreclose entirely a constitutional challenge to the Act.” *Id.* at 1651. While she acknowledges that *Carhart* “does not go so far as to discard *Roe* or *Casey*,” she recognizes that the Court is “differently composed than it was when we last considered a restrictive abortion regulation, [and] is hardly faithful to our earlier invocations of ‘the rule of law’ and the ‘principles of *stare decisis*.’” *Id.* at 1652.

## II. PERFECTING OBSERVER STATUS IN HETEROSEXUAL REPRODUCTION

This Part examines how and why the taste for heterosexuality is reproduced. The social construction of heterosexuality's value, I assert, creates self-fulfilling demand on the part of parents and courts for the conspicuous reproduction of heterosexuality. Once this happens, the reproduction of (heterosexual) reproduction seems to propel itself. To explain how this comes to be, I use Pierre Bourdieu's socioeconomic theory of reproduction, as supplemented with feminist and other sources on reproduction and heterosexuality. Read together, these sources let one peer into normative heterosexuality without falling into it.<sup>184</sup>

Section A introduces Bourdieu's framework. Section B considers the mental structure which creates demand for the reproduction of heterosexuality as a practice and as a norm. Section C explains how children provide their parents with capital and how, in a heterosexual economy, parents correctly discount the value of a gay child.

### A. Bourdieu: the Individual as Cell of Social Reproduction

As part of his vast sociology on taste, education, and the French academy, Bourdieu examined the reproduction of social institutions and tastes.<sup>185</sup> Commentators agree that his work could add "complete-

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<sup>184</sup> As David Halperin has noted,

[T]he project of shifting the discursive position of homosexuality from that of object to subject does not constitute a mere attempt to *reform* sexual discourses. . . . The aim, rather, is to treat homosexuality as a position from which one *can* know, to treat it as a legitimate *condition* of knowledge.

DAVID M. HALPERIN, SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY 60 (1995). One of the few anthologies of critical heterosexuality studies is THINKING STRAIGHT: THE POWER, THE PROMISE, AND THE PARADOX OF HETEROSEXUALITY (Chrys Ingraham ed., 2005). Focusing on heterosexuality and its discontents also avoids misplaced scrutiny. See, e.g., Martha M. Ertman, *Reconstructing Marriage: An InterSEXional Approach*, 75 DENV. U. L. REV. 1215, 1215 n.2 (1998) ("The danger of queer theorists applying constructionist analysis only to discuss gay and lesbian issues is that doing so deconstructs homosexuality leaving heterosexuality in its naturalized, superior position.").

<sup>185</sup> See generally PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE (Richard Nice trans., 1984) (1979) [hereinafter BOURDIEU, DISTINCTION]. His classic text on the subject is PIERRE BOURDIEU & JEAN-CLAUDE PASSERON, REPRODUCTION IN EDUCATION, SOCIETY AND CULTURE (Richard Nice trans., Sage Publications 1990 ed.) (1977). Those who process information visually will especially appreciate the book's schematic representations of how a person's education and career transform elements of social capital and how, in the aggregate, these patterns of transformations contribute to class formation. Bourdieu's trenchant analysis of the French higher education system will be of special interest to academics. See generally PIERRE BOURDIEU, HOMO ACADEMICUS (1988).

ness” to legal scholarship, especially on questions of agency and class.<sup>186</sup> One reason why this is so is because Bourdieu consciously overcame many methodological binaries.<sup>187</sup> Integrating received oppositions is useful for a relatively new issue like the taste for heterosexuality, which may deserve its own theoretical structure. Bourdieu’s model is “structural” because it connects individual consciousness and action, social structure, and the reproduction of both.<sup>188</sup> In this it has much in common with a Marxian analysis of “reproductive praxis” mentioned earlier.<sup>189</sup> Trained first as an ethnographer, however, Bourdieu saw class formation through the lens of the individual, one “thick” with motives and strategies, so, despite his protestations, his approach has some important things in common with the rational actor model.<sup>190</sup>

Bourdieu saw his work as a form of “genetic structuralism” which examined the origin of both mental and social structures and the joint

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<sup>186</sup> See, e.g., Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1020 (1995) (noting the value of Bourdieu’s explanation of formal education as an agent of social construction). Lawrence Lessig has noted the exceptional coherence of Bourdieu’s explanation of formal education as an agent of social construction. See *id.* at 973–74. He also uses Bourdieu’s concept of “social capital,” and praises how Bourdieu’s economic rhetoric contributes more “completeness” than the “materialist” approach of Richard Posner and Tomás Philipson. *Id.* at 1004–05, 1020. Susan Carle points out that American legal theory has only barely begun to consider the implications of Bourdieu’s work on class, and she refers to Bourdieu as a “master continental theorist of class.” Susan D. Carle, *Theorizing Agency*, 55 AM. U. L. REV. 307, 392 (2005). A good place to begin a study of Bourdieu is Richard Terdiman’s translation of Bourdieu’s essay on law as a juridical field, of which the translator’s introduction is exceptionally lucid. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 805–13 (Richard Terdiman trans., 1987).

<sup>187</sup> See PIERRE BOURDIEU, IN OTHER WORDS: ESSAYS TOWARDS A REFLEXIVE SOCIOLOGY 34 (1990). According to Bourdieu, “Today’s sociology is full of oppositions, which my work often leads me to transcend—even if I don’t set out deliberately to do so.” *Id.*

<sup>188</sup> See generally LEVI-STRAUSS, *supra* note 163.

<sup>189</sup> See Allman, *supra* note 62, at 203.

<sup>190</sup> See Craig Calhoun, *Habitus, Field, and Capital: The Question of Historical Specificity*, in PIERRE BOURDIEU: CRITICAL PERSPECTIVES 55, 70–71 (Craig Calhoun et al., eds. 1993). Calhoun notes the affinity:

Bourdieu’s theory does imply dynamism . . . at the level of the strategic actor . . . . That is, the motive force of social life is the pursuit of distinction, profit, power, wealth, and so on . . . . [D]espite his disclaimers, Bourdieu does indeed share a good deal with Gary Becker and other rational choice theorists.

*Id.* For example, Bourdieu’s view that semi-conscious “dispositions” inform gain-seeking is consistent with the way that the new institutional economics reasons aspire to behavioral assumptions that better approximate how people act in fact, not theory. See, e.g., OLIVER WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 44 (1985) (noting the use of bounded rather than idealized rationality in transaction cost economics because this assumption better reflects “human nature as we know it”).

reproduction of each.<sup>191</sup> I see his work as “Marxian behavioralism” because of its focus on individual action in the patterned reproduction of social structure.<sup>192</sup> This article examines the relationship between prenatal biases and social and legal structure, so I use his framework because it maps these elements. Bourdieu’s preoccupation with the origin and reproduction of social structures is relevant to this article’s central goal: to demonstrate the existence of a socially-constructed preference (rewarded by law) which privileges heterosexuality and, at the same time, propels personal reproduction, thereby begetting begetting.

Catherine MacKinnon has criticized the way that some feminists have built on “the work of French men” while ignoring the reality of women’s lives.<sup>193</sup> This may be true of followers of Bourdieu’s contemporaries, but I do not think that this criticism applies to this article. In fact, Bourdieu’s work encourages a critical move “from the model of reality to the reality of the model.”<sup>194</sup> That said, it is true that he paid less attention to questions of sex and gender—an odd and unfortu-

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<sup>191</sup> See Bourdieu, *supra* note 186, at 14. Bourdieu described his work this way:

I would say that I am trying to develop a *genetic structuralism*: the analysis of objective structures – those of different *fields* – is inseparable from the analysis of the genesis, within biological individuals, of the mental structures which are to some extent the product of incorporation of social structures; inseparable, too, from the analysis of the genesis of these social structures themselves.

*Id.*

<sup>192</sup> Looking for original ways to span the divide between determinism and constructionism is common to much contemporary scholarship. See, e.g., JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX,”* at x (1993) (“Such a willful and instrumental subject, one who decides *on* its gender, is clearly not its gender from the start and fails to realize that its existence is already decided *by* gender.”) (clarifying overly constructionist interpretations of her earlier work); KYRIAKOS KONTOPOULOS, *THE LOGIC OF SOCIAL STRUCTURE passim* (1993) (proposing theory of structural causation from “macro” levels through “meso” levels in order to reach “micro” behavior at the level of individuals); Carle, *supra* note 186, at 371–74 (arguing for the value of turn-of-the century classical pragmatist thought as an analytical framework in her comprehensive consideration of agency theory in social constructionist debates).

<sup>193</sup> Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687, 702 (2000) (“Postmodern feminists seldom build on or refer to the real lives of real women directly; mostly, they build on the work of French men, if selectively and not very well.”). Indeed, MacKinnon notes how much of postmodernism developed from feminist and Marxian critiques of social dominance: “Postmodernism’s analysis of the social construction of reality is stolen from feminism and the left but gutted of substantive content—producing Marxism without the working class, feminism without women.” *Id.* at 710. The same can be said for feminism’s legacy to postmodern art. See Holland Cotter, *The Art of Feminism As It First Took Shape*, N.Y. TIMES, Mar. 9, 2007, at E29 (“Much of what we call postmodern art has feminist art at its source.”).

<sup>194</sup> PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* 39 (Richard Nice trans., 1990) (1980).

nate oversight considering that physical reproduction is the royal road to social reproduction, including inequality.<sup>195</sup> In general, though, Marxian analysis of the sexual order has been somewhat limited.<sup>196</sup>

A particular virtue of Bourdieu's approach is that by taking us behind-the-scenes into the middle and upper classes, it avoids the classism of viewing only the reproduction of the poor as a social problem.<sup>197</sup> It is true that reproductivism is regressive, with its costs, like infanticide, falling most heavily on the young, poor, and uninformed.<sup>198</sup> As do others, I emphasize the importance of class when thinking about reproduction.<sup>199</sup> A proper critique of natalism, however, should consider the role

<sup>195</sup> However, "this substantive omission should not be taken to mean that Bourdieu's theoretical apparatus does not necessarily have relevance for feminism." Lisa Adkins, *Introduction: Feminism, Bourdieu and After*, in *FEMINISM AFTER BOURDIEU* 3, 3 (Lisa Adkins & Beverly Skeggs eds., 2004). This volume is the best source on feminist applications of Bourdieu.

<sup>196</sup> There are a few prominent exceptions. See, e.g., PAUL ROBINSON, *THE FREUDIAN LEFT* (1969) (studying the relationship between Marxism and psychoanalysis in the work of Wilhelm Reich, Geza Roheim, and Herbert Marcuse). Wilhelm Reich argued for a "sex-economic morality" that integrated Freudian ideas about libido with Marxism. WILHELM REICH, *THE SEXUAL REVOLUTION: TOWARD A SELF-REGULATING CHARACTER STRUCTURE* 25–29 (Therese Pol trans., Farrar, Straus & Giroux 1974) (1945).

<sup>197</sup> The most extended example of this is Bourdieu's charming examination of the class structure of cultural taste in contemporary French society. See generally BOURDIEU, *DISTINCTION*, *supra* note 185. It classifies and examines taste across social strata but pays special attention to the "petit-bourgeois" and its anguished relationship to the "bourgeoisie." For example, he notes that "one can contrast a bourgeois ethos of ease, a confident relation to the world and the self, which are thus experienced as necessary . . . with a petit-bourgeois ethos of restriction through pretension, the voluntaristic rigour of the 'called' but not yet chosen . . ." *Id.* at 339 (distinguishing between rising and falling sectors of the petit-bourgeois). Mapping the correspondence between French and U.S. class structure would require a more extended discussion, but I just want to highlight his sustained interest in the sociology of the affluent. See also PIERRE BOURDIEU, *MASCULINE DOMINATION* 101 (Stanford Univ. Press 2001) (1998) [hereinafter BOURDIEU, *MASCULINE DOMINATION*] ("The women of the petit-bourgeoisie, who go to extremes in their attention to the care of the body . . . and more generally in their concern for ethical and aesthetic respectability, are the greatest victims of symbolic domination, but also the natural vectors for the relaying of its effects towards the dominated categories.").

<sup>198</sup> See Mary Overpeck, *Epidemiology of Infanticide*, in *INFANTICIDE: PSYCHOSOCIAL AND LEGAL PERSPECTIVES ON MOTHERS WHO KILL* 19, 24–25 (Margaret G. Spinelli ed., 2003) [hereinafter *INFANTICIDE*]. Two of the most important risk factors for infanticide are the age of the mother and her education. *Id.* Infanticide research suffers from inadequate reporting, but some research has been conducted by state vital statistics agencies. See *id.* at 19–20. One study of 2776 probable infant homicides found that infants at highest risk of infanticide are the second or subsequent children born to mothers under the age of seventeen. *Id.* at 24. Infants of mothers who had not completed high school were eight times more likely to be killed than those of mothers with sixteen years of education, although this correlation also reflects the aforementioned risk factor of age. *Id.* at 25.

<sup>199</sup> See generally Franke, *supra* note 49. Dorothy Roberts has also criticized the way that advocacy for reproductive technologies disproportionately consumed by middle and up-

of the reproduction of the affluent.<sup>200</sup> After all, legal standards about family life may reflect bourgeois styles and interests to the detriment of others.<sup>201</sup> Because wealth may insulate the rich and the very rich from some forms of status anxiety, it is in the middle and upper-middle classes where the challenge to improve social standing through reproductive competition may emerge more clearly.<sup>202</sup>

Bourdieu's model of social reproduction has three moving parts which are central to my argument: the accumulative self ("habitus"); the convertible capitals it seeks; and the exchange markets ("fields") where it converts these capitals in contests with others.<sup>203</sup> The following sections examine each of these concepts in the context of the taste for heterosexuality and its role as a crankshaft of heterosexual reproduction.

### B. *Heterosexual Time-Inconsistency in the Habitus*

At the heart of Bourdieu's theory about social reproduction is a notion of a "future-projected, strategizing, accruing, exchange-value

per-middle class persons ignores the different reproductive needs of poorer women. See ROBERTS, *supra* note 175, at 56.

<sup>200</sup> Some suggest that heterosexual marriage strategies contribute materially to the reproduction of economic inequality: "Yet sorting on education, income, race, religion, and other characteristics in marriage is probably far more important in transmitting inequality than capital market restrictions on investments in human capital, neighborhood segregation, and the other variables usually emphasized." GARY S. BECKER & KEVIN M. MURPHY, *SOCIAL ECONOMICS MARKET BEHAVIOR IN A SOCIAL ENVIRONMENT* 34 (2000).

<sup>201</sup> Consider, for example, how concerns about meeting social expectations for dowry in India may encourage female infanticide for families of modest means: "[E]ven today, the birth of a daughter automatically triggers the pressure of saving a suitable dowry. If a family cannot provide a suitable dowry, it risks social ostracism. Among poor rural families, the persistence of female infanticide and sex-selective abortions of healthy female fetuses is attributable to this fear." See Michelle Oberman, *A Brief History of Infanticide and the Law*, in *INFANTICIDE*, *supra* note 198, at 3, 5.

<sup>202</sup> See *supra* note 197. And this class focus also makes the argument more directly relevant to the members of the legal academy.

<sup>203</sup> See generally BOURDIEU, *MASCULINE DOMINATION*, *supra* note 197. This "invisible hand" of reproductivism substitutes in part for the concerted strategies noted by Bourdieu:

The work of reproduction was performed, until a recent period, by three main agencies, the family, the church and the educational system, which were objectively orchestrated and had in common the fact that they acted on unconscious structures. The family undoubtedly played the most important part in the reproduction of masculine domination. . . . In fact the whole of learned culture, transmitted by the educational system . . . has never ceased, until a recent period, to convey archaic modes of thought.

*Id.* at 85-86.



self.<sup>204</sup> The self works through the “habitus,” a reservoir of skills, tastes, and dispositions that reflect prior learning and socialization.<sup>205</sup> The taste for heterosexuality is one of those “dispositions” which comes to reside in the habitus through “learning and socialization.” Though not, as far as I know, framed in such terms, this basic insight is hardly original, as suggested by scholarship about homophobia. My goal here is to suggest how this habitual disposition shows up in valuations of potential children.

Humanities scholar Lee Edelman has performed the most detailed analysis of how reproductivism has been “soft-wired” into heterosexual consciousness as a symbol which drives many heterosexuals to organize time through “reproductive futurism.”<sup>206</sup> He posits a conflict in the minds of heterosexuals between two symbols.<sup>207</sup> The dominant symbol is the “Child.”<sup>208</sup> In other words, not a child-in-fact, this is a “when, if, and as-issued” child whose imputed interests reach back from an equally imagined future to call the shots in the present.<sup>209</sup> The Child “marks the *fetishistic* fixation of heteronormativity: an *erotically* charged investment in the rigid *sameness* of identity that is central to the compulsory narrative of reproductive futurism.”<sup>210</sup> (Not an easy sentence, granted, but understanding it is worth the effort.) I have added emphasis to point out that this process involves the collective regulation of libido—that of the parent, the child, and third parties who bear the attendant social costs and benefits—for the sake of reproducing the *same* social arrangements.<sup>211</sup>

Against the Child, the death drive emerges as a nihilist force associated with the homosexual; it disrupts future-looking reproduction by suggesting that the present may make claims of its own, notwithstand-

<sup>204</sup> Beverley Skeggs, *Exchange, Value and Affect: Bourdieu and the “The Self,” in FEMINISM AFTER BOURDIEU*, *supra* note 195, at 75, 83. Skeggs does an excellent job of distinguishing this exchange-value of the self from competing theoretical models. *Id.* at 77–83.

<sup>205</sup> Bourdieu took the habitus from previous theorists and made it “generative”: “I was very close to Chomsky, in whom I found the same concern to give to practice an active, inventive intention . . . I wanted to insist on the *generative capacities* of dispositions, it being understood that these are acquired, socially constituted dispositions.” See BOURDIEU, *supra* note 187, at 13.

<sup>206</sup> See generally EDELMAN, *supra* note 19.

<sup>207</sup> See *id.* at 3.

<sup>208</sup> See *id.* at 2–4. Edelman capitalizes “child” to emphasize its totemic power.

<sup>209</sup> See *id.*

<sup>210</sup> *Id.* at 21 (emphasis added).

<sup>211</sup> This symbolic operation involves managing sex energy (hence “erotically” and “fetishistic”). The goal of the operation is to reproduce “sameness,” thus my corollary that the Child—like the heterosexual parent—is straight too.

ing the imaginary future of imaginary children.<sup>212</sup> These symbolic conflicts collapse distinct moments in time (the future of the imaginary Child and everyone else's present), reflecting a time disjunction similar to the time confusion of heterosexual coitus discussed earlier in connection with *Morrison* and *Hernandez*.<sup>213</sup> It is this ricocheting backward and forward that may keep some heterosexuals permanently locked into a time disorder.<sup>214</sup> This time confusion makes a market for reproduction by keeping heterosexuals from anticipating the forward costs of reproduction. The symbolic capital bribe which cases like *Morrison* and *Hernandez* offer—however illusory it may turn out to be in practice—also keeps some heterosexuals from properly pricing the value of the present and, perhaps, the value of relationships with existing people who do not enter into the reproductive calculus.

It is my contention—extending Edelman's argument—that this totemic Child is demonstrably heterosexual—at the level of symbol—because that sexual orientation conforms with the overall logic of reproduction—as currently understood—and, therefore, produces the most social approval. This symbolic heterosexual Child would be an example of one of those “internalized categories” which Bourdieu identifies as the building block of social and natural “realities.”<sup>215</sup> Support for the claim that the symbolic Child which Edelman discusses is itself heterosexual comes from the reactions of parents to the early signs that a child may be homosexual. For example, Dr. Nicolosi's guide

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<sup>212</sup> EDELMAN, *supra* note 19, at 9. “The drive—more exactly, the death drive—holds a privileged place in this book. . . . [T]he death drive names what the queer, in the order of the social, is called forth to figure: the negativity opposed to every form of social viability.” *Id.*

<sup>213</sup> See *supra* notes 118–133 and accompanying text.

<sup>214</sup> “Politics, then, in opposing itself to the negativity of such a [death] drive, gives us history as the continuous staging of our dream of eventual self-realization by endlessly reconstructing, in the mirror of desire, what we take to be reality itself.” EDELMAN, *supra* note 19, at 10.

<sup>215</sup> See BOURDIEU, MASCULINE DOMINATION, *supra* note 197, at 121. When explaining how it is that social reform movements accomplish lasting results, Bourdieu emphasizes the need to “subvert” the internalized schema of representation:

To accomplish a durable change in representations, [symbolic subversion] must perform and impose a durable transformation of the internalized categories (schemes of thought) which, through upbringing and education, confer the status of self-evident, necessary, undisputed natural reality, within the scope of their validity, on the social categories that they produce.

*Id.* Here, preconsciousness or some form of subliminal consciousness in the form of parents' hopeful but unwarranted expectations about potential children informs the experience of subsequent actual children who come into being. See *id.*

for parents on preventing homosexuality in (existing) children includes detailed guidelines about what parents can do in the first years of a child's life to mitigate the risk of incipient homosexuality.<sup>216</sup> Edelman's main point is about how this mental and social system prejudices sexual minorities; my point is that heterosexuals also suffer in this system.<sup>217</sup>

Habital heterosexuality involves the reproduction of itself. That is, because it drags learned preferences from the past into the present, the habitus is a structure broker that mediates between former and future states of the world through strategies. It is in this sense that the habitus makes possible the reproduction of reproduction, thereby creating demand for heterosexuality and its symbolic value.

The heterosexualized habitus needs a forum in which to seek gain and, in Bourdieu's model, these capital production and exchange markets are called "fields."<sup>218</sup> "Bourdieu understands the social world to

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<sup>216</sup> See NICOLOSI & NICOLOSI, *supra* note 48, at 33–53 (suggesting steps for reparative intervention by parents in the development of what may be a "prehomosexual boy"). The references in these guidelines to the felt experience of these boys of their "genderlessness," are open to other readings. Indeed, perhaps unwittingly, Nicolosi's idea of a child's "genderlessness," the feeling of not being particularly invested in the behaviors and identity ascribed to one's chromosomal sex status also lends support to the autonomy of gender from sex and sexual orientation, a refreshing perspective given that progressive discourse now uses "gender" when it means "chromosomal sex" (and, in so doing, forecloses the transformative potential of gender). During the last decade or so, "gender" has come to substitute for "sex" on official forms (especially those with progressive aspirations) and in academic and popular discourse. I think this substitution makes people feel "modern" or hip. In fact, though, it is a reactionary move from the point of view of gender politics. Gender starts from the idea that identity and behavior do not correlate with chromosomal sex status. The sex spectrum runs from "male" to "female" while, in parallel fashion, the gender spectrum runs from "butch" to "femme." By substituting "gender" for "sex" the former loses its power as a reminder of the false correlates between sex and identity. Properly conceived, gender is nothing more than a transitional concept that—correctly—includes the seeds of its own eventual irrelevance. This idea is outside the scope of this article but too important not to mention.

<sup>217</sup> See generally EDELMAN, *supra* note 19.

[O]ur enjoyment of liberty is eclipsed by the lengthening shadow of a Child whose freedom to develop undisturbed by encounters, or even by the threat of potential encounters, with an "otherness" of which its parents, its church, or the state do not approve . . . terroristically holds us all in check and determines that political discourse conform to the logic of a narrative wherein history unfolds as a future envisioned for a Child who must never grow up.

*Id.* at 21.

<sup>218</sup> See BOURDIEU, *supra* note 187, at 87–88. For legal academics not yet familiar with Bourdieu's framework, it can be grasped intuitively by thinking about our profession. As teachers, we cultivate particular dispositions in students, such as "thinking like a lawyer" and absorbing specialized course content to produce (seemingly) seamless performances.

comprise differentiated, but overlapping, fields of action, for example, the economic field, the political field, the legal field, and so on.<sup>219</sup> Fields precede and give rise to “games” by setting up the economic interests that animate more targeted competition among relevant actors.<sup>220</sup> Embedded in this statement is the idea that games emerge as a

Unceasing calculation is part of the tenure track, where daily strategies are crafted (and concealed, perhaps) in a countdown to one or two important future decisions by senior faculty, a process during which one may have to make a separate peace despite collective interests as faculty.

Reproduction and exchange figure prominently in many more of our customary practices: expounding one’s views through articles, conferences, and media appearances; asking prospective colleagues in their interviews versions of “Why aren’t you me?”; adding to the reputation of one’s home institution; and cultivating ideas, disciplines, and disciples. Being cited is a key form of reproduction, hence citation markets (and cartels) where faculty provide price support for each other’s work. The promotion and tenure process—and the pageantry of appointments—is a clear site of conflicts over reproductive projects. Just ask anyone who has served on an appointments committee and has noticed a colleague gush at an applicant with a shared distinction: rank, clerkship, or attendance at one of the “thirty schools in the Top Ten.” (The phrase belongs to my College of Law colleague, Tom Baker.) Academic salaries being what they are, economic capital (“financial” is a better word since all forms of capital are economic) matters less in academe than cultural, social, and symbolic capitals, although marginal differences in merit increases, negligible to begin with, can fuel controversy.

Pre-tenure, article placement and scholarship reviews allocate cultural capital, both in one’s home institution (where status may be marked-to-market) and extramurally. Consider academics huddled around a credential, mentor, or prized social network or signaling social standing in an asterisked footnote by thanking a particular reader, regardless of whether or not that reader’s reactions were seriously considered. A law review article is a bid for the symbolic capital of a judge, legislature, or another scholar or critic. Recognition is key to symbolic capital, hence the appeal of titles and chairs and the habit of running serial Lexis searches for one’s own name (*guilty*). The struggle over the power to name and classify (“the theory effect”) is the bread-and-butter of much academic conflict. Faculty meetings are one forum for these conflicts, with opportunities for serving the self through institutionally-framed discourses and the small, but important, joy of blocking an opponent’s capital strategy. Few things exemplify the symbolic power to create binding status and power through “naming” as does the power of a promotion and tenure committee when considering an application for tenure.

Bourdieu emphasized law as the primary engine of symbolic capital, but nonlegal mechanisms also allocate legitimacy; consider the roles of the Carnegie Foundation and *U.S. News and World Report* in the faculty habitus. These two institutions make possible our ordinal fixations, including the “trading up” practices involved in maximizing article placement and the sense of knowing one’s place, especially when wearing a nametag at the Marriot Wardman.

<sup>219</sup> Lisa Adkins, *Reflexivity: Freedom or Habit of Gender*, in *FEMINISM AFTER BOURDIEU*, *supra* note 195, at 191, 193.

<sup>220</sup> It is fields that make possible the emergence of interests, and, hence, games: “The existence of a specialized . . . field is correlative with the existence of specific stakes . . . . [I]nterest is at once a condition of the functioning of a field (a scientific field, the field of *haute couture*, etc), in so far as it is what ‘gets people moving’, what makes them . . . compete and struggle . . . .” See BOURDIEU, *supra* note 187, at 87–88.

function of field dynamics.<sup>221</sup> Courts make and police fields for games through judicial review, which can empower courts to structure and restructure basic social arrangements (for example, marriage).<sup>222</sup> The main field which this article considers is physical reproduction. Cases like *Morrison* and *Hernandez* help promote investment in this field by rewarding acts of coital recklessness with the special rights of marriage.

### C. *Children as Capital*

Faced with one risk and reward scenario after another, “the habitus always works with a perception of future value and accumulation.”<sup>223</sup> What the habitus wants is what Bourdieu classifies as “multiform and convertible” capital, the main types of which are social, cultural, economic, and symbolic capital.<sup>224</sup> Before explaining how a child provides these capitals—and how, in a heterosexual social economy, the return from a straight child might exceed that from a gay one—let me define them.

“Economic capital is wealth either inherited or generated from interactions between the individual and the economy . . . .”<sup>225</sup> Cultural capital takes the form of educational accomplishment, as reflected in credentials.<sup>226</sup> “Social capital is generated through social processes between the family and wider society and is made up of social net-

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<sup>221</sup> Here Bourdieu addresses time before the first period of a game:

[T]he inclination to play the economic game, to invest in the economic game which is itself the product of a certain economic game, is at the very basis of the existence of this game. This is something forgotten by every form of economism. Economic production functions only in so far as it first produces a belief in the value of its products . . . and it must also produce a belief in the value of the activity of production itself . . . .

*Id.* at 89.

<sup>222</sup> While many law and economics arguments do a good job of explaining how games create incentives for players, these arguments do not always address why or how these games come to be in the first place. Bourdieu offers such an explanation, however, through an argument about interests: “Unlike the natural, ahistorical or generic interest referred to by economists, interest in my view, is an investment in a game, any game, an investment which is the condition of entry into this game and which is simultaneously created and reinforced by the game.” *Id.* at 48.

<sup>223</sup> See Skeggs, *supra* note 204, at 85.

<sup>224</sup> See Calhoun, *supra* note 190, at 69–70.

<sup>225</sup> Diane Reay, *Gendering Bourdieu’s Concepts of Capitals? Emotional Capital, Women and Social Class*, in *FEMINISM AFTER BOURDIEU*, *supra* note 195, at 57, 57.

<sup>226</sup> See Calhoun, *supra* note 190, at 70.

works.<sup>227</sup> Friendship by the abacus (that is, a quid pro quo calculation) pervades much social life because friendship can involve gain.

Symbolic capital is key to normative heterosexuality because this type of capital includes social approval.<sup>228</sup> "Symbolic power is the power to make things with words"<sup>229</sup> and is essentially unstable.<sup>230</sup> The family is "the guardian of symbolic capital."<sup>231</sup> Law produces much symbolic capital through official determinations, like those defining the scope of marriage or the extent of parental authorities.<sup>232</sup> These legal determinations confer "upon a [particular] perspective an absolute, universal value, thus snatching it from a relativity that is by definition inherent in every point of view . . . ."<sup>233</sup> For example, Devon Carbado makes a form of symbolic capital argument when noting that opening marriage to

<sup>227</sup> Reay, *supra* note 225, at 57.

<sup>228</sup> Symbolic capital includes social approval in all of its manifestations:

Authority, knowledge, prestige, reputation, academic degrees, debts of gratitude owed by those to whom we have given gifts or favors: all these are forms of symbolic capital. Such symbolic capital can be readily convertible into the more traditional form of economic capital. The exchange value of symbolic capital, while it cannot be stated to the penny, is continuously being estimated and appraised by every individual possessing or coming into contact with it. The relevance of a notion of symbolic capital to the study of an important professional field like the juridical is considerable.

See Bourdieu, *supra* note 186, at 812.

<sup>229</sup> Pierre Bourdieu, *Social Space and Symbolic Power*, 7 SOC. THEORY 14, 23 (1989). Symbolic power turns on classification and naming: "[T]he words, the names which construct social reality as much as they express it, are the stake par excellence of political struggle, which is a struggle to impose the legitimate principle of vision and division, i.e., a struggle over the legitimate exercise of what I call the 'theory effect.'" *Id.* at 20–21.

<sup>230</sup> See BOURDIEU, *supra* note 187, at 93. Bourdieu notes the "essential instability of symbolic capital which, being based on reputation, opinion and representation . . . can be destroyed by suspicion and criticism, and is particularly difficult to transmit and to objectify." *Id.*

<sup>231</sup> *Id.* Bourdieu makes the observation in the context of the family's relationship to religion and the state when he notes "the constant, explicit support that the family, that guardian of symbolic capital, receives from churches and from law." See *id.* The court in *Hernandez* alludes to this symbolic capital. See 855 N.E.2d at 7 ("Beyond this, [heterosexual couples] receive the symbolic benefit, or moral satisfaction, of seeing their relationships recognized by the State.").

<sup>232</sup> What Bourdieu says about state-granted titles generally is true also about marriage:

Official nomination, that is, the act whereby someone is granted a title, a socially recognized qualification, is one of the most typical expressions of that monopoly over legitimate symbolic violence which belongs to the state or its representatives . . . . As an official definition of an official identity, it frees its holder from the symbolic struggle of all against all by imposing the universally approved perspective.

See BOURDIEU, *supra* note 187, at 135.

<sup>233</sup> *Id.* at 21.

homosexuals would reduce its premium as a symbol.<sup>234</sup> It is the desire to hold on to this symbolic premium which has led defenders of straight supremacy—when their backs are against the wall—to concede the economic substance of marriage to homosexuals (through civil unions) but not the symbolic franchise of marriage. *Morrison* and *Hernandez* add symbolic capital to heterosexual reproduction by converting a heterosexual social ill—unintended pregnancy—into a warrant for a special right. And the flip-side of this subsidy is the “symbolic violence” which the opinions perform on homosexuals.<sup>235</sup>

What kind of capital could a child provide to a parent? The answer is obvious in economies in which children provide the promise of wage returns from labor.<sup>236</sup> In other economies, other forms of capital must be considered. Though Gary Becker comes from a different methodological tradition, his work complements Bourdieu’s model of a capital-seeking habitus. Becker notes that reproduction involves a discretionary lifestyle choice by an individual to acquire a “consumption good.”<sup>237</sup> Becker’s model assumes a pair consisting of a female and a male.<sup>238</sup> The all-in cost (or benefit) of having a child, says Becker, is the present value of all anticipated inflows minus the present value of all anti-

<sup>234</sup> See Carbado, *supra* note 43, at 96. (“[T]o the extent that lesbian and gay marriages are legalized, the “value” of heterosexual marriage—its cultural, political, and social currency—is diminished. Part of the perceived value of marriage as an institution derives from its heterosexual exclusivity. . . . The right to marriage must be heterosexually earned.”)

<sup>235</sup> The particular form of insult derived from reading cases like *Morrison* and *Hernandez* involves what Pierre Bourdieu considered “symbolic” or “gentle” violence. BOURDIEU, *MASCULINE DOMINATION*, *supra* note 197, at 1–2 (“And I have also seen masculine domination . . . as the prime example of this paradoxical submission, an effect of what I call symbolic violence, a gentle violence, imperceptible and invisible even to its victims, exerted for the most part through the purely symbolic channel of communication and cognition . . . or even feeling.”). A glib and callous dissent from a Massachusetts opinion on same-sex marriage provides a typical example. See *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 572 n.1 (2004) (Sosman, J., dissenting) (“The insignificance of according a different name to the same thing has long been recognized: ‘What’s in a name?/That which we call a rose/By any other name would smell as sweet . . . .’”) (quoting WILLIAM SHAKESPEARE, *ROMEO AND JULIET*, act 2, sc. 2)). I am particularly grateful to Frank Valdés for his advice on negotiating symbolic violence in legal decisions while reading them.

<sup>236</sup> See generally Schultz, *supra* note 72.

<sup>237</sup> See Becker, *Fertility*, *supra* note 1, at 210. “For most parents, children are a source of psychic income or satisfaction, and, in the economist’s terminology, children would be considered a consumption good. Children may sometimes provide money income and are then a production good as well.” *Id.*

<sup>238</sup> See BECKER, *FAMILY*, *supra* note 1, at 38 n.3 (referencing “a household with one man and one woman”). The only examples that he provides reflect this configuration.

pated outlays.<sup>239</sup> Here, "income" refers not primarily to money income (although this is so when children act as an income reserve from which aged parents may draw), but to various forms of psychic income too. The costs of reproduction also involve both money and psychic costs, although children can reduce their net cost to the family unit by providing services.<sup>240</sup>

If this present value is a negative number (the costs exceed the income), the child is a consumer durable; if the present value is a positive number (the anticipated income exceeds the cost) the child is a producer durable.<sup>241</sup> This present value also includes a time-discounted "dynastic utility function" that measures the income of future descendants.<sup>242</sup> Unlike most other commodities, however, "[c]hildren are usually not purchased but are self-produced by each family, using market goods and services and the own time of parents, especially of mothers."<sup>243</sup>

According to Becker, it is "complementarity" in the sex-based differences between the heterosexual male and the heterosexual female that makes cross-sex pairing more efficient than other arrangements.<sup>244</sup> In this view, sex-based division of labor reflects natural efficiencies in gestation and child-rearing.<sup>245</sup> Indeed, he argues for a biological basis for preferring cross-sex households over other types.<sup>246</sup>

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<sup>239</sup> See Becker, *Fertility*, *supra* note 1, at 213. More technically, the cost of a child "equals the present value of expected outlays plus the imputed value of the parents' services, minus the present value of the expected money return plus the imputed value of the child's services." *Id.*

<sup>240</sup> See *id.*

<sup>241</sup> *Id.*

<sup>242</sup> See BECKER, FAMILY, *supra* note 1, at 156. "By relating the utility of children to their own consumption and to the utility of their children, we obtain a *dynastic* utility function that depends on the consumption and number of descendants in all generations." *Id.* The model assumes that parents are altruistic toward their children. *Id.* at 155.

<sup>243</sup> *Id.* at 138. Becker explains private demand for children and patterns between the quantity and quality of children (as measured by parental investment in education). *Id.* He defines demand as "the number of children desired when there are no obstacles to the production or prevention of children." *Id.* at 141.

<sup>244</sup> BECKER, FAMILY, *supra* note 1, at 39. Becker's argument makes no moral judgments about arrangements other than a cross-sex pair, but stylized examples like this may confer symbolic value on the model: "Complementarity [between heterosexual men and heterosexual women] implies that households with men and women are more efficient than households with only one sex, but because both sexes are required to produce certain commodities complementarity reduces the sexual division of labor in the allocation of time and investments." *Id.*

<sup>245</sup> *Id.* at 37-48.

<sup>246</sup> *Id.* at 39. The argument also reflects the classic use of analogies from nonhuman sexual arrangements, a point explored in greater detail later:



The biological argument rests on analogies to the “naturalness” of sexual reproduction by nonhuman animals.<sup>247</sup> (There is also some interesting countervailing zoological research that challenges determinism by studying non-reproductive sex in nonhuman animals.)<sup>248</sup> This is akin to the biological determinism behind some of the legal arguments brought by the state in the cases discussed earlier.<sup>249</sup> (I am not attributing to Becker’s arguments any explicit normativity.<sup>250</sup> Versions of the “heterosexual complementarity” arguments, however, are used in *Morrison* and *Hernandez* to justify reserving the special legal rights of marriage as a reward for reckless heterosexual coitus.)<sup>251</sup>

My contention is that babies and children provide parents with social and symbolic capital by enhancing reputation in important networks. Such gains produce psychic income from individual alignment with widely-held norms. For example, sociologist Viviana Zelizer has pointed out that, while their financial value dropped during the

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Consequently, biological differences in comparative advantage between the sexes explain not only why households typically have both sexes, but also why women have usually spent their time bearing and rearing children and engaging in other household activities, whereas men have spent their time in market activities.

*Id.*

<sup>247</sup> According to Becker, humans reproduce in much the same way as all vertebrates: “Sexual reproduction along these lines is all but universal among vertebrates: not only mammals, but also fish, reptiles, birds, and amphibians reproduce sexually.” *Id.* at 37.

<sup>248</sup> See BRUCE BAGEMIHLE, *BIOLOGICAL EXUBERANCE: ANIMAL HOMOSEXUALITY AND NATURAL DIVERSITY* 168 (1999) (“What many people fail to realize is that reproduction itself often occupies a peripheral position in animal life—either being a ‘marginal’ activity among apparently heterosexual animals, or else a common activity among seemingly ‘marginal’ animals such as those involved in homosexuality.”).

<sup>249</sup> See, e.g., *Baker*, 744 A.2d 864, 909. For example, the state’s argument in *Baker* uses the concept of biological complementarity between man and woman to show that marriage is essentially heterosexual. “The State contends that (1) marriage unites the rich physical and psychological differences between the sexes; (2) sex differences strengthen and stabilize a marriage; (3) each sex contributes differently to a family unit and to society. *Id.* at 909; see also *Morrison*, 821 N.E.2d at 26 (favorably citing *O’Connor v. O’Connor*, 253 N.E.2d 250, 258 (Ind. 1969) (“Through the institution of marriage, biological drives are directed into channels of socially accepted activity . . .”)); *Hernandez*, 855 N.E.2d at 15, (J. Graffeo, concurring) (“The binary nature of marriage—its inclusion of one woman and one man—reflects the biological fact that human procreation cannot be accomplished without the genetic contribution of both a male and a female.”).

<sup>250</sup> To the credit of Becker’s work, it clearly distinguishes between efficiency analysis and other values like social justice. For example, he points out that “an efficient division of labor is perfectly consistent with exploitation of women by husbands and parents—a ‘patrimony’ system—that reduces [women’s] well-being and their command of their lives.” BECKER, *FAMILY*, *supra* note 1, at 4.

<sup>251</sup> See *Morrison*, 821 N.E.2d at 24; *Hernandez*, 855 N.E.2d at 7.

nineteenth century due to child labor laws, children became “economically ‘worthless’ but emotionally ‘priceless.’”<sup>252</sup> The type of income which children provided shifted from economic to what Bourdieu would probably consider symbolic.<sup>253</sup> Social economist Thorsten Veblen coined the concept of “conspicuous consumption” to explain what he saw as the downward drift of taste from the upper to lower classes, who tried to enhance their status by consuming goods associated with the wealthy.<sup>254</sup> As imagined by Veblen, spending money on the right goods would let a person consume “up” beyond his actual class. In the case of conspicuous reproduction which I suggest, having children does not enhance one’s financial status but, rather, provides social approval, including validation of one’s identity.<sup>255</sup>

Although the realities of raising a child may involve substantial sacrifice on the part of a parent and symbolic detriment, part of the payoff from having children is the symbolic capital from the social approval

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<sup>252</sup> VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN 3, 6 (1985).

<sup>253</sup> *See id.*

<sup>254</sup> “Conspicuous consumption of valuable goods is a means of reputability to the gentleman of leisure.” *Id.* at 64. The less affluent have fewer resources for leisure but their taste resembles that of the affluent because “the upper class extends its coercive influence with but slight hindrance down through the social structure of the lowest strata.” *Id.* at 70. This is too simple; which is why I prefer Bourdieu’s more nuanced appreciation of the dynamics of taste within the middle classes. *See* discussion *supra* note 202. Thorsten Veblen introduced the concept of a status good in 1899. *See* THORSTEN VEBLEN, A THEORY OF THE LEISURE CLASS (New York, MacMillan (1899)); Jonathan Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property and the Incentive Thesis*, 91 VA. L. REV. 1381, 1388–91 (2005) (citing Thorsten Veblen’s concept of status goods). Veblen’s work anticipated much of the current recognition in economics for the impact of peer valuation on individual consumption, as Gary Becker and Kevin Murphy note with surprise: “We were surprised to discover, upon rereading Thorsten Veblen’s influential *Theory of the Leisure Class* (1934), that he anticipated many of our results, although he does not make a systematic analysis . . . . [H]e particularly emphasizes behavior that conveys signals about one’s wealth, that is, ‘conspicuous consumption,’ to use his famous phrase.” *See* BECKER & MURPHY, *supra* note 200, at 5.

<sup>255</sup> With regard to sex identity, for example, one infertility researcher concludes that infertility leads men and women to revise their own sex self-concept:

Those who do not conceive after an extended effort, however, begin to question images [of their sex role] they find themselves unable to live up to. . . . Everyone [of the several hundred subjects] was asked the question, Has your identity as a woman/man changed as a result of experiencing infertility? All women and most men responded affirmatively. . . .

GAY BECKER, THE ELUSIVE EMBRYO: HOW WOMEN AND MEN APPROACH NEW REPRODUCTIVE TECHNOLOGIES 29 (2000) (citation omitted).

and enhanced social status which initially and automatically result.<sup>256</sup> Adrienne Rich anticipates the analysis: "A child can be used as a symbolic credential, a sentimental object, a badge of self-righteousness."<sup>257</sup> As symbol, the decision to reproduce may be read to signal maturity, sexual self-regulation, and social responsibility, all of which are open to other readings. Some may read the "credential" as an expression of maturity and an assumption by the parent of the complex inter-temporal responsibilities produced by something with even more long-term variability than a floating-rate mortgage. Another way to read having a baby is a commitment by the parent to sexual self-regulation, most obviously in the form of compliance with the incest taboo. Such a reading is consistent with Edelman's analysis of reproductive futurism as a mechanism of responsible sublimation of libido.<sup>258</sup> Interpreting reproduction as suggesting sexual self-regulation seems odd in light of the sexual recklessness addressed by *Morrison* and *Hernandez* and the awkward truth about child sexual abuse—that it seems to be mostly a family affair, despite the moral panic about unrelated sexual predators.<sup>259</sup> Equally odd is the interpretation that having a child represents a form of social responsibility, given that having babies tends to shift energy away from the public and onto the brood, whose priorities must come first.

In a social economy where a child can function as a status good, a gay child may be worth less because it impairs the parent's dynastic utility function.<sup>260</sup> The gay child may cut off the parent's reproductive am-

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<sup>256</sup> Reproduction may also involve symbolic detriment, such as the risk of employment discrimination based on the possibility that a woman will become pregnant.

<sup>257</sup> ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS AN EXPERIENCE AND INSTITUTION*, at xxiv (1986) (offering an account of situated theory of motherhood and patriarchy).

<sup>258</sup> See EDELMAN, *supra* note 19, at 4.

<sup>259</sup> Although reporting of sexual abuse, particularly of boys, remains incomplete, much—perhaps most—of this abuse occurs in the family. See MIC HUNTER, *ABUSED BOYS: THE NEGLECTED VICTIMS OF SEXUAL ABUSE* 21 (1990) (suggesting that 75%–95% of child sexual abuse is perpetrated by someone known or related to the child). In this case, the symbolic subsidy given that the family may keep the truth about these practices from emerging. For example, some sexual abuse "treatment professionals claim they do not bring up the subject of incest, because they don't want to insult the client by implying that he might have come from 'that kind of family.'" *Id.* at 29.; see also David Finkelhor & Larry Baron, *High-Risk Children* in DAVID FINKELHOR ET AL., *A SOURCEBOOK ON CHILD SEXUAL ABUSE* 60, 78–79 (1990) (summarizing prevalence studies of child sexual abuse, including those of the special risks of sexual abuse to girls in families with a stepfather).

<sup>260</sup> When modeling how parent-investors react to their children, Becker posits a distinction between perceived "normal" orientations consistent with sex-based "biology" and "deviant" orientations of children who buck statistically-based expectations based on sex. BECKER, *FAMILY*, *supra* note 1, at 40. He suggests that parental investment in children of the latter sort involves risk: "Investments in 'deviant' children, on the other hand, conflict

bitions, “corrupting the blood” or reducing the likelihood of genetic transmission and accumulation through that child.<sup>261</sup> The gay child may produce less social capital in networks where the parent may have some explaining to do, for example, to his or her *own* parents, who may have their own concerns about dynastic utility.<sup>262</sup>

The way that some parents treat their sexual minority children suggests such discounting.<sup>263</sup> The high suicide rate among sexual minority children may reflect a parent’s “downgrade” of a child from investment to sub-investment grade.<sup>264</sup> And the ordinary instability of heterosexual pairings cited by *Morrison* and *Hernandez* may be more pointed against sexual minority children, exposed to targeted neglect from disappointed parent-investors.<sup>265</sup> Modest advances in reducing animus against homosexuals have (quite correctly) sounded the alarm that tolerance will cause the social market value of investments in heterosexuality to drop.<sup>266</sup> Small wonder that some parents mobilize

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with their biology, and the net outcome for them is not certain.” *Id.* His use of the word “deviance” suggests no moral judgment, just a statistical one. *Id.* at 40 n.4. The same logic would also suggest discounted parental investment in homosexual children. Becker notes that “in this analysis parents and society are not irrational, nor do they willingly discriminate against deviants.” *Id.* at 41. Obviously, the same cannot be said about parents who possess the taste for heterosexuality.

<sup>261</sup> This may be part of what parents “blame” themselves for when a child is gay. *Cf.*, Carbado, *supra* note 43, at 120 (“The parents of heterosexuals do not love them ‘in spite of’ their sexual orientation, and parents do not blame themselves for their children’s heterosexuality.”).

<sup>262</sup> “Having a gay or lesbian child reflects not only on the child but the entire family. For one thing, it also alters the parents’ social status.” Ruskola, *supra* note 43, at 321 (noting a straight parent’s complaint that his son’s homosexuality compromised the family’s social standing).

<sup>263</sup> “The legal system’s complacency regarding the emotional abuse of queer youth also results from notions of parents’ rights.” Martin, *supra* note 43, at 189. The effects of parental abuse in sexual minority children also include suicide, homelessness, substance abuse, sex work, and contraction of HIV. *Id.* at 174–79.

<sup>264</sup> See Arriola, *supra* note 64, at 438–39 (noting increased risk of suicide among sexual minority youth). See generally Stephen T. Russell & Kara Joyner, *Adolescent Sexual Orientation and Suicide Risk: Evidence from a National Study*, 91 AM. J. PUB. HEALTH 1276 (2001) (suggesting that sexual minority youths are more likely to contemplate suicide than their peers).

<sup>265</sup> See, e.g., Hicks, *supra* note 43 (concluding that reparative “therapy” should be interpreted judicially as child abuse). After the American Psychiatric Association repudiated the notion of homosexuality as a disorder, “gender identity disorder” emerged largely as a diagnostic category to track and treat children with observed tendencies toward homosexual object choice or other sex discordant behavior. See Sedgewick, *supra* note 44, at 18–19, 20; 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, 84–91 (1995) (parsing the interaction of sex, gender, and sexual orientation as separate categories).

<sup>266</sup> See Michael Janofsky, *Gay Rights Battlefields Spread to Public Schools*, N.Y. TIMES, June 9, 2005, at A18 (“We’re concerned about the effort to capture youth through indoctrination

against such tolerance to avoid frustration of their anticipated “capital returns” from reproduction.<sup>267</sup> Surely, these parental preferences predated the birth of the child.

Many homosexuals raise children, sometimes their own but often, through adoption and foster care programs, the unwanted children of heterosexuals.<sup>268</sup> Would a homosexual parent also preference hetero-

into the homosexual lifestyle. Students are a captive audience, and they are being targeted by groups with that as an agenda.” (quoting Mathew D. Staver, president and general counsel of Liberty Counsel, a “conservative group”); see also Nancy J. Knauer, *Homosexuality as Contagion: From The Well of Loneliness to the Boy Scouts*, 29 HOFSTRA L. REV. 401, 404, 468–82 (2000) (showing how a contagion model of homosexuality articulated in the 1920s continues to inform parental and other efforts to erase homosexuality from the experience of the young). See generally NICOLOSI & NICOLOSI, *supra* note 48.

<sup>267</sup> The constitutional status of religious claims makes them valuable to parents who want to safeguard their investment from the risk of homosexualization. For example, in *Citizens for a Responsible Curriculum v. Montgomery County Pub. Sch.*, No. AW-05-1194, 2005 U.S. Dist. LEXIS 8130, at \*34–35 (S.D. Md. 2005), the Court issued a temporary restraining order against an eighth- and ninth-grade curriculum to which religious fundamentalists had objected because it noted that some fundamentalist religions are more likely to have negative attitudes about gays than other religions:

Defendants open up the classroom to the subject of homosexuality, and specifically, the moral rightness of the *homosexual lifestyle*. However, the Revised Curriculum presents only one view on the subject—that homosexuality is a natural and morally correct lifestyle—to the exclusion of other perspectives. . . . As such, the Court is deeply concerned that the Revised Curriculum violates Plaintiffs’ free speech rights under the First Amendment, and believes that Plaintiffs’ free speech allegations merit future and further investigation.

*Id.* (emphasis added to draw attention to the judge’s own bias). Such mobilizations against tolerance are common—and encouraged—among religious fundamentalists. See, for example, SOUTHERN BAPTIST CONVENTION, RESOLUTION: ON EDUCATING CHILDREN (2005), <http://www.sbc.net/resolutions/amResolution.asp?ID=1142>, a resolution adopted by the Southern Baptist Convention regarding homosexuality in schools:

Whereas, Homosexual activists and their allies are devoting substantial resources and using political power to promote the acceptance among schoolchildren of homosexuality as a morally legitimate *lifestyle*. . . . Whereas, Parents have access to textbooks, curricula, special programs, teachers, and other school personnel, giving them tremendous power to effect change in schools. . . . Resolved, That we urge parents and churches to exercise their rights to investigate diligently the curricula, textbooks, and programs in our community schools and to demand discontinuation of offensive material and programs . . . .

*Id.* (emphasis added to stress the similarity between judicial and religious vocabulary); see also Ron Barnett, *Baptists’ Fears of Homosexuality in Curriculums Muted Here*, GREENVILLE NEWS (S.C.), Sept. 26, 2005, at 15B (noting fundamentalist success in using public schools as mouthpieces for heteronormativity).

<sup>268</sup> See GATES, ET AL., *supra* note 6, at 8. By one estimate, over sixty-five thousand children under eighteen live in a same-sex household. *Id.* at 8 (this figure also includes second

sexuality? Homosexuals might also derive social and symbolic value from having straight children. Public displays of heterosexuality pay instant dividends while displays of homosexuality (especially between males) may be met with negative reactions ranging from disapproval and shunning to physical violence and, in the most extreme cases, murder.<sup>269</sup> Expanding on sociologist Erving Goffman's work on identity management by members of stigmatized groups, Kenji Yoshino has noted that homosexuals play down their identity in order to reduce exposure to this type of hostility.<sup>270</sup> For a gay or lesbian parent, then, having a child—especially a heterosexual one—may yield “covering value.” And this kind of social and symbolic income may be dearer to the homosexual parent than a straight one who is already awash in that type of social approval and other forms of symbolic capital.

Contra, one might expect homosexual parents to mimic their straight counterparts through projection of the parent's identity, but this time a homosexual one. One could postulate a lesbian daughter preference, for instance, to mirror the heterosexual parent's taste for

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parent adoptions). Another fourteen thousand foster children also live in same-sex households. *Id.* at 15.

<sup>269</sup> In 2006, there were nearly fourteen hundred reports of hate crimes against gays, lesbians, and other sexual minorities. CLARENCE PATTON, NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS, ANTI-LESBIAN, GAY, BISEXUAL AND TRANSGENDER VIOLENCE IN 2006, at 2 (2007), available at [http://www.ncavp.org/common/document\\_files/Reports/2006NatlHVReportReleaseEdition.pdf](http://www.ncavp.org/common/document_files/Reports/2006NatlHVReportReleaseEdition.pdf). In 2006, fifty-five percent of the sexual minorities reporting hate crimes were male and twenty-eight percent were female. *Id.* at 10. Another thirteen percent of the victims self-reported as “Transgendered male-to-female.” *Id.* I understand that category to mean that some if not most of those reporting were biological males, a conclusion supported by official statistics. For example, although the 2006 statistics of the Federal Bureau of Investigation were not yet available, for 2005 these statistics reported more than three times as many anti-gay incidents against male victims as female victims. See Federal Bureau of Investigation, Hate Crimes Statistics 2005, available at <http://www.fbi.gov/ucr/hc2005/table1.htm>. There is little reported about the specific incidents which trigger these incidents but, to a homophobe, physical expressions of same-sex affection would be more provocative than the mere existence of a gay or lesbian person. Some research has correlated homophobia with personal discomfort with same-sex touching. See, e.g., Neal J. Roese et al., *Same-Sex Touching Behavior: The Moderating Role of Homophobic Attitudes*, 16 J. OF NONVERBAL BEHAV. 249 (1992). In contrast, consider the pleasant surprise felt by this woman who, after decades as a lesbian, began expressing affection in public with a man: “Whenever we [two women] would hold hands in public, I felt . . . fear, waiting for the customary dirty looks or . . . looking-away.’ In place of revulsion, she was now greeted by strangers with approving smiles. ‘I felt suddenly acceptable and accepted and cute, as opposed to queer.” Guy Trebly, *A Kiss Too Far?* N.Y. TIMES, Feb. 18, 2007, § 9, at 1.

<sup>270</sup> See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 875–924 (2002) (analogizing from the dynamics of gay self-effacement through “covering” to other forms of subordination through assimilation based on sex and race). Gays and lesbians sometimes play down their identity to avoid the discomfort of regulatory attention from enforcers of straight supremacy. See *id.* at 776, 849–63.

heterosexuality in children, although I have come across no argument for it.<sup>271</sup> Or a homosexual parent might prefer a homosexual child to protect it from normative heterosexuality. However, social science research goes out of its way to show that gay and lesbian parents do not “homosexualize” (my word) their offspring.<sup>272</sup> The supplicant posture of this research is worth noting: it genuflects to the straight supremacist fear that gay and lesbian parents will mimic straight ones in reproducing parental preferences.<sup>273</sup> It implicitly reveals the Catch-22 that gay parents must face: if being raised by gay parents increased the likelihood of a child being gay, this would threaten the dominance of heterosexuality; but if children raised by sexual minorities are no more likely to be gay than those raised by straight ones, then this outcome also challenges heterosexual normativity by refuting the claim that only heterosexual parents can be trusted to reproduce heterosexuality.

### III. IMPLICATIONS

“So what?” you might say. It is one thing to know that, chances are, your child will be heterosexual or right-handed. It is another to desire it—with varying degrees of elasticity as suggested by the auction’s price points—and to cathect the outcome with meaning. The implications of this meaning are, of course, contestable; but let me suggest some provisional conclusions about the conceptual problems

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<sup>271</sup> I first presented this argument at a feminist conference in Finland on the politics of the philosophy of gender. A member of the audience associated with a Finnish political action group that advocated for homosexual parents objected to it on two grounds. First, lesbians could not afford to abort male fetuses because of the prohibitive cost of pregnancy. Second, lesbians benefited from having male babies because (and I hope that this ground involved unstated ambivalence about resting on Freud) it was their primary contact with the penis.

<sup>272</sup> See, e.g., Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 15 *CURRENT DIRECTIONS PSYCHOL. SCI.* 241, 242 (2006). One study did find a statistically significant difference in the reported ability of children of homosexual parents to feel connection with people at school: they report feeling *more* connected than do their counterparts. *Id.* This result is particularly remarkable given the finding, corroborated by the hostility that many students who are themselves sexual minorities encounter in elementary and secondary schools, that the children of homosexuals may become targets of “anti-gay” sentiment from other students. *Id.* at 243. The studies that target sexual orientation, in part to test for a disproportionate prevalence of homosexuality in offspring, have not found a higher incidence of homosexual offspring for homosexual parents. Charlotte J. Patterson et al., *Children of Lesbian and Gay Parents: Research, Law, and Policy*, in *CHILDREN AND THE LAW: SOCIAL SCIENCE AND POLICY* 1, 12 (Bette L. Bottoms et al., eds., 2000).

<sup>273</sup> Several lines of social science research have considered “whether the development of sexual identity might be compromised” in children raised by homosexual parents. *Id.* at 11.

raised by the taste for heterosexuality. Section A concludes that it is a eugenic family preference, nodded to by cases like *Morrison* and *Hernandez*. Then, turning to the interests of heterosexuals, Section B urges more ex ante recognition of heterosexual ambivalence and regret about coital reproduction, which would reduce the pressure behind the taste for heterosexuality.

A. *Lifestyle Competition: Managing Eugenic Disappointment in the Family*

The taste for heterosexuality in offspring is akin to (and similarly troubling as) the preference, in some cultures, for a son over a daughter.<sup>274</sup> In this sense, it is one of the “eugenic concerns” which Martha Ertman sees in reproductive markets.<sup>275</sup> In isolation and as part of an aggregate, the taste dynamically reproduces the very condition—conceptual liquidation of sexual minorities—that many would-be parents use as a bootstrap justification for the taste.<sup>276</sup> None of this is meant to suggest that parents are simple “perpetrators.” They suffer, too, and dearly. Normative heterosexuality has few winners once all the cards are on the table.

Michele Goodwin makes some feasible legal recommendations to mitigate marketized racism in the adoption market.<sup>277</sup> Unlike law’s formal commitment to ending formal racism, however, the law promotes heterosexuality, including through the regulation of marriage and childrearing.<sup>278</sup> It would, therefore, be premature for me to recommend reforms to positive law. That said, a legal argument for protection from the taste could take the form of Bonnie Steinbock and Ron McClamrock’s argument for a “minimum birthright” for future children.<sup>279</sup> Arguing that even future people have “interests,” Stein-

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<sup>274</sup> See Schultz, *supra* note 72, at 386–87. Economic reasons are cited for this preference too: “[N]et economic productivity of boys may exceed that of girls . . . [T]he remittance rate to parents from the economic productivity of boys and girls may differ such that the old age insurance value for parents of an investment in boys exceeds that of . . . girls.” *Id.* at 386.

<sup>275</sup> See Ertman, *supra* note 4, at 26–30.

<sup>276</sup> See Gabilondo, *supra* note 27, at 21–22.

<sup>277</sup> See Goodwin, *supra* note 4, at 75–79 (recommending price caps, taxation, and public education to correct marketized racism).

<sup>278</sup> See *supra* notes 75–94 and accompanying text.

<sup>279</sup> See Bonnie Steinbock & Ron McClamrock, *When Is Birth Unfair to the Child?* HASTINGS CTR. REP., Nov.–Dec. 1994, at 15, 15 (citing arguments made by Joel Feinberg). Using an approach to contingency familiar to property law, this stake in minimum birthrights is modeled after the concept of springing “future interests.” *Id.* The idea of springing interests protects contingent interests in a quality of life while avoiding a vested interest in coming into existence at all: “The pre-conscious, presentient fetus has no actual interests, and



bock shows that people-in-being must consider the interests of future people.<sup>280</sup> By analogy, future sexual minorities may be entitled to protection from heterosexuality offspring preference in parents-to-be.

In the meantime, it might behoove straight parents to take some cues from their same-sex counterparts. Doing so would contribute to the “symbolic subversion” which Bourdieu identifies as a key objective of the movement to resist the conceptual liquidation of sexual minorities.<sup>281</sup> Correctly, he notes that the “symbolic destruction” of the dominant heterosexual order and the abolition of its underlying “principle of division” are the main objectives of any serious efforts on this issue.<sup>282</sup>

One baby step which heterosexuals could take is some consistency in using the word “lifestyle,” which refers to a principle or taste underly-

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therefore cannot be harmed (or benefited). But on the assumption that the fetus will be born, we can ascribe to it certain ‘future interests’ which can be . . . defeated by actions done before the potential person becomes an actual person.” *Id.* See generally Maura Ryan, *The Argument for Unlimited Procreative Liberty: A Feminist Critique*, HASTINGS CTR. REP., July–Aug. 1990, at 6, 7–9 (objecting to legal recognition of a parent’s property right in children).

<sup>280</sup> See BONNIE STEINBOCK, *LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS AND FETUSES* 37 (1992) (applying an interest view of moral status to conscious individuals, nonconscious individuals, future people, and potential people, such as embryos and fetuses). Steinbock argues that future people have moral status because their interests are foreseeable now:

If people today pollute the atmosphere and drinking water . . . and deplete natural resources, that is likely to have disastrous effects on the lives of those who come later. Their actual future interests will be harmed . . . because of our decisions today . . . Because they have interests, future people qualify for moral status.

*Id.*

<sup>281</sup> See BOURDIEU, *MASCULINE DOMINATION*, *supra* note 197, at 123. Bourdieu’s analysis of heterosexual power leaves something to be desired, mostly because it is so brief. The only extended discussion I could find about the “symbolic domination” which heterosexual power imposes on sexual minorities is in the Appendix to *MASCULINE DOMINATION*. See *id.*

<sup>282</sup> See *id.* The irony of Bourdieu’s comment is that he does not account for the gap between the alleged strength of the gay and lesbian movement and the relatively modest progress it has made in symbolic subversion:

[T]he gay and lesbian movement brings together individuals who, although stigmatized, are relatively privileged, especially in terms of cultural capital, which constitutes a considerable asset in their symbolic struggles. The objective of every movement committed to symbolic subversion is to perform a labour of symbolic destruction and construction aimed at imposing new categories of perception and appreciation, so as to construct a group or, more radically, to destroy the very principle of division through which the stigmatizing group and the stigmatized group are produced.

*Id.* at 123. Halley’s earlier analysis of the legal construction of heterosexuality is a good example of such an effort. See HALLEY, *supra* note 165, at 83.

ing a discretionary consumption choice. The word “lifestyle” persists as a somewhat crass (heteronormative) putdown of homosexuals, a good recent example of which is the holding in *Lawrence v. Texas*: “[The present case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who . . . engaged in sexual practices common to a homosexual *lifestyle*.”<sup>283</sup> To a homosexual, the word “lifestyle” sounds—or ought to sound—just as “Negro” or “colored” would sound to an African-American. Justice Kennedy’s plainly conciliatory diction serves the important judicial function of projective denial by doing two things at once: first, it suggests that having a sexual orientation—a homosexual one, that is—is akin to choosing between Prada or Hugo Boss; second, it invites us to assume that when heterosexuals have a relationship it involves something other than a lifestyle. As Becker points out, however, having a baby is a lifestyle choice because it involves acquiring a “consumption good.”<sup>284</sup> Maybe heterosexuals need to be reminded more diligently on this point.

As the welcome borrowings by *arriviste* metrosexuals suggest, heterosexuals stand to gain from copying homosexuals, maybe in reproduction too. Sexual minority parents may socialize children differently from their heterosexual counterparts, hopefully by disapproving of the sex-based institutions which have been the bane of homosexual existence. Their own experience with animus, family coercion, and legal insult may give gay and lesbian parents a practical comparative advantage at letting a young child develop organically along a standard based *in fact*—not just in law—on the child’s best interests, rather than the projective interests of the parents, as endorsed by third parties like courts. If feminist Dorothy Dinnerstein was right to blame cross-sex childrearing for patterned heterosexual malaise, then stopping the near-monopoly of these traditional family structures might not be such a bad thing.<sup>285</sup> Legal doctrine like *Morrison* and *Hernandez*, however, stunts heterosexual self-awareness by providing a pretext for not considering any serious lifestyle competition with gay and lesbian par-

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<sup>283</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (emphasis added to reflect value-laden terms that can serve as the textual bases for future cases); see also Franke, *supra* note 143 on the limits of *Lawrence*.

<sup>284</sup> See *supra* note 237 and accompanying text.

<sup>285</sup> See DOROTHY DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE* 10 (1977) (“The gathering impulse to break loose from our existing gender arrangements, to free ourselves from the fixed symbiotic patterns that have so far prevailed between [heterosexual] women and men, is part of the central thrust of our species’ life toward more viable forms.”).

ents.<sup>286</sup> It does this by sanctioning (in the positive, not the negative, sense) heterosexual reproductive practices that deserve more scrutiny and, as the courts admit, mitigation.<sup>287</sup> The effect is to preclude the need to imagine—and put into practice—better reproductive practices, much in the way that MacKinnon notes feminist conceptions of the state have been precluded.<sup>288</sup>

### B. *The Wages of Coitus: Heterosexual Counterdemand*

The more general problem, for the heterosexuals posited in *Morrison* and *Hernandez*, is how to escape the social conditions that can lead to a long and dreary cycle of reproductive regret. Were heterosexuals more aware up front of the “total effect” and costs of reproduction, they might better avoid the marriage-inducing accidents considered by *Morrison* and *Hernandez*.<sup>289</sup>

Here I offer a strategic essentialization of anti-natalist regret in the aggregate by introducing the idea of “counterdemand” for children.<sup>290</sup> Though one could express a similar idea in terms of the “excess supply” of children, counterdemand appropriately focuses on the holding preference of parents in the aggregate instead of on the supply of children. Rather than conscious decisions that successfully eliminate the risks of pregnancy *ex ante*—such as contraception, avoidance of reproductive sex, and voluntary sterilization—counterdemand refers to de-

<sup>286</sup> See *supra* notes 118–133 and accompanying text.

<sup>287</sup> See *supra* notes 118–133, 135–136 and accompanying text.

<sup>288</sup> MACKINNON, *supra* note 21, at 249. MacKinnon notes: “It will be said that feminist law cannot win and will not work. But this is premature. Its possibilities cannot be assessed in the abstract but must engage the world. A feminist theory of the state has barely been imagined; systematically, it has never been tried.” *Id.*

<sup>289</sup> Cf. R.H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 44 (1960) (showing in the context of the law of nuisance that, absent transaction costs, allocating liability between two counterparties to a transaction makes no difference in allocative terms because the parties will negotiate in order to optimize the yield on the transaction). The useful phrase belongs to Coase:

[W]e have to take into account the costs involved in operating the various social arrangements (whether it be the working of a market or of a government department), as well as the costs involved in moving to a new system. In devising and choosing between social arrangements we should have regard for the *total effect*.

*Id.* (emphasis added).

<sup>290</sup> See generally Van Praag & Warnaar, *supra* note 1, at 243. Considering the net effects of reproductive decisions is the essence of deliberative rationality on this point: “A child does not only generate household costs but revenues as well. . . . There is a calculus of cost and revenue behind it and in some sense we are only really interested in the *balance*.” See *id.*

sire (and attempts) to “back-track” from prior action that might not have been undertaken but for pro-natalist bias.

Counterdemand starts by adding up data that suggests some regret over or repudiation of the fact of pregnancy or birth: abortion, infanticide, post-partum “disorders” in women, pregnancy denial, child abuse, pregnancy-related domestic violence, child abandonment, and the giving up of one’s child for adoption.<sup>291</sup> In one sense, counterdemand would be one measure of time-inconsistency in reproduction. Even this interim measure, however, will understate counterdemand because it overlooks private parental regrets about reproduction which never rise to the level of a reportable incident.

As noted earlier, of each year’s roughly four million births, about 1.3 million (33%) of them may represent unintended pregnancies not terminated.<sup>292</sup> Approximately one million of these four million births involve premature birth, low birth weight, or birth defects (all factors which may impair a real baby’s quality of life), and over 450,000 of the total births are by teenage females arguably too young to appreciate how having a baby at that age impacts one’s life prospects.<sup>293</sup> About 240,000 pregnant women experience domestic abuse, with forty percent of this abuse beginning during the couple’s first pregnancy.<sup>294</sup> Suggesting counterdemand on the part of fathers, pregnant women are at twice the risk of battery (presumably from partners) than non-pregnant women.<sup>295</sup> Many children suffer crimes, neglect, and other

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<sup>291</sup> See *infra* notes 292–310 and accompanying text. The statistics are silent as to whether parents with counterdemand are heterosexual or homosexual, although my intuition is that heterosexual parents are dramatically overrepresented in any measure of counterdemand (that is, the proportion of counterdemand attributable to heterosexuals exceeds the proportion of heterosexuals in the general population). A finding to that effect would vindicate the judicial arguments in *Hernandez* that opposite-sex couples need incentives to promote the stability which same-sex parents are able to provide through their own self-regulation. See *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006). Nonetheless, as Chief Justice Kaye points out in her dissent, the majority fails to show how excluding homosexuals contributes to heterosexual stability. *Id.* at 27 (Kaye, J., dissenting) (“Correctly framed, the question before us is not whether the marriage statutes properly benefit those they are intended to benefit—any discriminatory classification does that—but whether there exists any legitimate basis for excluding those who are not covered by the law.”).

<sup>292</sup> See discussion *supra* note 17. My use of abortion statistics to support my argument does not involve any criticism of women who seek abortion. Quite the contrary: it is remarkable that at least this many women manage to obtain abortions despite the legal and cultural obstacles. A more “abortion-friendly” legal system that provides people—especially the young—more options for managing their reproduction might reduce demand for “morning after” marriages in response to unintended pregnancy.

<sup>293</sup> AM. PREGNANCY ASS’N, *supra* note 17.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

misfortunes at the hands of their parents.<sup>296</sup> Counterdemand should take into account some of this suffering by children because it may reflect parental frustration over contact with the realities of child-rearing.

Post-partum mood disorders and pregnancy denial may also involve a form of counterdemand. As a formal matter, postpartum depression refers only to post-natal mood disruptions which are more serious than the common “baby blues.”<sup>297</sup> Even at this high threshold, however, it is frequent.<sup>298</sup> Estimates of the frequency of post-partum

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<sup>296</sup> See NAT'L CTR. ON CHILD ABUSE PREVENTION RES., CHILD MALTREATMENT: REPORTS, VICTIMS, AND FATALITIES 1 (2007) [hereinafter CHILD MALTREATMENT], available at [http://member.preventchildabuse.org/site/DocServer/Child\\_Maltreatment\\_Fact\\_Sheet\\_2005.pdf?docID=221](http://member.preventchildabuse.org/site/DocServer/Child_Maltreatment_Fact_Sheet_2005.pdf?docID=221) (membership required). In 2005, state child abuse authorities substantiated claims of child abuse and neglect for 899,000 children out of a pool of over 3.5 million children with respect to whom abuse allegations were brought. *Id.* In 2005, infanticide rates for children under five years of age stand at 2.2% for whites, 6.6% for blacks, and .07% for others. Bureau of Justice Statistics, Dept. of Justice, Homicide Trends in the U.S.: Infanticide, <http://www.ojp.usdoj.gov/bjs/homicide/tables/kidsratestab.htm> (last visited Jan. 24, 2008) [hereinafter DOJ, Infanticide]. Infanticide child abuse authorities believe that children with disabilities are more likely to be abused than other children. NAT'L CTR. ON CHILD ABUSE PREVENTION RES., FACT SHEET: MALTREATMENT OF CHILDREN WITH DISABILITIES, 1 (n.d.), <http://member.preventchildabuse.org/site/DocServer/maltreatment.pdf?docID=124> (membership required) (“Some researchers suggest that children with disabilities may have increased vulnerability to abuse because of society’s response to the disability, rather than the disability itself. Children with disabilities may be perceived as less valuable than other children. Their reports may not be considered trustworthy. Discipline may be more punitive and accompanied by a lack of respect.” (citations omitted)). Also in 2005, 1460 children died of abuse and neglect. CHILD MALTREATMENT, *supra*, at 1. In 2005, federal authorities also identified 556 homicides of children under five years of age. DOJ, Infanticide, *supra*. An additional 4500 infant deaths every year are attributed to Sudden Infant Death Syndrome, a residual category for otherwise unexplained deaths which, in some cases, may be associated with neglect. Ctrs. for Disease Control & Prevention, U.S. Dep’t of Health and Human Servs., Sudden, Unexplained Infant Death Initiative (SUIDI): Overview, <http://www.cdc.gov/SIDS/SUID.htm> (last visited Jan. 24, 2008).

<sup>297</sup> Katherine L. Wisner, et. al., *Postpartum Disorders*, in INFANTICIDE, *supra* note 198, at 35, 41 (“Postpartum depression also must be distinguished from the ‘baby blues,’ which are very common and occur in 50%–80% of women. Symptoms, which peak on days 4–5 postpartum, consist of a mild mood disturbance without the pervasive dysphoria characteristic of major depression.”).

<sup>298</sup> See *id.* at 36. One study found that fourteen percent of women were experiencing a major mood disorder within three months after terminating or continuing a pregnancy to term; in the first month after birth, a woman is over twenty times more likely to develop psychosis than in the two years prior to the birth. *Id.* Abortion opponents sometimes note that some women who have abortions become depressed after doing so. Symptoms and Frequently Asked Questions About Post Abortion Stress Syndrome, <http://afterabortion.com/faq.html> (last visited Jan. 24, 2008) (discussing the controversy surrounding Post Abortion Stress Syndrome (PASS)). It is more accurate to note that, for some women, pregnancy—whether or not terminated—leads to depression. See Katherine L. Wisner, et. al., *Postpartum Disorders*, in INFANTICIDE, *supra* note 198, at 35, 41.

depression range from ten to fifteen percent of all live births.<sup>299</sup> Postpartum psychosis affects far fewer women—between one in one thousand and one in five hundred—but has consequences much more severe than depression.<sup>300</sup> Pregnancy denial involves the refusal to admit that one is pregnant to oneself (or, perhaps, to one's forbidding parents).<sup>301</sup> Pregnancy denial often precedes neonaticide—the killing of an infant on the day of its birth.<sup>302</sup> The baseline for pregnancy denial is the absence of “the usual heightened emotional state of the pregnant woman that is associated with the process of early bonding.”<sup>303</sup> Not surprisingly, then, some feminists argue that law should revise thinking about infanticide by seeing it as involving a form of motherhood-as-suffering.<sup>304</sup>

Liquidating unwanted children is, of course, the ultimate expression of time-inconsistent regret in reproduction. As noted by Michelle Oberman, infanticide, perhaps contrary to popular belief, has been a constant through history.<sup>305</sup> Deterrence based on legal punishment fails since infanticide tends to be “a spontaneous crime, reflecting a loss of control rather than a cool-headed calculation.”<sup>306</sup> Indeed, Oberman notes that, given the circumstances in which many of these mothers find themselves, “on some occasions this terrible crime may be all but inevitable.”<sup>307</sup> Law in the United States law is “remarkably

<sup>299</sup> Postpartum Progress, [http://postpartumprogress.typepad.com/weblog/2004/08/by\\_the\\_numbers.html](http://postpartumprogress.typepad.com/weblog/2004/08/by_the_numbers.html) (Aug. 4, 2004) (comparing conservative estimate of annual incidence of post-partum depression (400,000)—10% of 4,000,000 live births—with annual diagnoses of Parkinson's disease (50,000), Alzheimer's disease (250,000), multiple sclerosis (104,000), and diabetes (800,000)).

<sup>300</sup> See NAT'L WOMEN'S HEALTH INFO. CTR., U.S. DEPT. OF HEALTH & HUMAN SERVS., DEPRESSION DURING AND AFTER PREGNANCY: FREQUENTLY ASKED QUESTIONS, 3 (2005), <http://www.4woman.gov/faq/postpartum.pdf>. For an interesting extrapolation comparing rates of post-partum depression in the United States with those in other countries, see WrongDiagnosis.com, Statistics by Country for Postpartum Psychosis, [http://www.wrongdiagnosis.com/p/postpartum\\_psychosis/stats-country.htm](http://www.wrongdiagnosis.com/p/postpartum_psychosis/stats-country.htm) (last visited Jan. 24, 2008).

<sup>301</sup> Laura J. Miller, *Denial of Pregnancy*, in INFANTICIDE, *supra* note 198, at 81, 82–86.

<sup>302</sup> *Id.* at 81.

<sup>303</sup> *Id.* at 82.

<sup>304</sup> *Id.* at 129.

<sup>305</sup> Oberman, *supra* note 201, at 6–8 (noting that religious and legal efforts fail to eradicate the practice and tracing infanticide in ancient cultures, medieval Judeo-Christian society, Great Britain, and the United States); see also Owen D. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 N.C. L. REV. 1117, 1192–1200 (1997) (situating the history and contemporary practice of human infanticide in the context of evolutionary theory).

<sup>306</sup> See Oberman, *supra* note 201, at 14.

<sup>307</sup> *Id.* at 16. See generally Lucy Jane Lang, *To Love the Babe That Milks Me: Infanticide and Reconceiving the Mother*, 14 COLUM. J. GENDER & L. 114 (2005) (arguing that infanticide is a

inconsistent” and gives only limited recognition to “post-partum psychosis” as a legal defense.<sup>308</sup> This inconsistency reflects a failure to “recognize the profound similarities that underlie the many contemporary infanticide cases” and address them properly.<sup>309</sup>

Expressed as a rough ratio of supply (live births) to counterdemand, for every ten live births: three result from an unplanned pregnancy; two involve premature birth, low birth weight, or birth defects; one arises from a teenage pregnancy; one produces post-partum depression; and two abortions occur, exposing women to the health risks of a quite invasive procedure. Even this primitive construction of counterdemand suggests a more complex picture than patterned exuberance about babies-as-ideas.<sup>310</sup> Indeed, this is a more complete look at the heterosexual coitus than that used by *Morrison* and *Hernandez* as an anchor for their holdings. (And it bears noting that procreative morbidity and mortality abroad, especially in developing countries, are much worse.)<sup>311</sup>

Because the mental organization of time bears directly on counterdemand, more research about the time dynamics of reproduction would help. Behavioral research suggests that humans suffer from overoptimism, tending to overvalue nearer states in time at the expense of later ones, a phenomenon called “hindsight bias.”<sup>312</sup> Models for moral reasoning and microeconomics, however, have tended to understate the instability of many time preferences, perhaps because accounting

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patterned reaction to suffering in women caused by social pressure to conform to ideals of motherhood).

<sup>308</sup> See Oberman, *supra* note 201, at 9.

<sup>309</sup> *Id.* at 14.

<sup>310</sup> Counterdemand would seem to be another aspect of Derek Parfit’s “repugnant conclusion” that, at the heart of reproductivism lies the principle that more unhappy lives are better than fewer happy ones. See generally DEREK PARFIT, REASONS AND PERSONS 381–87 (1984) (showing that total utility for a population can be increased by growing the population into a larger one in which members have a standard of living just marginally above an interest in nonexistence). Russell Jacoby has more recently noted that, for the conservative writers who push reproductivism, “the sanctity of life ends at birth; at least they show little interest in the suffering of the living.” Russell Jacoby, *Excellent Writers, Facile Thinkers*, CHRON. HIGHER EDUC. (Wash. D.C.), Feb. 2, 2007, at B13.

<sup>311</sup> POPULATION RESOURCE CTR., WORLD HEALTH DAY 2006, [http://www.prcdc.org/files/World\\_Health\\_Day\\_2006.pdf](http://www.prcdc.org/files/World_Health_Day_2006.pdf) (last visited Jan. 24, 2008) (“Death and disability from maternal causes account for nearly twenty percent of the total disease for women of reproductive age in developing countries.”). Women under the age of fifteen are five times more likely to die from childbirth than older women. *Id.*

<sup>312</sup> See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1524–25 (1998) (noting that people underestimate the probability of bad outcomes to themselves compared with others).

for time-inconsistency makes economic models more complicated and limits the generalizability of their conclusions.<sup>313</sup> Manuel Utset and others, however, have shown that many self-control problems actually reflect time-inconsistency.<sup>314</sup> Reproduction (and sexual decision-making generally) are good candidates for this type of analysis both because sex impulses have great potential to influence behavior and because the multiplier effects over time of reproductive and sexual decisions are unusually significant. Pregnancy and child-rearing require the participants to plot their preferences over a period that may span two decades or longer. (One good legal approach to this reproductive reality is the enactment of states "safe haven" laws which make unwanted children "puttable" by establishing mechanisms to transfer unwanted infants and children.<sup>315</sup> By reducing the exit costs of holding unwanted children, such laws make children more "liquid."<sup>316</sup>)

Greater institutionalization of feminist methods in the economic study of reproduction might increase the contestability of dominant ideas about reproduction.<sup>317</sup> Both a feminist economics and a feminist

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<sup>313</sup> John Rawls's concept of deliberative rationality assumes time-consistency. "We are to see our life as one whole, the activities of one rational subject spread out in time. Mere temporal position, or distance from the present, is not a reason for favoring one moment over another." See JOHN RAWLS, *A THEORY OF JUSTICE* 124 (1971). "One who rejects equally the claims of his future self and the interests of others is not only irresponsible with respect to them but in regard to his own person as well. He does not see himself as one enduring individual." *Id.* at 423.

<sup>314</sup> See Utset, *supra* note 126, at 419–20. As noted earlier, some behavioral law and economics research finds that people's preferences are much less stable (or "time-consistent") than previously thought. *Id.* Utset also notes how time-consistency in law imposes marginal but material costs on decision-making about abortion. See Manuel A. Utset, *The Temporally Extended Family & Self-Control: An Essay for Lee E. Teitelbaum*, 2006 *UTAH L. REV.* 107, 132–34 (showing that legal decisions that improperly assume time-consistent behavior on the part of pregnant women may impose marginal costs on ending a pregnancy).

<sup>315</sup> Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 *COLUM. L. REV.* 753, 760 (2006) (using "moral panic" analysis to note the "snug and interesting fit between Safe Haven legislation and a culture whose politics are increasingly organized around the protection of unborn life").

<sup>316</sup> See Becker, *Fertility*, *supra* note 1, at 227. Becker notes the illiquidity of children in the context of the preference for holding liquid assets (sometimes called a "flight to quality" in the bond world) during cyclical downturns in the economy and periods of economic depression: "[S]ince children cannot be bought and sold they are a less 'liquid' asset than ordinary durables, and the economic uncertainty accompanying a depression would increase the community's preference for liquid assets." *Id.* He makes this point when considering reasons why the demand for children—as for any consumer durable—may decline during an economic depression. *Id.* at 223–27.

<sup>317</sup> In 2000, only fifteen percent of faculty in economics departments of Ph.D.-granting institutions were female. Marianne Ferber & Julie Nelson, *Introduction to FEMINIST ECONOMICS TODAY: BEYOND ECONOMIC MAN* 1, 3 (Marianne A. Ferber & Julie A. Nelson eds., 2003). In 2000, moreover, women made up only seven percent of the tenured economics



law and economics are emerging, much of which sounds in contract.<sup>318</sup> Some of it challenges the bright line distinctions in the rational actor model between open market relations and the economics of the family.<sup>319</sup> Parallel to these developments in feminist methods, behavioral law and economics has been maturing into a discipline, one that insists on more use in theory of inductive detail about real people.<sup>320</sup> One source of such detail is games, including cooperation simulations like the ultimatum game, the stag hunt, and the prisoner's dilemma, in addition to such exercises as the heterosexuality auction.<sup>321</sup> Because this commitment to inductive detail creates an important opening for feminists, especially economically-minded ones, this article urges a marriage—or at least a civil union—between feminist methods and behavioral law and economics, the progeny of which could make reproductive law and policy better reflect the realities of reproduction for women and others.

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faculty. *Id.* Organizations such as the Committee on the Status of Women in the Economics Profession and the International Association for Feminist Economics have contributed to building professional networks, increasing the prominence of feminist research in professional economics journals, and incorporating feminist pedagogy in the economics classroom. *Id.* at 2–29 (reviewing the incorporation of women's and feminist perspectives in the economics profession).

<sup>318</sup> See, e.g., Gillian K. Hadfield, *Households at Work: Beyond Labor Market Policies to Remedy the Gender Gap* 82 GEO. L.J. 89, 104 (1993) (“If we instead focus our theoretical efforts on moving away from the altruistic model of the household, which assumes that a single benevolent head makes household decisions, we may find ourselves at least initially on more solid footing. . . . Theorists can bring many of these tools to bear on the analysis of the family.”). See generally Darren Bush, *Caught Between Scylla and Charybdis: Law & Economics as a Useful Tool for Feminist Legal Theorists*, 7 AM. U. J. GENDER SOC. POL'Y & L. 395 (1999) (considering the relationship between feminist legal theory and a law and economics approach to unconscionability in contracts); Jeanne M. Dennis, *The Lessons of Comparable Worth: A Feminist Vision of Law and Economic Theory*, 4 UCLA WOMEN'S L.J. 1 (1993) (proposing a feminist economics perspective based on theory and practice from which to analyze sex-based wage discrimination); Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235 (1998).

<sup>319</sup> See Paula England, *Separate and Soluble Selves: Dichotomous Thinking in Economics*, in FEMINIST ECONOMICS TODAY: BEYOND ECONOMIC MAN, *supra* note 317, at 33–59. Becker's model assumes radically separate selves. *Id.* at 45–48. She criticizes this bright-line distinction as tending to underemphasize the range of separate preferences within the family. *Id.* at 43–50.

<sup>320</sup> See Jolls, *supra* note 312, at 1473. This research field purports to ask “How do ‘real people’ differ from homo economicus?” *Id.* at 1475–76. Jolls suggests three methodological premises (bounded rationality, bounded self-control, and bounded self-interest) in order to produce “testable propositions” pending the ultimate resolution of the many philosophical questions involved. *Id.* at 1477.

<sup>321</sup> *Id.* at 1489–98.

One example of useful work in this area is Molly Walker Wilson's writing on surrogacy contracts. She suggests that surrogacy contracts should be voidable at law because would-be surrogates, when they execute these contracts, cannot appreciate how they may feel when it comes time to tender their baby to the counterparty, typically a wealthier couple.<sup>322</sup> She frames the problem of surrogacy contracts in the context of time-inconsistent behavior.<sup>323</sup> She bases her claim on four features of human decision-making which vitiate meaningful consent to a surrogacy contract: the optimism bias, the endowment effect, the problem of market manipulation, and cognitive dissonance over time.<sup>324</sup> Wilson's work does not support counterdemand but, rather, the more general claim that reproduction is prone to time-inconsistent decision making.<sup>325</sup> The work by Utset and Wilson mines a new vein of insight about parental ambivalence about reproduction, but more is needed.

### CONCLUSION

This article was designed to intervene in some existing legal and socioeconomic conversations about reproduction and heterosexuality, ones in which economic logic mixes with other kinds of values. De-

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<sup>322</sup> Molly J. Walker Wilson, *Precommitment in Free-Market Procreation: Surrogacy, Commissioned Adoption, and the Limits on Human Decision Making Capacity*, 31 J. LEGIS. 329, 330–31 (2005) (arguing that time-inconsistent preferences in women between gestation and birth militate against the enforcement of surrogacy contracts).

<sup>323</sup> *See id.* The underlying philosophical issue is whether “the self at Time 1 should be able to commit the self at Time 2 to a binding decision. . . . [W]ho is the real self, the Time 1 self or the Time 2 self; and how much control should one self be able to exert over another?” *Id.* at 334–35. This question has special relevance for reproduction. As one feminist scholar, Mary O'Brien, has noted, the reproductive process actually involves three different types of time: “cyclical time, unilinear time and irregular episodicity.” MARY O'BRIEN, *THE POLITICS OF REPRODUCTION* 61 (1981). She identifies ten different pivotal moments in heterosexual reproduction through coitus, each of which has a logic that does not fit easily into the type of discounting assumed by the time-consistent preferences in the rational actor model. *See id.* at 47.

<sup>324</sup> Wilson, *supra* note 322, at 336–42.

<sup>325</sup> *Id.* at 331. “[W]omen who enter surrogacy contracts can never truly give informed consent because there is no way that they can know before conceiving the child how they will feel about giving up the child once the time comes.” *Id.* (citation omitted). The dynamic which Wilson identifies is actually the opposite of counterdemand for children; in other words, surrogacy contracts suggest regret over a prior decision to surrender the infant in Period 1 when the mother's holding preference in Period 2 has changed. *Id.* at 347 (“Commentators who blithely assert that people only enter into contracts that are in their own best interests ignore evidence that in certain situations individuals make systematic errors in the process of decision making.”). Counterdemand also suggests time-inconsistency in reproduction but in the opposite direction: it is the decision to conceive that gives rise to the ambivalence. *See supra* note 291 and accompanying text.

spite welcoming their candor about heterosexual malaise, reading *Morrison* and *Hernandez* as a gay man means facing the sorts of “insults” which cultural historian Didier Eribon has studied.<sup>326</sup> On the bright side, outsider status makes possible clinical detachment which is useful for analysis. To echo Halperin’s distinction, homosexuality and its legal aspects are often over-studied and over-theorized as an “object”, rather than as a platform for generative insights.<sup>327</sup> More interesting is the heterosexual as a legal matter. So this article considered heterosexual reproduction and, more specifically, how prenatal tastes for heterosexuality in children may drive demand for children and inform how parents make sense of reproduction (or fail to do so). The issue matters not only to opponents of “gender cleansing” in children but also to those interested in how market mechanisms—like the adoption market Goodwin studied and the “when, if, and as-issued” market from the heterosexuality auction—impact the family.

Let me recapitulate before concluding. Conceptual liquidation of homosexuals begins long before birth. The prenatal taste for heterosexuality is inferable from parental reactions to children. Indeed, it may be strong enough to overcome the “taste for own children” which Becker considers the “distinguishing characteristic of families.”<sup>328</sup> Refining and pursuing one’s taste for heterosexuality in children follows from (and reenacts) a social and legal premium on heterosexuality and its reproduction. So the pill Posner imagines to inoculate children against homosexuality (or, for that matter, prenatal diagnosis of homosexual tendencies in time to abort) makes sense as a strategy for turning the conceptual liquidation of sexual minorities into a liquidation-in-fact.<sup>329</sup>

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<sup>326</sup> See generally DIDIER ERIBON, *INSULT AND THE MAKING OF THE GAY SELF* (Michael Lucey trans., 2004) (1999). Didier Eribon shows how “insult” is the collective speech act that constitutes a gay person’s sense of self:

Thus do gay people live in a world of insults. They are surrounded by a language that hems them in and points them out. The world insults them; it speaks of them and of what is said about them. The words of day-to-day life as well as of psychiatric, political, and juridical discourse assign each of them individually and all of them collectively to an inferior place within the social order. And yet this very language preceded them: the world of insults preexisted them, and it takes hold of them even before they know what they are.

*Id.* at 56.

<sup>327</sup> See HALPERIN, *supra* note 184, at 60.

<sup>328</sup> See BECKER, *FAMILY*, *supra* note 1, at 45.

<sup>329</sup> See ROBSON, *supra* note 37, at 202.

I used Bourdieu's model of socially-constructed self-interest as the engine of social reproduction to suggest how the Ponzi scheme which Edelman describes stays in perpetual motion, in seeming stealth. By subsidizing heterosexual coitus with symbolic capital through marriage, *Morrison* and *Hernandez* make a market for the heterosexuality premium and, perhaps, become complicit in a long, dreary, and all too regenerative cycle of reproductive regret for some heterosexuals. To interrupt this form of reproductive praxis in law, sex, and consciousness, I spoke *at* and *about* the legal doctrine without speaking *from* it, as it does not admit of special appearances to challenge its jurisdiction without thereby conceding it.

The structuralist premises underlying my argument would themselves predict that, essentially, it will fall on deaf ears as far as legal institutions are concerned; a contrary reaction would call into question the quality of my argument. Let me close by noting that my goal is not to encourage liberals, progressives, and others opposed to anti-gay animus to "cover" by denying what may be their taste for heterosexuality in children. Quite the contrary—arguments in favor of the taste for heterosexuality should be made and examined. What I do care about is encouraging some to think critically about their role as individuals in ideologies of reproduction through what has been called Bourdieu's "sociology . . . as a form of therapy."<sup>330</sup> Doing so might help to cultivate a taste for the new, rather than for sameness. The benefits which Adrienne Rich promised feminists may be available more widely.<sup>331</sup> If more heterosexuals did this kind of mental work, we might get to the point where—as Alexander Portnoy's analyst tells him at the novel's end—we can now begin.<sup>332</sup>

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<sup>330</sup> MICHAEL GRENFELL, *PIERRE BOURDIEU AGENT PROVOCATEUR* 195 (2004) (putting Bourdieu's intellectual production in a biographical context).

<sup>331</sup> See Rich, *supra* note 45, at 648. The possibilities for friendship which Adrienne Rich points out in the context of women apply more universally:

To take the step of questioning heterosexuality as a "preference" or "choice" for women—and to do the intellectual and emotional work that follows—will call for a special quality of courage in heterosexually identified feminists but I think the rewards will be great: a freeing-up of thinking, the exploring of new paths, the shattering of another great silence, new clarity in personal relationships.

*Id.*

<sup>332</sup> PHILIP ROTH, *PORTNOY'S COMPLAINT* 274 (Vintage 1994) (1967) (illustrating psychic conflicts in integrating sexual impulses and upward mobility against the background of ethnic subordination as a Jew) ("So [*said the doctor*]. Now vee may perhaps to begin. Yes?") (original brackets).