



2002

# Sex, Marriage and History: Analyzing the Continued Resistance to Same-Sex Marriage

Josephine Ross

Follow this and additional works at: <https://scholar.smu.edu/smulr>

## Recommended Citation

Josephine Ross, *Sex, Marriage and History: Analyzing the Continued Resistance to Same-Sex Marriage*, 55 SMU L. Rev. 1657 (2002)  
<https://scholar.smu.edu/smulr/vol55/iss4/11>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# SEX, MARRIAGE AND HISTORY: ANALYZING THE CONTINUED RESISTANCE TO SAME-SEX MARRIAGE

*Josephine Ross\**

**M**ARRIAGE has long been seen as what makes sex legitimate - literally making it legal, roping it off from all those other kinds of sex for which an appalled neighborhood might haul you in front of the local ecclesiastical or county court.

E. J. Graff<sup>1</sup>

*And she steal love's sweet bait from fearful hooks.  
Being held a foe, he may not have access  
To breathe such vows as lovers use to swear;  
And she as much in love, her means much less  
To meet her new beloved anywhere.  
But passion lends them power, time means, to meet,  
Tempering extremities with extreme sweet.*  
William Shakespeare, *Romeo and Juliet*<sup>2</sup>

## I. PUBLIC RESISTANCE TO RECOGNITION OF SAME-SEX MARRIAGE IS A VICIOUS CIRCLE

There continues to be a good deal of opposition in this country to marriages by same-sex couples.<sup>3</sup> Public opinion constitutes the main obstacle to legal advancement although there is growing acceptance of same-sex couples. There is no lack of constitutional theories demonstrating that gays and lesbians are entitled to enjoy the benefits and responsibilities of

---

\* Visiting Assistant Clinical Professor of Law, Boston College Law School. B.A., Oberlin College; J.D., Boston University School of Law. I am grateful to Phyllis Goldfarb and Catherine Wells for their advice and encouragement throughout. I also would like to thank George Fisher and Anthony Farley for their insightful comments on earlier drafts.

1. E.J. GRAFF, WHAT IS MARRIAGE FOR?: THE STRANGE SOCIAL HISTORY OF OUR MOST INTIMATE INSTITUTION 53 (1999).

2. WILLIAM SHAKESPEARE, ROMEO AND JULIET (Jill L. Levinson ed., Oxford Univ. Press 2000) 1554-1616) (Act 2, Prologue by the Chorus).

3. Nationally, 51% of Americans are opposed to allowing gay couples to marry while 34% approve. Will Lesser, Poll: Americans Back Some Gay Rights, AP Story found at <http://www.hrc.org/newsreleases/2000/000531.asp> (last visited Oct. 30, 2002). A poll conducted in 1993, found 60% opposed gay "legal partnerships." U.S. NEWS & WORLD REPORT, July 5, 1993, at 42-43. In 1987, 75% opposed same-sex marriage.

civil marriage.<sup>4</sup> Despite persuasive arguments in courts, however, proponents of same-sex marriage are facing many setbacks in the ballot boxes and legislatures.

Anti-marriage legislation has been sweeping across this country, referred to as DOMA (the federal Defense of Marriage Act) and mini-DOMAs.<sup>5</sup> The 1999 decision by the Vermont Supreme Court in *Baker v. Vermont*<sup>6</sup> should also be understood against the background of Hawaii where voters amended the state constitution just as the Hawaii Supreme Court appeared set to hand out to gay men and lesbians the first marriage victory.<sup>7</sup> The opinions in *Baker* are laudable in their recognition of gay couples as having human relationships that deserve the protections and equitable distribution of benefits by the state. Yet the majority stopped short of bestowing civil marriage licenses to same-sex couples, deferring instead to the legislative branch to fashion the appropriate remedy. Jurisprudentially, the Vermont Court was illogical to call for equality but settle for legislation creating a parallel system to marriage that is separate and unequal.<sup>8</sup> Certainly one reading of the decision is that the Vermont Supreme Court judges were realists who knew that if they granted full

---

4. For some examples of articles that lay out constitutional arguments in favor of same-sex marriage see for example, Andrew Koppelman, *Why Sex Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994) (equal protection and sex discrimination issues); Christine Jax, *Same-Sex Marriage—Why Not?*, 4 WIDENER J. PUB. L. 461 (1995) (equal protection as a suspect class); David Cruz, *Just Don't Call It Marriage: The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925 (2001) (free speech issues); Mark Tanney, *The Defense of Marriage Act: A "Bare Desire to Harm" an Unpopular Minority Cannot Constitute a Legitimate Governmental Interest*, 19 T. JEFFERSON L. REV. 99, 143-46 (1997) (due process issues); Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont's State Constitutional Same-Sex Marriage Case*, 42 B.C. L. REV. (2002) (marriage as a state constitutional right); *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997), cert. denied, 522 U.S. 1049 (1998) (see the plaintiff's brief on freedom of religion). In contrast, the scholarly position on why gays should not be able to marry may best be summed up, as one colleague did in an oral presentation: "The people have spoken."

5. Defense of Marriage Act, Pub. L. No. 104-199, § 2, 110 Stat. 2419 (1996). In addition, thirty-three states currently have anti-marriage laws: Alaska, Alabama, Arkansas, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Iowa, Idaho, Illinois, Indiana, Kentucky, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia. Seven states have anti-marriage measures pending in their legislatures as this article goes to press: Massachusetts, Nebraska, New Jersey, New York, Nevada, Ohio, Wisconsin.

6. *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

7. *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999). As the Hawaii Supreme Court appeared set to hand out to gay men and lesbians the first marriage victory, voters passed a ballot initiative amending the state constitution to exclude same-sex marriage from its equal protection guarantee.

8. In the year 2000, following the *Baker* decision, Vermont passed civil union legislation allowing state benefits to registered couples, the most sweeping domestic partnership benefits in the nation. However, it is not called marriage and will therefore not trigger federal recognition, which make up the bulk of economic benefits for married couples, (e.g., social security, tax benefits). It will create questions for those couples that register and move out of state. *Panel Opts for Domestic Partnership*, THE GRAND RAPIDS PRESS, Feb. 10, 2000, at A12; Michael Crowley, *Vermont Court Gives Rights to Gay Couples: Legislature to Decide Legal Implications*, SUN-SENTINEL (Ft. Lauderdale), Dec. 21, 1999, at 1A, available at 1999 WL 29920387.

marriage benefits, they would likely be overturned through a Constitutional Amendment, as was done by the Hawaii electorate. Thus, public sentiment was arguably the driving force behind the opinion as well as the result. The Vermont controversy also showed that the public's opposition to marriage for same-sex couples does not necessarily mean that they are anti-gay or against financial security and general stability for gay couples.<sup>9</sup> The Vermont legislature created a parallel system of rights called civil unions, which provide better protection for same-sex couples than any domestic partnership legislation so far, while consciously avoiding the term "marriage" to describe these unions. Although four of the legislators who had cast ballots in favor of civil unions were voted out of office, most were reelected, and there have been no ballot initiatives seeking to amend the Vermont constitution. The sticking point was the symbolism of the word "marriage" rather than the benefits and responsibilities that come with marriage.

What are needed now, rather than new constitutional arguments to use in court, are arguments that can convince the public. But first the meaning of that resistance must be understood. More than ever what is needed is a theory to explain the continued resistance to same-gender marriages.<sup>10</sup>

One reason for the public's resistance is that historically gay relationships existed outside marriage, and marriage is "what makes sex legitimate." As a result, same-sex relationships have been sexualized. In conventional thinking, gay love is understood as the equivalent of gay sex. Gay sex is perceived as profane, in contrast to marriage, which is

---

By not using the term "marriage," the Vermont civil unions will not constitute marriage for the purpose of federal protections or rights (although there will probably be some litigation around this).

9. A poll conducted on January 28, 1999 in Vermont found 43% of respondents in favor of same-gender marriage, 48% opposed and 7% with no opinion. *Vermonters Split on Gay Marriage*, BOSTON GLOBE, Jan. 28, 1999 at B5. During the November 2000 elections in Vermont, exit polls demonstrated that 51% of voters were pro-civil union. Governor Dean and Lt. Governor Doug Racine, who are pro-civil union, were re-elected. Secretary of State Deb Markowitz and State Auditor Liz Ready are also pro-civil union. Further, 17 of 19 pro-civil union Senate members were re-elected. See Vermont Civil Union Election Results, available at <http://www.glad.org/Publications/CivilRightProject/vtelectionchart.PDF> (last visited Oct. 30, 2002).

10. This article uses the word "sex" and "gender" interchangeably because "sex" in normal conversation usually means sexuality. This use of the term gender was appropriated by Supreme Court Justice Ruth Bader Ginsburg when she was litigating sex discrimination cases because she did not want to be in court talking about "sex." Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 HARV. C.R.-C.L. L. REV. 255, 285 n.122 (citations omitted). In contrast, many other scholars use the word "sex" to signify biological difference between men and women and use the term "gender" to mean feminine and masculine. See, e.g., Frank Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to its Origins*, 8 YALE J.L. & HUMAN. 161, 162 (1996); John Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1125 (1999). Like Ginsburg, I think there is a problem with using the word "sex" when discussing something other than sexuality, because sex means sexuality in common parlance. We lack an adequate language to discuss men, women and same-sex relationships without involuntarily injecting sexuality into the discussion.

perceived as sacred.<sup>11</sup> To recognize gay marriage, therefore, is to elevate same-sex love from the profane to the sacred, a seemingly insurmountable hurdle. One blatant example is a Vermont town clerk who refused to issue civil union licenses to gay couples because she considered these unions to be “an encouragement of perversion.”<sup>12</sup> A recent letter to my local newspaper even used the term “profane” to describe same-sex marriages. The writer was upset about the filing of a lawsuit in Massachusetts in 2001 challenging the exclusion of same-sex couples from marriage, which he refers to as “a suit for the legalization of sodomy and *profane* marriage.”<sup>13</sup> In the 2000 presidential debate, George W. Bush explained he was “not for gay marriage,” referring to marriage as “a sacred institution.”<sup>14</sup> In contrast, Bush referred to gay relationships in sexualized terms, stating: “I don’t think it’s any of my concern how you conduct your sex life.” This sacred/profane dichotomy can be understood as a syllogism: marriage is sacred, gay relationships are profane; therefore, marriage should not include same-sex unions. It operates as a vicious circle.

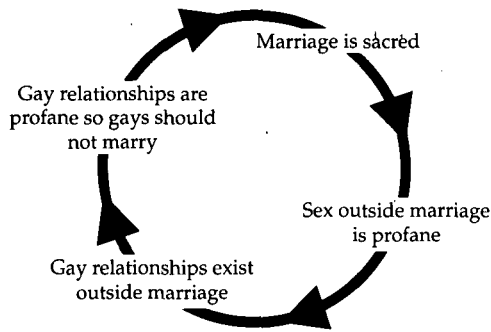
---

11. *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (“Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred”). Compare *Padula v. Webster*, 822 F.2d 97, 102 (D.C. Cir. 1987) (“The issue presented us is only whether homosexuals, when defined as persons who engage in homosexual conduct, constitute a suspect or quasi-suspect classification”). The concepts of sacred and profane certainly have religious roots in both Christianity and Judaism, see, e.g., KAREN ARMSTRONG, *ISLAM* (2000) at 14-15 (contrasting early Christian to early Islamic teachings), but it is the secular version or residual attitudes of these concepts that I am most interested in.

12. Ross Sneyd, *Same-Sex Unions Denounced in Vt.*, AP, June 29, 2000, at 2000 WL 23361049.

13. TELEGRAM & GAZETTE SATURDAY, June 2, 2001, at A12 (emphasis added). Letter by Thomas M. Stachura of Auburn entitled “Sodomy Is a Felony and Shouldn’t Be Legalized.” This letter is an exception to the generally positive reaction this suit engendered in the regional papers, specifically, the *Boston Globe* and the *Worcester Telegram & Gazette*. The Worcester couple who were the focus of the original Telegram article informed me that they received all sorts of letters and phone calls of encouragement including from people they never met. See also *Goodridge v. Dep’t of Pub. Health*, 14 MASS. L. PTR. 591 (Mass. Dist. Ct. May 7, 2002).

14. President George W. Bush’s statements during the second presidential debate. When asked about his position on gay marriage, Bush replied: “I’m not for gay marriage. I think marriage is a *sacred* institution between a man and a woman . . . . I am a tolerant person . . . I don’t hire or fire someone based upon their sexual orientation. I don’t think it’s any of my concern how you conduct your *sex life* and I think it’s a private matter.” See generally Josephine Ross, *Sexualizing of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 HARV. C. R. - C.L. L. REV. 255 (2002) (examining the way mixed-race relationships were seen as perverse or illicit sexual liaisons, especially before the Supreme Court held mixed-race marriages to be worthy of Constitutional protection).



### *The Vicious Circle*

The reasoning is circular and self-sustaining. Lack of marital rights constitutes both cause and effect. Marriage provides privacy and makes sex legitimate. Gay relationships are viewed as sordid and pruriently sexual because at least in part because they exist outside marriage, outside the boundaries of what is deemed acceptable. Thus lack of marriage rights causes gay relationships to be viewed in a distorted light. This in turn makes them appear unworthy of marriage recognition. Continued deprivation of marriage is thus a circular enterprise. The circular nature of the arguments against gay marriage make them particularly difficult to combat.

## II. WHY GAY RELATIONSHIPS ARE SEXUALIZED

### A. WHETHER PROMISCUITY CAUSES GAY RELATIONSHIPS TO BE VIEWED AS PROFANE

*A society that has for much of the last millennium precluded in every conceivable way the formation of gay couples, systematically denying them any social, legal, fiscal, or religious acceptance, criticizes gay men for casual sexual relations and concludes that their sexuality is not "well-adjusted."<sup>15</sup>*

William Eskridge identified promiscuity among gay men as a reason why Americans are hesitant to grant equal marriage rights to gays. He turned this into an argument in favor of gay marriages, arguing that gay men will become less promiscuous if they are allowed to marry.<sup>16</sup> Marc Fajer also identified promiscuity as the problem, but he viewed it as primarily a problem of perception. Fajer's solution is for "advocates [to] use stories about love and intimacy to counter the non-gay pre-understanding

15. John Eastburn Boswell, *Jews, Bicycle Riders, and Gay People: The Determination of Social Consensus and Its Impact on Minorities*, 1 YALE J.L. & HUMAN. 205, 223 (1989).

16. WILLIAM ESKRIDGE JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 45 (1996). This point is also well rendered in Boswell, *supra* note 15, at 223. Fajer's book review also critiques this point, Marc A. Fajer, *Toward Respectful Representation: Some Thoughts On Selling Same-Sex Marriage*, 15 YALE L. & POL'Y REV. 599, 599 (1997). Straight men were supposed to be civilized by marriage. See generally, GRAFF, *supra* note 1, at 59-68.

that gay sex necessarily is obsessive, loveless, and promiscuous.”<sup>17</sup>

One staunch opponent of marriage for same-sex couples wrote, “sexual fidelity is not an expected or typical characteristic in same-sex relationships, especially among gay men,” to support his contention that efforts to recognize gay marriages are really a radical rejection of marriage.<sup>18</sup> The perception of promiscuity is a symptom of a deeper problem rather than the problem itself. Did Magic Johnson not prove that promiscuity was alive and well in the heterosexual world?<sup>19</sup> Straight male promiscuity is not seen as a reason to deny marriage rights to heterosexual men. The stereotyping of gays as promiscuous is but a symptom of the majority culture’s sexualization of gays.

Americans are obsessed with gay sex, and the obsession is unrelated to concern about the quantity of sex partners. To explain what is meant by obsession, consider this scenario: if a man says “my girlfriend is blond,” or “I am married to a blond woman,” no one will accuse him of talking about sex. But if a gay man declares “my boyfriend is blond,” he will be understood to be discussing his sex life. An obsession or fixation with gay people as sexual beings undergirds stereotypes about gays—the loose and licentious stereotype, the child-abusing stereotype – that will not be cured by protestations of monogamy.<sup>20</sup> As psychologist Beverly Greene wrote: “Lesbians and gay men are often depicted in ways that overly sexualize them. Indeed, folklore and clinical research often focus on the sexuality of lesbians and gay men as if that were all that defined them.”<sup>21</sup>

Lesbians are generally not viewed as promiscuous, yet their relationships are also sexualized. An interchange that took place in my life highlights this strange emphasis on sex within the public psyche in viewing gay people. I was on an airplane and happened to be sitting next to a profes-

---

17. Marc Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes and Legal Protection for Lesbians and Gay Men*, 46 *MIAMI L. REV.* 511, 518 (1992).

18. Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimize a Retreat from Marriage by Redefining Marriage*, 39 *S. TEX. L. REV.* 735, 759 (1998). Wardle also considers sexual relations among gay couples are different. This issue is discussed further on in the article. “Obviously, sexual relations between persons of the same gender are different from sexual relations between male and female couples. But that is not the only difference. For instance, sexual fidelity is not an expected or typical characteristic in same-sex relationships, especially among gay men.” *Id.* at 759-760. From this promiscuity, Wardle infers a “virtually unrestricted restructuring of marriage” which would make it meaningless. *Id.* at 760.

19. Derrick Z. Jackson, *Male Athletes Needed Aboard the Anti-Aids Bandwagon*, *BOSTON GLOBE*, Aug. 10, 1994, at 15. Magic Johnson’s acknowledgement of casual sex with multiple partners may have rivaled the notorious “Patient Zero” in Randy Shilts’s book about AIDS. *RANDY SHILTS, AND THE BAND PLAYED ON* (St. Martin’s Press 1987). Interestingly, it was Martina Navratilova, a lesbian athlete and spokeswoman for the gay movement, who spoke negatively about Johnson’s revelation. See Jackson, *supra*.

20. GRAFF, *supra* note 1, at 135-36 (debunking the myth that gay men are the primary abusers of children).

21. Beverly Greene, *Beyond Heterosexism and Across the Cultural Divide: Developing an Inclusive Lesbian, Gay and Bisexual Psychology: A Look to the Future*, in *EDUCATION, RESEARCH AND PRACTICE IN LESBIAN, GAY, BISEXUAL AND TRANSGENDERED PSYCHOLOGY: A RESOURCE MANUAL* 17 (Beverly Greene & Gladys L. Croom eds., 2000).

sor from a prestigious university. We talked about many things and after a while he asked me about my boyfriend, how long we had been going out. I told him the number of years, but corrected the gender. He said, "Oh, I've always wanted to know: What do lesbians do in bed?" His question came out spontaneously and uncensored. His question didn't suggest that I was promiscuous or even that I had a lot of sex. Rather, it betrayed an obsession with gay sexuality and suggests that he views gay sexuality as qualitatively different from his own, and that he equated my coming out to him with a willingness to discuss sex, as if I had brought up the topic. Since lesbians are generally viewed as less promiscuous than gay or straight men, promiscuity is not the cause of the sexualized view of gay relationships.

### B. ROMEO AND JULIET AS GAY ALLEGORY

*Graze where you will, you shall not house with me. . . Beg ! Starve! Die in the streets! For by my soul I'll ne'er acknowledge thee.*<sup>22</sup>

*Romeo and Juliet* remains the quintessential rendering of straight romance, as the film *Shakespeare in Love* attests.<sup>23</sup> In Shakespeare's play, sex, love and marriage are intertwined. The couple's love is new and raw and sexual; they have only known each other a couple of weeks. If the same lines had been written about two men in love, the play would be considered a play about sex. In contrast, *Romeo and Juliet* is considered a romance. Illicit sexuality is shown as noble and pure because of the young couple's desire to marry; because they are willing to accept punishment, even death, in pursuit of their love; and because it is heterosexual.

The romantic tragedy also reads as a gay allegory. Two young people love each other and desire each other but they can only do so in secret because of the attitudes of their parents and the community at large. Despite their deep love, the community has the power to separate the lovers and to declare their marriage meaningless. Romeo and his loved one's decision to follow their hearts renders them outcasts in their own families.<sup>24</sup> Although they find a religious man to marry them,—“God joined my heart and Romeo's, thou our hands”<sup>25</sup>—their community does not recognize their marriage vows. In the same-sex version of Shakespeare's drama, some would likely view the Montagues and Capulets not as villains, but as sensible people that define marriage in such a way that it excludes same-sex unions.<sup>26</sup>

22. SHAKESPEARE, *supra* note 2, act 2, sc. 5.

23. Winner of 1999 Academy Award for Best Picture.

24. See generally, SHAKESPEARE, *supra* note 2.

25. *Id.* act 4, sc. 1.

26. Death for love's sake, at the heart of *Romeo and Juliet*, also finds strong parallel among the gay youth of today. Reports of problems among Gay, Lesbian and Bisexual (GLB) youth suggest that many are at risk of developing emotional, social, and physical health problems. Among the most important of these is an apparently two-to-threefold increased rate of suicide attempts among GLB youth. James Lock & Hans Steiner, *Gay, Lesbian, and Bisexual Youth Risks for Emotional, Physical, and Social Problems: Results*



Shakespeare reveals how interwoven romance, sex, and marriage can be. Given this interweaving, it is difficult to advocate for same-gender marriage in a culture which views the raw sexuality and passion of *Romeo and Juliet* as pure, meanwhile viewing the gay version of the play as sordid. *Romeo and Juliet* illustrates that notions of gay profanity are not rooted in promiscuity.

C. LANGUAGE REINFORCES SEXUALIZED VIEW OF  
GAY RELATIONSHIPS

*But I'm not being radical when I kiss you  
And I don't love you to make a point.*<sup>27</sup>

The sexualizing of gay men and lesbians must be understood in the context of patriarchy, which makes all but the most limited forms of sexuality off limits. As James Baldwin once said: "Nobody really cares who goes to bed with whom, finally . . . They care that you should be frightened of what you do. As long as you feel guilty about it, the State can rule you."<sup>28</sup> Or, as Michael Bronski wrote in 1984: "The patriarchy is sustained through a complex network of gender, racial, and sexual arrangements. Erotophobia—the fear of sexuality—is a bulwark of support for those standards. Patriarchy is supported, to a large degree, by sexual repression."<sup>29</sup>

By making most sexual desires taboo, society is able to make people fearful. The converse is also true; the way to make people fear an outside group is to brand it as sexually deviant. According to Foucault, the focus on sexuality by doctors in the 19th century gave birth to the concept of homosexuality.<sup>30</sup> Sexuality was dissected and a person who had same-gender sexual desires was labeled based on these desires, as a "homosex-

---

from a Community Based Survey, J. AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, Mar. 1, 1999, 1999 WL 11376107. The Shakespearean couple find lasting love and marriage only in death. One could argue that currently gay youth are killing themselves because they see their quest for love as hopeless.

27. CATIE CURTIS, TRUTH FROM LIES, (Emd/Capitol 1995) It goes on like this: "It's the hollow of my heart that cries when I miss you/And keeps me alive when we're apart." *Id.* Curtis is a current lesbian folk singer with cross-over appeal.

28. Richard Goldstein, "Go The Way Your Blood Beats": An Interview with James Baldwin, in JAMES BALDWIN, THE LEGACY 173 (Quincy Troupe ed., 1989).

29. MICHAEL BRONSKI, CULTURE CLASH: THE MAKING OF GAY SENSIBILITY 10 (1984). Stereotyping is a process of endowing "the other" with traits we consider bad, which includes sexual promiscuity and licentiousness. See Greene, *supra* note 21, at 3, quoting the words of psychologist R.J. Siegel: "Fear is the glue that maintains existing biases" for "fear becomes part of the process of projecting onto those whom we see as unlike ourselves all of the attributes that we would like to deny in ourselves." Overcoming bias through awareness, mutual encouragement and commitment. RACISM IN THE LIVES OF WOMEN: TESTIMONY, THEORY AND GUIDES TO PRACTICE 295-301 (Jeanne Adleman & Gloria Enguidanos eds., 1995).

30. 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, AN INTRODUCTION 36-45 (Robert Hurley, trans., Vintage Books 1990) (1976). He refers to psychologists, psychiatrists and medical doctors that focused on sexual practices and pleasures that gave these "peripheral sexualities" a permanent reality. "The sodomite had been a temporary aberration; the homosexual was now a species. . . . The nineteenth century and our own have been rather the age of multiplication: a dispersion of sexualities, a strengthening of their dispa-

ual" person. Hence the origins of gay identity was a sexual definition. The equation *gay love = profane sex* must be understood as connected to the prevailing definition of "gay" as a sexual mode of being.

Plaintiffs' briefs in the Vermont lawsuit showcased loving same-sex couples without ever using the word "gay" or "sexual orientation." This appeared to annoy the other side. In their reply brief, counsel for the State complains that plaintiffs do not even reveal if they are homosexual or not.<sup>31</sup> Can anyone be any more "out" than filing a law suit proclaiming one's love and commitment for someone of the same gender? Again, the State is fixating on the sexual identity of the two parties as if gay meant something different from two people who love each other and want to make a commitment that is emotional, public and spiritual.<sup>32</sup> This avoidance of the term "gay" by the Vermont plaintiffs raises certain questions. In advocating for marital rights, is it necessary to divorce oneself from the term "gay" in order to avoid the "profane" stigma? Does the concept of "gay" as a "sexual" orientation contribute to the view of gay intimacy as profane? How else can the term "gay" be defined?

While the sexualizing of gays has been imposed from outside, it has also been embraced within the gay movement. Even the word "sexual" is part of accepted definitions of gay identity: the phrase "*sexual* orientation" is uniformly used within the gay community, replacing the criticized "*sexual* preference" of the 1980s, and many gay scholars define gays as a "*sexual* minority." There is another way that theorists could have framed the issue of self-definition, namely, the emphasis could have been on relationships rather than on sexuality.<sup>33</sup> For example "relationship orientation," "gender orientation," or "gay orientation" are terms that omit the word "sexual" and thereby focus on relationships more than sexuality.

Adrienne Rich defined lesbianism broadly in her seminal essay, *Compulsory Heterosexuality and Lesbian Existence*.<sup>34</sup> She proposed that lesbianism refer "not simply [to] the fact that a woman has had or consciously desired genital sexual experience with another woman," but "to embrace many more forms of primary intensity between and among women, including the sharing of a rich inner life."<sup>35</sup> What was important in Rich's view, was bonding among women; her focus was on relationships and on gender. Instead of equating gays with sexuality, gays could be equated with relationships, relationships that challenge gender norms.

---

rate forms, a multiple implantation of perversions. Our epoch has initiated sexual heterogeneities."

31. State's Reply Brief, *Baker v. State*, 744 A.2d 864, 888-89 (Vt. 1999).

32. The wisdom of the plaintiffs' move, is that by defining the couples by their life and relationship rather than by sex or sexuality, they avoid the *Hardwick* trap. The *Hardwick* trap is the argument that gays are people who are sexually intimate with those of their own gender; the constitution allows criminalization of this sexual intimacy; therefore, gay men and lesbians must not be entitled to any constitutional protection.

33. Ross, *supra* note 14, at 280-85.

34. ADRIENNE RICH, *BLOOD, BREAD AND POETRY: SELECTED PROSE, 1979-1985*, at 23-75 (1986).

35. *Id.*

Within the gay community, the definition of "gay" as a sexual mode of being has generally succeeded while Rich's view receded.<sup>36</sup> The gay movement in general, and queer theorists in particular, have contributed to this notion of gay sex being the defining aspect of gay lives. Queer theory, one of the outgrowths of postmodernism, has been particularly clear about framing gay people as sexual minorities.<sup>37</sup> Embracing gay identity as a sexual identity has been in many ways a successful route towards change. It is through acceptance of their maligned sexuality that gay men and lesbians have found a voice, a community, a movement, and, most importantly, each other.

The gay movement, and certainly many members of the gay community, are moving out of adolescence. As a result, the focus has been on marriage rather than dating. Now that the turf at issue is marriage, the sexual definition no longer fits, and has become a hindrance. By moving into the marriage arena, the gay movement is necessarily talking about relationships rather than about lone individuals. The terms one hears are: love, family, raising children, the death of one partner, shared lives. Thus, the very subject matter brings the movement closer to the feminist view that gays are radical because they refuse to be circumscribed by gender restrictions as to who they should live with or love.<sup>38</sup> Unmistakably the push for marriage came from the roots up, from the people themselves,

---

36. It has always been difficult to define the term gay, or to determine who is within the spectrum of the gay civil rights struggle, which has gradually widened to include bisexuals and transgender persons. When gay is defined as those who have relationships or build their lives with someone of their own gender, it leaves out many people, especially single gays. But when "gay" is defined as those who are sexually active and attracted to those of the same gender, it leaves out other gay men and lesbians, and helps paint all gay people as sexually obsessed, which is inaccurate and destructive to the move for equal treatment of couples. The definition of gays as sexually active with those of their own sex leaves out bisexuals, those who consider themselves gay but have never had sex, single men and women also, and those who are in same-sex marriages where the sexual aspect has disappeared.

37. Not only does queer theorist Michael Bronski think gays are obsessed with sex, but he thinks this is the key to gay liberation, what allowed gay men to be free to create their own culture:

This historical categorization of homosexuality as a totally sexual experience continues today. Homosexuality is considered to represent a pure, unencumbered form of sexuality. Not engendering new life, marriage, and apparently employing sexuality as the primary form of self-definition, homosexuality represents sex incarnate. In short, homosexuals are obsessed with sex. This obsession, along with the impulse to personal freedom that makes sexual activity possible, is at the center of the gay sensibility.

Bronski, *supra* note 29, at 191.

38. Progressive scholars Paula Ettelbrick and Nancy Polikoff have warned that fighting for marriage would make the movement less radical and more conformist. Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation*, *OUT/LOOK NAT'L GAY AND LESBIAN Q.*, 9 (Fall 1989) and *Wedlock Alert: A Comment On Lesbian and Gay Family Recognition*, 5 *BROOK. J.L. & POL'Y* 107 (1996) [hereinafter *Wedlock Alert*]; Nancy Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage*, 79 *V.A. L. REV.* 1535 (1993). But in my view, since marriage allows greater visibility for gay men and lesbians, it is also a liberating force.

not the leaders.<sup>39</sup> One can see the progress from sick to proud to normal as not necessarily a bad direction for the movement to take, especially since marriage involves greater visibility for gay relationships.

In this writer's view, gays are not a sexual minority but a gender role minority. The reason that gay relationships are threatening is because they clearly defy sex roles—not only because boys are raised to marry girls and vice versa, but because there are no predetermined gender roles within the marriage. As the State of Vermont wrote in its brief, "marriage is an institution that uniquely celebrates the complementarity of the sexes."<sup>40</sup> The ideal of marriage as straight helps men feel masculine and women feminine. As in much homophobia, discrimination in marriage is based on fear that gays undermine the male/female, masculine/feminine paradigm. A man who worries about his masculinity—perhaps he cannot fix anything in the house—can still consider himself the man because he is the man in the marriage; after all, no woman could marry his wife. Whatever he brings to the relationship he gets to consider male or masculine, but if his marriage looks just like that of two women next door, then his masculinity is in doubt. It is the similarity between same-sex marriage and opposite-sex marriage that is the sticking point. It is the pressure on men to be "masculine" and the insecurity engendered by that ill-defined requirement that spawns anti-gay sentiment. Similarly, women who cross outside the traditional female role into the work world throughout much of their lives can still feel "feminine" on their wedding day and in their marriages, feminine in relation to their masculine husbands. Is this "masculine/feminine" divide a mirage, a cultural packaging that takes many shapes depending on the culture and individuals involved? The similarity between the lives of straight and gay couples might make heterosexuals feel that way. By preventing gay couples from calling their relations marriages, insecure heterosexuals may feel their own claim to masculinity or femininity enhanced. Hence, the use of gender to determine who can marry and who cannot serves the uses that discrimination always does, of making others feel better.

Lesbian and gay sexual orientations challenge traditional definitions of gender, the presumed natural order of male superiority, the gender roles and hierarchies that are based on that presumption, as well as how normal sexual attraction is defined. . . the rationale for male gender privileges based on the presumed natural origins of traditional gender roles is undermined.<sup>41</sup>

---

39. Seven in ten lesbians and six in ten gay men responding to a recent national survey said they would want to marry same-sex partners if they could. Craig Christensen, *If Not Marriage? On Securing Gay & Lesbian Family Values by "Simulacrum of Marriage,"* 66 *FORDHAM L. REV.* 1699, 1725 (1998).

40. See State's Appeal Brief (Part 2), *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999), available at <http://www.vtfreetomarry.org/statepart2.htm>. One opponent of gay marriage disturbed by the lack of male and female sex roles in same-gender marriage stated that "gay marriage 'would appear almost as a mocking burlesque of marriage.'" *ESKRIDGE*, *supra* note 16, at 104.

41. Greene, *supra* note 21, at 21.

The fight against gay marriage is best understood as a desperate attempt to keep the gender line from further eroding, to preserve at least some demarcations between what it means to be a man and what it means to be a woman. The sexualizing of gay lives is simply a product of the fact that our relationships have existed outside of society's strictures. The term "gay" should refer to those involved with people of the same gender or who wish to be involved romantically with someone of the same gender, not a synonym for sexuality or homosexuality. Such a move will help vitiate the vicious circle.

Others have written that opposition to gays in general and gay marriage in particular is based upon sex discrimination within the culture.<sup>42</sup> However, most commentators still consider gay sexuality to be the distinguishing feature of gay identity. Even John Culhane who argues that gender identity is a social construct like race, writes: "Many thousands of gay men and lesbians are living lives that, except for how they express sexual love for each other, are indistinguishable from those of their opposite-sex counterparts."<sup>43</sup> In contrast, this author suggests that gay couples are almost indistinguishable from their opposite-sex counterparts when they express sexual love. It is when navigating the world without straight privilege, and when structuring their relationships outside of gender role expectation that gay couples are most different from their opposite-sex counterparts.

I am washing over differences between straight sex and gay sex, you complain. After all, the sex act itself is different.<sup>44</sup> "Obviously, sexual relations between persons of the same gender are different from sexual relations between male and female couples," opined one scholar opposed to same-sex marriage.<sup>45</sup> But it is not that different; rather, the meaning of the sex act changes depending upon the gender/sex of the participants.

---

42. See, e.g., John Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1164-75 (1999); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 189 (1988); Cruz, *supra* note 4, at 942-44.

43. See Culhane, *supra* note 42, at 1138. Culhane theorizes that gay marriage challenges the assumption that men are sexually aggressive and women are sexually passive. Chai Feldblum writes of the need for articles upholding the moral worth of gay sex to further the marriage debate. Chai R. Feldblum, *Keep the Sex in Same-Sex Marriage*, 4 HARV. GAY & LESBIAN REV. 23, 25 (1997). Cf. Edward Stein, *Evaluating The Sex Discrimination Argument For Lesbian and Gay Rights*, 49 UCLA L. REV. 471 (2001); ESKRIDGE, *supra* note 16, at 172, where he refers to a "transvestite quality" in using sex anti-discrimination laws to address same-sex marriage; it "dresses a gay rights issue up in gender rights garb." *But see id.* at 162-170, where Eskridge writes of the connection between homophobia and sexism.

44. Nor can one point to the sex acts of oral sex or sodomy, any more than kissing or touching, as uniquely homosexual. Approximately 85% of heterosexual women engage in oral sex, the same percentage of lesbians engaging in that conduct, and approximately 20% engage in anal sex according to studies reported in Chai R. Feldblum, *Sexual Orientation, Morality, And The Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, n.222 (1996). Others might argue that gays and lesbian cannot reproduce and that makes them different from straight couples. But many straight couples never have children, some cannot, and if we take away those times when opposite couples purposely attempt to bear children, that still leaves an awful lot of sexual intimacy.

45. Wardle, *supra* note 18.

Gender is laden with meaning within our culture. The meaning of a sex act is different to the participants depending upon the gender of the participants. Kissing is the same act with a man or a woman, but the gender of the person will dramatically change the experience for most recipients. While there are some generalized differences between gay sexuality and straight sexuality, the only true constant is gender difference rather than sexual position or practice.<sup>46</sup>

People with physical disabilities are not considered a sexual minority. One could argue that physical disabilities changes the sexual encounters between people as much as gender does, but it would be insulting to conclude that they are therefore a sexual minority.<sup>47</sup>

Consider also how African-Americans are sexualized in this country. The marriages of slaves were no more recognized than gay marriages are today.<sup>48</sup> The sexualizing of black men can be seen in the false rape charges and lynchings of the past, and present day stud stereotypes, while black women are sometimes sexualized as “whores.”<sup>49</sup> The quote that begins this section could be applied to African-Americans and mixed-race couples as well as to same-sex couples.

Directly on point, interracial relationships were sexualized in the United States before *Loving v. Virginia*.<sup>50</sup> This view of mixed-race love as deviant, pornographic and sinful has gradually decreased since marriage rights were gained.<sup>51</sup> Opponents of mixed-race marriages believed the “sexual purity” of white womanhood was at stake.<sup>52</sup> In the 1960s, an African-American man and a white woman could not “walk down the street without the leering, disapproving stares of passers-by, especially white men.”<sup>53</sup> Even the facts of *Loving* are eerily suggestive of *Bowers v. Hard-*

46. Obviously, what opposite-sex couples do in bed varies couple to couple, as it does among gay and lesbian couples. There is no one monolithic sexuality. Imagine three couples, two straight and one gay. One straight couple’s sexual routine may look a lot more like the lesbian couple’s than it does like the other straight couple’s. To say that the lesbian couple is sexually different from what the straight couples do is to whitewash the vast differences among straight couples. Of course, this is just what marriage does; it creates a zone of privacy around couples, making differences among straight couples disappear. The only constant difference between same-gender sexuality and opposite-gender sexuality is the gender of the participants.

47. People with disabilities have the opposite hardship: they are not seen as sexual beings at all. Greene, *supra* note 21, at 31.

48. For a discussion of slave marriages see Graff. She asks “did slaves marry?” Her answer is yes and no, comparing the state of being both married and unmarried to present day same-sex couples. GRAFF, *supra* note 1, at 18-27.

49. See generally CORNEL WEST, RACE MATTERS (1997). See Anthony Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457, 516, 519 (1997), for a discussion of the relation between oppression against black Americans and sexuality. In addition, feminists have long documented the sexualization of women in this country, and demonstrated its connection to lack of power.

50. *Loving v. Virginia*, 388 U.S. 1 (1967).

51. See Ross, *supra* note 14, at 269 & n.64.

52. James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U.L. REV. 93, 101-02 (1993) (citing F. James Davis, WHO IS BLACK?: ONE NATION’S DEFINITION 63 (1991)); Law, *supra* note 42, at 233 n.220.

53. CALVIN C. HERNTON, SEX & RACISM IN AMERICA 118 (1965, reprinted with introduction 1988). See Ross, *supra* note 14, at 257-59.

wick<sup>54</sup>, the sodomy case. The sheriff in *Loving* went to the couple's home in the night and roused the male defendant out of bed.<sup>55</sup> Today, white women who date men of another race may still be seen as sexually loose.<sup>56</sup>

What the sexualization of interracial couples teaches, is that sexualization is a negative hardship imposed from the outside onto taboo (or non-sanctioned) relationships. It also indicates that the obsession with gay sex has little to do with promiscuity or the quantity or quality of sex within same-sex relationships. No advocate of interracial equality would consider someone sexually different because they couple with someone of a different race. That would be perceived as racist. Yet gay people themselves claim the mantle of sexual minority to describe their own love and life.

Sexuality and passion are forces for relationships, art, and consumerism, but sex itself is a small part of most people's daily lives. If a couple is together 20 years, the percentage of the time they spent engaging in coitus is probably a very small portion of the time they spend together, talking, driving, eating, etc. What makes many couples (gay or straight) feel married has to do with the relationship between them, how they talk to each other, how they take care of each other, combined with how they are perceived by the others as a couple. It would be interesting to read a psychological study to find out if gays only feel gay when making love. Ironically, that's probably the time that identity and minority status are forgotten. Gay identity is probably strongest the rest of the time: when buying dinner in the supermarket, going out to a restaurant, attending a parent-teacher conference at their child's school, or deciding whether to go to the office party together. Thus, a major sticking point in the sexualized definition of gay individuals and couples is that it distorts lives. Equating gay people with sexuality is problematic.

I have heard the objection that if relationship rather than sexuality were the defining aspect of gay people's lives, then two men or two women who were not sexually intimate could claim to be gay, or marry. But

---

54. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

55. Six weeks after the Lovings were married they had a terrible shock. Sheriff Garnett Brooks arrived with a warrant at the Loving's house directing him to bring "the body of said Richard Loving" before a judge. He dragged the Lovings out of bed. They spent the next five days in jail. Their crime was the violation of a Virginia law providing that "if any white person intermarry with a colored person"—or vice versa—each party "shall be guilty of a felony" and face prison terms of five years. IRONS & GUITTON, *infra* note 62, at 278. As Justice Blackmun noted in his dissent in *Hardwick*, "The parallel between Loving and this case is almost uncanny." *Hardwick*, 478 U.S. at 211 n.5 (Blackman, J., dissenting). Law, *supra*, note 42, at 232.

56. Hernton, *supra* note 53. Writing in 1965, Sociologist Hernton writes "This 'slut concept' . . . weighs heavily upon any white woman who marries a Negro." I also assert this from personal experience as a lawyer. One case in particular stands out in my mind. I handled an evidentiary hearing after which I learned that the court officers in the room all thought the white female prosecution witness lacked credibility. I engaged one of the officers in conversation to learn why he thought so, and found out it was because the witness was living with a black man, and was therefore loose and trashy. I was shocked at the time, but later on I came to expect reactions of this sort.

is this really a problem? Mixed-sex couples who marry without any sexual interest in each other are counted as straight, and are only scrutinized if one applies for new immigration status.<sup>57</sup> One is welcome to assume that a marriage with sexual intimacy is better than the one without, but why should only same-sex couples not have privacy in their marriages and the opportunity to be married with as little sexual intimacy as many straight married couples?

### III. MARRIAGE PROVIDES A ZONE OF PRIVACY AROUND SEXUALITY

Marriage serves to hide sexuality from prying eyes, providing a zone of privacy around a couple's intimacy or lack of intimacy, and at the same time provides greater visibility of the relationship. Without broadcasting the sexuality within the relationship, gay relationships, particularly for lesbians, often become invisible. For example, when I saw the film *Entre Nous*,<sup>58</sup> I found it to be about an intense love affair between two married women. No sex between the two women is portrayed, which I took as ambiguous; either the director had left it up to the imagination, or perhaps, sadly, the women were unable to consummate their love. Again, there was no sex shown between the married women and their husbands either, which I also found ambiguous; it is unclear whether or not they had sex with their husbands during the year the movie took place. Reviewer Pauline Kael described the movie in the *New Yorker Magazine* as a "non-lesbian" film.<sup>59</sup> By not revealing sexual activity, the passion, importance, the lesbianism of the women's relationship disappears for major audiences. In contrast, the importance of their relationships with their husbands does not. Because they are married, the viewer will give weight to their relationship and will not require proof of sexual activity. Imagine a futuristic version of *Entre Nous*. Again, no sex is shown, but this time after leaving their husbands, the women marry each other. In this version, the women's relationship will be termed lesbian while, at the same time, allowing them privacy in their bedroom.

Many gay couples long for the privacy shield which will allow them to hold themselves out to the world as a couple, without having to answer questions about what they do in bed and how often. Sex is central to some relationships. To others, sexual attraction rather than sex is the passion and glue of the relationship. To others, sex and sexual attraction are unimportant or peripheral aspects of the marriage. This is as true for opposite sex partnerships as for gay partnerships. Quantity and quality

---

57. GRAFF, *supra* note 1, at 48. My research assistant brought me a clipping of a comedian who remarked that "same-sex marriages have been around forever." After three years of straight marriage, "people are having the same sex they had last year, and this leads to squabbling. . . Get your hands off me." John Kelso, *Cavemen's Babble Meant, 'Yes Dear,'* AUSTIN AMERICAN-STATESMAN Apr. 23, 2000, available at 2000 WL 7334862.

58. *Entre Nous* (Fox Lorber 1983). Based on a real story by the daughter of one of the women.

59. Pauline Kael, *Film Review*, NEW YORKER, Mar. 5, 1984, at 130.



vary across the spectrum. One benefit marriage brings is that the couple's sex life is not inquired into. The outside world sees their relationship as legitimate no matter how much or how little sex they have.

This privacy for married couples is what makes it such a sought-after commodity. Without marriage, the way to be visible was often understood as flaunting one's sexuality. Marriage offers relief from the obsession that causes the public to latch onto one part of gay lives and place leering attention on it. Because marriage is "what makes sex legitimate," marriage allows greater visibility without sacrificing privacy.

#### IV. HOW DOMESTIC PARTNERSHIPS AND CIVIL UNIONS MAY ERODE THE VICIOUS CIRCLE

*No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated.*<sup>60</sup>

The effect the sacred/profane dichotomy bears on the legal rights of gays and lesbians can be seen poignantly in *Hardwick*. Justice Lewis Powell, the swing vote that upheld the constitutionality of the sodomy laws as applied to a consenting male couple in a bedroom, had originally indicated he would rule the sodomy laws unconstitutional. When Justice Powell switched his vote in *Hardwick* to vote with the majority, he did so because he had trouble envisioning gay sexuality as a fundamental right.<sup>61</sup> Justice Powell was not sure consensual sex should be criminalized, but he could not vote to grant gay sexuality the status of "fundamental," the same status accorded to straight married couples. Thus, he voted with the majority to uphold the sodomy statute as applied against a consensual relationship in Mr. Hardwick's bedroom. The jump from profane to "fundamental"—like the jump from profane to sacred—was simply too big a jump for someone like Justice Powell to make.

In Lawrence Tribe's argument against Georgia's sodomy laws, he gave the court one image of sexual intimacy—that of a husband and wife kissing in their home.<sup>62</sup> The justices were expected to analogize from that intimacy to gay intimacy, without having to think about what gay intimacy looks like.<sup>63</sup> Tribe's decision not to portray any form of gay intimacy is indicative of what might be called the "profanity problem." How are the Powells of the world to determine that gays have a fundamental right to sexual expression when advocates dare not so much as mention a same-

60. *Hardwick*, 478 U.S. at 191.

61. *Id.* (Powell, J. concurring). Justice Powell, who was the swing vote switched his vote during the deliberations. Later, Justice Powell believed he had made a mistake in supporting the majority. See JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR. (1994).

62. MAY IT PLEASE THE COURT 366 (PETER IRONS & STEPHANIE GUITTON eds. 1993).

63. Justice Powell and the majority, did not do so. I think it was a mistake not to normalize gay sexuality by discussing a long term gay couple kissing in their home rather than a straight married couple, but many bright thinkers feel that Profesor Tribe was rightly cautious.

gender kiss in the Supreme Court for fear it will revolt those they wish to convince?

In moving away from the sodomy debates and into the marriage arena, plaintiff lawyers are able to choose their litigants and put forward the perfect plaintiffs: loving couples, loving parents, well-adjusted citizens of the state. They are able to counteract the notion that gays are just sexual beings by portraying gay couples who are well-rounded individuals in long-term relationships.

Law school professors who teach *Hardwick* take note, for the sodomy discussions tend to frame gays in terms of illicit sex, while a discussion of *Loving v. Virginia* and same-gender marriage can round out the view of gay people as human beings capable of love and commitment.<sup>64</sup> Truly the marriage cases themselves answer Fajer's call for stories about love and intimacy to counter dominant images of promiscuous gay men.<sup>65</sup>

*Baker v. Vermont* and the attendant creation of civil unions in Vermont break the circle at yet another place, the point that gay sex occurs outside of marriage.<sup>66</sup> After *Baker*, many same-sex relationships will be recognized by the State and, while not accorded the status of marriages, neither will they be considered quite outside marriage. The civil unions now enacted in Vermont will provide visibility to gay couples, emphasizing "a singular human relationship"<sup>67</sup> and de-emphasizing sexuality as the defining characteristic of gay lives. It should follow that these relationships will gradually lose their illicit character, and gay sexuality will eventually no longer be viewed as profane.

## V. CHALLENGING THE "MARRIAGE IS SACRED" PROPOSITION IN THE VICIOUS CIRCLE

There are several ways to challenge the vicious circle at the point that reads: marriage is sacred. One argument as put forward by William Eskridge, is that civil marriages in America are bureaucratic rather than sacred<sup>68</sup> therefore, allowing gays to marry is not an endorsement of gay

---

64. *Loving v. Virginia*, 388 U.S. 1 (1967). The sodomy battle is the traditional way that law students are now introduced to gay issues. I would urge constitutional law professors to teach *Loving v. Virginia* and gay marriage issues first, as a way of centering the discussion on relationships rather than sex. The sodomy approach is due partly to *Hardwick* happening to be the first case to reach the Supreme Court that involved gay rights. The sodomy first approach is also due to the views of theorists themselves, especially queer theorists and straight legal theorists.

65. See Fajer, *supra* note 17, at 520.

66. *Baker v. State*, 744 A.2d 864 (Vt. 1999).

67. *Id.* One way to understand the *State v. Baker* decision is that the Vermont Court decided that it was too big a jump to go from profane to sacred, and the middle ground, the back of the bus, was therefore necessary to gradually shed the notion that gay relationships are profane. The decision and the civil union legislation that followed from it have been embraced within the gay community because the back of the bus is an improvement to those who have not been able to ride at all.

68. See generally, ESKRIDGE, *supra* note 16. Evan Wolfson argues that the litigation in *Baheer*:

[i]nvolves the denial of a marriage license by the State, and has nothing to do with private religious doctrines or ceremonies. Each religion remains free to

marriages, because clerks do not really endorse the straight people who obtain marriage licenses.<sup>69</sup> It is easier to get a marriage license than a driver's license: "However evil, perverted, or incompetent you might be, the clerk will still give you a marriage license, because the clerk and the state do not care about your character, morality, or competence."<sup>70</sup>

Eskridge also details the list of benefits accorded to married couples, a useful undertaking which connects with his theme that gays do not necessarily seek to be part of some sacred ritual, but only seek the relationship equivalent of a driver's license. A non-sacred approach will serve to bring about a "Danish-style compromise,"<sup>71</sup> as Eskridge calls it or marriage "light" as Graff calls it,<sup>72</sup> but not marriage. In a sense, the *Baker* decision can be understood as an adoption of Eskridge's arguments that gays are not seeking to be part of a sacred ritual, but only to gain all the economic rights associated with marriage.<sup>73</sup>

While Eskridge's argument is a cogent, logical attack on the continued exclusion of same-sex couples from civil marriage, its persuasion value is limited. By arguing in essence that marriages are not sacred, Eskridge fails to take into account the public need for myths and the public's reasons for keeping gay relationships second class. When people think of marriage they have an ideal: the beautiful, slim bride and handsome groom. The ideal persists no matter how many marriages there are which contradict the ideal, such as beatings, verbal abuse, incompatibility and unhappiness within many actual marriages. The ideal has survived all the ugly facts exposed in divorce court in these past decades. Indeed it is the reality of these real problems within the ideal that makes second class status of gays so necessary to one segment of Americans opposed to marriage rights. Just as some poor whites in the reconstruction period of American history could consider themselves superior to African Americans, so some straight people, no matter how bad their relationship, can

---

grant or withhold its sanction to same-sex unions, wholly independently of a civil marriage. Parenthetically, there is little clamor from Catholic, Protestant, Jewish, or other religious denominations when licenses are granted for marriages performed by other faiths, even though they may not recognize such marriages as consonant with the doctrines of their respective religions; there, the line between civil and religious marriage is understood and respected.

Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 n.50 (1994-1995).

69. ESKRIDGE, *supra* note 16.

70. *Id.* at 106-07. Fajer finds this argument "unbelievable" and worries that "it could undermine the credibility" of his other arguments. Fajer, *supra* note 17, at 604.

71. ESKRIDGE, *supra* note 16, at 122.

72. GRAFF, *supra* note 1, at 52 ("marriage light" Graff writes, quoting a French magazine).

73. "While many have noted the symbolic or spiritual significance of the marital relationship, it is plaintiffs' claim to the secular benefits and protections of a singularly human relationship that, in our view, characterizes this case." *Baker*, 744 A.2d at 888-89. A marriage equivalent suffices, particularly if the federal government were to accord this state recognition true economic equivalency to marriage, but the *Baker* decision proves that you cannot remove the sacred from marriage without getting something else that quacks but doesn't look like a duck.

consider themselves superior to those poor misfits who live with members of their own sex and cannot get married. Eskridge's tack of noting that people who rape and murder can get married hardly moves people to open the door to another group it considers profane.

Another way to challenge the vicious circle at the point that reads "marriage is sacred" is to agree that marriage is sacred, but not in an unchanging way. This is essentially what E. J. Graff did in her popular history entitled *What is Marriage For?*<sup>74</sup> In Graff's model, the notion that same-sex couples are profane is relegated to a past where marriages were defined differently from the way they are today. Present negative attitudes are merely leftover vestiges of outdated philosophies that have as much chance of success in the long run as did the notion that if a married couple tried to prevent the conception of children, the wife was "no better than a harlot."<sup>75</sup>

Graff's history of sexuality within straight marriage is a useful means of dismantling the vicious circle. Graff divides Western civilization into three dominant philosophies towards the role of sexuality in marriage; these she labels "Refraining," "Reproducing" and "Refreshing." Refraining refers to the view that sexual pleasure is evil and demonized. This was the early Christian philosophy against marriage which gradually morphed into a view that marriage was "a slightly dirty but necessary runner-up to celibacy," justified for making babies and preventing the greater evil, namely sex outside marriage.<sup>76</sup> Next came the Reproducing ideal, the belief that marriage was for having babies or making heirs. Graff traces this early philosophy back to the Roman emperors who needed three official offspring, and whose wedding nights usually entailed rape.<sup>77</sup> In contrast, the Refreshing ideal is the notion of marriage as shared inner life, and sexual satisfaction. The new Refreshing ideal, originally articulated by the nineteenth century free-lovers, recently triumphed over the other two.<sup>78</sup>

Same-sex marriage is an inevitable consequence of the triumph of the Refreshing ideal in modern marriage, Graff theorizes. Under the Re-

---

74. GRAFF, *supra* note 1.

75. *Id.* at 53. See also Mary Becker, *Family Law In The Secular State And Restrictions On Same-Sex Marriage: Two Are Better Than One*, 2001 U. ILL. L. REV. 1 (2001).

76. GRAFF, *supra* note 1, at 65.

77. *Id.* at 55-57. Jews are described by Graff as motivated by both reproducing and refreshing. *Id.* at 69.

78. Graff's vision of past straight marriage as not necessarily companionate tends to disprove Eskridge's assertion that past gay marriages were companionate marriages. See ESKRIDGE, *supra* note 16, at 45. To understand the furor in the United States in the nineteenth century against contraception, Graff writes, one must realize that the Reproducing ideal itself was being threatened by the new Refreshing ideal articulated by the nineteenth century free-lovers. The proponents of the Comstock laws knew that "the very meaning of marriage might change—from an institution aimed mainly at procreative duty to an institution that accepted sexual love." As horrifying as the nineteenth century free-lovers were to dominant Christian philosophy at the time, in the 1950s, when "the Pope agreed that husband and wife should experience pleasure and happiness in body and spirit," the Refreshing ideal had won. GRAFF, *supra* note 1, at 75-76.

refreshing ideal, marriages are supposed to be about love and integrity of the individual conscience.

The new code put in a terrible bind anyone who . . . discovered within herself affections and desires aimed at her own sex. How could she now justify imprisoning herself in a baby-making marriage? . . . Now she had to feel a deep, intimate, personal union with this guy – which made her inner dryness toward him an insupportable hypocrisy, even a sin.<sup>79</sup>

Modern marriage is also supposed to be about equality, ending centuries of sex-role requirements, making way for same-sex couples. “Once women and men can learn and live alone; once husbands and wives are theoretically equal at work, in bed, and in chores; once marriage is for love and not for money—how can society fairly bar the marriage of two people of one sex?”<sup>80</sup> Changes in the meaning of marriage simultaneously explain the advent of same-sex marriage and the prior exclusion of gays from marriage.

The historical exclusion of gays from marriage is a result of the former purposes of marriage, since gay relationships were anathema under the Refraining and Reproducing ideas. If Refraining is right, then sexual pleasure is wrong. If Reproducing is right, any act that prevents babies is “the crime against nature.” This brings the reader up to the present where Graff points that the Refreshing ideal is triumphing over its earlier rivals. If Refreshing is right, then gay people belong within the marriage tradition. Gay sex was wrong when sexual pleasure itself was wrong (as it was under the Refraining philosophy). Gay sex was wrong when the only permissible sex was for having babies (the Reproducing philosophy). Gay couples are demonized now because they are scapegoats for those who reject the Refreshing ideal and want to go back to earlier philosophies of sexuality and gender roles within marriage.<sup>81</sup> Those unhappy with the Refreshing ideal target same-sex intimacy and appear to have history on their side. But gay sex is wrong only if all sexual pleasure is wrong or if all non-procreational sex is wrong.

Perhaps it is ironic that the sexist and tawdry history of marriage should be used to support the right to marry. Feminists in the gay movement who disapproved of the way marriage historically entrapped women argued that gay men and lesbians should not succumb to the marriage allure, but create new, untraditional family relationships.<sup>82</sup> Certainly

---

79. GRAFF, *supra* note 1, at 84.

80. *Id.* at 36.

81. *Id.* at 55. This fits with historical discussions of the sodomy statutes. Sodomy statutes were broad, and aimed at all sexual encounters that were not in the orthodox manner. However, over time, much of this non-orthodox sexuality has been accepted. Thus, gay sodomy is really just the remains of the of the old taboos, the old battle ground, “never mind that some 95 percent of American women say they have oral sex.” *Id.* at 84-85. See also Feldblum, *supra* note 44.

82. Ettlbrick, *supra* note 38, at 9; *Wedlock Alert*, *supra* note 38. See also, Nancy Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage*, 79 VA. L. REV. 1535 (1993).

Graff proves that the same history can prove either point.

Graff's destabilization of the category of traditional marriage is similar to the arguments put forward by Anne Goldstein in her critique of Justice Burger's opinion in *Bowers v. Hardwick*. Interestingly,

[b]y 1868, when the Fourteenth Amendment was ratified, no additional states had singled out sexual acts between men for special prohibition. Many states' statutes had been bowdlerized, however, and now prohibited "the crime against nature" instead of "sodomy" and "buggery." That phrase applied to acts of anal intercourse between men and women as well as between two men. Courts in at least seven of the thirty-two states Justice White found to have "criminal sodomy statutes in effect in 1868," explicitly held these statutes did not apply to oral-genital contact. Some treatise writers explicitly included sodomy in marriage within the statutory proscription.<sup>83</sup>

Historically the sodomy laws applied equally to opposite sex love-making, Goldstein noted, hence the criminalization of gay sex is not fundamental or traditional as the majority postulated. Goldstein criticized Justice Burger's reliance on a long history and tradition criminalizing homosexuality as factually inaccurate because the concept of the "homosexual" person is new to history. Graff has a different emphasis; rather than argue that there is no tradition of targeting gay sex for condemnation, as Goldstein did, Graff argues that the condemnation derives from past traditions that are now obsolete.

Pro-marriage scholarship before Graff used history differently. It recounted same-sex relationships in history, not straight marriage, nor was it critical of the past.<sup>84</sup> One of the first chapters of Eskridge's book is devoted to the history of *same-sex marriage*, detailing many historical examples from around the world when two men or two women were permitted to marry. For example, Eskridge describes a tradition throughout North American Indian tribes where persons called the Berdaches cross traditional gender lines to take on some characteristics of the opposite sex and marry people of the same sex.<sup>85</sup> The fact that Eskridge writes of gay marriage in history while Graff writes as if there were no gay marriages makes sense when one realizes that the histories are aimed at breaking the vicious circle at different points. Eskridge uses history to disprove that gay relationships exist outside marriage. In contrast, Graff uses history to defeat the other equation, *marriage = sacred*.

---

83. Anne B. Goldstein, *History, Homosexuality and Political Values*, 97 YALE L. J. 1073, 1084-85 (1988) (citations omitted).

84. See ESKRIDGE, *supra* note 16; JOHN BOSWELL, SAME-SEX UNIONS IN POSTMODERN EUROPE 270 - 271 (1994). In an Amicus Curiae brief to the Vermont Supreme Court by the Professors of Legislation and Statutory Interpretation, which addresses the *Baker v. State* case, they adopted Eskridge's multi-cultural analysis of marriage in arguing that "there is nothing new about same-sex marriage." They state that "throughout human history—in ancient Egypt and Babylonia, in classical Greece, in Republican and Imperial Rome, in most Native Cultures of the Americas, in most African cultures, and in the Western tradition—marriage has included same-sex relationships."

85. ESKRIDGE, *supra* note 16, at 27-28. See also, BOSWELL, *supra* note 84, 270-71.

Although Eskridge admits that the modern West has long been hostile to same-sex unions, he declares that he proved “overwhelming” evidence of same-sex marriage.<sup>86</sup> The presented facts fall short of proving “overwhelming” evidence of same-sex marriage, nor do they convince the reader that gays are part of the (sacred) marriage tradition.<sup>87</sup> Eskridge has been rightly criticized for including historic situations where same-sex couples were permitted to have intimate relationships outside of marriage, and treating these examples as if they were part of a history of same-sex marriage. By confusing relationships outside of marriage with marriage, Eskridge fails to acknowledge that marriage is viewed as sacred, and therefore distinct from relationships outside this protected zone. Given the tendency of many readers to treat gay relationships as akin to sex, Eskridge’s examples of non-married relationships will be read as examples of sexual relationships. Therefore, instead of proving that gay men are part of the marriage tradition, Eskridge will be read as proving a history of gays having sex. The Berdache and other historical examples will not succeed in convincing Americans of gay’s historical inclusion in the sacred tradition because to contemporary Americans, these examples seem not sacred, but queer (in all senses of the word), and probably as profane as Hardwick and his lover in *Hardwick*.<sup>88</sup> Thus, society’s sexualization of gay relationships proves too deeply rooted to be undone by Eskridge’s portrayal of gay relationships in other cultures.

Graff’s use of history is more successful than Eskridge’s because she harnesses the reader’s antipathy for different cultures. When Eskridge writes about the Berdache, readers are likely to see that culture as alien, having little to say about American traditions. Similarly, readers have the same response to Graff’s descriptions of straight antecedents, that these cultures were weird. That is precisely the response she wants. Graff loves to provide anecdotes to prove her points and to give this effect.<sup>89</sup>

---

86. “This is not to deny the modern West’s hostility to same-sex unions but merely to situate that hostility in a broader perspective.” ESKRIDGE, *supra* note 16, at 7.

87. Despite assurances that he is not using the term marriage “casually”, his history includes “any kind of culturally or legally tolerated institution whereby individuals of the same sex are bonded together in relationships for reasons of affinity, economy, or society.” *Id.* at 16-17.

88. *Hardwick* was a challenge to Georgia’s sodomy law, which was gender neutral on its face. A police officer entered Michael Hardwick’s bedroom and observed him in the act of oral sex and arrested him. The Supreme Court narrowly upheld the criminal sodomy statute, ruling that the Constitutional right of privacy did not extend to this activity. *Id.* at 180.

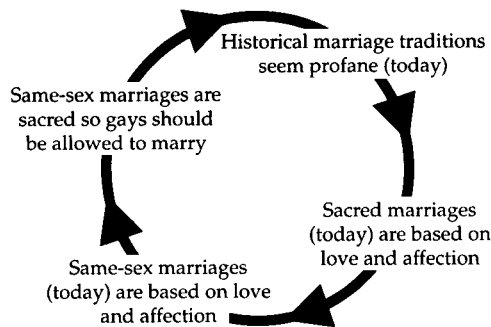
89. For example, here is Graff on the early church’s desire to contain sexuality within marriage:

The monks and theologians offered a little jumpstart towards angelic life by helpfully ruling sex off-bounds just as often as they could—for instance, during menstruation, pregnancy, or nursing (which could be as long as two years), and on holy days—such as Thursdays, in memory of Jesus’ betrayal, Fridays, in memory of his death, Saturdays, in honor of the virgin Mary, on Sundays, of course, on Mondays, in memory of the departed souls, as well as forty days before Easter, Pentecost, Christmas, on feasts, fasts, and even—imagine!—on the wedding night . . .

A ninth century theologian wrote that “it is better for a wife to permit herself to copulate with her own father in a natural way than with her husband against nature.”<sup>90</sup> Graff takes pains to explain that copulate “against nature” meant intercourse with contraception, or oral or anal intercourse, or a position where the man is not on top, or using withdrawal technique to avoid pregnancy. The contemporary reader finds these moralisms perverse rather than sacred. Her history of marriage is not the history of a sacred institution, but a history of an institution that was improved immensely by change, and that only becomes sacred to the extent it truly embraces the love and intimacy ideal.

Although Graff challenges the core notion that marriage is sacred in a traditional, unchanging way, unlike Eskridge, Graff does not attempt to shatter the myth that current marriages are ideal. In fact, Graff uses the word “sacred” to describe her own marriage and she writes of same-sex couples: “when we love we, too, find sex to be a *sacrament*, a language for love, a marital bond.”<sup>91</sup>

Graff’s theory may be understood as a set of logical statements that replace the set of logical statements within the vicious circle.



### *E.J. Graff's Version Of The Sacred And Profane In Marriage*

Graff’s argument can be understood as a new syllogism that reads: if marriage is about love and affection, and same-sex relationships are about love and affection, then marriage must include same-sex marriage.

## VI. CONCLUSION

The quest for marriage rights can be understood as a yearning for privacy around sexuality, coupled with visibility for the relationship and its romance. As Graff writes, the word marriage cannot “possibly encompass whatever the two of you are to each other—best pals or intimate ene-

GRAFF, *supra* note 1, at 60-61. This was in Augustine’s time, who lived in the fourth and fifth centuries.

90. *Id.* at 63. Ninth century theologian Bernadine of Siena also pontificated that if married couples tried to prevent making babies the wife was no better than a harlot. *Id.* at 53.

91. *Id.* at 85-86, 246 (emphasis added).



mies; passionate lovers or exhausted parents who can't remember the last time you had sex . . . . All that variety—quite rightly—gets collapsed in the eyes of the law.”<sup>92</sup> Many gay couples long for the privacy shield which will allow them to hold themselves out to the world as a couple, without having to answer questions about what they do in bed and how often.

One problem with defining gay people in sexual terms is that if sexual intimacy is perceived as profane, then to define gay people as those that commit profane acts is not persuasive to those who resist granting full citizenship to gays and lesbians. Such nomenclature feeds into the tautology posed by conservative judges after *Hardwick*. Namely, if gays are defined as those who commit sodomy, and it is permissible to criminalize sodomy, then gay people are not protected, period.<sup>93</sup> Again there is the circular reasoning which makes it so difficult to obtain the right to marry. Gays are a sexual minority, defined by their sexuality, which is different and illegal. Therefore, gays should not be treated equally, and especially not provided the mantle of marriage.<sup>94</sup>

There is an obsession with gay sexuality, a sexualization of same-gender relationships. Thus *Romeo and Juliet* is perceived as a pure romance, but if Juliet was a second man's part, the play would be seen by many as more sordid than pure. This article has shown that the American obsession with gay sexuality is primarily a function of the fact that gay sexuality has existed until now, outside of marriage, and is therefore subject to the taboo and fascination towards all sexual encounters outside of marriage. Gay male promiscuity, real or imagined, is not the cause. At its root, the sexualization of gay men and lesbians is part of a larger obsession with sexuality based on repression by religion and the state. Fear of sexuality has been a useful tool for those in power to control the majority. Only certain kinds of sexuality were permitted and that was limited to sex within marriage. Since same-sex couples were not able to marry, intimacy between same-sex partners was illicit, off-limits, and profane.

The push for marriage gives fresh insight into the debate about whether sexuality lies at the heart of gay identity. The vicious circle illuminates the interrelation between the sexualizing of gay men and lesbians, and their

---

92. *Id.* at 38.

93. For the rationale that if homosexual conduct can be criminalized, then homosexuals cannot be protected by the Constitution, see, e.g., *Padula v. Webster*, 822 F.2d 97 (1987) (“The issue presented us is only whether homosexuals, when defined as persons who engage in homosexual conduct, constitute a suspect or quasi-suspect classification”). See list of cases presented in Justice Dooley's concurrence in *Baker*.

94. Marriage would do an end run around *Hardwick*. For if *Hardwick* stands for the proposition that only sexuality within marriage is entitled to privacy rights under the constitution, and illicit sexuality constitutes sex outside of marriage, then married same-sex couples will be protected. Of course *Hardwick* would still leave the “haves” and the “have-nots,” with unmarried gays lumped together with unmarried opposite-sex couples. But the destructive tailwinds of that decision will be abated once gays obtain marriage rights since the status of sexual outcast bestowed on gays in the decision will no longer be able to be used to broad-brush all gay people, in all areas of law. Once gay couples can marry, then much of the power of *Hardwick* is over. Marriage affords that precise shield of privacy protection that has not been generally unavailable to gay couples in this country.

exclusion from marriage. This article shows how sexuality is just one part of same-sex marriage, and how the sexualizing of same-sex relationships distorts the reality of these relationships as well as fueling opposition to civil marriages. The gay community in general has framed gay identity as a sexual identity. There has been a tendency within the gay movement to describe gay relationships in sexual terms rather than in terms of relationship and gender. Thus, the term "sexual orientation" might be replaced by "relationship orientation" or "same-sex orientation" in contexts that describe relationships rather than sexuality. The fixation on gay sexuality harms the quest for marriage rights and is a distortion of most gay people's lives. One proposal this article makes is that the gay community examine its use of language to determine if it encourages a sexualized and distorted view of gay life and love.

