

Washington University Journal of Law & Policy

Volume 33 *The Politics of Identity after Identity Politics*

January 2010

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Recommended Citation

Jeffrey A. Redding, *Queer/Religious Friendship in the Obama Era*, 33 WASH. U. J. L. & POL'Y 211 (2010), https://openscholarship.wustl.edu/law_journal_law_policy/vol33/iss1/8

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Queer/Religious Friendship in the Obama Era

Jeffrey A. Redding*

[P]art of what I hope to offer as president is the ability to reach to people that I don't agree with, and the evangelical community is one where the Democratic Party, I think, we have generally seen as hostile. We haven't been reaching out to them, and I think that if we're going to makes [sic] significant progress on critical issues that we face, . . . we've got to be able to get beyond our comfort zones and just talk to people we don't like.

—Barack Obama¹

* Assistant Professor, Saint Louis University School of Law. Portions of this Article were presented at the American Society of Comparative Law's 2008 Annual Meeting, two symposia on California's Proposition 8 at Chapman University School of Law during the 2008–09 academic year, a spring 2009 faculty workshop at Saint Louis University School of Law, and the Queer/Empire conference at McGill University's Faculty of Law during the spring of 2009. I thank participants at these fora for their questions and comments, and also Kim Brooks, Mary Anne Case, Glenn Cohen, Katherine Darmer, Adrienne Davis, Moon Duchin, Chad Flanders, Roger Goldman, Menaka Guruswamy, Holning Lau, Robert Leckey, Sebastian Lourido, Eric Miller, Chantal Nadeau, Doug Nejaime, Karen Petroski, Darren Rosenblum, Laura Rosenbury, Kerry Ryan, Pete Salsich, Kendall Thomas, Molly Walker Wilson, and Kenji Yoshino for very helpful individual comments and conversations. Dallin Merrill, Kate Mortensen, and Kevin Salzman provided excellent research assistance for this Article, and both Yale's Fund for Lesbian and Gay Studies ("FLAGS") and Saint Louis University's School of Law provided generous support for the research required by this Article. This Article is a continuation and extension of previous work of mine concerning same-sex marriage, and portions of the following works are thereby relied upon in this Article: (1) Jeffrey A. Redding, *Dignity, Legal Pluralism, and Same-Sex Marriage*, 75 *BROOK. L. REV.* 791 (2010), and (2) Jeffrey A. Redding, *Queer/Religious Potentials in U.S. Same-Sex Marriage Debates*, in *QUEER THEORY: LAW, CULTURE, EMPIRE* 122 (Kimberley Brooks & Robert Leckey eds., 2010). Of course, all errors of fact and judgment across this entire critical marriage project remain mine alone. This Article is dedicated to Sebastian Lourido, for crossing so many borders with me.

1. Meet the Press: Barack Obama (MSNBC television broadcast Nov. 11, 2007), available at <http://www.msnbc.msn.com/id/21738432/page/5/> (last visited Sept. 1, 2010).

A NEW BEGINNING

November 4, 2008, was a confusing day for many American gays and lesbians. On the one hand, this election day witnessed the democratic repudiation of a homophobic Republican Party, and the reinvigoration of a homophobic Democratic Party. On the other hand, gays and lesbians were seemingly handed a stunning defeat in the ostensibly friendly “blue” state of California in the form of Proposition 8.² Even more perplexing and alarming for gays and lesbians was the fact that Proposition 8’s success seemed, in the immediate aftermath of the election, to be the result of large numbers of African-Americans voting at the California polls *for* the Democrats, but *against* gays and lesbians.³ Gay and lesbian logic could make no sense of this result: the friend (African-Americans) of gays and lesbians’ friend (the Democratic Party) should be gays and lesbians’ friend, correct? The answer, or so it confusingly seemed, was “not really.”

In this Article, I aim to address the Proposition 8 debacle and its aftermath by challenging commonplace notions of queer political friendship in the Obama era. Differentiating between an assimilative gay and lesbian⁴ politics, and a more imaginative queer politics, I

2. Proposition 8 is also known as the California Marriage Protection Act, and it was approved by voter-ballot initiative and enacted into law by Californians on November 4, 2008. Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1. Proposition 8 inserted the following provision into the State of California’s constitution: “Only marriage between a man and a woman is valid or recognized in California.” *Preserving California’s Constitution*, N.Y. TIMES, Sept. 29, 2008, at A20. For more information on Proposition 8, see Proposition 8: Voter Information Guide, <http://www.voter.guide.sos.ca.gov/past/2008/generaltitle-sum/prop8-title-sum.htm> (last visited Sept. 1, 2010).

3. Research conducted subsequent to the November 4, 2008, poll demonstrated that African-American votes were not the decisive factor in Proposition 8’s success. See Justin Ewers, *Poll: Black Voters Not Responsible for Passage of Same-Sex Marriage Ban in California*, U.S. NEWS & WORLD REPORT, Dec. 4, 2008, <http://www.usnews.com/articles/news/national/2008/12/04/poll-black-voters-not-responsible-for-passage-of-same-sex-marriage-ban-in-california.html> (“If black voters had voted the same way as whites—50 percent for same-sex marriage and 50 percent opposed—the net gain for same-sex marriage supporters would have been slightly more than 500,000 votes. Prop 8 passed by a margin of just under 600,000 votes.”).

4. One might also refer to “LGBT” (lesbian, gay, bisexual, and transgendered) political advocacy here. I use the expression “gay, lesbian, and bisexual” (or “gay and lesbian” as an unfortunately useful shorthand) in this Article, instead of more-inclusive “LGBT” terminology, since many of the issues concerning same-sex marriage—which is a major focus of mine in this

argue that queers have been hurt by mainstream gay and lesbian political advocacy—the kind of advocacy, for example, that both led up to and followed Proposition 8—and that, as a consequence, queers should actively contest and act to counter this gay and lesbian advocacy in political and legal arenas. In other words, I argue that, to the extent that there has been friendly cooperation with gay and lesbian politics by queers, queers should vigorously and skeptically reconsider this cooperation. Moreover, in addition to suggesting an unorthodox queer “adversary” in this Article, I will simultaneously suggest an orthodox “ally,” namely, the radically religious opponents of gay and lesbian same-sex marriage.

My encouragement here of a queer rupture with gay and lesbian politics will surprise some people. For some, it will come as a revelation that there is not a vast left-wing conspiracy out there. However, many others before me have contested any supposed neat alignment within “progressive” politics; the forced friendship between racial minorities and gays and lesbians in the United States is but one example subject in this literature.⁵

Article—are only occasionally issues for transgendered people. Indeed, “[s]ame-sex marriages already exist in the transgender community.” Phyllis Randolph Frye & Alyson Dodi Meiselman, *Same-Sex Marriages Have Existed Legally in the United States for a Long Time Now*, 64 ALB. L. REV. 1031, 1036 (2001). Same-sex marriages arise in the transgendered community as a result of post-marital changes in the natal sex of one partner in an opposite-sex marital relationship. See generally Jennifer L. Levi, *Advising Transgender Clients*, in REPRESENTING NONTRADITIONAL FAMILIES (2d ed. 2006). Same-sex marriages also arise in the transgendered community when states refuse to legally recognize post-natal sex changes. As a consequence, same-sex-appearing marriages result when one person in an opposite-sex relationship transitions between sexes yet is still allowed to marry a partner of the “same” sex because the state refuses to legally recognize the sex change. Frye & Meiselman, *supra*, at 1033. This ironic result of a state’s refusal to recognize post-natal changes in the legal sex of individuals can be found in Tennessee, Texas, Kansas, Florida, and Ohio. See Julie A. Greenberg, *When Is a Same-Sex Marriage Legal? Full Faith and Credit and Sex Determination*, 38 CREIGHTON L. REV. 289, 296–98 (2005). Finally, and more theoretically, transgendered individuals may object to the entire methodology concerning the duality or even knowability of “sex” that often arises in the context of “gay and lesbian marriage” being advocated for, and read in, the register of “same-sex” marriage. See Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN’S L.J. 219, 220 (1998) (“Both the opponents and the proponents of same-sex marriage have generally assumed that ‘same-sex marriage’ is equivalent to ‘gay or lesbian marriage.’”).

5. For example, Janet Jakobsen has written:

Progressives argue that sexual orientation should be a protected category, like race, but it is hardly as if legal prohibition has effectively protected people of color from racism in U.S. society. . . . [As a result, t]hose who fought for civil rights protections can feel

Indeed, it is well known in both theoretical and activist circles that take up sexuality issues, that there are serious divergences in the imaginations and aims of each respective camp.⁶ As a result, it has been far more difficult than it commonly seems to speak of LGBTIQ⁷ people in any easy fashion. In fact, whatever cohesive unity that exists here is perhaps only epiphenomenal to the common perception of an angry, irrational, religious enemy. This all being the case, my suggestion here of a divorce between queer politics and gay and lesbian politics can only update, in the light of continually troublesome post-November 2008 developments in gay and lesbian politics, powerful extant queer arguments about the many serious problems with contemporary gay and lesbian politics. Such arguments have been made previously by people like Judith Butler,⁸ Janet Halley,⁹ and Michael Warner.¹⁰

used when their struggles are invoked as the stable ground of analogy without recognition of either the difficulties of those struggles or the continuing fragility of civil rights protections when it comes to race.

Janet R. Jakobsen, *Queers Are Like Jews, Aren't They? Analogy and Alliance Politics*, in *QUEER THEORY AND THE JEWISH QUESTION* 64, 70–71 (Daniel Boyarin et al. eds., 2003).

6. Broadly speaking, queer theoreticians and activists have advocated less assimilative views about sexuality and social order than those that gay and lesbian advocates have pushed.

7. “LGBTIQ” is short for “Lesbian, Gay, Bisexual, Transgender, Intersex, and Queer.”

8. See generally Judith Butler, *Is Kinship Always Already Heterosexual?*, in *LEFT LEGALISM/LEFT CRITIQUE* 229 (Wendy Brown & Janet Halley eds., 2002).

9. Janet Halley has discussed how

gay and queer thought and aims diverge. Each seeks the welfare of a different kind of sexual subject. A gay-identity approach posits that some people are homosexual and that the stigma attached to this kind of person should be removed. By contrast, a queer approach regards the homosexual/heterosexual distinction with skepticism and even resentment, arguing that it is historically contingent and is itself oppressive.

Janet Halley, *Sexuality Harassment*, in *LEFT LEGALISM/LEFT CRITIQUE*, *supra* note 8, at 80, 82.

10. Michael Warner, for example, has written quite eloquently of these problems in *THE TROUBLE WITH NORMAL*. Writing critically of the gay and lesbian movement, from a queer perspective, Warner comments:

The gay and lesbian movement is America’s longest-running sex scandal. It might have been expected to end all sexual scandal once and for all, to declare an end to the days of shame, bringing sex out of the closet and into the daylight, letting all the gerbils scamper free. Its leaders, especially, might have become, by this late date, unembarrassable. But that hasn’t happened. Many of the leaders and organizations of the gay and lesbian movement continue to be defensive about sex and sexual variance. . . . [and] many of the movement’s spokespersons . . . have increasingly called for a “new maturity,” beyond mere sex.

In comparison to its suggestion of a queer adversary, this Article's more significant contribution is its suggestion of a new queer friend: the so-called "radical religious right." At first blush, this suggestion that queers befriend the radical religious right seems ludicrous. Indeed, more so than ever, these seem to be troubled times for relations between American queers and religious Americans of almost every stripe. While the past couple of decades witnessed *some* successful efforts at prodding some relatively more "progressive" American religions into a less fearful stance on human sexuality,¹¹ it would seem to many people that progress hit a fairly serious roadblock with the passage of Proposition 8. Indeed, after this voter-ballot initiative, gays, lesbians, and queers made much of the financial contributions of the Church of Jesus Christ of Latter-day Saints¹² and Catholic Church to the pro-Proposition 8 campaign.¹³ In

MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 45 (1999). Elsewhere, and from his (and others') queer perspective, Warner has called mainstream gay and lesbian organizations promoting marriage "fundamentally alien organizations." Michael Warner, *Beyond Gay Marriage*, in *LEFT LEGALISM/LEFT CRITIQUE*, *supra* note 8, at 259, 263.

11. For example, American elements of the globalized Anglican church have been sites of movement with respect to the treatment of homosexuality in Christianity. In 2003, the (Anglican) Episcopal Diocese of New Hampshire ordained Gene Robinson as its bishop. Profile: Bishop Gene Robinson, <http://news.bbc.co.uk/2/hi/americas/3208586.stm> (last visited Sept. 1, 2010). Robinson, who at the time had lived openly with another man for almost twenty years, had previously divorced his wife after acknowledging his homosexuality to both himself and her. *Id.* His ordination as Anglican bishop marked the first time that a sexually active, openly homosexual man had been so ordained. *Id.*

This is not to suggest, however, that this event passed without controversy in the American branch of the Anglican church and elsewhere in the Anglican world. For example, in response to Robinson's ordination, many Anglican churches both within and without the United States loudly protested, claiming that Robinson's ordination was a perversion of Biblical teachings and law. *See id.* Moreover, in the aftermath of Robinson's ordination, some individual American Anglican (Episcopalian) churches and dioceses that disagreed with Robinson's ordination oriented themselves away from the American Episcopalian church, seeking association with like-minded Anglican bishops and provinces in Africa and South America. *See, e.g., Fort Worth: More Diocesan Leaders Endorse Realignment*, EPISCOPAL LIFE ONLINE, Sept. 11, 2008, http://www.episcopalchurch.org/81803_100590_ENG_HTML.htm; Mary Frances Schjonberg, *Pittsburgh: Episcopal Church Petitions to Join Property Case, Wants Duncan to Vacate Offices*, EPISCOPAL LIFE ONLINE, Feb. 17, 2009, http://www.episcopalchurch.org/81803_105094_ENG_HTML.htm; *US Anglicans Join Kenyan Church*, BBC NEWS, Aug. 30, 2007, <http://news.bbc.co.uk/2/hi/africa/6970093.stm>.

12. This is the denominationally-preferred name for what is commonly known as the "Mormon Church." *See* The Church of Jesus Christ of Latter-day Saints, *Style Guide—the Name of the Church*, <http://newsroom.lds.org/ldsnewsroom/v/index.jsp?vgnextoid=ca07ae4af9c>

response, efforts were initiated to repeal the tax-exempt status of religious groups and institutions which participate in political and legislative campaigns, thereby threatening the interests and financial viability of many more such groups and institutions (whether non-progressive or progressive) than those which were the direct target of gay and lesbian ire.¹⁴ In doing so, gays, lesbians, and queers chose to ignore history's lesson that "the proximate sources of heightened [conservative Christian] activism have frequently been perceptions that governmental policies benefiting fundamentalist and evangelical institutions, *especially their financing*, were in danger of ending."¹⁵

Even more alarming, in reaction to the passage of Proposition 8, the streets of American cities witnessed loud scenes of gay, lesbian, and queer anger and protest, often directed at Mormons and their temples.¹⁶ And more quietly, gays, lesbians, and queers renewed their

7e010VgnVCM1000004e94610aRCRD (last visited Sept 1, 2010). In line with official denomination preferences, I will be referring to members of the Church of Jesus Christ of Latter-day Saints as "Mormons" in this Article.

13. Dan Aiello, *Prop 8 Foes Slow to Pick up on Mormon Involvement*, BAY AREA REP., Feb. 12, 2009, available at <http://ebar.com/news/article.php?sec=news&article=3713>; John Wildermuth, *Mormon Church Reports \$190,000 Prop. 8 Expenses*, S.F. CHRON., Jan. 31, 2009, at B3, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/01/30/BA7615KLB9.DTL>; Posting of Jessica Garrison to L.A. Now, <http://latimesblogs.latimes.com/lanow/2009/01/top-officials-w.html> (Jan. 30, 2009, 17:51 PST); Posting of Andy Towle to Towleroad, <http://www.towleroad.com/2009/10/documentary-exposes-mormon-financial-contributions-to-prop-8.html> (Oct. 20, 2009, 12:24 EST).

14. See Editorial: *Mormon Church Should Lose Tax Exempt Status Over Prop 8 Support*, UWIRE, Nov. 14, 2008, available at <http://www.cbsnews.com/stories/2008/11/18/politics/uwire/main4613144.shtml>; *Mormons Stole Our Rights*, <http://www.mormonsstoleourrights.com> (last visited Sept. 1, 2010); Posting of Mario Ruiz to the Huffington Post, http://www.huffingtonpost.com/mario-ruiz/gays-hit-back-at-mormons_b_142001.html (Nov. 6, 2008, 23:20 EST); Posting of Patricia Nell Warren to The Bilerico Project, http://www.bilerico.com/2008/11/why_stop_at_punishing_just_the_mormon_ch.php (Nov. 9, 2008, 10:00 EST). For a queer perspective skeptical of this gay and lesbian tactic, see Posting of Sam Ritchie to The Bilerico Project, http://www.bilerico.com/2009/11/attacking_tax-exemptions_for_churches_a_lose-lose.php (Nov. 12, 2009, 09:30 EST).

15. Rogers M. Smith, *Secularism, Constitutionalism, and the Rise of Christian Conservatism in the United States, Address of Religion in the 21st Century*, University of Copenhagen (May 30, 2007) (on file with author) (emphasis added).

16. See, e.g., *Gay-Marriage Rally Held at NYC Mormon Temple*, ASSOCIATED PRESS, Nov. 12, 2008, available at <http://www.newsday.com/news/new-york/gay-marriage-rally-held-at-nyc-mormon-temple-1.885717?9=1>; Posting of Chris Rovzar to NY Magazine: Daily Intel, http://nymag.com/daily/intel/2008/11/gays_turn_anger_snappy_sarcasm.html (Nov. 13, 2008, 10:00 EST); Posting of Andy Towle to Towleroad, <http://www.towleroad.com/2008/11/prop-8-protos-1.html> (Nov. 9, 2008, 00:47 EST). A constant refrain at these protests was the willful

fire on a traditional nemesis, the Catholic Church, and newly discovered ones as well, namely African-American churches.¹⁷

This all being the case, in this Article I argue that these anti-religious actions and the animosity fueling them have been counter-productive from an American queer perspective. More specifically, I argue that American queers went down the wrong road by joining with mainstream gay and lesbian advocates protesting religious groups, instead of joining with religious groups in protest of mainstream gay and lesbian advocacy. Certainly, the campaign surrounding Proposition 8 was deeply troublesome in any number of aspects, and people should always have the freedom to criticize their adversaries. However, that being the case, I believe that queers misfired in their religion-directed protests after the passage of Proposition 8, and that if any list of queer-dubious groups or agendas is going to be drawn up, that list should include all those involved in attempting to institute a hegemonic politics of family. As I will detail below, this would include contemporary mainstream gay and lesbian advocacy with its (legally) monistic marriage agenda.

Moreover, beyond suggesting an unorthodox¹⁸ queer adversary in this Article, I aim to simultaneously suggest an orthodox ally, namely, the radically religious opponents of contemporary gay and lesbian same-sex marriage advocates. Real opportunities to forge new

distortion and mocking disrespect of religious (and, most notably, Mormon) beliefs and practices. For example, some signs at these protests contained the following slogans and statements: “You want three wives, I want one husband;” “I Don’t Need 5 Wives, Just 1 Husband;” and “Keep Your Magic Undies Off My Civil Rights.” See, e.g., Keep Your Magic Undies Off My Civil Rights, NBC L.A., http://www.nbclosangeles.com/news/local/Prop_8_Protestors_March_LA_Streets.html (last visited Sept. 1, 2010). For a statement from Mormon leadership firmly disavowing polygamy, see The Church of Jesus Christ of Latter-day Saints, Polygamy: Latter-day Saints and the Practice of Plural Marriage, <http://www.newsroom.lds.org/ldsnewsroom/eng/background-information/polygamy-latter-day-saints-and-the-practice-of-plural-marriage> (last visited Sept. 1, 2010).

17. For commentary relating to same-sex marriage supporters’ blaming of African-American churches for the Proposition 8 vote outcome, see, e.g., Teresa Morrison, *Debunking the Black Blame*, THE ADVOCATE, Nov. 10, 2008, http://www.advocate.com/exclusive_detail_ektid65518.asp and Posting by Byron Williams to The Huffington Post, http://www.huffingtonpost.com/byron-williams/blaming-the-african-ameri_b_143892.html (Nov. 14, 2008, 11:15 EST).

18. See *supra* notes 8–10 for examples of authors who have previously made arguments about the differences between queer politics and gay and lesbian politics that correspond to the arguments I articulate in this Article.

kinds of political friendship between queers and religious people, as well as real possibilities of generating imaginative legal frameworks that are enhancing of queer agency,¹⁹ have been lost by queer cooperation with a gay and lesbian-led retreat into a strictly secular, religion-phobic sexuality politics.²⁰ Queers never had to and should not continue to join in this retreat. What is needed instead is a more, *à la* Judith Butler, “antifoundationalist approach to coalition politics.”²¹

That being the case, in this Article, I will argue not only that mainstream gay and lesbian same-sex marriage advocates’ jurispathic²² efforts in support of legal uniformity have been averse to queer interests, but also that Proposition 8 and other legally pluralistic, non-secular family law agendas hold great promise for queer interests. Indeed, while supporters of Proposition 8 have said many homophobic things, and while Proposition 8 itself was jurispathic in some respects, it was also jurisgenerative in its reviving of space for queers to engage in new legal thinking, activism, and legislation around queer norms concerning relationship-recognition and family law. Crucially, Proposition 8 returned California to a vibrant reality of radical non-legal uniformity, or legal pluralism, where same-sex couples are governed by a “domestic partnership” regime and mixed-sex couples are governed by the regime of “marriage.” In Proposition 8’s resuscitation of the California same-sex domestic partnership regime, this controversial ballot initiative not only gave new life to a legal arena potentially imbued with queer agency, but also opened up unprecedented opportunity for, and protection of, additional non-majoritarian relationship-recognition

19. For a more detailed discussion of how I understand the idea of “agency,” see Jeffrey A. Redding, *Dignity, Legal Pluralism, and Same-Sex Marriage*, 75 BROOK. L. REV. 791, 835–37 (2010).

20. I realize that this claim about the secular nature of contemporary gay and lesbian politics is a controversial one, but I believe it is more than defensible. Indeed, it is supported by a recent report by the influential United States-based National Gay and Lesbian Task Force. REBECCA VOELKEL, NATIONAL GAY AND LESBIAN TASK FORCE, A TIME TO BUILD UP: ANALYSIS OF THE NO ON PROPOSITION 8 CAMPAIGN AND ITS IMPLICATIONS FOR FUTURE PRO-LGBTQQIA RELIGIOUS ORGANIZING 1 (2009), http://www.thetaskforce.org/downloads/reports/reports/time_to_build_up_rev.pdf.

21. JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 21 (4th ed. 2008).

22. I use this term in the Coverian sense. See Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40–44 (1983).

regimes in the future. At least some of these potential legislative regimes have the distinct possibility of being more directly responsive to queer lives, queer relations, and queer families than majoritarian marriage ever will be. In other words, and as I have argued elsewhere at great length, one can see Proposition 8 as having created not a “separate but equal” legal situation, but the real possibility of “separate *and better*”²³ legal arrangements for queers. Ultimately then, I believe one can see Proposition 8—and its religious supporters—as having opened up new and meaningful vistas in queer agency and, as a consequence, queer dignity.²⁴ In contrast to this kind of dignity-enhancing legal pluralism, same-sex marriage advocates have largely been advocating for a queer-dignity-detracting legal uniformity, i.e., one-size-fits-all “marriage.”²⁵

While undesirably hegemonic in itself, gay and lesbian same-sex marriage advocates’ jurispathic goal has also raised the ire of many, though certainly not all,²⁶ religious people. The tactics deployed by same-sex marriage supporters after the Proposition 8 vote only served to add fuel to the existing fire between gay and lesbian activists and their religious adversaries.²⁷

As a result, at this point in time, it seems clear that most contemporary gay and lesbian same-sex marriage advocates have largely turned their backs on the Church of Jesus Christ of Latter-day Saints, the Catholic Church, and other religious groupings that have not been allegedly progressive enough to re-interpret and reform their religious texts, practices, and silences to allow for same-sex marriage. In response, my goal in this Article is to suggest that American queer activism needs to realign itself at this moment in time, deepening its traditional skepticism of mainstream gay and lesbian politics, while initiating an embrace of the radically religious people that this gay

23. I explore the idea of a “separate and better” queer family law regime in greater detail in Redding, *supra* note 19.

24. For a more-detailed exploration of the relationship between queer agency and queery dignity, see generally *id.*

25. I borrow the expression “one-size-fits-all” from Margaret F. Brinig & Steven L. Nock, *The One-Size-Fits-All Family*, 49 SANTA CLARA L. REV. 137 (2009).

26. See, for example, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009), for the Iowa Supreme Court’s observations in this respect, as well as the numerous amicus briefs filed by religious organizations in favor of same-sex marriage in that case.

27. See *supra* notes 13–17 and accompanying text.

and lesbian politics has scorned. Indeed, however tempting and self-satisfying and occasionally witty it might be to adopt the flippant stance towards Mormons and other religious folk that many gay and lesbian same-sex marriage advocates have adopted, I believe that American queer thought and activism can and should adopt a substantially different approach.

In Part I, I offer some important clarifications, definitions, and disclaimers with respect to the arguments that I make in this Article, including how I am understanding and using the terms “queer,” “radically religious,” and “friendship.”

In Part II, I discuss how contemporary gay and lesbian same-sex marriage advocacy has effectively de-friended queers by wielding a peculiar conception of “dignity” in a jurispahic and queer-phobic manner. As I demonstrate in this Part, this gay and lesbian advocacy’s attempt to institute majoritarian marriage for everyone has hobbled a potential for robust queer agency by undermining the separate legal infrastructure necessary for the maintenance of meaningful same-sex domestic partnership and civil union regimes (or, what I will refer to in this Article occasionally as “queer space”).

My discussion in Part II sets the stage for my exploration in Part III of how, in contrast to mainstream American gay and lesbian advocates, a number of religious folk have acted in a more queer-friendly manner by arguing for different understandings and implementations of human dignity (and its conceptual cognates, e.g., minority rights, toleration, etc.), namely ones that are jurisgenerative and pluralistically oriented. As I demonstrate in this Part, in contexts as varied as Canada, the United Kingdom, and India, many religious people have used dignity arguments to demand the possibility of pluralistic family law alternatives that can remain somewhat separate—and protected—from majoritarian law and majoritarian demands. In other words, “dignity” in these contexts has been used by religious people to argue for the possibility of separate—and, from the perspective of many, better—family law for non-majoritarian peoples.

In Part IV, I use Part III’s illustrative discussion to argue that now might very well be the time for queer and religious people in the contemporary United States to work together on advocating for and building a kind of legal regime that is more encouraging of legislative

spaces protective of both queer and (radically) religious interests. In this respect, I discuss two specific aspects of a larger agenda on which newly-friendly queers and radically religious folk might collaborate in the United States. These aspects concern (1) the further development of alternatives to majoritarian marriage and family law, and (2) active resistance to the legal strategies and understandings deployed by attorneys Theodore Olson and David Boies in their ongoing *Perry v. Schwarzenegger* litigation challenging the U.S. constitutional *bona fides* of California's Proposition 8. With respect to the second aspect, I also suggest and develop in this Part an alternative queer/religious legal strategy, using arguments which are embedded in the City of San Francisco's motion to intervene in *Perry v. Schwarzenegger*.

I. CLARIFICATIONS AND DISCLAIMERS

Before moving to a fuller development of this Article's arguments, some clarifications, definitions, and disclaimers are necessary. Perhaps most urgent is the issue of how I am understanding and using the terms "queer" and "radically religious," or, in other words: Which individuals and groups precisely do I believe constitute each of these categories?

While I can understand and anticipate the need from some readers for such specificity as to category membership, I believe it is important, from the outset, to avoid answering such a query with the extreme amount of precision implicitly demanded by such a question. This cautious response is warranted for a few different reasons.

Most importantly, by encouraging "queer" and "radically religious" folk to be in direct conversation—and collaboration—with each other, I expect that each movement's understanding and practice of itself will undergo changes, as will each's composition. Thus, while it is possible to name important queer theorists and activists here²⁸—for example, Judith Butler, Janet Halley, and Michael Warner—as well as important personalities and organizations in the radically religious camp²⁹—for example, Jay Sekulow at the

28. See *supra* notes 8–10 and accompanying text.

29. See generally STEVEN P. BROWN, TRUMPING RELIGION: THE NEW CHRISTIAN RIGHT,

American Center for Law and Justice, and Matthew Staver at the Liberty Counsel—there is no guarantee that all of these actors will remain “in the fold” as some of the unsettling implications of a queer/religious friendship become clearer. As it is, each movement is already in an unstable and dynamic dialectic with its “other,”³⁰ and any effort here to freeze such a sociocultural process, and attempt to fix who precisely is “queer” and who precisely is “radically religious,” would be a fairly useless enterprise. Moreover, it would be a move with little or no predictive power. Following Judith Butler, I believe that “the value of coalitional politics is not to be underestimated, but the very form of coalition, of an emerging and unpredictable assemblage of positions, cannot be figured in advance.”³¹

In addition, in this Article I am less interested in identifying specific groups and personalities as either/or than I am interested in tapping into a certain register of politics. In fact, one might say that I am less interested here in a register of *politics*, and more interested in a religious and sexual “anti-politics.” Accordingly, when I ascriptively use the adjectival expression “radically religious” in this Article, I mean to conjure those self-consciously religious individuals and groups who represent unruly challenges to the modern bureaucratic American state, and who refuse to be either tamed or normalized into meekly obeying the regulative imperatives and commands of this state. As queer theorist Michael Warner might describe these religious individuals and groups, they are those which do not indulge in a “state fetish.”³² While I do not intend to suggest any strict and unchanging character or boundaries of “the state” or “the law” or their antagonists,³³ another way of articulating my

THE FREE SPEECH CLAUSE, AND THE COURTS (2002); HANS J. HACKER, THE CULTURE OF CONSERVATIVE CHRISTIAN LITIGATION (2005).

30. See TINA FETNER, HOW THE RELIGIOUS RIGHT SHAPED LESBIAN AND GAY ACTIVISM 119–29 (2008). While Fetner is more concerned with explicitly *gay and lesbian* activism in her book, rather than LGBT (or queer) activism, see *id.* at xviii, her larger focus on the “interactive effect between opposing movements: the effect that each movement has on the other, and the impact of that interaction on [each] social movement[’s] goals” is helpful. See *id.* at 121.

31. BUTLER, *supra* note 21, at 20.

32. See Warner, *supra* note 10, at 284.

33. Indeed, one must wonder along with Sally Engle Merry as to “[w]here do we stop speaking of law and find ourselves simply describing social life?” Sally Engle Merry, *Legal*

friendship project here is to say that I am interested in how those individuals and groups who seek legal *exceptionalism*, rather than *inclusion* in the orderly operation of the modern state and its imperatives, might become better friends.³⁴ More affirmatively, and to borrow from the title of Marc Galanter's well-known work, one could also say that I am interested in those individuals and groups, both religious and queer, who recognize that "justice [can be found] in many rooms."³⁵

That being said, no group, individual, or movement in itself embodies an entirely rejectionist politics. For example, some of the radically religious groups that have sought legal exceptionalism have argued for that exceptionalism using, of all things, the U.S. Constitution's First Amendment.³⁶ Indeed, this reality provides only more reason to resist the call to strictly define exactly who and what I mean by "radically religious" or "queer." Normal and un-normal political sentiments filter through all of us. And this is all the reason more to wonder why queer and religious folk are not in more-regular and more-direct conversation and collaboration with each other.

Given all of this, it is admittedly the case that some of the terms that I use in this Article—namely "adversary," "enemy," "friend," "ally," and the like—are hyperbolic ones. This is especially the case seeing that it is nearly impossible to find any entity that, in its entirety, and on all issues, can be simplistically characterized as either/or. That being said, I will use these terms in this Article, provocative and occasionally theoretically misplaced as they may be, because I believe that only strong language can work to dislodge the present array of agendas and alliances from its awkward and unproductive stasis of queer/religious *disconnects*.

Indeed, while I will focus in this Article on how queers and the radically religious might collaborate on family law pluralism projects specifically, there are a variety of other projects in which both

Pluralism, 22 LAW & SOC'Y REV. 869, 878 (1988).

34. In American legalese, the terms would be "accommodation" versus "inclusion." See generally Douglas NeJaime, *Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation*, 32 HARV. J.L. & GENDER 303 (2009).

35. See generally Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981).

36. See, e.g., NeJaime, *supra* note 34, at 375.

movements might very well recognize the other's agenda. Such collaborative projects, for example, could include a joint offensive against gay and lesbian attempts to institute in the educational realm what Douglas NeJaime characterizes as a "gay centrist position of sexual orientation as a stable, seemingly innate, identity category."³⁷ Such a gay and lesbian education agenda sexually neuters its human subjects, which is in sharp tension with queer ontology.³⁸ Similarly, like many queer thinkers and activists, many members of the Christian Right assert the ineluctably sexual aspects of being non-heterosexual.³⁹ While this can (and cannot) be an essentialist position, these relatively radical Christians also hold out the possibility that people may convert from one sexuality to another. Most gay and lesbian groups find the possibility of "conversion" existentially threatening, if not altogether a false proposition.⁴⁰ However, a queer ethic may find much truth and fascination in this radical challenge to mainstream gay and lesbian claims about the genetic sources and abiding stability of sexual identity. Last, but not least, to the extent that radical Muslims are part of the American radical religious tableau, they and queers might form a friendship centered around developing a critical politics of the body and its defilement through Islamophobic American torture.

Thus, while I focus in this Article on family law as an arena where queers and the radically religious can cooperate, there are potentially other areas of cooperation as well. However, in opening up space for new connections, alliances, and friendships in the Obama era, I do not intend in this Article to suggest that queer interests and those of the radically religious are homologous, any more than I mean to

37. *Id.* at 373.

38. *See id.* at 369–71.

39. *See id.* at 372–73.

40. *See id.* at 334–35 for a discussion of a battle between Christian and gay and lesbian groups over the inclusion of material on "ex-gays," along with information on gays, lesbians, and bisexuals, in a Maryland public school system's sexual education programming. The well-known organization Parents, Family, and Friends of Lesbians and Gays ("PFLAG") has also characterized gay-straight conversion as involving "the discredited notion that homosexuality is a choice which can be corrected through so called reparative therapy." Parents, Family, and Friends of Lesbians and Gays, Advocacy & Issues: Anti-Equality Organizations, <http://community.pflag.org/Page.aspx?pid=504> (last visited Sept. 1, 2010).

concur with extant conclusions that queer, gay, and lesbian interests can (or should) all coexist in an easy peace.⁴¹

In this respect, it is also important to acknowledge here that American queer practice could more firmly distance itself from contemporary gay and lesbian politics without embracing the radically religious. As the maxim goes, the enemy of one's enemy is not necessarily one's friend. I acknowledge that. However, in what follows, after first demonstrating the kind of ill-advised and (arguably) queer-phobic arguments for family law uniformity that contemporary mainstream gay and lesbian same-sex marriage advocates are putting forward presently, I will proceed to discuss how, in contrast to this gay and lesbian advocacy, religious movements and groups have taken the lead in proposing queer-philic alternatives to majoritarian marriage, both in the United States and elsewhere. This is not to say that religious people fall into line on the question of family law pluralism—they do not—but it is to say that where one finds legal alternatives to majoritarian marriage, it is religious people who have most often successfully argued for and achieved these alternatives. This suggests that American queer practice not only can learn from religious political practice but also that, to the extent that religious people are at the forefront of efforts to moderate norm-dominating states, queer politics can find a ready friend in the religious in efforts to escape majoritarian family law regimes.

Finally, it is important to emphasize from the outset that the new alliance that I am proposing in this Article is not just a matter of crude tactical maneuvering; hence, my repeated use of the emotive and affective word “friendship.” Rather, as I will demonstrate below, my suggestion here results from a deeply principled rethinking of who is friendly, and who is unfriendly, to queer interests.⁴² While

41. See, e.g., Kathryn Abrams, *Elusive Coalitions: Reconsidering the Politics of Gender and Sexuality*, 57 UCLA L. REV. 1135 (2010) (arguing that transgender advocates have demonstrated an admirable “ability to combine short-term and long-term strategies, and to retain flexibility about means and ends” that unfortunately has been absent “in the struggles between some feminists and queer theorists”).

42. For more discussion on how *principle* can provide the foundation for belief in legal pluralism, see Martha Minow, *Is Pluralism an Ideal or a Compromise?: An Essay for Carol Weisbrod*, 40 CONN. L. REV. 1287 (2008).

majoritarian marriage has become one of the central aims and projects of contemporary gay and lesbian politics, this gay and lesbian agenda is adverse to queer people in important if under-remarked ways. Queer friendship with this hostile gay and lesbian politics must, as a result, be reevaluated and reoriented.

II. QUEER-PHOBIC GAY AND LESBIAN ADVOCACY CONCERNING DIGNITY AND MAJORITARIAN MARRIAGE

My quest for new queer friendships in the Obama era begins with an explanation and exploration of how mainstream gay and lesbian same-sex marriage advocates are using simplistic arguments concerning “dignity” in a way potentially adverse to queer people and their welfare. Dignity is crucial to discuss given that both the California and Connecticut supreme courts, in line with mainstream gay and lesbian advocacy strategies, have recently and repeatedly invoked this concept when characterizing what is at stake for gays, lesbians, and queers with respect to “marriage” as opposed to “domestic partnerships” or “civil unions.” In this Part, I explicate and excavate these high courts’ jurispactic and queer-phobic understanding and use of the concept of dignity.

I concentrate in this Part on these two state high court judgments because they are the most recent state supreme court judgments that explicitly invoke the concept of dignity in their resolution of the question presented. By way of comparison, the recent Iowa Supreme Court judgment legalizing same-sex marriage in that state did not use the word “dignity” even once in its judgment.⁴³ Prior to the California and Connecticut high court decisions, the Supreme Judicial Court of Massachusetts issued an advisory opinion in 2004 to the Massachusetts Senate regarding a question similar to that addressed by the California and Connecticut courts, namely the constitutionality of a state government naming officially-recognized, otherwise-equivalent same-sex relationships something other than “marriage.”⁴⁴

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

44. See *In re Opinions of Justices to Senate*, 802 N.E.2d 565 (Mass. 2004). Earlier, of course, the Massachusetts Supreme Judicial Court had issued its groundbreaking opinion, *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), legalizing same-sex marriage. The concept of dignity played a role in this opinion as well, with the court declaring

However, I do not discuss this opinion in detail in this Part because so much of the analysis in that opinion is relied upon and utilized by the California and Connecticut supreme courts. In the dual interests of brevity and currency, I focus on these two most-recent state supreme court opinions instead.

In the spring of 2008, the California Supreme Court handed down its groundbreaking decision concerning same-sex marriage in *In re Marriage Cases*.⁴⁵ In this case, the court was asked to decide whether California's relationship-recognition system was consistent with the California Constitution's protections with respect to the right to marry and the right to equality.⁴⁶ Under this relationship-recognition system, "marriage" was reserved for mixed-sex couples, while same-sex couples had access only to a parallel "domestic partnership" regime. Like California, some other states had also created parallel systems of family law within their borders,⁴⁷ but California's regime of separate laws for different sexual orientations was unusual in that it accorded domestic partners "virtually all of *the same* legal benefits and privileges, and impose[d] . . . all of *the same* legal obligations and duties, that California law affords to and imposes upon a married couple."⁴⁸ Accordingly, what the California Supreme Court had to decide in this case was whether California's "separate but equal" family law system was constitutional under the California

that "[t]he Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens." *Id.* at 948.

45. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

46. *See id.* at 400.

47. For example, Hawaii has enacted a law concerning "reciprocal beneficiaries" and Wisconsin has adopted a form of "limited domestic partnership," but neither scheme provides the same rights and obligations as "marriage," or California's expansive marriage-like "domestic partnership" regime. *See* Status of Same-Sex Relationships Nationwide, Lambda Legal, <http://www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html> (last visited Sept. 1, 2010).

48. *In re Marriage Cases*, 183 P.3d at 398 (emphasis added). According to the court, nine differences remain between domestic partnerships and marriages in California. *Id.* at 416 n.24. Some of these differences are arguably to the benefit of people entering a domestic partnership, while others arguably impose burdens that people entering marriage do not face. *Id.* An example of an advantage is that domestic partnerships are easier to dissolve than marriages in California. *Id.* An example of a burden placed solely on people wishing to enter domestic partnerships is the requirement that such people have a common residence; there is no such common-residence requirement for people marrying. *Id.*

Constitution.⁴⁹ Ultimately, the court held that this system was unconstitutional, and that same-sex couples had to be given “marriage” licenses just like mixed-sex couples.⁵⁰

I concentrate here on an aspect of the court’s decision that has remained under-examined, namely, the court’s discussion of the concept of dignity and its relationship to pluralistic family law systems. The court’s words on the subject of how dignity relates to family law pluralism are worth quoting at length:

One of the core elements of the right to establish an officially recognized family that is embodied in the California constitutional right to marry is a couple's right to have their family relationship accorded dignity and respect equal to that accorded other officially recognized families, and assigning a different designation for the family relationship of same-sex couples while reserving the historic designation of ‘marriage’ exclusively for opposite-sex couples poses at least a serious risk of denying the family relationship of same-sex couples such equal dignity and respect.

. . . .

. . . [R]etaining the designation of marriage exclusively for opposite-sex couples and providing only a separate and distinct designation for same-sex couples may well have the effect of perpetuating a more general premise—now emphatically rejected by this state—that gay individuals and same-sex couples are in some respects ‘second-class citizens’ who may, under the law, be treated differently from, and less favorably than, heterosexual individuals or opposite-sex couples.⁵¹

Like other parts of the court’s opinion, the court’s discussion of dignity here was groundbreaking, but in an unanticipated and

49. *Id.* at 779. The court explicitly linked California’s system of maintaining a “*separate* institution of domestic partnership,” *id.* at 445 (emphasis added), with the historic practice of “relegat[ing] racial minorities to *separate* and assertedly equivalent public facilities and institutions,” *id.* at 451 (emphasis added).

50. The court held that California’s system was unconstitutional on both a “fundamental right to marry” and equal protection grounds. *See id.* at 419, 428, 452–53.

51. *Id.* at 400–02.

unfortunate way. For many people outside of the United States especially, the court's equation of dignity and family law uniformity is revolutionary, but mainly because it seems so ahistorical and ungrounded in real-world experience. In the next Part, I discuss these global family law experiences in more detail, and what they can tell us about how family law pluralism can actually *enhance* both the agency and dignity of non-majoritarian peoples. That being said, the reality of family law globally did not completely escape the court's attention in its opinion. For example, the court ably made use of a Canadian Supreme Court opinion in describing how the history of discrimination against gay people cautions against thinking that any separate and parallel family law system can be anything but discriminatory.⁵² Yet, as I discuss in the next Part, the court's global vision in its decision was extremely partial, avoiding not only a deeper exploration of Canadian family law realities and debates, but similar ones pertaining to family law pluralism, dignity, and the rights of non-majoritarian peoples elsewhere.

Less than six months after the California Supreme Court's decision, the Connecticut Supreme Court followed with its own ground-breaking opinion on same-sex marriage. In *Kerrigan v. Commissioner of Public Health*,⁵³ the Connecticut Supreme Court decided whether Connecticut's practice of "segregat[ing] heterosexual and homosexual couples into [the] separate institutions" of "marriage" and "civil union," respectively, violated the

52. Noted the court:

[P]articularly in light of the historic disparagement of and discrimination against gay persons, there is a very significant risk that retaining a distinction in nomenclature with regard to this most fundamental of relationships whereby the term "marriage" is denied only to same-sex couples inevitably will cause the new parallel institution that has been made available to those couples to be viewed as of a lesser stature than marriage and, in effect, as a mark of second-class citizenship. As the Canada Supreme Court observed in an analogous context: "One factor which may demonstrate that legislation that treats the claimant differently has the effect of demeaning the claimant's dignity is the existence of pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue. . ." It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them, since they are already vulnerable.

Id. at 445 (quoting *M. v. H.*, [1999] 2 S.C.R. 3, 54–55 (Can.)).

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

Connecticut Constitution's protections as to substantive due process and equality.⁵⁴ Similar to California's system of parallel relationship-recognition, Connecticut's civil union scheme "conferred on [civil] unions all the rights and privileges that are granted to spouses in a marriage."⁵⁵

As the California Supreme Court did with California's "separate but equal" legal set-up, the Connecticut Supreme Court too ultimately held that the denial of "real"⁵⁶ marriage to same-sex couples in Connecticut implicated the dignity interests of these couples, and also homosexual—including, presumably, queer—individuals more generally.⁵⁷ In this respect, the Connecticut court found that the formal equality that Connecticut had legislated between marriage and civil unions was suspect because these institutions did not operate in a historical vacuum.⁵⁸ According to the court, "[a]lthough marriage and civil unions do embody the same legal rights under our law, they are by no means 'equal.' . . . [T]he former is an institution of transcendent historical, cultural and social significance, whereas the latter most surely is not."⁵⁹

With respect to this asserted significance for marriage, and echoing plaintiffs' claim that marriage—more so than civil unions—is "special," the Connecticut Supreme Court's opinion explained in detail the unique and vital role that it feels marriage plays in the American polity.⁶⁰ Following a number of other courts' leads, the

54. *Id.* at 411–12. The Connecticut Supreme Court understood the Connecticut Constitution's due process guarantee to incorporate "the fundamental right to marry the person of [one's] choice." *Id.* at 413.

55. *Id.* at 413.

56. *Kerrigan*, 957 A.2d at 417.

57. *See id.* at 417, 466–74. It should be noted that the Connecticut Supreme Court was also worried about how withholding "marriage" from same-sex couples affects the well-being of such couples' children. According to the court:

[T]he ban on same sex marriage is likely to have an especially deleterious effect on the children of same sex couples. A primary reason why many same sex couples wish to marry is so that their children can feel secure in knowing that their parents' relationships are as valid and as valued as the marital relationships of their friends' parents.

Id. at 474. For more detail regarding harm to children, see also *id.* at 475 n.77.

58. *Kerrigan*, 957 A.2d at 418.

59. *Id.*

60. *Id.* at 416 ("[Plaintiffs] contend that [marriage] is an institution of unique and

Connecticut Court alternatively characterized marriage as “fundamental to our very existence and survival,”⁶¹ “intimate to the degree of being sacred,”⁶² and, citing a more ancient yet less hyperbolic precedent, “one of the most fundamental of human relationships.”⁶³

As a result of this remarkably (and perhaps uniquely) esteemed institutional history for marriage, the withholding of “marriage” nomenclature to same-sex couplings became acutely problematic for the court, especially given the fact that “historically [same-sex couples have] been the object of scorn, intolerance, ridicule or worse.”⁶⁴ Indeed, as a consequence of this historical stigmatization, the court believed that civil unions could only be popularly perceived as “an official state policy that [civil unions are] inferior to marriage, and that the committed relationships of same sex couples are of a lesser stature than comparable relationships of opposite sex couples.”⁶⁵

Given these concerns, it was no surprise that the Connecticut Supreme Court ultimately determined that Connecticut’s relationship recognition scheme violated the Connecticut Constitution’s equality protections.⁶⁶ In doing so, the court stressed the “overriding similarities” between opposite-sex and same-sex couples,⁶⁷ with same-sex couples “shar[ing] the same interest in a committed and loving relationship as heterosexual persons who wish to marry, and [] shar[ing] the same interest in having a family and raising their children in a loving and supportive environment.”⁶⁸ Given the asserted fundamental equivalence between same-sex and mixed-sex couples, it became nearly inescapable that the court would declare that “firmly established equal protection principles lead[] inevitably to the conclusion that gay persons are entitled to marry the otherwise

enduring importance in our society, one that carries with it a special status.”).

61. *Id.* (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

62. *Id.* (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)).

63. *Id.* (quoting *Davis v. Davis*, 175 A. 574, 577 (1934)).

64. *Id.* at 418.

65. *Id.* at 475.

66. *Id.* at 481.

67. *Id.* at 424.

68. *Id.*

qualified same sex partner of their choice. . . . [S]ame sex couples cannot be denied the freedom to marry.”⁶⁹ Moreover, following this decision, Connecticut same-sex couples soon learned that they were not only entitled to marriage, but that they would have no choice but to be married if they wished to have their relationships officially recognized by the State of Connecticut. Shockingly, legislation passed by the state legislature after *Kerrigan v. Commissioner of Public Health* not only eradicated the civil union option for future couples, but also forcibly converted all previous civil unions into marriages.⁷⁰

The Connecticut Supreme Court’s opinion thus reached the same basic conclusion as that of the California Supreme Court. One remarkable difference between the two decisions, however, was that the Connecticut Supreme Court opinion never discussed foreign legal or political experiences. As discussed above, the California Supreme Court opinion did discuss and utilize such experience but in an ungrounded and distorted manner.

In the next Part, I present a different view of what transnational legal experience teaches with respect to how dignity and family law pluralism relate. As my discussion of non-majoritarian, religious politics there will suggest, gay and lesbian arguments that rely on non-pluralistic legal models and arguments are outdated, shortsighted, and as detrimental for non-majoritarian peoples—including queers—as all arguments for legal monism tend to be. Most fundamentally, then, in the next Part, I aim to strip away the veneer of liberal obviousness that attaches to claims concerning dignity and its incompatibility with family law pluralism, including separate (and

69. *Id.* at 482.

70. In both Connecticut and New Hampshire, after the legalization of same-sex marriages in those two states, civil unions were automatically converted into “marriages.” See GAY & LESBIAN ADVOCATES & DEFENDERS, QUESTIONS AND ANSWERS ABOUT CONNECTICUT’S TRANSITION FROM CIVIL UNIONS TO MARRIAGE 4 (2009), <http://www.glad.org/uploads/docs/publications/ct-cu-to-marriage.pdf>; Andrew J. Manuse, *New Hampshire Legalizes Gay Marriage*, REUTERS, June 3, 2009, available at <http://www.reuters.com/article/idUSTRE5526NV20090603>.

In contrast, after the legalization of same-sex marriage in Vermont in September, 2009, no new civil unions could be entered into there, but existing civil unions were not automatically converted into marriages. See Vermont.com, Guide to Vermont Civil Marriage, <http://www.vermont.com/civilmarriagefaq.cfm> (last visited Sept. 1, 2010).

better) systems of relationship-recognition and family law for non-majoritarian queer and religious peoples. In doing so, I do not give up on the idea of “dignity” (and its liberal conceptual cognates like “minority rights” and “toleration”), but I do aim to sketch a more robust yet subtle conception of dignity that is reoriented to focus on the relationship between it and the *agency* of non-majoritarian peoples vis-à-vis their own laws and their own lives. With such a religion-driven and queer-philic vision of dignity in hand, I believe the possibility—and necessity—of a new queer-religious friendship in the Obama era will be much more apparent, as will be the tenuousness of any future friendship between pluralistic queers and monistic gays and lesbians.

III. QUEER-PHILIC VISIONS OF FAMILY LAW AND DIGNITY: DIGNITY AND PLURALISM

If you have a State, you must have one attitude, one behaviour, one pattern of thinking. Unless we have that thinking, it would be very difficult to have homogeneity in this society itself, in this country itself.

—Anadi Sahu, Bharatiya Janata Party politician, Member of Parliament (India)⁷¹

There is a position—not at all unfamiliar in contemporary discussion—which says that to be a citizen is essentially and simply to be under the rule of the uniform law of a sovereign state [T]his is a very unsatisfactory account of political reality in modern societies.

—Rowan Williams, Archbishop of Canterbury⁷²

71. PARL. DEB., Lok Sabha XIII (July 19, 2002), available at <http://parliamentofindia.nic.in/lsdeb/ls13/ses10/190702.html>.

72. Rowan Williams, Archbishop of Canterbury, Lecture at the Royal Courts of Justice: Civil and Religious Law in England: A Religious Perspective (2008), available at <http://www.archbishopofcanterbury.org/1575>.

A. Introduction

The American gay and lesbian rights movement's present and unyielding focus on majoritarian marriage rights is both a historic and global anomaly.⁷³ As Part II demonstrated, advocates for gays and lesbians have argued that without access to majoritarian marriage, there can be no gay and lesbian dignity. In this Part, I aim to bring into question this increasingly self-evident conclusion by presenting examples of family law politics from around the globe that challenge an ideal of liberty and justice—and marriage—for all. In doing so, I hope to show that one can acknowledge dignity (as well as its conceptual cognates) as an important goal, but also that one can locate it alternatively in a politics of pluralism that contests the desirability of majoritarian marriage for non-majoritarian peoples. Moreover, I show in this Part how this pluralistic politics readily aligns itself with (some forms of) religiosity. Ultimately then, I hope to suggest in this Part that one can buttress queer dignity via religious politics. In Part IV, I will expand upon and explore this Part's theme in the particular context of the American political and legal set-up.

In this Part, I first discuss how recent family law politics in Canada and the United Kingdom complicate the dignity/legal uniformity equation before discussing a similarly complicating set of politics in India that has a much longer history. Each of the countries discussed in this Part is a multi-ethnic, multi-religious, pluralistic democracy where debates over minority rights and cultural rights have been common. In other words, each of these three countries has a great deal of experience with the “dignity question,” and each has struggled with the kind of political and legal questions that arise when one has a diverse population that does not possess any single notion of the “good life.” Indeed, compared to these three countries, the United States is somewhat of a latecomer to discussions concerning dignity and family law pluralism.⁷⁴ However, that being

73. See generally NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 11–62, 83–122 (2008) (discussing the history and global context of the current push for same-sex marriage rights in the U.S.).

74. I say “somewhat” here keeping in mind that it was American-style federalism itself that created the opportunity for both California and Connecticut to come up with a different family law system than that found in New York, for example—a system in which “marriage”

said, my ultimate hope here is that, in the same way that American progressives hope that the United States will learn from foreign nations' legal experiences, progressive queer people will be inspired to learn from the family law politics of "culturally foreign," religious people. Thus, it is to such foreign/religious experience that I now turn.

B. Private Ordering, Family Law Arbitration, and Dignity

This section discusses two jurisdictions relatively familiar to the American lawyer, namely, Canada⁷⁵ and the United Kingdom, where religious minorities have used or are using arbitration and other alternative dispute resolution strategies more broadly to enforce family law norms that differ from the majoritarian ones legislated by the state and enforced in state courts. In the academic literature, one commonly sees arbitration referred to as a type of family law "private ordering."⁷⁶

Arbitration, like personal law discussed below, results in family law pluralism. However, arbitration differs from personal law in that the family law pluralism that exists in a personal law system is arguably more dependent on and more the creation of the state. Arbitration, on the other hand, is imagined as existing outside of the state, and as providing an "alternative" to the state's monolithic rules.⁷⁷ In this way, arbitration potentially allows for even greater

and its homosexual sidekicks (i.e., "domestic partnerships" and "civil unions") *differed minimally* in economic and legal benefits. There is a common inability, however, in American discussions of family law pluralism to conceive of this pluralism at a level different than that of the fifty states.

75. The particular jurisdiction within Canada on which I will be focusing is Ontario. However, some of this discussion necessarily implicates discussion about Canada as a whole. Thus, depending on the situation, I will sometimes specifically refer to "Ontario," and other times to "Canada" more generally.

76. See generally Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQUIRIES L. 573, 578 (2008).

77. As the Boyd Report described it:

[D]isputants may . . . give up on the quest for an agreed resolution to the[ir] dispute, and choose instead to have a neutral third party decide the[ir] dispute. When this is done by agreement of the parties to the dispute, it is known as arbitration. . . .

. . . [Arbitration is] private; [it does] not depend on 'the law' to make [it] work, and [it does] not involve any governmental or state action.

family law pluralism than a personal law system does, as the potential variation in family law rules corresponds to the diversity found amongst cognizable *couples* in society as opposed to cognizable *communities*.

In 2003, Canadian politics became preoccupied with the issue of family law pluralism and, in particular, efforts by the Ontario-based Islamic Institute of Civil Justice (“IICJ”) to offer religiously-premised family law arbitration services to Muslims in Canada’s Ontario province. At the time, the president of this organization, Syed Mumtaz Ali, suggested that Canadian Muslims would not be “good Muslims” if they did not choose to have their family law issues decided according to Islamic law rather than by the secular Canadian legal system.⁷⁸ As one can imagine, these statements, coming as they did so soon after 9/11, struck a nerve in both Canadian secular and religious circles, and sparked much public controversy. While a great deal of this controversy was the result of Islamophobic and/or racist sentiment⁷⁹ and overlooked the fact that Ontario Jews and Christians both had been using religiously-informed, legally-sanctioned

MARION BOYD, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION 9 (2004), <http://www.crvawc.ca/documents/MarionBoydReportonSharia.pdf> [hereinafter BOYD REPORT].

78. *See id.* at 3. Prior to this 2003 conference, in a 1995 interview, Mr. Ali had also declared that:

As Canadian Muslims, you have a clear choice. Do you want to govern yourself by the personal law of your own religion, or do you prefer governance by secular Canadian family law? If you choose the latter, then you cannot claim that you believe in Islam as a religion and a complete code of life actualized by a Prophet who you believe to be a mercy to all.

Interview by Rabia Mills with Syed Mumtazali, President of the Canada Society of Muslims (Aug. 1995), <http://muslim-canada.org/pfl.htm>. Syed Mumtaz Ali’s organization, the Canadian Society of Muslims, also stated in 2003 that:

Once [a] matter comes to [Muslim arbitration], the parties will be free to choose the law that they wish to rely upon. This model will not exclude application of Canadian laws if the parties wish to do so. It is expected that the Muslim Law and associated Case Law created through the old Anglo-Mohammadan Law precedents would be the model for Personal Law cases initially, but any other *Fiqh* could also be relied upon if the parties so desire.

The Canadian Society of Muslims, Darul-Qada: Beginnings of Muslim Civil Justice System in Canada, Apr. 2003, <http://muslim-canada.org/news03.html>.

79. *See* BOYD REPORT, *supra* note 77, at 68.

arbitration to resolve their family law disputes for years,⁸⁰ it nonetheless represented a serious crisis for the Ontario government. As a result, a special report, known as the “the Boyd Report,” was commissioned by the provincial Government of Ontario in 2004.⁸¹ The Boyd Report’s discussion is instructive and important here, as this discussion demonstrates that visions exist of the relationship between dignity and family law pluralism different from those articulated by the California and Connecticut Supreme Courts, and also that religious persons are at the forefront of efforts to make these alternative visions viable realities.

At the time of the controversy, Ontario’s Arbitration Act⁸² could be used to address a variety of family law (including inheritance) disputes outside of the courts, according to any body of law that the parties to the dispute chose. Certain family law issues were outside of the power of an arbitrator to decide in a binding manner, including the basic status of a marriage (i.e., an arbitrator could not declare a divorce; only a civil court could) and the custody of any children.⁸³ However, disputes pertaining to spousal division of property, spousal support, child support, and testate succession could all be conclusively decided outside of the state’s courts,⁸⁴ in front of any kind of arbitrator, according to any body of law (religious or otherwise) the parties chose.⁸⁵

In its recommendations, the Boyd Report laid out how religious family law arbitration should proceed in Ontario in the future. The report attempted to walk a careful path between the possibility of two

80. *See id.* at 55–57. The Boyd Report notes that representatives of one Jewish organization providing family law arbitration services told investigator Marion Boyd that Orthodox Jews are forbidden by their religion from bringing their legal disputes before “secular judges.” *Id.* at 55. The report also received a submission from one Christian organization (the Christian Legal Fellowship) representing hundreds of Christian lawyers, law professors, and law students, in which it was noted that “[m]any . . . communities [of faith] may feel that their core values, including the sanctity of the nuclear family are threatened by having their disputes resolved outside of their faith community by persons having no familiarity with their belief system.” *Id.* at 56.

81. *See id.* at 5.

82. Arbitration Act, R.S.O., ch. 17 (1991).

83. *See* BOYD REPORT, *supra* note 77, at 14, 16.

84. *See generally id.* at 14–28.

85. *See id.* at 12 for a discussion of parties’ freedom to choose both the arbitrator and the body of law that would apply to the resolution of their dispute.

different kinds of legal regimes, each of which the report found extreme and undesirable. The first of these regimes the Boyd Report called “secular absolutism,” which it identified as the legal system presently found in France.⁸⁶ Under a secular absolutist system, “the state must abstain from any involvement in religious matters, and religious authorities must be prohibited from having any authority whatsoever over matters that are regulated elsewhere by state law” presumably including family law.⁸⁷ Under such a secular system of law, the state is where the definition and enforcement of one family law, for everyone, begins and ends.

The second regime to be avoided, according to the Boyd Report, is a system whereby any group, such as Canadian Muslims, is allowed to establish a “separate” legal regime “distinct from [that of] the rest of Canadians, with the goal of political autonomy for the [] community in this country.”⁸⁸ Such a system is problematic because:

Ontarians do not subscribe to the notion of “*separate but equal*” when it comes to the laws that apply to us. . . . A policy of compelling people to submit to different legal regimes on the basis of religion or culture would be counter to [Canadian] *Charter* values Equality before and under the law, and the existence of a *single legal regime* available to all Ontarians are the cornerstones of our liberal democratic society.⁸⁹

While invoking the talismanic vocabulary of “separate but equal” to decry any (allegedly) extreme form of family law pluralism, the Boyd Report’s observations as to the desirability of family law uniformity were clearly agonized and perhaps ambivalent. The report, for example, acknowledged Canada’s rich tradition of “separate but equal” legal regimes, most notably in historically francophone Quebec and the aboriginal First Nations territories. With respect to the legal situation of Quebec, the report noted:

[T]he historical context clarifies why Britain tolerated the use of the French civil law in Quebec after defeating the French

86. *See id.* at 89–90.

87. *Id.* at 89 (emphasis added).

88. *Id.* at 88.

89. *Id.* (emphasis added).

and why that system of law was continued in our Constitution. Indeed, Canada is a delicate balancing act where protection of the religious, language and legal rights of both French and English have marked our ethos from the beginning.⁹⁰

With respect to the First Nations and their legal particularity in Canada, the Boyd Report was more adamant—and, as a result, also more tortured—about the inapplicability of this “separate but equal” legal situation for any claim to an autonomous, religiously-premised and religion-controlled⁹¹ system of family law for Muslims, or any other non-First Nations group:

To compare any group of people, whether they are distinct on a cultural, ethnic or religious basis, to the First Nations of Canada in this country’s legal and historical context reveals a misunderstanding of the nature of the relationship between the Canadian state and the First Nations. From [this report’s] perspective, comparisons in this direction are erroneous at best.⁹²

Ultimately then, the report’s related legal conclusions here (to their detriment) rested on arguments about the First Nations’ singularity in Canada’s Constitution Act and other important legislation.⁹³

Despite rejecting a community *autonomy-based* model of Islamic family law enforcement in Ontario, the Boyd Report was not able to completely walk away from a *difference-based* model, however. Indeed, the Boyd Report ended up endorsing the basic system of optional arbitration for select family law matters that then existed in Ontario, while only making suggestions on the margins for reforms to

90. *Id.* at 79.

91. As the Boyd Report describes this model: “According to such a conception of minority rights, the Muslim community, and other communities arbitrating family law matters using religious principles, would be able to do so based on whatever internal rules they adopt and the state would have no right to intervene.” *Id.* at 90.

92. *Id.* at 87–88.

93. *Id.*

this system.⁹⁴ As the report saw it, the existing system was consistent with the basic Canadian commitment to multicultural policies that “allow[] and support[] communities’ and individuals’ links to cultures (including their religions) of origin”⁹⁵ and that support “inclusion which takes account of difference, not exclusion based on difference.”⁹⁶

The Government of Ontario ultimately decided to reject the Boyd Report’s recommendations, despite their basic endorsement of the status quo. Indeed, the government went so far as to make illegal any arbitration conducted according to any body of law other than “the law of Ontario or of another Canadian jurisdiction.”⁹⁷ This significant

94. The Boyd Report noted:

[It] did not find any evidence to suggest that women are being systematically discriminated against as a result of arbitration of family law issues. Therefore the Review supports the continued use of arbitration to resolve family law matters. . . . The *Arbitration Act* should continue to allow disputes to be arbitrated using religious law, if the safeguards currently prescribed and recommended by this Review are observed.

BOYD REPORT, *supra* note 77, at 133. Many of the reforms suggested by the *Boyd Report* are relatively minor, such as requiring arbitrators to provide written reasons for their decisions and to keep and transmit to the government better written records of their decisions. *Id.* at 140. Some recommendations are more significant, such as the recommendation to require that the agreement to arbitrate a family dispute be reconfirmed at the time of the family law dispute instead of, say, allowing an agreement entered into at the time of the marriage to necessarily hold sway. *Id.* at 134. A potentially important recommendation is that the Arbitration Act should be amended to more concretely define what its requirement of a “fair and equal process” in arbitration means. *Id.* at 136.

95. *Id.* at 90. Ayelet Shachar, another Canadian defender of religious family law arbitration, has similarly stressed how religious law can “offer religious women a significant source of meaning and value,” Shachar, *supra* note 76, at 575, and as a result, can leave them feeling “obliged to have at least some aspects of their marriage and divorce regulated by religious principles and communal institutions.” *Id.* at 604. Shachar has also argued the decision to ban religious arbitration is “not an ideal normative and jurisprudential solution,” given that the government’s “‘out of sight, out of mind’ approach [to religious arbitration] will probably not be of much assistance to vulnerable group members in blocking communal pressures to resolve family disputes by turning to ‘their’ group’s authorities which, now legally unrecognized, remain free of any regulatory oversight, whether ex ante or ex post.” *Id.* at 604–05 (emphasis added).

96. BOYD REPORT, *supra* note 77, at 89.

97. See Family Arbitration, R.R.O. 134/07 (2007). After this amendment, the Arbitration Act in Ontario now reads:

Other third-party decision-making processes in family matters 2.2 (1) When a decision about a matter described in clause (a) of the definition of “family arbitration” in section 1 is made by a third person in a process that is not conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction,

change in the law of arbitration came about largely as a result of post-9/11 heightened anxiety concerning the loyalties and intentions of Canadian Muslims.⁹⁸ Notwithstanding the contrary law enacted, the Boyd Report's discussions and conclusions are instructive and important, for they provide an important example of how religiously-motivated individuals have taken the lead in jumpstarting a discussion about and advocating (albeit unsuccessfully) for a more pluralistic legal environment, and thereby contributing to the viability of non-majoritarian peoples.⁹⁹ The next Part will explore how American queers might join in and contribute to this non-majoritarian project as well.

While a certain sort of family law pluralism was shut down in Canada post-Boyd, the Islamophobia that underlay this move is not reflective of how dignity-minded individuals and governments must necessarily come out on the question of family law pluralism. As the present situation in the United Kingdom suggests, other jurisdictions,

(a) the process is not a family arbitration; and

(b) the decision is not a family arbitration award and has no legal effect. 2006, c. 1, s. 1 (2).

Arbitration Act, R.S.O., ch. 17 (1991).

98. See Shachar, *supra* note 76, at 584; see also Haroon Siddiqui, Op-Ed, *Sensationalism Shrouds the Debate on Sharia*, TORONTO STAR, June 12, 2005, at A17.

99. This is not to say that religious people in Canada were united in challenging the preeminence of the Canadian state's role in regulating family relationships; they were not. In this respect, the *Boyd Report* was exemplary in its serious engagement with differences of opinion between Muslims (and other religious peoples) about the proper goals of the community—including how best to obtain respect and dignity for this community. These differing views spanned the spectrum from a desire to establish a completely autonomous legal system for Canadian Muslims, see BOYD REPORT, *supra* note 77, at 88, to those of the Muslim Canadian Congress ("MCC"), see *id.* at 29–30. The MCC is described as a private national organization that viewed itself as "progressive," and that also claimed that the Arbitration Act "does not cover family disputes" and "that if indeed the government takes the position . . . that the Arbitration Act can deal with these matters, then . . . the Arbitration Act is unconstitutional . . . in that . . . [it b]reaches the unwritten constitutional norms enunciated by the Supreme court of Canada . . . namely the rule of law, constitutionalism, federalism, and respect for minorities." *Id.* But that being said, it was religious people who took the lead in instigating and defending the need for a re-thinking of family law uniformity in Canada, though there were others who also supported this agenda as well. See *id.* at 37, 65 & 120 for a discussion of the pro-arbitration positions of groups like Facts Are Capable Too ("FACT") and Fathercraft. Such groups may have religious backing, but they are not explicitly religious in the way that the Jewish, Muslim, and Christian (e.g., Salvation Army) groups supporting arbitration in this Canadian report were.

equally afflicted by Islamophobia, might be on a different path—one that is more accommodating of non-majoritarian lives, whether radically religious or queer.

In early 2008, the Archbishop of Canterbury, Rowan Williams, delivered a widely reported and controversial lecture in the United Kingdom entitled “Civil and Religious Law in England: A Religious Perspective.”¹⁰⁰ Conceived as a general talk about how to respond to “the presence of communities which, while no less ‘law-abiding’ than the rest of the population, relate to something other than the British legal system alone,”¹⁰¹ the Archbishop’s words resonated widely and loudly in a country still recovering from the 2005 attacks on its capital’s public transportation system and the fears of a Muslim “fifth-column” that these attacks engendered. Journalistic reporting of the lecture focused on its comments concerning the place of Islamic law¹⁰² in an ostensibly secular¹⁰³ legal system. However, the Archbishop himself emphasized that he was trying to speak *generally* “about the right of religious believers . . . to opt out of certain legal provisions—[for example,] the problems around Roman Catholic adoption agencies which emerged in relation to the Sexual Orientation Regulations [the previous spring].”¹⁰⁴

Ultimately, the Archbishop argued in his talk that “a defence of an unqualified secular legal monopoly in terms of the need for a universalist doctrine of human right or dignity is to misunderstand the

100. See Rowan Williams, Archbishop of Canterbury, Foundation Lecture at the Royal Courts of Justice: Civil and Religious Law in England: A Religious Perspective (Feb. 7, 2008), available at www.archbishopofcanterbury.org/1575.

101. *Id.*

102. See Ruth Gledhill & Philip Webster, *Archbishop of Canterbury Argues for Islamic Law in Britain*, TIMES, Feb. 8, 2008, available at <http://www.timesonline.co.uk/tol/comment/faith/article3328024.ece>; Jonathan Petre & Andrew Porter, *Adopt Sharia Law in Britain, Says the Archbishop of Canterbury Dr Rowan Williams*, DAILY TELEGRAPH, Feb. 8, 2008, available at <http://www.telegraph.co.uk/news/uknews/1578017/Adopt-sharia-law-in-Britain-says-the-Arch-bishop-of-Canterbury-Dr-Rowan-Williams.html>; *Sharia Law in UK is ‘Unavoidable,’* BBC NEWS, Feb. 7, 2008, available at <http://news.bbc.co.uk/2/hi/7232661.stm>.

103. It is somewhat of a challenge to characterize the English legal system as “secular” when, as the Archbishop himself acknowledges, “the law of the Church of England is the law of the land.” Williams, *supra* note 72. The Archbishop goes on to note, however, that the “daily operation” of that Church law “is in the hands of [non-Church] authorities to whom considerable independence is granted.” *Id.* That being said, later on his talk, the Archbishop speaks admirably of what he characterizes as a necessary “theology of law.” *Id.*

104. *Id.*

circumstances in which that [secular] doctrine emerged.”¹⁰⁵ A more preferable articulation of secularism, according to the Archbishop, would be to facilitate “a pattern of [social and legal] relations in which a plurality of divers[e] and overlapping affiliations work for a common good, and in which groups of serious and profound conviction are not systematically faced with the stark alternatives of cultural loyalty or state loyalty.”¹⁰⁶

While the Archbishop’s widely publicized talk was a direct response to recent developments and concerns in the United Kingdom, including the intentions and loyalties of the United Kingdom’s Muslim population, debates concerning the limits to legal pluralism in the United Kingdom had been ongoing for some time. Some of these debates concerned the roles and rights of a number of non-state Muslim legal institutions that Muslim non-governmental organizations have developed all over the United Kingdom over the past two decades.

These institutions, or “shari’a councils,” use procedures and practices informed by Islamic legal and moral norms in the process of providing mediation and family law dispute resolution services for disputes arising in Muslim families.¹⁰⁷ They identify themselves with names like “Muslim Marriage Guidance Council,” “Islamic Sharia Council,” and “Muslim Arbitration Tribunal.”¹⁰⁸ Most of these institutions see themselves as merely mediators in Muslim couples’ disagreements, offering non-binding advice to Islamic family norms. Some of these institutions also hear individuals’ petitions for religious divorce and issue religious divorces.¹⁰⁹ However, these

105. *Id.*

106. *Id.*

107. See John R. Bowen, *Private Arrangements: “Recognizing Sharia” in England*, BOSTON REV., Mar./Apr. 2009.

108. See *id.* (providing a general overview of the functioning of the Muslim Arbitration Tribunal and Islamic Sharia Council). See generally Sameer Ahmed, *Pluralism in British Islamic Reasoning: The Debate over Official Recognition of Islamic Family Law in the United Kingdom* 50–60 (Dec. 23, 2006) (unpublished Ph.D. dissertation, Oxford University) (on file with author).

109. For example, John Bowen reports that at the February 2008 monthly meeting of scholars associated with the Islamic Sharia Council, the scholars either dissolved or asked for more information with respect to the seven cases that they heard as a group that month. See Bowen, *supra* note 107. All seven cases were requests by women to divorce their husbands. See *id.* For a general overview of the functions of these institutions, see Samia Bano, *In Pursuit of*

declarations of divorce have no civil law effect, since only a state court can declare an officially-married couple legally divorced.¹¹⁰ Only one institution, the Muslim Arbitration Tribunal, has taken the steps to officially register itself under the state's Arbitration Act, so that it may resolve civil disputes¹¹¹ in a legally binding manner, using the tools of state-defined arbitration.

As in Canada, Muslim opinion in the United Kingdom as to the desirability of establishing a distinct set of legal institutions for Muslims is not unanimous; there are Muslim supporters and Muslim detractors of efforts to establish non-state Muslim legal institutions. Furthermore, amongst both supporters and detractors there are different reasons that people give for their position vis-à-vis these non-state institutions.¹¹² As robust as this intra-community dissension might be, evidence suggests nonetheless that the number of people

Religious and Legal Diversity: A Response to the Archbishop of Canterbury and the 'Sharia Debate' in Britain, 10 ECCLESIASTICAL L.J. 283, 294-95 (2008).

110. See Bowen, *supra* note 107, at 3; see also Lucy Carroll, *Muslim Women and 'Islamic Divorce' in England*, 17 J. MUSLIM MINORITY AFF. 97 (1997).

111. Not all of these arbitration matters involve intra-family civil disputes. The website of the Muslim Arbitration Tribunal reports that they also handle "Commercial and Debt Disputes" and "Mosque Disputes." Muslim Arbitration Tribunal, Types of Cases We Deal With, <http://www.matribunal.com/cases.html> (last visited Sept. 1, 2010).

112. For example, some Muslim supporters of these non-state institutions have disdain for majority practices and values. Such Muslims "see Western society as aimless and rootless, marred by increasing vandalism, crime, juvenile delinquency, the collapse of marriages, growing number of illegitimate children, and near constant stress and anxiety. They view Islam as the positive alternative." Ihsan Yilmaz, *Muslim Alternative Dispute Resolution and Neo-Ijtihad in England*, 2 ALTERNATIVES: TURK. J. INT'L REL. 121-22 (2003).

Others' support might be characterized as less disdainful than fearful, especially of state-sponsored Islamophobia. In this respect, Yilmaz notes the disparity in how English Jews and Sikhs are protected under the Race Relations Act, but not Muslims, and that "[a]s a result, there has been widespread alienation from the state among [Muslims]." *Id.* at 122.

Finally, other Muslims worry less about majority ill-will than they do about majority cultural incompetence. See SONIA NURIN SHAH-KAZEMI, UNTYING THE KNOT: MUSLIM WOMEN, DIVORCE, AND THE SHARIAH 53-5, 71-7 (2001) for examples and discussion of incompetence on the behalf of British (non-Muslim) lawyers giving advice to their Muslim clients on both English and Islamic law. In one instance, one of these lawyers drew up a *talaqnama* for his client, in which he had his client—a woman—attempt to divorce her husband by pronouncing 'I TALAK YOU' thrice. See *id.* at 54-5. It should be noted that this is not an instance of a woman exercising a delegated right of divorce (correctly, at least), as the woman's declaration of *talaq* does not take the proper form for the exercise of such a delegated right. See WOMEN LIVING UNDER MUSLIM LAWS, TALAQ-I-TAFWID: THE MUSLIM WOMEN'S CONTRACTUAL ACCESS TO DIVORCE—AN INFORMATION KIT 34 (1996), available at <http://www.wluml.org/node/390>.

using the services of these non-state Muslim institutions has been on a steady rise.¹¹³

While the future direction of the debate over official recognition of Islamic family law in the United Kingdom is unpredictable, the fact that the head of the Church of England is making speeches advocating a pluralistic legal regime that could directly benefit many existing Muslim communities and institutions suggests that monumental change (including monumental religious-political realignment) is afoot in the United Kingdom. Moreover, whatever the outcome of this debate, its existence helps demonstrate how, yet again, members of religious communities have taken the lead in arguing *against* the coercive application of majority-defined state family law norms, and *for* the creation and viability of non-majoritarian political and legal spaces

C. Personal Law, "Separate But Equal" Family Laws, and the Rights of Non-Majoritarian Peoples

The debates in Canada and the United Kingdom concerning family law pluralism are, in part, about "private ordering," or the ability of people to "privately" construct alternatives to the state's monolithic family law rules, norms, and assumptions. However, another model of family law pluralism, namely, that of "personal law," is also widely practiced and debated around the globe. In contrast to the *private* ordering model, this form of family law pluralism is one where the (public) state itself is involved in defining and enforcing different alternatives in family regulation.¹¹⁴ Personal law systems are crucially important to study and understand at this point in time, as the family law system that is emerging in the United

113. The Islamic Sharia Council, one such non-state Muslim legal institution, reports that from 1982–1995, 1500 cases were filed with it. From 1996–2009, however, at least 5500 cases were filed. Islamic Sharia Council, Statistics, <http://www.islamic-sharia.org/about-us/about-us-9.html> (last visited Sept. 1, 2010).

114. States that have personal law systems will differ to the extent they will allow communities to legislate, administer, and otherwise enforce their particular personal laws. There is no single model of a personal law system, though there are commonalities between such systems. For a comparison of two widely-studied personal law systems, see Marc Galanter & Jayanth Krishnan, *Personal Law and Human Rights in India and Israel*, 34 *ISR. L. REV.* 101, 115–20 (2000).

States (both before and after Proposition 8) strongly resembles the “personal law” approach to family law, whereby different communities are governed by different regimes of family law.¹¹⁵

India stands out as a country where the administration of family law is organized around a personal law model. India’s personal law system is premised on people’s religiously communal identifications.¹¹⁶ Reference to India’s personal law system means the system of Indian family law whereby Hindus, Muslims, Christians, and others are governed by different family law codes, practices, and norms.¹¹⁷

For example, in this system of family law, one finds a “Hindu Marriage Act” and also an “Indian Christian Marriage Act.” The Hindu Marriage Act also governs Hindu divorces, while a “Indian Divorce Act” governs Christian divorces, and a “Dissolution of Muslim Marriages Act” governs some kinds of Muslim divorces.¹¹⁸ There are also numerous other examples of these types of statutes in India, as well as a large body of religion-specific, judicially-developed common-law relating to family issues.¹¹⁹

While the motivations behind personal law systems have been complex and dynamic over the course of history,¹²⁰ today they are in

115. Traditionally, personal law has been viewed as a kind of legal system which shares little with territorially-premised pluralistic legal systems. I believe this view of things is wrong, however. *See generally* Jeffrey A. Redding, *Slicing the American Pie: Federalism and Personal Law*, 40 N.Y.U. J. INT’L L. & POL. 941 (2008). Moreover, in light of the pattern in U.S. state laws that is emerging with respect to the definition and enforcement of marriages versus domestic partnerships (or civil unions), it is time to question any easy conclusion about the existence of sharp differences between the American system of family law and personal law systems. Indeed, just as Muslims and Hindus form families according to different laws in India, now so do homosexuals and heterosexuals utilize different family laws in some American states.

116. Galanter & Krishnan, *supra* note 114, at 103.

117. Presently in India, the central government (and, to a much lesser degree, state governments) legislates on different religious communities’ personal laws. Furthermore, there is a relatively unified, hierarchically organized national judiciary in India that enforces and administers this legislation, as well as the large amount of uncodified religious personal law that is found in judicial precedents. *See id.* at 106–07.

118. *See id.* at 109 n.42.

119. There is also family law (for example, the recently-enacted “Protection of Women from Domestic Violence Act”), which is not administered along communitarian lines.

120. India’s personal law system can be traced back at least to the 1772 decision by Warren Hastings, the British viceroy for India at the time: “in all Suits regarding Inheritance, Marriage, Caste, and all other religious Usages or Institutions, [apply] the Laws of the Koran with respect

very large part “intended to help ethnic groups and religious minorities express their cultural particularity and pride without it hampering their success in the economic and political institutions of the dominant society.”¹²¹ Moreover, examining personal law systems in India and elsewhere, one often finds that “second class” citizens—for example, Muslims and Sikhs¹²² in the case of Hindu-majority India—often vociferously oppose any effort to amalgamate them into a common, unitary family law system.¹²³

to [Muslims], and those of the Shaster with respect to [Hindus].” A Plan for the Administration of Justice (1772), in SELECTIONS FROM THE STATE PAPERS OF THE GOVERNORS-GENERAL OF INDIA Vol. 2, 290, 295–96 (G.W. Forrest ed., 1910). For a discussion of this British policy, see Galanter & Krishnan, *supra* note 114, at 106; see also M.B. HOOKER, LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS 58–85, 94–116 (1975).

While one might have expected otherwise from such an ambitious announcement, ultimately Hastings’s decision was only fully implemented in the areas of marriage, divorce, inheritance, and adoption law, as well as in the management of religious endowments. After independence, and after much debate, the post-colonial Indian state decided to continue this basic split between universally oriented criminal law and personally oriented family law.

121. WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 31 (1995). Rina Verma Williams has characterized the post-colonial retention of personal law systems as “a way to avert ethnic unrest and preserve cultural autonomy in multiethnic societies.” RINA VERMA WILLIAMS, POSTCOLONIAL POLITICS AND PERSONAL LAWS: COLONIAL LEGAL LEGACIES AND THE INDIAN STATE 7 (2006). Finally, India’s post-Independence leader, Jawaharlal Nehru, himself remarked that “we do not dare touch the Moslems [with respect to their personal law] because they are in a minority and we do not wish the Hindu majority to do it. These are personal laws and so they will remain for the Moslems, unless they want to change them.” TIBOR MENDE, CONVERSATIONS WITH MR. NEHRU 57 (1956). *But see* MAHMOOD MAMDANI, CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM 111 (1996) (arguing that colonial-era legal pluralism “was more an expression of power relations in a colonial society than a recognition and tolerance of any multicultural diversity”).

122. See Himanshi Dhawan & Subodh Ghildiyal, *After Hindus, divorce could get hassle-free for Sikhs too*, TIMES OF INDIA, June 11, 2010 (quoting Delhi Sikh Gurudwara Management Committee member Paramjit Singh Sarna as saying “We have separate set of Sikh rituals and we would like to be registered under the Sikh Marriage Act rather than the Hindu Marriage Act as we have to do now. It is a matter of our identity and a legal recognition to Anand Karaj”), available at <http://timesofindia.indiatimes.com/india/Divorce-may-now-get-easier-for-Hindus-Sikhs-demand-the-same/articleshow/6034264.cms>.

123. It is important to note here that at India’s independence, conservative Hindu organizations also opposed the newly independent state’s (ultimately successful) attempts to reformulate Hindu personal law, using arguments about the inappropriateness of state “interference” in religious personal laws. See WILLIAMS, *supra* note 121, at 104–14. Later, this radical brand of Hindu politics veered its focus, such that “[i]n the 1980s, religious identity for the Muslim community became virtually coterminous with the preservation of their personal law. For some Hindus . . . Indian national identity became virtually coterminous with forcing the Muslim community to give up their personal law.” *Id.* at 127.

One important and dramatic example of minority resistance to majoritarian family law in India is helpful to examine here. In the mid-1980s, the Indian political scene became consumed by what is widely known as “the Shah Bano crisis.”¹²⁴ This controversy, whose reverberations are still strongly felt today, resulted from a decision handed down by the Indian Supreme Court: *Mohd. Ahmed Khan v. Shah Bano Begum*.¹²⁵ The question presented by this case was whether the Indian Code of Criminal Procedure’s requirement that a man indefinitely financially maintain his ex-wife after a divorce if she is “unable to maintain herself”¹²⁶ was applicable to Muslim men, who arguably have more limited responsibilities toward their ex-wives under classical Islamic family law.¹²⁷ Ultimately, the Supreme Court determined that the Code of Criminal Procedure’s requirements superseded any contradictory Muslim personal law rules and requirements,¹²⁸ and also that nothing in Muslim personal law forbade indefinite maintenance to a divorced wife “who is unable to maintain herself.”¹²⁹

The opinion ignited large protests by conservative Muslims across India (and smaller counter-protests by a number of dissident Muslim women and their allies).¹³⁰ Eventually, then-Prime Minister Rajiv Gandhi and his government acquiesced to conservative Muslim

124. See Redding, *supra* note 115, at 966–68.

125. *Mohd. Ahmed Khan v. Shah Bano Begum*, A.I.R. 1985 S.C. 945.

126. INDIA CODE CRIM. PROC. § 125(1)(a).

127. Under most classical interpretations of Islamic divorce law, it is generally the rule that a man is required to financially maintain his ex-wife until she has menstruated three times, post-divorce. See DAVID PEARL & WERNER MENSKI, *MUSLIM FAMILY LAW* 182–84, 280–82 (3d ed. 1998).

128. *Mohd. Ahmed Khan*, A.I.R. 1985 S.C. at 952–53.

129. See *id.* at 949–53. Arguably, the first holding was sufficient to have settled the case, and it was gratuitous and provocative for the Supreme Court to have interpreted the Muslim community’s personal law. This seems especially the case given that other portions of the Court’s opinion took a patronizing tone in regards to the content of such personal law. The lead paragraph in this opinion included the following remarks: “it is alleged that the ‘fatal point in Islam is the degradation of woman’ To the Prophet is ascribed the statement, hopefully wrongly, that ‘Woman was made from a crooked rib, and if you try to bend it straight, it will break; therefore treat your wives kindly.’” *Id.* at 956.

130. See Kirti Singh, *The Constitution and Muslim Personal Law*, in *FORGING IDENTITIES: GENDER, COMMUNITIES AND THE STATE IN INDIA* 96, 101–03 (Zoya Hasan ed., 1994); WILLIAMS, *supra* note 121, at 145 (documenting smaller size of counter-protests by progressive Muslims).

demands and passed a law to eliminate Muslim—and only Muslim—women’s rights to petition for and receive indefinite post-divorce maintenance from their ex-husbands.¹³¹ While the legal effect of this relatively recent addition to India’s personal law system has been whittled back over time, the statute still exists and many Muslim political and social organizations would very likely resist its removal intensely.¹³²

The Shah Bano crisis, and its aftermath, demonstrates that many people in India, both progressive and conservative, view family law pluralism as not only coexisting with the dignity of minorities, but actually as somewhat of a prerequisite for that dignity. While it is true that there are many feminists in India who have worked against the personal law system, it is safe to say that the momentum on this issue within the Indian feminist community has been seized by *religious* feminists. These religious feminists are working for more women-friendly versions of personal law. However, such a project has goals quite different from delegating family law to patriarchal others, whether those “others” be patriarchal authority figures within religious communities or within the secular state itself.¹³³

131. See The Muslim Women (Protection of Rights on Divorce) Act, No. 25 of 1986. In response to this legislation, cries of “appeasement” were effectively raised by Hindu nationalist quarters, which eventually helped lead to the national electoral successes of the Hindu-nationalist BJP political party. These successes, in turn, led to a severe polarization in Hindu-Muslim relations in India, a corresponding increase in violence between the two communities, and the drawing of new and sharper boundaries between the two communities. These communal problems, and the challenges they present for legislation and judicial decision making in the area of personal law, persist today.

132. For the results of different surveys of Muslim public opinion on the issue of personal law reform, see WILLIAMS, *supra* note 121, at 58. A 1996 survey found that sixty-seven percent of Muslims (and over fifty percent of Christians) favored the retention of India’s personal law system, while only forty-two percent of Hindus favored keeping this system. Yogendra Yadav, *The Maturing of a Democracy*, INDIA TODAY, Aug. 31, 1996, at 28, 41. Another 1995 survey of two hundred Muslim women found that while only forty-six percent of respondents thought that Muslim personal law in India should be reformed, only fourteen percent would go so far as to eradicate the Indian method of organizing family law along a personal law model itself. Sabeeha Bano, *Muslim Women’s Voices: Expanding Gender Justice under Muslim Law*, 30 ECON. & POL. WKLY. 2981, 2982 (1995). All of these results should be appropriately contextualized and qualified by noting both the enormous size of India’s Muslim population—approximately 150 million—and the large number of class, caste, regional, and sectarian differences that internally differentiate this population.

133. See, for example, *supra* note 132 for results of a poll of Muslim women that are consistent with this observation. More generally, Madhavi Sunder has noted how

The existence of religious feminists is evidence of intense disagreements between different members of religious communities concerning the proper content of the family law that should apply to the community.¹³⁴ Unfortunately, it is often the case that these disagreements are resolved at the expense of women. That being duly noted, the nature of these (fortunate) debates nonetheless demonstrates that the legal and political debates that accompany many personal law systems possess a very different framework as to the relationship between dignity and family law pluralism than that framework found in the California and Connecticut supreme court opinions. In these systems with communally-premised personal law, both refuge and dignity are found outside of the confines of majoritarian marriage and family law.

D. Conclusion

The California and Connecticut Supreme Courts viewed gay and lesbian—and—queer dignity as inextricably linked to formal equality and access to the heterosexual, secular institution of majoritarian marriage. This account of dignity is not necessarily wrong, but, as my discussion in this Part (and the next) suggests, this account involves more assertion than analysis and ignores the ways in which numerous people around the globe have felt that something other than mimicry of the majority is what creates a feeling of dignity in their lives. In this respect, religious people amongst others have been leaders in not

[i]ndividuals in the modern world [are] increasingly demand[ing] change *within* their religious communities in order to bring their faith in line with democratic norms and practices. Call this the New Enlightenment: Today, individuals [are] seek[ing] reason, equality, and liberty not just in the public sphere, but also in the private spheres of religion, culture, and family.

Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1403 (2003). Finally, Kumkum Sangiri has remarked on the perhaps less-than-obvious patriarchal objectives of India's ostensibly liberatory/secular state by noting that "[b]eneath the opposition between a state-imposed uniform civil code and personal laws that are sought to be reformed from 'within' a community . . . lies an unresolved but entirely patriarchal concern: who will control and regulate women. . . ?" Kumkum Sangiri, *Politics of Diversity: Religious Communities and Multiple Patriarchies*, 30 ECON. & POL. WKLY. 3287, 3296 (1995).

134. One might note that, at the very least, this contention is on the table in India, whereas legal and judicial discussions concerning same-sex marriage in the United States obscure and ignore debate within the gay and lesbian community about the desirability of marriage.

only contesting majoritarian hegemony, but also in putting in place the social, political, and legal infrastructure necessary for living a non-subordinated life. Indeed, by being active authors of their law and exercising both authority over and responsibility for their law, these religious people have been exemplars of how to live a life with dignity.¹³⁵

Ultimately, then, dignity is a much more complicated, contested, and dynamic concept than contemporary gay and lesbian same-sex marriage advocates, including supportive courts, appear willing to acknowledge. Moreover, protecting the dignity of queer people may very well require something different than amalgamating queers into a heterosexually-dominated majoritarian marriage regime, in which queers (as well as gays and lesbians) will continually be democratically outmatched with respect to this regime's substantive content and norms. In the next Part, I explore how new and better queer friends might facilitate the new and better queer agendas in which I am interested.

IV. NEW AGENDAS, NEW FRIENDS

My discussion in the preceding two Parts has demonstrated that mainstream American gay and lesbian understandings and implementations of dignity are out of touch with much global understanding and practice vis-à-vis this concept, as well as the welfare of queer people in the United States itself.¹³⁶

It is possible that, in the future, gay and lesbian voices will be raised against the gay and lesbian organizations and individuals who

135. And even here, the picture as to religious people and politics is itself complicated, with not all religious people being interested in either their own or others' agency. For example, in India, religious nationalist parties have recently been the parties most interested in family law monism. *See supra* note 123.

136. Clearly, the fact that religious minorities around the world are not using dignity claims to argue for their amalgamation into majoritarian marital and family law does not necessarily preclude gays, lesbians, or queers in the United States from (correctly) doing so. There are real differences between other countries' religious minorities and America's sexual minorities and the histories of the family law systems in each country. For one, many religions have had family law traditions that predate secular states and secular norms by centuries. Gays, lesbians, and queers, on the other hand, have often been excluded or excommunicated from the family altogether. It would not be surprising if each kind of community or cultural grouping views the family differently and needs different things to feel "whole" or dignified.

are seeking to institute hegemonic notions of dignity, family, and law. However, until this happens, queer people need new friends, and I argue in this Part that a new American queer friendship with the American radical religious right holds real promise for the Obama era and beyond.

While many people will be skeptical of such a friendship proposal, I demonstrate here both the attractiveness and workability of this queer/religious friendship via two different discussions. The first discussion is an explicitly affirmative discussion and concerns how this queer/religious friendship could and should work on behalf of many possible legal alternatives to majoritarian marriage.

The second discussion is a more cautionary one, in that it explores how “left/right friendships” can easily go bad and effectively end up replicating the kind of monistic family law politics that I have criticized in this Article. Specifically, in this second discussion, I caution against any future queer/religious friendship that replicates the friendship that recently budded in a federal district court in San Francisco between Theodore Olson and David Boies. As I discuss, the friendship between these two well-known, politically-affiliated lawyers, one Republican and the other Democratic, has been a jurispathic one, and is not the kind of friendship that I would want to result from this Article’s arguments. That being said, Olson and Boies’s friendship has also been jurisgenerative in some limited respects, and I will conclude this discussion by exploring the queer/religious potential that attaches to a set of alternative legal arguments put forward by the City of San Francisco when it petitioned to intervene in the Olson-Boies litigation.

In this Part, then, I will bring my discussion from the previous Parts “home” to argue a specific and plausible kind of friendship between American queers and the American radical religious right. Certainly, previous work by American queer theorists¹³⁷ has strongly echoed the critique made by the radically religious concerning the monopoly that state-enforced majoritarian marriage enjoys in many places. What has been missing, however, from this queer critique is a way to effectuate it via politics and law. Given that (missing) reality,

137. See *supra* notes 8–10.

in what follows I will explore how a joint queer/religious political and legal effort could effectively work to displace majoritarian marriage from the universe's center. I believe that this de-centering move would allow not only for a greater constellation of relationship-recognition schemes, but also a different kind of politics: namely, one where queers and the radically religious can collaborate with and befriend each other, and thereby open up a world of heretofore unknown possibilities that are only fitting for the itself-unprecedented Obama era.

A. "*Separate but Equal*" American Family Laws: *The More, The Queerer*

While there are many different political and social projects on which a queer/religious friendship of the sort that I suggest in this Article could work,¹³⁸ here I discuss one directly related to my critique in this Article (as well as my previous work)¹³⁹ of the ways in which gay and lesbian same-sex marriage advocates are promoting a peculiar understanding of the relationship between dignity and legal pluralism. This proposed project concerns the development of a legal infrastructure both permitting and encouraging of relationship-recognition alternatives that are separate from—and potentially better than¹⁴⁰—majoritarian marriage. In broader terms, such a project would work to much more deeply institute a culture of *legal pluralism* in American family law, as opposed to a culture of *legal monism*.

Of course, legal pluralism in the context of American family law is not a totally new development and, hence, neither is my broad suggestion here. After all, as American federalism has been understood and practiced, each of the fifty states retains a great deal of sovereign power over the family law which is legislated and enforced within each state's borders. Oddly enough, however, the parallels between the "separate but equal" jurisdiction over marriage and other aspects of family law that each of the fifty states enjoys,

138. See *supra* pp. 223–24.

139. See Redding, *supra* note 19.

140. See generally *id.*

and the “separate but equal” family law regimes which mixed-sex and same-sex couples enjoy *within* some states,¹⁴¹ has largely been overlooked in today’s controversies over same-sex marriage.

Other aspects of legal pluralism in the context of American family law have also been neglected in the current debates over same-sex marriage. For example, within the past fifteen years, Arizona, Arkansas, and Louisiana each have created within their own borders a non-majoritarian marital option that mixed-sex couples may choose when registering their relationships with the state. This alternative form of relationship-recognition has been denoted “covenant marriage” by all three states. Covenant marriages differ from non-covenant marriages, in that:

[C]ovenant spouses agree to restrict their pursuit of a “no-fault” divorce, and by virtue of the premarital counseling, do so knowingly and deliberately. . . . Thus, the covenant marriage law permits an immediate divorce for proof of fault by the other spouse in more circumstances than the law applicable to “standard” marriages. In contrast, in the absence of fault, the covenant marriage law requires significantly more time living separate and apart.¹⁴²

Covenant marriages, then, are both more difficult to enter because of their requirement of pre-marital counseling and to exit because of their restrictions on the availability of no-fault divorce.¹⁴³

Certainly, people can and have supported the availability of covenant marriages for non-religious reasons.¹⁴⁴ However, covenant marriages have had the most vibrant support from religious people and organizations, including some of the same ones that are opposed

141. For more discussion of the disconnects between the discussion of commonplace American forms of pluralism, such as federalism, and the discussion of other kinds of pluralism, see generally Redding, *supra* note 115.

142. Katherine Shaw Spaht & Symeon C. Symeonides, *Covenant Marriage and the Law of Conflicts of Laws*, 32 CREIGHTON L. REV. 1085, 1097–98 (1999). For more information on a specific covenant marriage law, including details of its passage and legal and other objections to the law, see Joel A. Nichols, *Louisiana’s Covenant Marriage Law: A First Step toward a More Robust Pluralism in Marriage and Divorce Law?*, 47 EMORY L.J. 929 (1998).

143. See generally Nichols, *supra* note 142.

144. *Id.* at 930.

to opening majoritarian marriage to same-sex couples.¹⁴⁵ Accordingly, the covenant marriage movement can be properly viewed as a product of a religious politics that is skeptical of the prevailing model of marriage available in the contemporary United States. As they have been elsewhere around the world then, religious people have been at the forefront of contemporary efforts in the United States to create agency-enhancing alternatives to majoritarian marriage as well.

Interestingly, radically religious people faced some of the same objections to their legally pluralistic family law proposals that others have faced when trying to counter advocates of legal monism—for example, mainstream gay and lesbian advocates of majoritarian marriage. In this respect, some of the major controversies over covenant marriage, as with same-sex relationship-recognition, coalesced around issues of nomenclature. In what follows, I will explore how the resolution—or, rather, ignoring—of such nomenclature “controversies” illustrates why a future queer/religious collaboration and friendship vis-à-vis family law pluralism might very well work.

With respect to its creation of a “special” kind of marriage, covenant marriage, at least initially, faced a certain amount of opposition from religious clergy and commentators.¹⁴⁶ For many, the basic concern appeared to be that the newly available covenant marriages might imply that non-covenantal marriages could or should be taken less seriously. For example, reacting to the idea of covenant marriage, one columnist remarked that she thought that it was “kind of insulting . . . to say that [all couples not in covenant marriages] are not really married, that they are in marriage lite, L-I-T-E.”¹⁴⁷ Motivated by the same concern, a Reverend James Lindsay was

145. See Scott L. Feld, Katherine Brown Rosier & Amy Manning, *Christian Right as Civil Right: Covenant Marriage and a Kinder, Gentler, Moral Conservatism*, 44 REV. RELIGIOUS RES. 173 (2002). For more recent covenant marriage activism, see *In Support of Senate Bill 168—Covenant Marriage: Hearing before the Judicial Proceedings Comm.*, 2008 Leg., 425th Sess. (Md. 2008) (statement of Peter Sprigg, Vice President for Policy, Family Research Council), available at <http://www.frc.org/get.cfm?i=T508B01>.

146. See Nichols, *supra* note 142, at 956 (describing religious and other opposition to covenant marriage’s nomenclature).

147. *Id.* at 956 (quoting *Covenant marriages: New Louisiana Law Makes It Harder to Divorce*, ABC NEWS NIGHTLINE, Transcript, Aug. 20, 1997).

quoted as saying: ““When I got married, it was me, my spouse, and God. Wasn’t that good enough?””¹⁴⁸ And somewhat similarly, a voice from the academy has worried about the implications of creating a “marital sub-status” off of which private entities might piggyback to offer, for example, less favorable insurance rates or reduced employee benefits to those who “only” have a non-covenantal marriage.¹⁴⁹

As interesting and thought-provoking as such nomenclature concerns about covenant marriage versus majoritarian marriage have been, they clearly have not succeeded in capturing the imagination of potential litigants, courts, or the public. While only a few jurisdictions have chosen to offer covenant marriage and, in the jurisdictions where covenant marriage is available, this kind of marriage is less prevalent than non-covenantal marriage,¹⁵⁰ the covenant marriage relationship-recognition regime and its potential implications have not faced anything like the kind of full-on frontal court assault that domestic partnership and civil union regimes have—especially with respect to their ostensibly denigrating non-“marital” choice of relationship nomenclature.¹⁵¹

The reasons for both the public and the law’s differential attitude about the nomenclature implications of *covenant* marriages versus

148. *Id.* (quoting Sandy Banisky, *Altering the Way to the Altar; License; Louisiana’s New ‘Covenant Marriage’ Option Forces Couples to Slow down and Act Cautiously. But So Far, Few are Choosing It*, BALT. SUN, Oct. 20, 1997, at 1A). Katharine Bartlett also reports that religious opposition to covenant marriage arose because of, for example, Episcopalian resistance to returning to any kind of “unworkable” fault-based divorce regime, Roman Catholic resistance to pre-marital counseling in which the prospect of divorce is mentioned, and evangelical worries that creating a two-tier system of marriage might create a third tier, namely, same-sex marriage. See Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 832 n.92 (1998) (citing Michael J. McManus, *Divorce is Difficult in ‘Covenant Marriage,’* FRESNO BEE, Nov. 29, 1997, at A13; Bruce Nolan, *Bishops Back off Covenant and Marriage*, NEW ORLEANS TIMES-PICAYUNE, Oct. 30, 1997, at A1).

149. See Bartlett, *supra* note 148, at 833–34.

150. Statistics that were collected shortly after the making available of covenant marriage in Louisiana suggest that very few people choose a covenant form of marriage. See Nichols, *supra* note 142, at 968–69. However, these are admittedly old statistics and are not necessarily representative of the situation today. More than a decade later, it may likely be the case that more people are aware of the availability of this marital option.

151. For a provocative and imaginative student note imagining what such a court challenge would look like, however, see Melissa Lawton, *The Constitutionality of Covenant Marriage Laws*, 66 FORDHAM L. REV. 2471, 2498–2505 (1998).

same-sex domestic partnerships and civil unions—especially in jurisdictions such as California and Connecticut where the differences between mixed-sex and same-sex relationship-recognition regimes were almost entirely ones of nomenclature—are clearly complicated. That being said, previous queer interest in and discussion of covenant marriage provides, I believe, significant insight into the social epistemology that has not only sustained the law’s ability to look the other way vis-à-vis covenant marriage’s potential implications, but also a social epistemology that could sustain a future queer/religious friendship.

In this respect, well-known queer legal activist and scholar Paula Ettelbrick has addressed the issue of covenant marriage in her scholarly work in a quite intriguing and also revealing manner. Proposing the creation of a “continuum of family recognition options,”¹⁵² Ettelbrick has written: “I present the option of covenant marriage primarily to illustrate the point that a state may adopt co-existing forms of marriage. . . . In the interest of equality, covenant marriage, of course, should be open to same-sex couples, *though I am quite happy to leave it as is.*”¹⁵³

While Ettelbrick’s comments here as to the *mixed-sex* bona fides of covenant marriage are at one level humorously snarky, at a deeper level they are also entirely suggestive of why covenant marriage (nomenclature) has existed with so little legal or social scrutiny. As I see it, Ettelbrick is divining and expressing a widespread social sentiment and epistemology which might be paraphrased as follows: “Heterosexuals can have covenant marriage to themselves because it works for (some of) them; gays, lesbians, and queers are different than heterosexuals and need different relationship-recognition models and so the availability of covenant marriage shouldn’t matter to them.” In other words: different strokes are for different folks.

Clearly then, in addition to implicitly suggesting here how covenant marriage escapes (as it does) any calamitous charges of “separate but equal,” Ettelbrick is also endorsing some sort of radically pluralistic family law regime. This endorsement

152. Paula L. Ettelbrick, *Avoiding a Collision Course in Lesbian and Gay Family Advocacy*, 17 N.Y.L. SCH. J. HUM. RTS. 753, 758 (2000).

153. *Id.* at 758–59 (emphasis added).

demonstrates some extant queer support for family law pluralism in the United States. And, as discussed, covenant marriage itself provides evidence of support for family law pluralism from the radically religious as well. Ultimately then, in her discussion of “special” laws for all “special” peoples—whether religious or queer—Ettelbrick suggests a social epistemology and mechanics that could very well make a queer/religious friendship viable.

Moreover, Ettelbrick here is not alone in resisting¹⁵⁴ the simplistic hierarchy that so many mainstream gay and lesbian activists, commentators, and judges have wanted to construct for same-sex relationship-recognition regimes (e.g., “domestic partnership”) versus mixed-sex relationship-recognition regimes (i.e., marriage). In doing so, she writes in a queer tradition of skepticism toward the idea of universalistic frameworks involving either tiers¹⁵⁵ or centers, from which either authority or prestige necessarily declines or dissipates in any predictable fashion. Not surprisingly, such a queer tradition does not view majoritarian marriage in a particularly worshipful light. For example, Nancy Polikoff’s work,¹⁵⁶ in which Polikoff develops an approach to family law that she calls “valuing all families,”¹⁵⁷ is also important and relevant queer work. Polikoff’s approach recognizes that:

154. I say “resisting” here instead of somewhat stronger “rejecting” because there is some ambivalence in Ettelbrick’s discussion. And, indeed, while there is much desirable in Ettelbrick’s proposal to de-center majoritarian marriage in future family law, some of her discussion seems to undermine this goal and, as a result, seems unnecessary and/or questionable. For example, I believe that Ettelbrick concedes too easily the “deep cultural meaning associated with marriage” and its “potent and strongly symbolic” character. *Id.* Given this “deep culture meaning,” Ettelbrick strongly believes that “traditional marriage” should be open to same-sex couples. *Id.* at 759. However, that being the case, she is (confusingly) snarky about the prospect of same-sex couples entering “covenant marriages.” *See supra* note 152 and accompanying text.

155. For this reason, I resist using Joel Nichols’s terminology of “multi-tiered” marriage in this Article. *See* Joel A. Nichols, *Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community*, 40 VAND. J. TRANSNAT’L L. 135 (2007). I believe that such terminology too strongly suggests a vertical, hierarchical ordering of family law regimes, whereas I am interested in how we can think of legal pluralism in more horizontal terms.

156. The fullest statement of Polikoff’s beliefs can be found in her recent book from 2008. *See* POLIKOFF, *supra* note 73.

157. *Id.* at 5.

In every area of law that matters to same-sex couples, such as healthcare decision making, government and employee benefits, and the right to raise children, [non-marital] laws already exist in some places that could form the basis for just family policies for those who can't marry or enter civil unions or register their domestic partnerships, as well as for those who don't want to or who simply don't.¹⁵⁸

For Polikoff then, such non-marriage-premised laws could be increased in number, as an alternative to merely pursuing and further entrenching the current practice of handing out healthcare, employment, and parental rights solely through the monopolistic institution of (majoritarian) marriage—whether mixed-sex or same-sex.¹⁵⁹

The work of Polikoff, Ettelbrick, and other queer legal theorists and activists,¹⁶⁰ suggests that majoritarian marriage should be taken off of its pedestal, and more pluralistic relationship-recognition schemes be instituted. Ultimately, then, both the queer and the

158. *Id.* at 9.

159. *See id.*

160. On the “right” side of the political spectrum, economist Douglas Allen has similarly argued that: “[W]hen different human relationships fall under a ‘one size fits all’ law, the result is a bad fit for everyone. Alternations to heterosexual institutions resulting from [issues] arising in homosexual relations will have profound effects on heterosexual marriage, and heterosexual pressures on marriage law will likely be inappropriate for homosexual couples.” Douglas W. Allen, *An Economic Assessment of Same-Sex Marriage Laws*, 29 HARV. J.L. & PUB. POL’Y 949, 954 (2006). Allen proceeds to argue the appropriateness of two different relationship-recognition regimes, one for mixed-sex couples and another for same-sex couples. And indeed, while Allen concludes his piece by suggesting only these *two* different relationship-recognition regimes, namely “heterosexual marriage” and “homosexual marriage,” *see id.* at 980, his comments elsewhere suggest that he might actually favor two different regimes for homosexual themselves—one for gay male couples and another for lesbian female couples—and, hence, *three* different relationship-recognition regimes overall. *See id.* at 959.

My crude description here of Allen’s politics as “right” leaning does not come from his policy prescriptions, some of which I endorse, but on his teleological utilizations elsewhere in his writing of social Darwinian/economic efficiency thinking to arrive at conclusions such as the following:

Poorly designed laws lead to lobbying efforts and appeals that result either in successful regulation of marriage or in unsuccessful marriages, which in turn lead to low fertility, low quality off-spring, and ultimately a decline in the society. Either way, the Darwinian conclusion is inevitable: the general institutions of marriage we observe today are efficient, as they are the result of centuries of evolution.

Id. at 956.

radically religious in the United States share in a profound skepticism of, not only majoritarian marriage, but also of the legal monism that allows marriage to be majoritarian in the first place. This is shared ground where friendship could bloom. In comparison, mainstream gay and lesbian advocacy of legal monism seems distinctly aggressive, hostile, and unfriendly to queer interests. While it is possible that mainstream gays and lesbians could be friends with queers in the future, this would require a radical revision of contemporary gay and lesbian politics. Unfortunately, as the next section discusses, the gay and lesbian establishment's present political and legal imagination is only as visionary as looking in the mirror usually proves to be. It is no wonder then that gays and lesbians have not been Obama's favorite people.

B. The Don'ts and Dos of Queer/Religious Friendship: A Cautionary Note on Faux Amis

In May 2009, two same-sex couples filed a Complaint in a San Francisco federal district court, challenging the constitutionality of California's Proposition 8. This case has come to be known as *Perry v. Schwarzenegger*.¹⁶¹ The legal team representing these two couples who wished to get married in the State of California but were unable to because of Proposition 8 included two well-known attorneys, Theodore Olson and David Boies.¹⁶² Olson is a well-known conservative attorney, having recently served as United States Solicitor General from 2001 to 2004, at the behest of former President George W. Bush.¹⁶³ Prior to this appointment, Olson achieved national prominence in his role representing then-presidential candidate George W. Bush before the Supreme Court in *Bush v. Gore*.¹⁶⁴ His legal adversary in that case, but now co-counsel

161. *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010). For more information about the plaintiffs and this case, see American Foundation for Equal Rights, *Perry v. Schwarzenegger*, <http://www.equalrightsfoundation.org/our-work/perry-v-schwarzenegger/> (last visited Apr. 13, 2010).

162. See American Foundation for Equal Rights, *supra* note 161.

163. See Gibson Dunn, Theodore B. Olson, <http://www.gibsondunn.com/lawyers/tolson> (last visited Sept. 1, 2010).

164. *Bush v. Gore*, 531 U.S. 98 (2000).

in the California Proposition 8 litigation, was David Boies. Boies, in addition to representing then-presidential candidate Albert Gore in *Bush v. Gore*, is otherwise well-known for his efforts on behalf of the Democratic Party.¹⁶⁵

In this concluding section, I want to caution against *faux amis*, or the “false friends” that the Olson-Boies partnership represents vis-à-vis the particular kind of queer/religious friendship that I propose in this Article. The decision by Olson and Boies to take on the representation of their gay and lesbian plaintiffs’ legal challenge to Proposition 8 came as an immense surprise to many people. Given these two lawyers’ famous face-off in the hotly contested *Bush v. Gore*, and because each is commonly perceived as a lead representative of “the Right” and “the Left,”¹⁶⁶ respectively, Olson and Boies were deemed unlikely collaborators on almost any issue, much less that of same-sex marriage. While this collaboration might thus appear to be the kind of non-intuitive “left/right” friendship that I am proposing, as I argue in this concluding and cautionary section, the Olson-Boies partnership is a false cognate—or, as a French grammarian would say, a *faux ami*—to what I am proposing in this Article. Judith Butler describes “law’s uncanny capacity to produce only those rebellions that it can guarantee will—out of fidelity—defeat themselves,”¹⁶⁷ and here I would like to forestall, if perhaps only temporarily, the defeat that my rebellious friendship poses to “the law” of existing American sexuality politics by highlighting how this rebellion would *certainly* suffer defeat if it was confused with the Olson-Boies friendship. Ultimately, I believe that the Olson-Boies friendship is less an “unlikely union,”¹⁶⁸ but rather the sort of natural alliance which comes about between two persons/positions that see eye-to-eye vis-à-vis legal monism.

165. See Eve Conant, *Gay Marriage: The Case from the Left*, NEWSWEEK, Jan. 11, 2010, <http://newsweek.com/id/230316>.

166. See, e.g., *id.* (stating “[t]heir teamwork math is simple: Olson is the conservative and Boies is the liberal”).

167. BUTLER, *supra* note 21, at 144.

168. See Mitch Potter, *Same-Sex Legal Team an Unlikely Union*, TORONTO STAR, Jan. 12, 2010, available at <http://www.thestar.com/news/world/article/749461-same-sex-legal-team-an-unlikely-union>.

In what follows, I would like to make this point in a somewhat roundabout way. On that note, much is made of “plaintiff choice” in high-profile, groundbreaking, impact litigation cases. As Mary Bonauto of Lambda Legal has explained: “You want people who can withstand the rigors of a multiyear process . . . [the] kind of people you wouldn’t mind sitting in a room and chatting with, no matter who you are. We are always concerned about people who are overeager to be plaintiffs, and people who are huge activists.”¹⁶⁹ Here, I would like to reverse the usual skeptical gaze cast by impact-litigation attorneys toward “huge activist” plaintiffs, and ask instead: Who in the gay, lesbian, or queer communities got to choose Olson and Boies to argue on the behalf of non-heterosexuals’ “dignity” in front of a federal district court judge in San Francisco? The answer, as the following discussion suggests, is that Olson and Boies picked themselves, in the process becoming the “huge activist” plaintiffs that Bonauto worries about.¹⁷⁰

And, indeed, there has been much to worry about in Olson and Boies’s legal strategies. In their Complaint challenging Proposition 8, Olson and Boies asked, on behalf of their couple-clients, for a preliminary injunction enjoining enforcement of Proposition 8.¹⁷¹ In arguing for this provisional, pre-trial remedy, the Complaint asserted that plaintiffs were experiencing “severe humiliation, emotional distress, pain, suffering, psychological harm, and stigma caused by the inability to marry the ones they love and have society accord their unions and their families the same respect and dignity enjoyed by opposite-sex unions and families.”¹⁷² Moreover, the Complaint continued, lest anyone forget what this marital respect and dignity

169. Margaret Talbot, *A Risky Proposal: Is It Too Soon to Petition the Supreme Court on Gay Marriage?*, NEW YORKER, Jan. 18, 2010, available at http://www.newyorker.com/reporting/2010/01/18/100118fa_fact_talbot.

170. Nan Hunter has remarked: “I fear that their [Olson and Boies’s] strategy is: Ted Olson will speak, Anthony Kennedy will listen, and the earth will move. I hope I’m wrong about this—they’re excellent lawyers—but I fear, frankly, that there’s more ego than analysis in [this].” *Id.*

171. Complaint for Declaratory, Injunctive, or Other Relief at 10, *Perry v. Schwarzenegger*, No. 09-CV-02292 (N.D. Cal. May 22, 2009).

172. *Id.*

entails, one should not, because it is clear that marriage “enjoys a long history and uniform recognition.”¹⁷³

Ignoring for the moment the public theatrics orchestrated by this litigation, as well as the legalistic requirements that any successful request for a preliminary injunction must satisfy and the choices in language that those requirements invite,¹⁷⁴ and taking the Hydra-headed claim of “severe humiliation, emotional distress, pain, suffering, psychological harm, and stigma” at face value,¹⁷⁵ one has to wonder who exactly feels this way about being denied merely the status of “marriage” as opposed to its material and legal benefits (as California’s “separate but equal” domestic partnership system provides)? Certainly, it seems unlikely that the plaintiffs themselves—all of them presently unmarried, and only one of them previously legally married—can attest to this.¹⁷⁶

If there are experiential problems with ascribing this intense—indeed, unbearable—suffering to the plaintiffs themselves in this case, there are far fewer problems with ascribing such pain to the lawyers who actually drafted this Complaint. And, in this respect, and given the intense scrutiny that the institution of marriage is currently under in part due to this federal case, one cannot help but notice that Olson and Boies both have repeatedly enjoyed the benefits of this institution. Moreover, not only have Olson and Boies both enjoyed the legal privilege of entering into marriage once, but so have they

173. *Id.* at 8.

174. I am referring here to the requirement that the party moving for a preliminary injunction show some chance of “irreparable injury” for the injunction to be issued. *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (“The Court has stated that ‘the basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies. . . .’” (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506–07 (1959))).

175. *See supra* note 171. Presumably one should take the claim at face value, given the possibility of Civil Procedure Rule 11 sanctions in this and any other federal cases for the act of “presenting to [a] court any pleading, written motion, or other paper” containing “factual contentions [without] evidentiary support.” FED. R. CIV. P. 11(b)(3).

176. Neither of the two male plaintiffs in this case seem to have been married before. *See* Complaint, *supra* note 171, at 2–7. However, the female plaintiffs got married to each other in 2004 in San Francisco, only to see their marriage later invalidated by the California Supreme Court when the Court ruled that San Francisco Mayor Gavin Newsom was acting without legal authority in issuing marriage licenses to same-sex couples during that time. *Id.* Prior to this, one of these women was married to a man. *See* Richard C. Paddock, *2 Couples Make Case for Gay Rights in Big Trial*, AOL NEWS, Jan. 12, 2010, <http://www.aolnews.com/article/2-couples-make-case-for-gay-rights-in-landmark-trial/19312894>.

enjoyed the legal privilege of engaging in re-marriage, re-re-marriage and, in the case of Olson, re-re-re-marriage. Olson is presently married to his fourth wife, after divorcing two previous ones and suffering the loss of another in the 9/11 attack on Washington, D.C.¹⁷⁷ Boies is presently married to his third wife, after divorcing two previous ones.¹⁷⁸

Given all this, I believe that one can only truly begin to understand and appreciate the particularly strong—indeed, unbearable—injury resulting from lack of access to majoritarian marriage that Olson and Boies’s litigation strategy articulates by understanding the personal biographies of these two lawyers themselves. Their extensive familiarity with the institution of marriage clearly suggests why they decided to become such “huge activist” plaintiffs in this case. It is less clear whether their particular goal in this litigation is some sort of generalized goal of proselytizing majoritarian marriage, or whether their goal is a more defensive one of preserving the future viability and availability of marriage (for themselves) by forestalling impending moves to abolish the institution altogether.¹⁷⁹ However, whatever the case may be, I believe that it is fair to conclude that what we ultimately have here is most definitely not a meaningful “left/right” coalition but, rather, a joint effort by two men, both of whom apparently love majoritarian marriage, to preserve the viability and future availability of this majoritarian institution for themselves and/or others.

177. See Amy Argetsinger & Roxanne Roberts, *Napa Nuptials for Olson and His Lady*, WASH. POST, Oct. 22, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/22/AR2006102200052.html>.

178. See Anna Schneider-Mayerson, *The Boies Family*, N.Y. OBSERVER, Dec. 18, 2006, at 8 (describing how Boies met and when he separated from his previous two wives); see also Mitch Frank & Daniel Okrent, *Get Me Boies!*, TIME, Dec. 25, 2000, available at <http://www.time.com/time/magazine/article/0,9171,998841-1,00.html>.

179. Both the California Supreme Court and the Massachusetts Supreme Judicial Court contemplated the possible remedy of abolishing civil marriage for everyone, instead of opening up civil marriage to same-sex couples, in addition to mixed-sex couples. See *In re Marriage Cases*, 183 P.3d 384, 425–26 (Cal. 2008); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (contemplating yet rejecting the potential remedy of marriage abolishment). Although, both courts chose the latter remedy, one can envision future state high courts more seriously contemplating the former remedy, especially after witnessing all of the ruckus that has resulted in other states where same-sex “marriage” has been allowed.

As dubious as the motivation behind Olson and Boies's particular partnership is, it is also difficult to view positively the broader impact of their work. Certainly, it is nearly impossible to describe their work as anything like "building a coalition" (much less a friendly and welcoming one). While both lawyers have spoken publicly about their larger goal of gay and lesbian equality that they hope this case will facilitate—a goal larger than the specific aim of obtaining marriage licenses for the four plaintiffs the two lawyers specifically represent¹⁸⁰—Olson and Boies have refrained from any serious effort to engage the talents of those who have experience working toward this larger goal. In this respect, in addition to publicly exchanging epistolary barbs with organizations and persons who have this experience,¹⁸¹ Olson and Boies legally opposed an effort by the American Civil Liberties Union ("ACLU"), Lambda Legal, and the National Center for Lesbian Rights ("NCLR") to formally intervene in the federal district court case, despite these organizations' extensive litigation experience vis-à-vis the issues raised by the

180. Olson has described this case as a "teaching opportunity, so people will listen to us talk about the importance of treating people with dignity and respect and equality and affection and love and to stop discriminating against people on the basis of sexual orientation." Talbot, *supra* note 169. Boies has remarked:

Proposition 8 clearly and fundamentally violates the freedoms guaranteed to all of us by the Constitution . . . Every American has a right to full equality under the law. Same sex couples are entitled to the same marriage rights as straight couples. Any alternative is separate and unequal and relegates gays and lesbians to a second class status.

Press Release, American Foundation for Equal Rights, Prop. 8 Challenged in Federal Court; Ted Olson & David Boies to Argue Case (May 27, 2009), *available at* http://www.equalrightsfoundation.org/wp-content/uploads/2009/12/2009.05.27_AFER_Case_Announce.pdf.

181. *See generally* Letter from Chad H. Griffin, Board President, American Foundation for Equal Rights, to Kate Kendell et al., Executive Dir., Nat'l Ctr. for Lesbian Rights (July 8, 2009), *available at* <http://www.towleroad.com/2009/07/pushback-from-olsonboies-as-lgbt-groups-file-to-intervene.html>. In this letter, Griffin writes:

[G]iven [the American Foundation for Equal Rights's] willingness to collaborate with you, and your efforts to undercut this case, we were surprised and disappointed when we became aware of your desire to intervene. You have unrelentingly and unequivocally acted to undermine this case even before it was filed. In light of this, it is inconceivable that you would zealously and effectively litigate this case if you were successful in intervening. Therefore, we will vigorously oppose any motion to intervene.

Id.

case.¹⁸² Olson has stated that these organizations' assistance would have prevented a "unified, controlled, consistent, on-message approach."¹⁸³ In this respect, when Chad Griffin, one of the key players in organizing and finding financing for the Olson-Boies litigation,¹⁸⁴ expressed that he wanted "the [kind of] lawyers [for this case that] Microsoft [would] want, not the lawyers who are going to do it pro bono,¹⁸⁵ he seems to have gotten what he wanted."

The litigation effort by Olson and Boies, then, does not represent a new coalition of interests—much less a new political friendship—of any significance. Olson and Boies are best described as two married men working to preserve a majoritarian institution that they enjoy and have benefited from and presumably want to enjoy and benefit from in the future, rather than two men who have crossed ideological and political fault-lines to offer a new alignment, a new imagination, or new possibilities.

I believe that queers can do much better than Olson and Boies, or gay and lesbian same-sex marriage advocates themselves. Whereas Olson and Boies do not want to seriously engage even with their gay and lesbian friends—keeping them at arm's length as ambivalent *amici* rather than inviting them in as co-plaintiffs¹⁸⁶—and gay and lesbian same-sex marriage advocates are committed to their own form of monastic monism, the collaborative approach I suggest in

182. *See id.* As James Esseks, co-director of the ACLU's "Lesbian Gay Bisexual Transgender Project" described this litigation experience and the motivation behind these organizations' application to intervene: "The questions posed by the court are exactly the questions our organizations have been addressing for years in state and federal courts all across the country." Press Release, American Civil Liberties Union, LGBT Community Groups Seek to Intervene in Federal Challenge to Proposition 8 (July 9, 2009), available at <http://www.aclu.org/lgbt-rights/lgbt-community-groups-seek-intervene-federal-challenge-proposition-8>.

183. Talbot, *supra* note 169.

184. *Id.* (describing Griffin's role in organizing and helping find financing for the Olson-Boies litigation).

185. *Id.*

186. *See* Letter from Chad H. Griffin, *supra* note 181. Writing to these organizations, Griffin stated:

[r]egrettably, you embarked on a public and private campaign to undermine our efforts to vindicate the federal constitutional rights of California's gay and lesbian residents. We nevertheless remain willing to work closely with you at all stages of this case and welcome your continued participation in the district court proceedings as an *amicus curiae*. But we cannot and will not support your motion to intervene.

Id.

this Article is one that has queers re-interrogating their “others,” reaching out to their ostensible enemies, and making new religious friends. It is an approach for—as the epigraph that opens this Article suggests—the Obama era.

How to even begin with this approach is difficult to imagine, however. In closing this Part, I would like to sketch—very briefly—an opening for queer/religious friendship that Olson and Boies’s otherwise jurisprudential litigation efforts have generated. In doing so, I will make use of the arguments put forth by another “frenemy” of Olson and Boies, namely the City of San Francisco, which also sought to intervene into this federal case on the plaintiffs’ side.¹⁸⁷ Olson and Boies opposed San Francisco’s intervention application, though less strenuously than with respect to the attempted ACLU/Lambda Legal/NCLR intervention.¹⁸⁸ However, Olson and Boies’s effort to block out San Francisco and monopolize this litigation, as well as the meaning of “marriage,” “dignity,” and other key terms of the terrain over which the litigation is being fought, was unsuccessful and the federal district court judge in *Perry v. Schwarzenegger* permitted the City’s intervention.¹⁸⁹

Given the potential conclusions that the City of San Francisco’s arguments in support of its intervention lead toward, one can perhaps understand why Olson and Boies were opposed to the City’s direct involvement in the case. Indeed, while the City of San Francisco petitioned to intervene *in favor* of same-sex “marriage” rights,¹⁹⁰ some of the arguments that the City deployed in favor of its intervention just as readily lend themselves to queer/religious legal

187. See Notice of Motion and Motion to Intervene as Party Plaintiff; Memorandum of Points and Authorities at 1, *Perry v. Schwarzenegger*, No. 09-CV-2292 (N.D. Cal. July 23, 2009).

188. See Plaintiffs’ Opposition to Proposed Intervenors’ Motions to Intervene at 16, *Perry v. Schwarzenegger*, No. 09-CV-2292 (N.D. Cal. Aug. 7, 2009) (“Plaintiffs oppose any further intervention in their case. However, if the Court is inclined to permit any intervention, Plaintiffs respectfully request that the Court permit only the City to intervene and strictly limit its participation to prevent delay and ensure a fair and efficient proceeding for Plaintiffs.”).

189. *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 n.1 (9th Cir. 2009).

190. See Notice of Motion and Motion to Intervene as Party Plaintiff; Memorandum of Points and Authorities at 1, *Perry v. Schwarzenegger*, No. 09-CV-2292 (N.D. Cal. July 23, 2009).

pluralism goals. The City of San Francisco's relevant legal arguments in this respect were as follows:

San Francisco bears the financial burden of providing health care, welfare benefits, and other social services to adults and children who become dependent on public resources when a relationship breaks down. By denying same-sex couples the right to marry, Prop. 8 makes it less likely that such couples will formalize their relationships in a way that imposes obligations of support upon which adults and children may rely. Studies show that same-sex couples are significantly less likely to enter into domestic partnerships and civil unions, which lack the full social and governmental sanction and status of marriage, than they are to enter into marriage. Notwithstanding California's domestic partnership law, its denial of marriage to same-sex couples increases the likelihood that San Francisco's citizens will depend on local [public] health and welfare programs.¹⁹¹

One might wonder what in this pro-intervention legal argument gestures toward queer friendship with radical religiosity or legal pluralism. One can begin to see this, I believe, by looking back almost forty years to one of the most famous Supreme Court cases pertaining to religious exceptionalism, that of *Wisconsin v. Yoder*.¹⁹²

This well-known case concerned the constitutionality of the State of Wisconsin's criminal prosecution of three Amish parents for refusing to send their children, aged fourteen and fifteen, to school.¹⁹³ At the time, Wisconsin statutory law required children to be sent to public or private school until the age of sixteen.¹⁹⁴ When the parents refused to comply with this law, they were tried, convicted, and each fined five dollars.¹⁹⁵ In response, they brought a constitutional challenge to Wisconsin's compulsory school attendance law, alleging that it violated their First Amendment rights to practice their

191. Complaint in Intervention for Declaratory, Injunctive, or Other Relief at 6, *Perry v. Schwarzenegger*, No. 09-CV-2292 (N.D. Cal. Aug. 20, 2009).

192. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

193. *Id.* at 207.

194. *Id.*

195. *Id.* at 208.

particular Amish “religion.”¹⁹⁶ In response, the U.S. Supreme Court held that “the First [] Amendment[] prevent[s] the State from compelling respondents to cause their children to attend formal high school to age 16.”¹⁹⁷

For my purposes here, more important than the Court’s ultimate holding in this case is the Court’s characterization of the separateness and material independence of the religious communities implicated in this case. Wrote the Court:

The State attacks respondents’ position as one fostering ‘ignorance’ from which the child must be protected by the State. No one can question the State’s duty to protect children from ignorance but this argument does not square with the facts disclosed in the record. Whatever their idiosyncrasies as seen by the majority, this record strongly shows that the Amish community has been a highly successful social unit within our society, even if apart from the conventional ‘mainstream.’ Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms. The Congress itself recognized their self-sufficiency by authorizing exemption of such groups as the Amish from the obligation to pay social security taxes.

....

... [T]here [is not] any showing that upon leaving the Amish community Amish children, with their practical agricultural training and habits of industry and self-reliance, would become burdens on society because of educational short-comings.

....

... Indeed, the Amish communities singularly parallel and reflect many of the virtues of [Thomas] Jefferson’s ideal of the ‘sturdy yeoman’ who would form the basis of what he

196. For the facts of this case, see *id.* at 207–09. Specifically, two of the parents belonged to the “Old Order Amish religion” and one belonged to the “Conservative Amish Mennonite Church.” *Id.* at 207.

197. *Id.* at 234.

considered as the ideal of a democratic society. Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage.¹⁹⁸

The Court's positive characterization of the plaintiffs as belonging to communities that do not burden the material resources of the state parallels and anticipates the City of San Francisco's positive characterization of marriage as an institution that allows one to extricate one's self from dependency on the state's welfare programs. In other words, in the same way that the Supreme Court in *Yoder* seemed to say that the facilitation of non-state religious communal life is a good thing because members of such communities do not utilize social welfare programs, the City of San Francisco in its intervention petition in *Perry v. Schwarzenegger* seems to be saying that marital communities/couples are good because members of such communities/couples do not utilize social welfare programs.

The City of San Francisco's unconscious alignment with historical religious separatist movements is an intriguing—and potentially quite queer-friendly¹⁹⁹—development. Certainly, it is the case that the City of San Francisco is using modalities of argument historically associated with legal separatism and legal pluralism in favor of the kind of legal monism that Olson and Boies and other same-sex marriage advocates are pursuing to queers' detriment. However, that being said, it is arguably the case that the legal result that is actually the most consistent with the City of San Francisco's legal arguments is not state-premised “marriage” for everyone, regardless of its fit or appropriateness or desirability, but rather a type of legal regime that enables all sorts of communities (including all sorts of couples) to effectively structure their intimate and other lives in an empowered

198. *Id.* at 222, 224–26.

199. The City of San Francisco's legal arguments are queer-friendly in ways different from their friendliness towards legal pluralism as well. For example, in these arguments' reliance on social scientific inquiry generally, and economic analyses specifically, they are arguably less imperial and less normalizing than those deployed by other contemporary gay and lesbian same-sex marriage advocates. Indeed, the City's economic analyses as to the (detrimental) economic impact of not recognizing same-sex marriage are entirely subject to revision in the future, especially as more eyes begin to examine the enormous dollar amount of social subsidies that majoritarian “special” interests have been able to legislatively embed in majoritarian marriage over time.

way, i.e., one that does not require them to submit to the state in order to sustain themselves economically, socially, or legally. Arguably, this would require that the state not quash these communities/couples, but also not make it difficult for each community/couple to flourish in its own way, for its own reasons, and on its own terms.

This type of “San Francisco legal regime” might be akin to a private ordering regime, though there are other possibilities as well. What is fairly clear, however, is that such a legal regime would be pluralistic—not monistic—and would thereby have space for queers, the Amish, and other radically religious people too. This is a queer/religious legal regime for the Obama era, and beyond.

CONCLUSION

In the contemporary American political lexicon, “fundamentally” religious people who do not behave—whether orthodox, evangelical, Mormon, Mennonite, Taliban, or otherwise—are judged just as dangerous as sexually deviant people and their uncooperative desires. In other words, deviant religiosity and deviant sexuality are each “queer” in their own way. Given this basic (if abstract) similarity, it would seem that both deviations might have much to gain by working with each other to moderate the pernicious effects of a power-jealous and norm-domineering state.

Accordingly, in this Article, I have argued the worth of queers exploring a future political friendship with the radically religious. I have also explored with some detail one agenda item—namely, the adoption of a more pluralistic administration of family law—with which to initiate this exploration. Of course, who exactly would want to be friends with whom remains to be seen, and it is not the suggestion of this Article that all queers and all radically religious people will be best friends forever. Both queer and religious interests are fissiparous and always evolving, and one can never assume alignment either within or between these groupings. That being said, the assumption *has been* that queer folk and non-mainstream religious folk (e.g., Mormons, the overly-orthodox, etc.) are already and will always be enemies. In this Article, I suggest that this assumption is facile, especially in the current political environment.

In some respects, clearly, my argument here is a revolutionary one, especially to the extent that the queer/religious friendship that it suggests can only work to deepen an existing tension between contemporary queer and gay and lesbian activism. In other respects, however, the argument is staid and conciliatory—though certainly not unprincipled or un-theorized—especially to the extent that it suggests that the pluralistic family law and relationship-recognition regimes that have recently emerged in California and other states, and which are commonplace in countries all over the world, are phenomena that hold real promise for the realization of regularly-recited liberal values, including “dignity.”

However one characterizes it, my hope is that the argument I make in this Article will cause some to consider real alternatives to the corrosive and unfriendly politics surrounding same-sex marriage presently. Or so one can—following Obama—only hope.