

THIS IS NOT YOUR FATHER'S AUTONOMY: LESBIAN AND GAY RIGHTS FROM A FEMINIST AND RELATIONAL PERSPECTIVE

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I. INTRODUCTION

The arguments on behalf of same-sex marriage, both inside and outside of courtrooms, have been grounded in notions of equality and autonomy. The equality argument is relatively straightforward and is based on the idea that as long as the state awards benefits and privileges on the basis of marital status, it should treat committed same-sex relationships in the same way it does opposite-sex relationships.

The autonomy argument is a little more complicated. We tend in this country to associate autonomy with leaving individuals alone to pursue their life goals as they deem best.¹ By requesting that their relationships be recognized by the state, however, lesbians and gay men are not asking that it leave them alone; instead, they are asking for state recognition (and thus regulation) of their relationships. Supporters of same-sex marriage, therefore, are confronted with the challenge of articulating a vision of autonomy that places on the state an *affirmative* obligation to recognize committed same-sex relationships.²

I argue in this Article that feminist theory, and in particular the relational conception of autonomy articulated by feminist theorists such as Marilyn Friedman, can be of considerable assistance to supporters of same-sex marriage in articulating an alternative understanding of autonomy that goes beyond the need to leave individuals alone. I begin in Part II with an exploration of Friedman's feminist conception of autonomy as set

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¹ See *infra* notes 139–145 and accompanying text.

² It is true that once a relationship is defined as marital, the Constitution limits the ability of the government to interfere with that relationship. See *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965). However, the argument that the state has an initial obligation to *recognize* certain relationships is not, at its core, an argument about the need to leave individuals alone.

forth in her recent book *Autonomy, Gender, Politics*.³ I pay particularly close attention to the role that emotions, social contexts, and relationships play in Friedman's understanding of autonomy.⁴ I focus on these three elements because I believe that they play important roles in the understanding of autonomy held by many lesbians and gay men today.

In Part III, I provide a brief overview of the history of the gay rights movement. I divide that history into three stages. In the first stage, during the 1950s and 1960s, the movement's primary goal was to protect the private lives of lesbians and gay men so that they could (privately) express their sexuality without fear of harassment or prosecution by the state and its agents.⁵ During the second stage, roughly from 1970 until about the mid-1990s, the movement sought, in addition to protecting the privacy interests of lesbians and gay men, to achieve for them a modicum of equality in the public sphere.⁶ Despite the efforts to supplement privacy claims with equality claims, the gay rights movement, during the second stage, nonetheless continued to highlight and reinforce the distinction between the private and public spheres. The goal through the second stage, in other words, was to keep the state out of the business of regulating the personal relationships and lives of lesbians and gay men in the private sphere while seeking to have the state serve as a guarantor of equality in the public sphere.⁷

Matters became more complicated beginning around the mid-1990s when the gay rights movement started to make autonomy-based (as well as equality-based) arguments to support its demand that the state recognize (and thus regulate) the intimate and familial relationships of lesbians and gay men.⁸ During this third (and current) stage of the movement, a conception of autonomy that emphasizes exclusively the obligations of the state not to interfere with the private relationships and lives of individuals—one, in other words, that focuses only on the right to be left alone—has proven insufficient to support the position that the state has an affirmative obligation to recognize the intimate and familial relationships of lesbians and gay men.⁹ It is during this third stage of the gay rights movement that many in the lesbian and gay community (though by no means all) began to argue that the opportunity to participate in state-sanctioned and state-regulated relationships is necessary for individuals to lead free and autonomous lives.

This argument was captured (in an extremely pithy fashion) by a supporter of same-sex marriage who, at a rally outside of San Francisco's City

³ MARILYN FRIEDMAN, *AUTONOMY, GENDER, POLITICS* (2003); *see also infra* notes 26–75.

⁴ *See infra* notes 46–75 and accompanying text.

⁵ *See infra* notes 76–84 and accompanying text.

⁶ *See infra* notes 85–87 and accompanying text.

⁷ *See id.*

⁸ *See id.*

⁹ *See infra* notes 88–91 and accompanying text.

Hall in 2004,¹⁰ was observed holding a sign stating “MARRIAGE = FREEDOM.”¹¹ I will several times in the Article return to this slogan because I think it encapsulates the way in which many supporters of same-sex marriage in the lesbian and gay community conceive of the issue.¹²

After providing a brief historical overview of the gay rights movement, I return in Part IV to Friedman’s work to explore how her feminist conception of autonomy provides a helpful theoretical framework that supports the contemporary demands on the state made by supporters of same-sex marriage.¹³

My attempt to ground autonomy-based arguments on behalf of same-sex marriage in feminist theory may strike some as odd given that many feminists are critical of *both* autonomy and marriage. I do not in this Article defend the concept of autonomy from the criticisms of some feminists.¹⁴ In-

¹⁰ In February 2004, San Francisco’s City Hall became a rallying place for both supporters and opponents of same-sex marriage after the city announced that it would begin issuing marriage licenses to same-sex couples. During the following four weeks, the city issued over 4000 licenses to lesbian and gay couples. See *California Suits on Gay Marriage To Be Combined for Single Trial*, N.Y. TIMES, June 13, 2004, at A1. The city was eventually ordered by the California Supreme Court to cease issuing the licenses. See Dean E. Murphy, *San Francisco Forced To Halt Gay Marriages*, N.Y. TIMES, Mar. 11, 2004, at A1. The California Supreme Court later held that the city inappropriately issued the licenses and that they have no legal validity. See *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 498–99 (Cal. 2004). Other municipalities (such as New Paltz, New York and Portland, Oregon) also for a brief period in early 2004 issued marriage licenses to lesbian and gay couples. See Sabrina Tavernise & Thomas Crampton, *Gay Couples To Be Wed Today in New Paltz, Mayor Declares*, N.Y. TIMES, Feb. 27, 2004, at B2; Matthew Preusch, *Oregon County, with Portland, Offers Same-Sex Marriages*, N.Y. TIMES, Mar. 4, 2004, at A26.

¹¹ I observed this on CNN on March 2, 2004. The person holding the sign was a man. The gender of the sign-holder is relevant because some feminists believe that the institution of marriage, with its long history of promoting patriarchy and the subordination of women, is beyond reform and should be abolished rather than expanded. See sources cited *infra* note 18 and accompanying text. From this feminist perspective, a man holding a sign stating that “MARRIAGE = FREEDOM” has a different type of symbolism than does a woman doing the same.

The format of the “MARRIAGE = FREEDOM” sign is reminiscent of the “SILENCE = DEATH” slogan used so successfully during the 1980s by AIDS activists. See Jesse Green, *When Political Art Mattered*, N.Y. TIMES, Dec. 7, 2003, § 6 (Magazine), at 69.

¹² It is not surprising that the sign-holder in San Francisco used the word “freedom” rather than “autonomy” since the former is more commonly used in political discourse than is the latter. For purposes of this Article, however, it would be more accurate to state that “MARRIAGE = AUTONOMY” than to state that “MARRIAGE = FREEDOM.” An exploration of the difference between autonomy and freedom goes beyond the scope of the Article. Nonetheless, it should be pointed out that the two terms are not precise synonyms because freedom—in both its negative and positive senses—usually relates to conditions outside of the individual that affect her choices and actions. Autonomy, on the other hand, is a matter of self-determination, which depends on factors that are both external and internal to the individual. Friedman, in her conception of autonomy, for example, places a great deal of emphasis on the internal capacity of individuals to reflect on their choices and actions based on their wants, values, concerns, and commitments. See *infra* notes 31–42 and accompanying text.

¹³ See *infra* notes 92–124 and accompanying text. I also briefly address the issue of parenting by lesbians and gay men. See *infra* notes 103–107 and accompanying text.

¹⁴ For a helpful summary of different feminist critiques of autonomy, see Catriona Mackenzie & Natalie Stoljar, *Introduction: Autonomy Refigured*, in RELATIONAL AUTON-

stead, I point the reader to Friedman's response to those criticisms, which I believe is quite compelling.¹⁵ I do, however, argue in Part IV that it is possible to disagree on the specific issue regarding the advisability of seeking to reform marriage by making it available to same-sex couples while still agreeing "that autonomy *properly understood*"¹⁶ is a normatively and politically useful value for marginalized individuals such as lesbians, heterosexual women, and gay men. It seems to me that there can be significant agreement on this broader point between at least some feminist thinkers who are skeptical of marriage on the one hand and those in the gay rights movement who advocate for same-sex marriage on the other. To support my view on this point, I will in Part IV explore Martha Fineman's conception of autonomy as set forth in her recent book *The Autonomy Myth*.¹⁷

Although feminists and gay rights advocates share a number of the same goals in creating a less patriarchal and heterosexist society, there has been a divide between many feminist skeptics of marriage and gay rights advocates of same-sex marriage.¹⁸ The former, unlike the latter, believe that the institution of marriage should be abolished rather than expanded. Given this division among otherwise progressive political allies, I believe that there is a great deal of value in exploring deeper commonalities between the two groups.

There are three issues that I need to address briefly before proceeding. First, by focusing on considerations of autonomy in this Article, I do not mean to suggest that autonomy presents a more apt conceptual or normative vehicle for the attainment of same-sex marriage than does equality. In my view, persuasive arguments on behalf of same-sex marriage can be grounded in *both* equality and autonomy. The focus of this Article, however, is only on the latter.¹⁹

OMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF 3, 5–12 (Catriona Mackenzie & Natalie Stoljar eds., 2000).

¹⁵ See FRIEDMAN, *supra* note 3, at 30–97.

¹⁶ *Id.* at 103.

¹⁷ MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004); see also *infra* notes 134–160.

¹⁸ This divide was crystalized relatively early on in the struggle for same-sex marriage in a debate between Paula Ettelbrick and Thomas Stoddard. Compare Paula Ettelbrick, *Since When Is Marriage a Path to Liberation*, *OUT/LOOK*, Autumn 1989, at 8, reprinted in WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER AND THE LAW* 1098 (2d ed. 2004) (expressing deep misgivings about the advisability of pursuing same-sex marriage as a civil rights goal), with Thomas Stoddard, *Why Gay People Should Seek the Right To Marry*, *OUT/LOOK*, Autumn 1989, at 8, reprinted in ESKRIDGE & HUNTER, *supra*, at 1099 (arguing that the right to same-sex marriage is crucial to the attainment of equality for lesbians and gay men). For additional examples of feminism-based criticisms of the political and legal struggle for same-sex marriage, see, for example, Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 *LAW & SEXUALITY* 31 (1991); Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 *TEMP. L. REV.* 709 (2002); Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 *VA. L. REV.* 1535 (1993).

¹⁹ I will not in this Article address constitutionally based arguments on behalf of same-sex marriage. I argue elsewhere that the Due Process Clause can be understood as impos-

Second, I fully acknowledge that there are many in the lesbian and gay community who do not believe that the gay rights movement should pursue same-sex marriage as a civil rights goal. These critics can be roughly divided into three groups. The first consists of those who—if only for pragmatic reasons—believe that civil unions present a more appealing alternative to marriage.²⁰ The second group is comprised of those, including many feminists, who view same-sex marriage as an insertion of mainstream heteronormative values into the gay and lesbian community that will fundamentally transform the community and rob it of its alternative views and values.²¹ The third group, which also includes many feminists, is more radical in its criticism because its adherents want the state to cease recognizing (and thus regulating) sexually intimate relationships altogether.²²

The autonomy-based arguments that I explore here do not depend on the distinction between marriage and civil unions. My focus is on the connection between autonomy and the *legal recognition* of lesbian and gay relationships as informed by feminist theory. Whether such a recognition comes in the form of marriage or civil unions is not important to my arguments. Instead, what is crucial is to articulate a conception of autonomy that imposes on the state an affirmative obligation to recognize committed same-sex relationships in some capacity. My thesis is that the feminist writings of Friedman and (perhaps more surprisingly) of Fineman can be of assistance to us in that articulation.

As for the second and third groups of commentators and their criticisms of the pursuit of marriage as a civil rights goal, I cannot in this Article address their objections. My goal instead is to rely on the work of Fine-

ing an affirmative obligation on the state to recognize same-sex marriage. See Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184 (2004).

²⁰ For a pragmatic defense of civil unions, see WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 127–58 (2002). Pragmatic arguments on behalf of civil unions have become even more compelling since 2004, when thirteen states enacted state constitutional bans on same-sex marriage. See David D. Kirkpatrick & Katie Zezima, *Supreme Court Turns Down a Same-Sex Marriage Case*, N.Y. TIMES, Nov. 30, 2004, at A20 (noting that conservatives believe that “the overwhelming success of measures forbidding same-sex marriages in 13 states has indicated that the issue is a big winner for” them). While most Americans remain opposed to same-sex marriage, growing numbers seem open to the idea of civil unions for lesbians and gay men. See Brad Knickerbocker, *Political Battles over Gay Marriage Still Spreading; 12 More States May Vote on Banning it in 2006*, CHRISTIAN SCI. MONITOR, Nov. 29, 2004, at 1.

²¹ See Robson, *supra* note 18, at 819–20 (expressing concern that “[b]y naturalizing and universalizing marriage rather than heterosexuality, . . . we are simply in danger of replacing compulsory heterosexuality with a regime of compulsory matrimony”); MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 81–147 (1999) (criticizing marriage as an institution that privileges some while stigmatizing others).

²² See FINEMAN, *supra* note 17, at 124–30; MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 228–30 (1995) [hereinafter FINEMAN, *THE NEUTERED MOTHER*]; Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U. J. GENDER SOC. POL’Y & LAW 167 (1999).

man, a leading critic of the institution of marriage, to show that there is more common ground than is immediately apparent between feminists who are skeptical of marriage and supporters of same-sex marriage.²³

And lastly, as I finish writing this Article, the country is experiencing a strong backlash against same-sex marriage. In 2004 alone, the voters in thirteen states, by commanding majorities, approved amendments to their state constitutions banning same-sex marriage.²⁴ Meanwhile, facing increased political opposition, leading gay rights organizations are debating whether to temper their public support for same-sex marriage.²⁵ It seems particularly important, at this difficult and crucial juncture in the history of the gay rights movement, for those of us who believe that the state should recognize and support the relationships and families of lesbians and gay men to articulate, as clearly as possible, why this is the case. My hope is that this Article will be a modest contribution to that effort.

II. MARILYN FRIEDMAN'S FEMINIST CONCEPTION OF AUTONOMY

Professor Marilyn Friedman, in her recent book *Autonomy, Gender, Politics*, elaborates on what can be understood as a feminist conception of autonomy or self-determination.²⁶ Among political philosophers, of course, it is liberals who have traditionally been the strongest proponents and defenders of the value of autonomy. And there is much to Friedman's understanding of autonomy that is consistent with liberal theory. Friedman, for example, believes that it is possible to speak of individuals as self-determining through their choices and actions.²⁷ She takes issue with the postmodernist view that the self is nothing more than a reflection of social forces.²⁸ She disagrees, in other words, with the idea that the self is socially constructed all the way down.²⁹ Instead, Friedman believes that the

²³ "Fineman's work is rarely discussed in the context of gay and lesbian relationships and families," perhaps because Fineman herself rarely explicitly addresses gay rights issues in her scholarship. Zachary A. Kramer, *Exclusionary Equality and the Case for Same-Sex Families: A Reworking of Martha Fineman's Re-Visioned Family Law*, 2 SEATTLE J. SOC. JUST. 505, 507 (2004).

²⁴ The states that approved constitutional amendments in 2004 were Arkansas, Georgia, Kentucky, Louisiana, Michigan, Missouri, Mississippi, Montana, North Dakota, Oklahoma, Ohio, Oregon, and Utah. See HUMAN RIGHTS CAMPAIGN FOUND., EQUALITY FROM STATE TO STATE: GAY, LESBIAN, BISEXUAL AND TRANSGENDER AMERICANS AND STATE LEGISLATION 4 (2004), available at http://www.hrc.org/Template.cfm?Section=About_HRC&Template=/ContentManagement/ContentDisplay.cfm&ContentID=24538 (last visited Apr. 11, 2005).

²⁵ See John M. Broder, *Groups Debate Slower Strategy on Gay Rights*, N.Y. TIMES, Dec. 9, 2004, at A1.

²⁶ See FRIEDMAN, *supra* note 3, at 81–91.

²⁷ *Id.* at 36–38.

²⁸ See generally JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).

²⁹ See FRIEDMAN, *supra* note 3, at 30–38.

self can play an active and positive role in its own definition through autonomous choices and actions.³⁰

For Friedman, the key to self-determination is self-reflection. A person is able to behave or live autonomously when she makes choices and engages in actions that are in “accord with the deeper wants and values [that she] has reflectively reaffirmed and that are partly caused by those self-reflections.”³¹ When a person, in other words, is able to choose and act in ways that she has concluded, through self-reflection, are consistent with her wants and values, as well as with her deeper concerns and commitments,³² she is (to some degree) behaving or living autonomously.³³ As Friedman puts it, “[s]omeone is self-determining when she acts for the sake of what matters to her, what she deeply cares about, and, in that sense, who she ‘is.’”³⁴

Friedman admits that “someone’s personal identity, or who she ‘is,’ in a sense relevant to identifying her as a person distinct from others, is an ambiguous notion.”³⁵ In addressing the ambiguity, Friedman distinguishes between “perspectival identity” and “trait-based identity.”³⁶ The former constitutes a person’s wants, values, concerns, and commitments.³⁷ The latter constitutes characteristics that are consistent with the human groups to which she belongs (as determined by, for example, gender, race, or ethnicity).³⁸ In Friedman’s view, it is perspectival identity that serves as the reference point, so to speak, in determining whether any given person in any given situation is behaving or living autonomously. As she explains,

behaving or living autonomously is a matter of behaving or living in accord with what matters to someone, not of living in accord with characteristics of hers or categories applied to her that she does not particularly care about. If being white, female, heterosexual, or Jewish are not traits I care about in myself, then I am not being autonomous when I happen to live in ways that accord with those traits.³⁹

³⁰ *See id.*

³¹ *Id.* at 43.

³² Deeper concerns and commitments are matters of normative importance to individuals, in contrast to those that relate merely to preferences, for example, a proclivity for chocolate ice cream or fealty to the Boston Red Sox.

³³ Friedman makes clear that “[a]utonomy is a matter of degree. No finite being is thoroughly self-determined. Even self-reflection can range along a continuum. The more extensively one reflects on one’s wants and commitments, the greater is one’s autonomy with respect to them.” FRIEDMAN, *supra* note 3, at 7.

³⁴ *Id.* at 6.

³⁵ *Id.* at 10.

³⁶ *Id.*

³⁷ *See id.* at 11.

³⁸ *See id.* at 10.

³⁹ *Id.* at 11.

At this point, skeptics of autonomy are likely to raise the objection that it is impossible for individuals to sufficiently free themselves from the influences of social values and forces, as well as those of particular others, to engage in meaningful self-determination. The argument is that a person's wants, values, concerns, and commitments are not ultimately her own but are instead "traceable, at least in part, to causal conditions outside of and other than" herself.⁴⁰ Friedman provides what she calls "a compatibilist answer to this criticism," by which she means that "autonomy is a matter of degree and requires agents simply to harbor the capacities for certain sorts of reflection and agency, however these were acquired or are interconnected with the agency of others."⁴¹ The fact that a person's wants, values, concerns, and commitments may not be entirely her own does not prevent her from, at least some of the time, using her capacity to reflect on them and to make choices and take actions that are the result of that reflection.⁴²

Friedman ultimately believes that the concept of autonomy can be of considerable assistance to oppressed and marginalized groups in general and to women in particular. "When traditional practices are oppressive to a group [as they have been to women], the opportunity to challenge those practices is crucial to the group's betterment."⁴³ Women, like other subordinated groups, are more likely to challenge oppressive practices when they are able to behave or live autonomously, that is, when they are able to make choices and engage in actions that they view as consistent with their wants, values, concerns, and commitments, even if those choices and actions are inconsistent with the patriarchal practices and norms of their society.⁴⁴

⁴⁰ *Id.* at 37.

⁴¹ *Id.*

⁴² Friedman notes that,

[s]elf-determination may, ontologically speaking, be merely an intermediate causal process in a causal sequence extending backward and forward to infinity. Such causal embeddedness does not undermine its character as the kind of causal stage in the process that it is: the part determination by a self of her own behavior. All else is history.

Id.

⁴³ *Id.* at 61. "Th[e] ideal of personal autonomy," Friedman adds, "can be a particularly inspirational ideal for those who, in the course of living their lives, must cope with the all-too-familiar human wrongs of abuse, exploitation, domination, and oppression." *Id.* at 4.

⁴⁴ As Friedman puts it, "critical reflection on norms . . . harbors the undeniable potential for personal repudiation of assimilated norms." *Id.* at 60. Professor Diana Meyers also argues that women are able to engage in partial or limited autonomy by making some autonomous choices even when other (sometimes most) choices are not available to them due to restrictions imposed by powerful gender-based practices and norms. See Diana Meyers, *Personal Autonomy and the Paradox of Feminine Socialization*, 84 J. PHIL. 619, 627-28 (1987). Professor Kathryn Abrams agrees that it is possible for women, despite significant constraints on choices, to engage in limited self-definition and self-direction. See Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 824-39 (1999). Abrams criticizes Meyers, however, for, *inter alia*, failing to account for "a collective dimension to the development and exercise of auton-

Other than Friedman's focus on the impact of autonomy on the lives of women, there is nothing distinctively feminist about my discussion thus far of Friedman's understanding of autonomy. Friedman's belief in the ability of the self to contribute positively to its own definition and determination, as well as her optimism about the social and political utility of autonomy as a value, is consistent with liberal political philosophy. There are (at least) two elements of Friedman's understanding of autonomy, however, that can be categorized as feminist, both of which are in some tension with a traditionally liberal perspective on autonomy. The first element is Friedman's understanding of the role that emotions play in the ability of individuals to make judgments about what kinds of choices and actions are consistent with their wants, values, concerns, and commitments. The second element is Friedman's rejection of the view that autonomy is primarily about protecting the independence and self-sufficiency of individuals. In this regard, Friedman joins other feminists in the philosophical and sociopolitical critique of the atomistic individual. If we view the autonomous person as an atom, that is, as entirely disconnected from others and with little need for others, then autonomy becomes synonymous with independence and self-sufficiency. In contrast, Friedman's feminist understanding of autonomy seeks to sever the seemingly inevitable connection between autonomy on the one hand and independence and self-sufficiency on the other.⁴⁵

I discuss both of these feminist components of Friedman's conception of autonomy in the remainder of this Part. I return to them in Part III.B, where I elaborate on the understanding of autonomy held today by many lesbians and gay men.

A. *The Role of Emotions in Feminist Conceptions of Autonomy*

Autonomy has traditionally been viewed as a byproduct of the exercise of reason. The Kantian view of self-determination holds that autonomous choices and actions must be grounded in reason rather than in emotions.⁴⁶

omy." *Id.* at 821. Abrams notes that "[i]n a variety of formal settings, informal groups, and images of connection, women act together to develop alternative self-definitions, elaborate dissonant messages in cultural sources, and provide an affirming audience for emerging self-conceptions." *Id.* at 829. Friedman, unlike Meyers, discusses the role that collective action can play in the promotion of autonomy. See FRIEDMAN, *supra* note 3, at 71. While Friedman acknowledges that "[o]ppressed groups can benefit enormously from collective autonomy," she also notes that there can be tension between collective and individual goals. *Id.* In particular, when there is a conflict between the wants and values of the group and the wants and values of the individual, the latter will be "put in the unenviable position of having to choose between, on the one hand, acting or living as she thinks she ought, and, on the other hand, acting or living as her group has somehow collectively resolved to do to advance the cause of the whole group." *Id.* at 72.

⁴⁵ As I explore in Part IV, Martha Fineman also seeks to sever autonomy from independence and self-sufficiency. See *infra* notes 134–160 and accompanying text.

⁴⁶ See FRIEDMAN, *supra* note 3, at 9.

The Kantian tradition values reason at the expense of emotions because it sees the former as objective and neutral, whereas it views the latter as subjective and arbitrary.⁴⁷

Feminist theory generally rejects the dichotomy between reason and emotions. Professor Martha Nussbaum, for example, argues that “emotions are forms of *evaluative judgment* that ascribe to certain things and persons outside a person’s own control great importance for the person’s own flourishing.”⁴⁸ Similarly, Friedman believes that a person’s choices and actions grounded in her emotions can evince the requisite coherence to make them truly reflective of who that person is. In Friedman’s view, when there is coherence in choices and actions (as assessed in light of the person’s wants, values, concerns, and commitments), there is autonomy.⁴⁹ Emotions can play an important role in making the necessary coherent judgments that are part of the realization of autonomy. As she puts it,

actions that express an agent’s emotions and character can reflect what deeply and overall matters to her in case her emotions and character traits show coherent rational patterns amounting to concern. A person shows such coherence when her attitudes over time include, for example, love for a friend, a desire that the friend experience good fortune, and regret over the unkind words one spoke to the friend in an angry moment.⁵⁰

The disagreement regarding the normative significance, if any, of the difference between judgments grounded in reason and those based on emotions may seem like a rather dry subject of interest only to philosophers. This disagreement, however, has important sociopolitical consequences because the distinction between reason and emotions has served to promote and maintain patriarchal norms and practices in at least three ways. First, it has been used to argue that there are essential (and morally significant) differences between men and women. It is men, after all, who have traditionally been viewed as having the capacity for objectivity and neutrality through the application of judgment based on reason. Women, on the other hand, have traditionally been viewed as incapable of exercising good judgment because they have been understood to think and act according to emotion rather than reason.⁵¹ The result of this view is the further subor-

⁴⁷ See Susan Moller Okin, *Reason and Feeling in Thinking about Justice*, in *FEMINISM AND POLITICAL THEORY* 15, 17–21 (Cass R. Sunstein ed., 1990).

⁴⁸ MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* 22 (2001) (emphasis added); see also Alison M. Jaggar, *Love and Knowledge: Emotion in Feminist Epistemology*, in *GENDER/BODY/KNOWLEDGE: FEMINIST RECONSTRUCTIONS OF BEING AND KNOWING* 145 (Alison M. Jaggar & Susan R. Bordo eds., 1989) (discussing the feminist understanding of the role of emotions in the construction of knowledge).

⁴⁹ See FRIEDMAN, *supra* note 3, at 9–11.

⁵⁰ *Id.* at 9.

⁵¹ See Moller Okin, *supra* note 47, at 17–21.

dination of women as their interests and priorities are deemed to be less worthy and less morally important.

Second, the distinction between reason and emotions reinforces the distinction between the public and private spheres. The former, with its so-called objective values of justice and autonomy purportedly grounded in reason alone, has been understood to be the domain of men, while the latter, with its emphasis on care and responsibility grounded in emotions, has been understood to be the domain of women. This public/private distinction, as Friedman explains, deems “the world of personal relationships, of the family and of family ties and loyalties, that is, the traditional world of women[, to be] a world of lesser moral interest and importance than the public world of government and of the marketplace, that is, the male-dominated world outside the home.”⁵²

Third, if evaluative judgments that are part of autonomous choices and actions must be grounded in reason and not on emotions, this leads to an understanding of autonomy that equates it with independence and self-sufficiency. This is so because the exercise of reason, under Kantian theory, is self-regarding or inward-looking. Reasoning, in other words, is an internal process that individuals are assumed to be able to engage in without the need to interact with, or receive assistance from, others. In contrast, as Nussbaum puts it, emotions are “acknowledgments of neediness and lack of self-sufficiency.”⁵³ Emotions, in other words, are other-regarding because they almost always involve and arise from our relationships, ties, and interactions with others. This means that, while reason-based autonomy is consistent with notions of independence and self-sufficiency, emotion-based autonomy requires us to focus on the *relationships* of individuals. It is a person’s connections and ties to others that give rise to the emotions that, in turn, often give coherence (or rationality) to her choices and actions. In fact, as I explain below, Friedman views the autonomous person not as independent and self-sufficient, but as embedded in particular social contexts and relationships that, in crucial ways, account for her autonomy.

B. *Autonomy Without Atomism*

Friedman acknowledges that the value and exercise of autonomy has usually been associated with male capacities and prerogatives.⁵⁴ This has understandably led many feminists to be critical of autonomy as a value.⁵⁵ These critics argue that only men have been afforded opportunities to lead

⁵² MARILYN FRIEDMAN, WHAT ARE FRIENDS FOR?: PERSPECTIVES ON PERSONAL RELATIONSHIPS AND MORAL THEORY 98 (1993).

⁵³ NUSSBAUM, *supra* note 48, at 22.

⁵⁴ “The ideal of autonomy is hampered by a history in which it has been associated in Western cultures with a select few, typically, successful white men.” FRIEDMAN, *supra* note 3, at 23.

⁵⁵ *See id.* at 45–47.

autonomous lives and that autonomy is respected as a value only when exercised by men.⁵⁶ Although Friedman does not dispute that autonomy has traditionally been understood in ways that benefit privileged groups, including men, she counsels feminists not to reject autonomy as a value altogether, but instead to redefine it in ways that take feminist concerns and interests into account. The best way of doing this, Friedman argues, is to reject an individualistic or atomistic view of the autonomous person.⁵⁷ As I discuss below, Friedman defends a conception of autonomy that values (autonomy-promoting) social contexts and relationships rather than independence and self-sufficiency.

I divide the discussion below into one Section that explores the role of social contexts, and a second Section that discusses the role of relationships, in the ability of individuals to realize autonomy. In the former, I focus on the society-wide factors that contribute to the realization of autonomy, while in the latter, I focus on the role that relationships play in the ability of individuals to behave and live autonomously.

1. *Social Contexts*

For Friedman, autonomy is not the byproduct of leaving individuals alone so that they can exercise preexisting and fully constituted capacities for autonomy. Instead, autonomy depends on particular social contexts or conditions that make it possible for individuals to choose and act in ways that are consistent with their wants, values, concerns, and commitments.⁵⁸

No one, of course, argues that social contexts are irrelevant to the question of whether individuals are able to lead autonomous lives. But many theorists, particularly liberal ones, view the role of social conditions in the promotion of autonomy primarily in negative terms, that is, they view social conditions primarily as potential *impediments* to the ability of individuals to behave and live autonomously.⁵⁹ In contrast, Friedman believes that social conditions can play a *positive* role in the realization of autonomy by providing meaningful options to individuals. As she puts it, “autonomous self-reflection requires meaningful options that can be weighed in light of wants, values, or other points of reference. These options are at least partly matters of social conditions facing someone, and what those conditions *permit* and prevent.”⁶⁰ A society that fails to provide individuals with “a significant array of opportunities to act in ways that reflect what deeply matters

⁵⁶ *See id.*

⁵⁷ *See id.* at 103–04.

⁵⁸ *See id.*

⁵⁹ *See* Carlos A. Ball, *Autonomy, Justice, and Disability*, 47 UCLA L. REV. 599, 644–46 (2000).

⁶⁰ *See* FRIEDMAN, *supra* note 3, at 15 (emphasis added).

to [them]” is a society that fails to create the necessary conditions for the realization of autonomy.⁶¹

Whether an individual is able to exercise autonomy, Friedman argues, depends on both internal and external factors. As to the former, the person must “develop[] the competency for choosing or acting in ways that are autonomous.”⁶² Friedman believes that that competency, as I will explain in the next Section, is learned from others. As to the latter, a person’s ability to exercise autonomy depends on the existence of an array of choices made available to her by social institutions and practices.⁶³ An internal competency for autonomy, in other words, is not enough for the realization of autonomy if those that enjoy that competency have insufficient opportunities to choose and to act in ways that are consistent with their wants, values, concerns, and commitments.

2. Relationships

The realization of autonomy is not only dependent on supportive social conditions; it is also dependent on supportive relationships. For this reason, Friedman’s understanding of autonomy is explicitly relational in nature. The capacities for autonomy—that is, the capacities to understand and make choices based on a person’s wants, values, concerns, and commitments—are “acquired through learning from other persons already able to exercise them.”⁶⁴ We are able to learn how to develop our capacities for autonomy, in other words, as a result of the support, care, and guidance provided by particular others.⁶⁵

The process of developing the capacities for autonomy, Friedman emphasizes, is the same for women as it is for men.

Women’s moral agency, like that of men, is both socially grounded and individuated. Ordinary adult women, as much as men, are morally competent individual persons who must be nurtured and trained for that competency by other persons in social interrelationships shaped by cultural resources. A social conception of moral competence tells us that a morally competent person must first acquire from others a distinct self-hood and capacities to

⁶¹ *Id.* at 18. “Autonomy,” Friedman argues, “requires a social context as an *enabling*, or causal, background.” *Id.* at 17 (emphasis added).

⁶² *Id.* at 14.

⁶³ Friedman argues that “[i]t is a crucial moral criticism of the particular social institutions and practices in which oppressed lives are lived that those lives are so circumscribed as to face severely truncated ranges of morally satisfactory options.” *Id.* at 25–26.

⁶⁴ *Id.* at 15.

⁶⁵ *See id.* at 14.

reflect on herself and choose among alternatives in light of those reflections.⁶⁶

It is not just a matter, however, of learning to exercise our capacities for autonomy from others. Our relationships with others also play crucial roles in helping to determine our very wants, values, concerns, and commitments. We do not develop these in isolation from or independently of others and then go out into the world and make choices and engage in actions that are consistent with them. Instead, our wants, values, concerns, and commitments *emerge from* our relationships and interactions with others.⁶⁷

This does not mean that the self must accept the values and priorities as determined by others. The autonomous self is able, through reflection, to make determinations as to what is truly important to her. The point is that we do not arrive at our wants, values, concerns, and commitments by separating ourselves from others. Our priorities and identities instead emerge from our connections and ties to others. As Friedman puts it, “[a]tomistic selves, lacking any prior social relationships to other human beings, are not the bearers of autonomy.”⁶⁸

In emphasizing a relational understanding of autonomy, Friedman stresses the distinction between autonomy on the one hand and independence and self-sufficiency on the other. This distinction is important because our culture tends to equate autonomy with independence and self-sufficiency.⁶⁹ Friedman, like other feminists, argues that the notion of an independent and self-sufficient person is an illusion.⁷⁰ She points out that “even the most independent, self-reliant, and emotionally self-contained among us are nevertheless social beings who are connected to and dependent on a great many others for material and emotional support, for the development of our capacities, for the sources of meaning in our lives, and for our very identities.”⁷¹

Autonomy for Friedman, then, is not about atomistic individuals, going at it alone, with little need for others. Instead, persons lead autonomous lives from within relationships with others. By speaking of autonomy as relational, Friedman agrees with other liberal feminists such as Professor Jennifer Nedelsky.⁷² Nedelsky argues that it is “relationships—with par-

⁶⁶ *Id.* at 65.

⁶⁷ *See id.* at 14–19.

⁶⁸ *Id.* at 17.

⁶⁹ *See id.* at 47–50, 91–92.

⁷⁰ As Friedman argues, “[t]here is good reason to discuss the social relationships that are necessary causal conditions for autonomy. The point of exploring them is to curb an excessive individualism to which statements and paradigms of the ideal of autonomy might otherwise be prone, especially in public discourse—‘self-made man,’ for example.” *Id.* at 15; *see also infra* notes 133–160 and accompanying text (discussing the work of Martha Fineman).

⁷¹ FRIEDMAN, *supra* note 3, at 94.

⁷² *See id.* at 85 (referring to the writings of Jennifer Nedelsky).

ents, teachers, friends, loved ones—that provide the support and guidance necessary for the development and experience of autonomy . . . [R]elatedness is not, as our tradition teaches, the antithesis of autonomy, but a literal precondition of autonomy, and interdependence a constant component of autonomy.”⁷³ Autonomy, in other words, is not realizable without the ongoing support, care, and guidance provided by others. The link between connectedness and autonomy, therefore, is a causal rather than a dichotomous one. The exercise of a person’s autonomy is not primarily a function of leaving her alone, but is instead primarily a function of her relationships with others. In this way, the liberal feminism of theorists such as Friedman and Nedelsky offers us a conception of autonomy that is relational as opposed to individualistic: the autonomous person is viewed not as independent and self-sufficient, but rather as being able to exercise autonomy only as a result of her relationships with others.

Not every relationship, of course, is conducive to the realization of autonomy. Some relationships are exploitative and demeaning and as such interfere with rather than promote autonomy.⁷⁴ Oppressive relationships have been of particular concern to feminists because it is women (with, for

⁷³ Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 12 (1989). Professor Joseph Singer explains this point as follows:

We respect individuals, not by assuming them to be islands unto themselves, but by acknowledging that they best function and achieve their own ends in the context of social relations that support their own abilities to flourish. Individuals achieve autonomy not by complete separation from others but by a combination of independence and dependence. In other words, *interdependence* is the foundational characteristic of free individuals.

JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 130–31 (2000) (citing Nedelsky, *supra*); see also Robin West, *Rights, Capabilities, and the Good Society*, 69 FORDHAM L. REV. 1901, 1913 (2001) (arguing that “[i]n an atomistic rights culture . . . we come to identify our ‘rights’—our most precious political entitlements, and hence our political identity—as rights to individuate and distance or sever ourselves from, rather than rights to safely connect or relate to, our families, intimates, communities, or co-citizens”).

⁷⁴ “[R]elationships of certain sorts are necessary for the realization of autonomy whereas relationships of certain other sorts can be irrelevant or positively detrimental to it. The connection between autonomy, and the ‘social,’ in other words, is manifold and diverse.” FRIEDMAN, *supra* note 3, at 95.

Friedman also points out that autonomy can be disruptive of existing social and personal relationships, which is not necessarily problematic if those relationships interfere with rather than promote autonomy.

Rejecting values that tie someone to others may lead her to try to change the relationships in question or simply to detach herself from them. Someone might also reflect on the very nature of her relationships to particular others and come to believe that those ties are neglecting or smothering important dimensions of herself. In order to liberate those aspects of herself, she might have to distance herself from the problematic relationships.

Id. at 105.

example, abusive partners) who are usually on the wrong side of them.⁷⁵ In contrast, relationships that are characterized by love or affection or friendship or mutuality can help individuals determine their wants, values, concerns, and commitments, and make choices and engage in actions that are consistent with them. At the end of the day, without these supportive and caring relationships, the exercise of personal autonomy would be impossible.

III. AUTONOMY AND THE GAY RIGHTS MOVEMENT

Friedman's feminist conception of autonomy, with its emphasis on emotions, social contexts, and relationships, is reflected in the understanding of autonomy held by many in the lesbian and gay community today. This has not always been the case, however. There was a time when the gay rights movement advanced an understanding of autonomy that was much closer to that held by traditional liberalism, namely, one that focused on the *removal* of obstacles required for the attainment of autonomy (as opposed to the *provision* of the social conditions required for the realization of autonomy) and on the strict separation between the private sphere (that of emotions, relationships, and intimacy), which was deemed to be beyond the legitimate scope of governmental regulation, and the public sphere.

In Section A below, I provide a brief summary of how the understanding of autonomy held by many in the lesbian and gay community has evolved through the years. In Section B, I explore the overlap between the conception of autonomy held by many lesbians and gay men today and the feminist conception of autonomy articulated by Friedman.

A. *A Brief History of the Gay Rights Movement as It Relates to Autonomy*

It is possible, speaking in broad terms, to divide the history of the gay rights movement into three stages. In the first stage, during the early years of the movement—that is, during the pre-Stonewall activism of the 1950s and 1960s—the principal political goal of lesbians and gay men was to reduce the levels of state-promoted oppression. In a society where approximately one million lesbians and gay men were arrested between 1946 and 1961 for engaging in consensual sexual intercourse, as well as for dancing, kissing, and engaging in other open displays of affection,⁷⁶ the focus

⁷⁵ See *id.* at 140–59.

⁷⁶ See WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 60 (1999); see also John D'Emilio, *Cycles of Change, Questions of Strategy: The Gay and Lesbian Movement After Fifty Years*, in *THE POLITICS OF GAY RIGHTS* 31, 33 (Craig A. Rimmerman et al. eds., 2000) (noting that “[t]hroughout the 1950s, hundreds of gays and lesbians daily experienced trouble with the police, other government agencies, or their employers”) (citations omitted).

of early activists needed to be on protecting lesbians and gay men from the outright coercion and harassment carried out by the state.⁷⁷ The best way to accomplish this goal was to convince society that the state should not interfere with the private and intimate lives of individuals. The idea of protecting a separate realm of private conduct from repressive forces seeking to regulate that conduct on the basis of public morality was understandably appealing to lesbians and gay men as they first became politically active on issues related to sexual orientation.

The justification for a right to privacy in matters of sexual intimacy was captured famously by the authors of the Wolfenden Report issued in 1957.⁷⁸ The Report was written by a committee established by the British Parliament to study, among other issues, the possible decriminalization of male homosexual acts. (Britain had never bothered to criminalize female homosexual acts.) In supporting such a decriminalization, the committee noted that “[u]nless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business.”⁷⁹ The Report made clear that it did not intend “to condone or encourage private immorality”; rather, it argued that “to emphasize the personal and private nature of moral or immoral conduct is to emphasize the personal and private responsibility of the individual for his own actions.”⁸⁰ Although the issuance of the Wolfenden Report was barely noticed by the mainstream American press, gay publications “heralded it as a harbinger of a more humane future and a model for American legislators.”⁸¹ Activists thought at the time that if the state would only leave lesbians and gay men alone, and that if it could be forced to recognize that lesbians and gays were also entitled to privacy in their personal and intimate lives, then perhaps, at the very least, those who were physically and emotionally attracted to individuals of the same gender could lead quiet and peaceful lives without fear of incarceration or harassment.

The idea of a separate privileged sphere of privacy that must be protected from governmental intrusion has been a central tenet of liberal theory since at least the writings of John Stuart Mill.⁸² Liberal theory has viewed

⁷⁷ As Professor George Chauncey notes, “[t]he most significant early victories of the movement curtailed the police harassment of gay life.” GEORGE CHAUNCEY, *WHY MARRIAGE? THE HISTORY SHAPING TODAY’S DEBATE OVER GAY EQUALITY* 35 (2004). Chauncey adds that “[i]n some cities, such as New York and San Francisco, court rulings and political mobilization brought an end to wide-spread harassment in the mid-1960s.” *Id.* at 36.

⁷⁸ THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (American ed., Stein & Day 1963) (1957).

⁷⁹ *Id.* ¶ 61.

⁸⁰ *Id.*

⁸¹ JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970*, at 112 (1983).

⁸² See generally JOHN STUART MILL, *ON LIBERTY* (W. W. Norton & Co. 1975) (1859).

the drawing of a line around the physical, personal, and intimate lives of individuals—a line not to be crossed by the state—as the best way of promoting personal freedom and autonomy.⁸³ While inside the private sphere, traditional liberal theory holds, individuals should be free to do as they wish so long as others are not harmed.⁸⁴

Although considerations of privacy remain important to the gay rights movement to this day, a new stage of the movement emerged in the 1970s, when gay rights supporters began making equality-based claims to supplement their earlier privacy-based arguments. During this time of increased political activism, the priorities of lesbians and gay men began to shift. They now wanted more from the state than a simple abstention from repression and harassment; they also sought *protection by* the state, asking it to serve as a civil shield against discrimination.⁸⁵ Privacy-based arguments in the context of sexuality by their very nature emphasize the need to leave individuals alone so that they can engage in their chosen forms of sexual intimacy. The equality-based demands asserted by gay rights supporters beginning in the 1970s, however, were accompanied by a shift towards a focus on the fuller lives of lesbians and gay men. The focus, in other words, was no longer only on matters of private sexual intimacy, but was also on the ability of lesbians and gay men to lead open and full lives (as opposed to quiet and closeted ones) without the fear of discrimination or retribution. The focus of the gay rights movement, in other words, was expanded to include not just the demand for the right to be left alone in the private sphere but also for the right to equality in the public one.⁸⁶ This led lesbians and gay men to seek protection from discrimination in employment, housing, and public accommodations—protections that had already been granted to other minorities.

Although the focus of this Article is on autonomy rather than on equality, it is interesting to note that the second-stage equality argument that lesbians and gay men are similarly situated to others on a variety of matters (and are thus entitled to antidiscrimination protection), like the first-stage autonomy argument,⁸⁷ assumes a separation between the private and public spheres. In making the argument that lesbians and gay men are entitled to equality in the public sphere, the movement essentially also ar-

⁸³ See generally Jed Rubenfeld, *The Right of Privacy*, 104 HARV. L. REV. 737 (1989).

⁸⁴ See MILL, *supra* note 82, at 11 (setting forth this “harm principle”).

⁸⁵ See CHAUNCEY, *supra* note 77, at 38 (describing how by 1977, twenty-eight municipalities had added sexual orientation as a protected class to their antidiscrimination ordinances).

⁸⁶ In many ways, *Romer v. Evans*, 517 U.S. 620 (1996), can be viewed as the culmination of the second stage of the gay rights movement. The Supreme Court in that case struck down an amendment to the Colorado constitution that prohibited the state and local governments from providing discrimination protection to lesbians and gay men. In doing so, the Court made clear that states cannot enact laws with “the legislative end . . . to make [lesbians and gay men] unequal to everyone else.” *Id.* at 635.

⁸⁷ See *supra* notes 76–84 and accompanying text.

gued during its second stage that what takes place in the private sphere is largely irrelevant. In other words, *regardless* of what lesbians and gay men do in private, they are entitled to *public* equality.

Through the second stage of the movement, then, the intimate relationships and personal lives of lesbians and gay men played a paradoxical role. On the one hand, they led to oppression and discrimination as many in society reacted negatively to the idea of same-gender sex and love. On the other hand, the relationships and personal lives of lesbians and gay men were deemed by the movement to be largely irrelevant to the issue of how lesbians and gay men should be treated by the state. Through the second stage, the movement was largely operating under the assumption that lesbians and gay men were entitled to equality- and autonomy-based rights *despite* their intimate relationships and personal lives, not *because* of them.

This changed fundamentally when the gay rights movement, around the mid-1990s, entered what can be categorized as its third stage, as lesbians and gay men in large numbers began seeking to have their relationships and families recognized by law.⁸⁸ Beginning at this time, the content, meaning, and value of the intimate relationships and personal lives of lesbians and gay men were no longer beyond the scope of political and legal activism. Instead, that activism was, in important ways, centered around the relationships and families of lesbians and gay men.⁸⁹

Part of this shift entailed a change in the way in which at least some lesbians and gay men began to understand the meaning of autonomy. Autonomy was no longer universally viewed as synonymous with privacy and the right to be left alone. Instead, as the “MARRIAGE = FREEDOM” sign held in 2004 by a gay rights supporter suggests,⁹⁰ the concept of autonomy was now seen by many as requiring admission into impor-

⁸⁸ Chauncey argues that marriage became an important goal among many in the gay rights movement primarily as a result of events that took place in the 1980s—namely, the devastating impact of the AIDS epidemic and the growing number of lesbians and gay men who were becoming parents. See CHAUNCEY, *supra* note 77, at 95. AIDS forced thousands of gay men to confront the fear and uncertainty that resulted from the fact that their relationships had no legal status. See *id.* at 96–104. As Chauncey puts it,

[a]ll at once, a generation of gay men had to contend with the lack of national health insurance in the United States because so many men lost their insurance when they became too sick to work. Couples whose relationships were fully acknowledged and respected by their friends suddenly had to deal with powerful institutions—hospitals, funeral homes, and state agencies—that refused to recognize them at all.

Id. at 96. For its part, parenthood forced thousands of lesbians and gay men to confront the fear and uncertainty triggered by the fact that their families had no legal status. See *id.* at 105–11.

⁸⁹ See D’Emilio, *supra* note 76, at 49 (noting that “[w]hereas the issues of the 1970s revolved around a demand to be left alone, those of the 1990s call for recognition and inclusion”).

⁹⁰ See *supra* notes 10–11 and accompanying text.

tant social institutions such as that of marriage.⁹¹ I argue in the next Section that this new and more expansive understanding of autonomy brings to the forefront considerations that are of great importance to a feminist/relational conception of autonomy as articulated by thinkers such as Friedman.

B. The Current Goals of the Gay Rights Movement and Friedman's Feminist Understanding of Autonomy

In Part II, I explored in some detail Friedman's conception of autonomy, paying particular attention to the role of emotions, social contexts, and relationships.⁹² I now return to those three elements by discussing their place in the understanding of autonomy held today by many lesbians and gay men.

1. The Role of Emotions

As noted earlier, Kantian understandings of autonomy seek to distinguish normatively between reason and emotions.⁹³ Under Kantian theory, autonomous choices and actions are those that can be articulated and defended through reason-based judgments.⁹⁴ Feminist theory has, on the whole, rejected the dichotomy between reason and emotions.⁹⁵ In particular, Friedman's conception of autonomy accounts for the role that emotions play in "manifest[ing] a rational pattern of caring about or valuing something."⁹⁶ According to Friedman, emotions can be reflections of a person's wants, values, concerns, and commitments and can therefore constitute the bases for coherent choices and actions that are consistent with those wants, values, concerns, and commitments.⁹⁷

The personal relationships that give rise to the political and legal controversies surrounding same-sex marriage and parenting by lesbians and gay men are grounded in, and arise from, emotions such as love, affection, and devotion between individuals. These emotions, as experienced from within intimate and familial relationships, are reflections of the wants, values, concerns, and commitments of lesbians and gay men.

The debates over same-sex marriage and parenting by lesbians and gay men have turned the emotions of lesbians and gay men into contested and contestable grounds. Most gay rights opponents do not question whether the emotional attachment of lesbians and gay men to their partners and

⁹¹ On the difference between freedom and autonomy, see *supra* note 12.

⁹² See *supra* notes 26–75 and accompanying text.

⁹³ See *supra* notes 46–47 and accompanying text.

⁹⁴ See *id.*

⁹⁵ See *supra* notes 48–50 and accompanying text.

⁹⁶ See FRIEDMAN, *supra* note 3, at 9.

⁹⁷ See *supra* notes 49–50 and accompanying text.

children is heartfelt. Instead, some argue (along Kantian lines) that “objective” factors trump whatever “subjective” (i.e., emotional) attachment might exist between the persons in question. Thus, Professor John Finnis, for example, argues that sexual intimacy can never be a reflection of true affection and mutuality between same-gender partners.⁹⁸ As Finnis puts it, “[r]eality is known in judgment, *not in emotion*, and in reality, whatever the generous hopes and dreams and thoughts of giving with which some same-sex partners may surround their sexual acts, those acts cannot express or do more than is expressed or done if two strangers engage in such activity”⁹⁹

According to Finnis, practical reasoning leads to (what he considers to be) the self-evident and objective conclusion that only a man and a woman can achieve the types of intrinsic goods that are associated with marriage, namely, “children and mutual affection.”¹⁰⁰ Although some of us have responded in some detail to Finnis’s arguments,¹⁰¹ what is important for my purposes here is to note how Finnis attempts to *delegitimize* the demands of lesbians and gay men for societal recognition of their relationships by arguing that those relationships represent nothing more than the sum total of the (by definition) subjective emotions of the participants. The value of these relationships, according to Finnis, cannot be defended through reason-based judgments. This leads him to conclude that society owes same-sex relationships little respect.¹⁰²

A response to Finnis on this point, based on a feminist conception of autonomy, is that the emotions of love, affection, and devotion (to name just three of many) of lesbians and gay men for their partners are in fact worthy of respect because they are reflections of their wants, values, concerns, and commitments. A society that is respectful of personal autonomy, such as ours, must be cognizant of the ways in which its institutions and practices interfere with the ability of lesbians and gay men to make choices and engage in actions that are consistent with those emotions-based wants, values, concerns, and commitments.

This is not to say that the existence of love, affection, and devotion between same-sex partners, or between lesbian and gay parents and their children, is by itself enough to impose autonomy-based obligations of recognition on the state. Those who support gay rights in the area of family law and policy do not, for example, argue that the love and nurturance that lesbian and gay parents provide their children is enough to require the

⁹⁸ See John M. Finnis, *Law, Morality, and “Sexual Orientation,”* 69 NOTRE DAME L. REV. 1049, 1064–69 (1994).

⁹⁹ *Id.* at 1067.

¹⁰⁰ *Id.* at 1064.

¹⁰¹ See Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1909–19 (1997); see also Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51 (1997).

¹⁰² See Finnis, *supra* note 98, at 1064–69.

legal recognition of families headed by lesbian and gay parents, as Lynn Wardle has suggested.¹⁰³ Clearly, if children are otherwise harmed by the actions or omissions of parents who love, are attached to, and are devoted to their children, then the state can legitimately take appropriate action to either terminate, limit, or prohibit the formation of parent-child relationships.¹⁰⁴ It is not that the relevant emotions, and their corresponding role in exercising personal autonomy, trump considerations of harm to children.¹⁰⁵ Instead, the point is that the love, affection, and devotion that most lesbian and gay parents (like most parents) feel and evince toward their children partly reflect their wants, values, concerns, and commitments. As such, those emotional ties are relevant considerations in determining what the value of autonomy requires in this area of family law and policy. In the absence of demonstrated harm to the children, whose priorities and well-being must of course be paramount, the value of autonomy supports the legal recognition and protection of the emotional links between lesbian and gay parents and their children because those links are reflections of the parents' wants, values, concerns, and commitments.¹⁰⁶ As Friedman argues, a society that does not give individuals the opportunity to act consistently with their wants, values, concerns, and commitments is a society that fails to provide them with the opportunity to realize personal autonomy.¹⁰⁷

2. *Social Contexts and the Provision of Meaningful Choices*

One of the ongoing disagreements among political theorists relates to the role that the state should play in establishing the social conditions necessary for the realization of autonomy. On one side of the spectrum are

¹⁰³ Cf. Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV., 833, 864–67; Lynn D. Wardle, *Parenthood and the Limits of Adult Autonomy*, 24 ST. LOUIS U. PUB. L. REV. 169, 178 (2005) (arguing that “[t]he movement to . . . legalize adoptions by same-sex couples represents an attempt to redefine parenthood from a relationship requiring the commitment of both men and women together to the best interests of children, to *furthering the child-rearing interests* of any one or more autonomous adults”) (emphasis added).

¹⁰⁴ This comports with the “best interests of the child” standard that prevails throughout family law. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (declaring the best-interests rule an “entirely well-known . . . standard”).

¹⁰⁵ Friedman is clear that she does

not claim that autonomy is a supreme value, that it trumps all other moral concerns. Sometimes—indeed, often—other values will be more worthy of pursuit than autonomy. When people’s lives or basic material well-being are in danger, [for example,] securing those goods is easily more important than striving for personal autonomy, although considerations of autonomy may not be irrelevant.

FRIEDMAN, *supra* note 3, at 50–51.

¹⁰⁶ The Supreme Court has recognized that parents have liberty-based rights in raising, caring for, and educating their children. See *Troxel*, 530 U.S. at 66; *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923).

¹⁰⁷ See *supra* notes 58–63 and accompanying text.

libertarians who believe that the best way for the state to promote the autonomy of individuals is by not interfering with their choices and actions.¹⁰⁸ As libertarians see it, the state's autonomy-based obligations are entirely negative, that is, they only require that the state not act and thus not interfere with personal autonomy.¹⁰⁹

The implementation of a libertarian vision of autonomy was all that was required during the first stage of the gay rights movement, when the primary goal of activists was to convince the state to leave lesbians and gay men alone.¹¹⁰ As long as the movement's goal was to carve out a sphere of privacy, whether spatial or decisional or both, a libertarian conception of autonomy sufficed. Under this view of autonomy, the state has an obligation not to interfere with the personal relationships and lives of lesbians and gay men. The criminalization of consensual same-sex sexual conduct through sodomy statutes represents an example of such interference. In fact, a hand-held sign at a political demonstration stating that the "REPEAL OF SODOMY STATUTES = FREEDOM" would have been entirely consistent with the goals of the gay rights movement during its first (or second) stage.¹¹¹

But now that we are in what I have here characterized as the third stage of the gay rights movement,¹¹² many lesbians and gay men no longer accept that a lack of oppressive state regulation is enough to guarantee freedom or autonomy. Many members of the lesbian and gay community, as well as their supporters, now believe that state action is *required* to create the necessary social conditions that will provide lesbians and gay men with the opportunity to lead autonomous lives. From this perspective, the *failure* of the state to act, for example, by refusing to legally recognize the relationships and families of lesbians and gay men, constitutes a failure to create the necessary social conditions that make the realization of autonomy by lesbians and gay men possible. This partly explains the "MARRIAGE = FREEDOM" perspective held by many lesbians and gay men today.

Although Friedman does not elaborate on the state's affirmative obligations that arise from the value of autonomy, it is clear that her understanding of autonomy is more open to the idea that those affirmative obligations exist than a libertarian conception of autonomy. Friedman argues that social conditions are crucial to the realization of autonomy not only

¹⁰⁸ See generally ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974). Nozick describes the libertarian view of the role of government as follows: "a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified; . . . any more extensive state will violate persons' rights not to be forced to do certain things, and is unjustified . . ." *Id.* at ix.

¹⁰⁹ See Ball, *supra* note 59, at 606–25.

¹¹⁰ See *supra* notes 76–84 and accompanying text.

¹¹¹ Bill Eskridge estimates that in the twenty years following World War II, there were between 2000 and 5000 sodomy arrests per year in the United States. See ESKRIDGE, *supra* note 76, at 66.

¹¹² See *supra* notes 88–91 and accompanying text.

because of what they prevent, but also because of what they permit.¹¹³ In addition, she argues that the promotion of autonomy entails more than the removal of obstacles; it also requires that individuals have available to them a meaningful array of options.¹¹⁴

One of the key insights of Friedman's feminist understanding of autonomy is that autonomy cannot be realized in a social vacuum; instead, autonomy as an end-state depends on social conditions that allow for its exercise.¹¹⁵ The state often plays an indispensable role in determining those conditions. In fact, it is difficult to imagine—given that the state in our society decides which intimate and familial relationships merit legal recognition—how a meaningful array of options can be provided to lesbians and gay men in matters related to family law and policy in the absence of state involvement. The state interferes with autonomy, then, not only when it acts coercively (by, for example, penalizing individuals for engaging in consensual sodomy) but also when it limits options (by, for example, denying individuals the opportunity to marry those whom they love). From this perspective, the slogan “MARRIAGE = FREEDOM” makes complete sense.

It is true that in the United States, the failure of the state to act is not usually viewed as an impediment to autonomy. Americans tend to view the state as an obstacle rather than a purveyor of autonomy.¹¹⁶ This widely held perspective leads to the view that the state's refusal to recognize the personal relationships of lesbians and gay men does not interfere with their autonomy because it does not interfere with their ability to enter and remain in same-sex intimate relationships.¹¹⁷ From this perspective, the state impermissibly interferes with the autonomy of lesbians and gay

¹¹³ See *supra* notes 60–61 and accompanying text.

¹¹⁴ See *supra* note 63 and accompanying text.

¹¹⁵ See *supra* notes 58–63 and accompanying text.

¹¹⁶ I will return to this issue in Part IV where I discuss Martha Fineman's ideas on autonomy. See *infra* notes 134–160 and accompanying text.

¹¹⁷ This was the position taken by the court in *Standhardt v. Superior Court*, 77 P.3d 451. (Ariz. Ct. App. 2003). The plaintiffs in *Standhardt* relied extensively on *Lawrence v. Texas*, 539 U.S. 558 (2003), to argue that Arizona's ban against same-sex marriage violated the U.S. Constitution. See *Standhardt*, 77 P.3d at 453–54. The Arizona court rejected the *Lawrence*-based arguments by pointing out that the state's obligation under that case was one of noninterference with intimate relationships rather than one of recognition. Specifically, the court stated that:

[w]e view [*Lawrence*] as acknowledging a homosexual person's right to define his or her own existence, and achieve the type of individual fulfillment that is a hallmark of a free society, by entering into a homosexual relationship. We do not view [*Lawrence*] as stating that such a right includes the choice to enter a State-sanctioned, same-sex marriage.

Id. at 456 (emphasis added). Despite the conclusions of the court in *Standhardt*, I have argued elsewhere that proponents of same-sex marriage can use the Court's reasoning in *Lawrence* to support arguments that the state has substantive due process obligations to recognize such marriages. See Ball, *supra* note 19, at 1207–31.

men only when it prohibits or explicitly discourages lesbian and gay relationships. A refusal to recognize same-sex marriages, the argument goes, does not entail either a prohibition or a punishment. Thus, it cannot be contended that a refusal to recognize same-sex relationships amounts to a violation of the autonomy rights of lesbians and gay men.

I have elsewhere explored why this objection to the demands by lesbians and gay men (and their supporters) for the marital recognition of committed same-sex relationships should be rejected.¹¹⁸ I will limit myself here to providing a hypothetical that will hopefully illustrate how the state can easily limit autonomy simply by failing to act. Imagine that the government of a very patriarchal society—where most men and women, for example, are deeply committed to the view that women should not work outside of the home—refuses to recognize the educational degrees of women. The state does this to discourage women from entering the workforce. The state in our imaginary society does not, however, *prohibit* women from receiving an education. The state's position is that while educational institutions are free to educate women and to grant them degrees, it will not recognize those degrees for purposes of, for example, awarding government jobs or licenses (such as those required to practice law or medicine).

Notice that the state in our hypothetical is not acting in an explicitly coercive way. It is not *prohibiting* women from pursuing an education; what it is doing instead is refusing to recognize educational degrees obtained by women because it believes that society is better off when only men work outside of the home. It should be obvious, however, that the state's *failure to act* in this instance has a significant impact on the autonomy of women.¹¹⁹ Women living in such a society will be significantly limited in their ability to make choices that are consistent with what is important to them when their wants, values, concerns, and commitments involve pursuing (at least some) priorities and interests outside of the home.

The scenario just set forth is similar to the state's refusal to recognize committed same-sex relationships as marital unions because it believes that society is better off when the institution of marriage is limited to opposite-gender couples. By withholding recognition of the committed relationships of lesbians and gay men, the state limits the array of options available to them. It is true that lesbians and gay men under this regime are still "free" to pursue their intimate relationships, in the same way that women in our hypothetical are "free" to pursue their education. Such freedom from governmental regulation, however, does not translate into an

¹¹⁸ See CARLOS A. BALL, THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY 103–12 (2003) [hereinafter BALL, THE MORALITY OF GAY RIGHTS]; see also Ball, *supra* note 19, at 1191–1221; Carlos A. Ball, *Sexual Ethics and Postmodernism in Gay Rights Philosophy*, 80 N.C. L. REV. 371, 457–63 (2002); Ball, *supra* note 101, at 1939–40.

¹¹⁹ The state's policy also, of course, raises significant questions of equality. I am limiting my focus in this Article, however, to issues of autonomy.

opportunity to realize personal autonomy. The absence of state recognition of the committed relationships of lesbians and gay men deprives them not only of the many tangible benefits that accompany marriage¹²⁰ and the opportunity to take advantage of the structure, certainty, and predictability that legal recognition affords, but it also limits the ability of lesbians and gay men to make choices that are consistent with their wants, values, concerns, and commitments. The absence of state recognition of the committed relationships of lesbians and gay men, in other words, negatively affects their ability to behave and live autonomously. When the state excludes some individuals from important social institutions, whether they are related to education, employment, *or* marriage, it fails to abide by its obligation to make available to everyone a wide array of meaningful choices through which individuals realize their personal autonomy.

3. *Relational Autonomy*

As we have seen, Friedman's conception of autonomy is explicitly relational as opposed to individualistic or atomistic. Autonomy from this perspective is best promoted not by encouraging the isolation of individuals from others, but by encouraging relationships between individuals that are conducive to and supportive of the exercise of autonomy.¹²¹

The understanding of autonomy held by many lesbians and gay men today is similarly relational. By asking that the state recognize their relationships and families, lesbians and gay men are not seeking to advance notions of independence and self-sufficiency. In fact, the goal is just the opposite—to promote and protect the relationships of care, support, and nurturance that lesbians and gay men have with their partners and children. Lesbians and gay men, on issues related to their relationships and families, are not asking that the state leave them alone to exercise their autonomy free of governmental interference. Instead, they are inviting state recognition (and therefore state regulation) of their intimate and familial relationships as a way of making them stronger and more durable.

If individuals determine their wants, needs, concerns, and commitments through their relationships with others,¹²² and if choosing and acting consistently with those wants, needs, concerns, and commitments is the essence of autonomy,¹²³ then the state promotes personal autonomy when it recognizes and supports the relationships of individuals. Not all rela-

¹²⁰ See generally David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447 (1996) (describing the legal consequences of marriage, including decision-making powers, intestacy laws, ability to sue for loss of consortium, rights in parenting, and regulation of the economic relationships of couples).

¹²¹ See *supra* notes 54–75 and accompanying text.

¹²² See *supra* notes 65–75 and accompanying text.

¹²³ See *supra* notes 31–42 and accompanying text.

tionships, of course, are equal; some are more worthy of recognition and support than others. In prioritizing which relationships to recognize and support, however, it makes sense to begin with those involving ongoing care and commitment, which is usually present in relationships between long-term sexual partners and between parents and their children, because those relationships most clearly implicate notions of autonomy.¹²⁴

From the vantage point of relational autonomy, then, the “MARRIAGE = FREEDOM” perspective held by many in the lesbian and gay community becomes completely understandable. The gay rights supporter who was observed holding the “MARRIAGE = FREEDOM” sign was not seeking freedom by asking that the state leave him alone; instead, he was seeking freedom by asking that he be allowed to *join another* in a *socially supported relationship*. From his perspective, considerations of autonomy require not the promotion and protection of his independence and self-sufficiency; they require instead that the state provide him with the opportunity to have a particular type of relationship—one usually characterized by sexual intimacy as well as by long-term care, love, and commitment—legally recognized.

IV. AUTONOMY AND FEMINIST SKEPTICISM ABOUT MARRIAGE

I have argued so far that a feminist understanding of autonomy, as envisioned by a theorist such as Friedman, provides a conceptual framework that helps us better understand the autonomy-based demands made on the state by many lesbians and gay men today on matters related to family law and policy. It is possible, however, to raise at least two objections to my attempt to link autonomy, feminism, and same-sex marriage together. The first objection is that since many feminists are vigorous critics of autonomy, the attempt to speak of a *feminist* conception of autonomy is inherently problematic. As noted in Part I, I do not in this Article address this objection except to note that, in my estimation, Friedman is compelling in her response to feminist critics of autonomy.¹²⁵

A second possible objection is based on the reality that many feminists are strong critics of marriage as a social institution. To put it simply, if for some gay rights proponents “MARRIAGE = FREEDOM,” for many feminists, “MARRIAGE = OPPRESSION.” Numerous feminist scholars have argued that, given the invidious role that the institution of marriage has played in the subordination of women, political progressives, including gay rights proponents, should aim not to reform marriage (by, for example, seeking to expand the number of individuals who are eligible to marry),

¹²⁴ As Friedman notes, “[r]omantic [relationships] that nurture and affirm us can promote our autonomy as individuals by promoting our self-understanding, self-esteem, and capacities to act effectively in concert with others.” See FRIEDMAN, *supra* note 3, at 123–24.

¹²⁵ See *supra* notes 14–15 and accompanying text.

but should instead seek to abolish marriage altogether and replace it with other forms of legally recognized relationships.¹²⁶ As these feminists see it, it is not possible to transform marriage into an egalitarian institution; marriage has been and will always be an institution that seeks to privilege some (men and those who are married) and subordinate others (women and those who are not married). Given the feminist critique of marriage, it can be argued that any attempt to use feminist theory to advance the cause of same-sex marriage is also inherently problematic.

Several gay rights proponents (admittedly mostly men, including myself) have attempted to respond to the feminist objection of pursuing same-sex marriage as a civil rights goal.¹²⁷ We have argued that the recognition of same-sex marriages and the corresponding elimination of the gender requirement for marriage should help diminish, over the long run, the patriarchal and gender-subordinating components of that institution.¹²⁸ We have also pointed out that the struggle for same-sex marriage has led to the recognition of many different types of relationships—such as reciprocal beneficiaries in Hawaii,¹²⁹ domestic partnerships in California,¹³⁰ and civil unions in Vermont¹³¹—that have begun to weaken somewhat the hegemonic domination enjoyed by the institution of marriage over intimate relationships.¹³² The struggle for same-sex marriage, in other words, has resulted in more rather than fewer options for individuals in committed relationships who seek to have their relationships legally recognized.

¹²⁶ See sources cited *supra* note 18. For another feminist critique of marriage, see Claudia Card, *Against Marriage and Motherhood*, HYPATIA, Summer 1996, at 1. Card argues that “women who identify as lesbian or gay should be reluctant to put [their] activist energy into attaining legal equity with heterosexuals in marriage . . . because these institutions are so deeply flawed that they seem to me unworthy of emulation and reproduction.” *Id.* at 2.

¹²⁷ See, e.g., ESKRIDGE, *supra* note 20, at 206–17; BALL, THE MORALITY OF GAY RIGHTS, *supra* note 118, at 112–17, 127–28; see also Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9 (1991) (arguing that same-sex marriage has the potential to destabilize the inherently gendered system of marriage).

¹²⁸ See BALL, THE MORALITY OF GAY RIGHTS, *supra* note 118, at 127–28; see also ESKRIDGE, *supra* note 20, at 213–17; Hunter, *supra* note 127, at 17 (arguing that “[s]ame-sex marriage could create the model in law for an egalitarian kind of interpersonal relation, outside the gendered norms of power”).

¹²⁹ See HAW. REV. STAT. § 572C-4 (Supp. 2000).

¹³⁰ See CAL. FAM. CODE §§ 297–299.6 (West Supp. 2004).

¹³¹ See VT. STAT. ANN. tit. 15, §§ 1201–1207 (2002).

¹³² See BALL, THE MORALITY OF GAY RIGHTS, *supra* note 118, at 116; ESKRIDGE, *supra* note 20, at 210–13. Some feminist critics have been justifiably critical of the exclusion of heterosexual couples from new institutions such as civil unions. See Robson, *supra* note 18, at 753–55. These exclusionary policies leave marriage as the only option for heterosexual couples who want their relationships recognized by law. It is possible, however, that, as further pressure for reform is brought to bear on state legislatures, some of the new institutions will eventually be made available to heterosexual couples. The first step in achieving meaningful reform, in other words, may be to familiarize the citizenry with alternatives to marriage such as civil unions and domestic partnerships. The second step may be to convince a majority of the population that if lesbians and gay men are allowed into these institutions, so should heterosexual couples.

Rather than elaborate on these important but by now familiar responses to the feminist critique of same-sex marriage, I explore in this final Section whether it is possible for feminists to be critical of the pursuit of same-sex marriage as a civil rights goal while still believing that the concept of autonomy has normative and political value. I do so by discussing a recent book by Professor Martha Fineman, a leading feminist critic of marriage who argues for its abolishment rather than for its expansion.¹³³

It is easy at first blush, especially given the title of Fineman's book, *The Autonomy Myth*, to link together a feminist critique of marriage with a feminist rejection of autonomy as a value worth pursuing and defending. As I argue below, however, a close reading of Fineman's book reveals that she does not call for a complete rejection of the value of autonomy; instead, she calls for a *different* understanding of autonomy than that held by many Americans, one that emphasizes dependency and relationships rather than independence and self-sufficiency. Fineman's book shows that it is possible to disagree on the specific issue of whether it is advisable (or possible) to reform marriage while still agreeing "that autonomy *properly understood*" is a normatively and politically useful value.¹³⁴ On this point there can be significant agreement between at least some feminist thinkers who are skeptical of marriage (such as Fineman) on the one hand and those in the gay rights movement who are seeking the legal recognition of same-sex marriages on the other.

The Autonomy Myth focuses largely on dependency. Fineman notes that dependency is part of everyone's life: we were all dependent as children and many of us will become dependent as we age or become disabled.¹³⁵ She argues that it is unfair to place the primary responsibility for coping with dependency, that is, the primary responsibility for *caretaking*, on families, both because they have fewer economic resources than other institutions (such as the state and employers) and because some family members (i.e., women) are expected to do significantly more caretaking than others (i.e., men).¹³⁶ As Fineman sees it, matters of dependency and care should be primarily of public—rather than exclusively of private—concern.

The family, Fineman believes, should be viewed as another *social* institution akin to that of the state and the market.¹³⁷ She calls for the reallocation of caretaking responsibilities across social institutions, away from the family and toward the government and employers. Thus, as a policy matter, Fineman calls on the state and job providers to subsidize and support caretakers.¹³⁸

¹³³ See FINEMAN, *supra* note 17, at 121–41.

¹³⁴ FRIEDMAN, *supra* note 3, at 103.

¹³⁵ See FINEMAN, *supra* note 17, at 35.

¹³⁶ See *id.* at 31–54.

¹³⁷ See *id.* at 57–70.

¹³⁸ See *id.* at 218–62.

The myth that Fineman critiques in her book is not one that promotes autonomy as a realizable end, but is instead one represented by “simplistic”¹³⁹ and “uncomplicated”¹⁴⁰ notions of autonomy that are part of American ideology and traditions. It is these misguided notions, Fineman argues, that privilege individualism and the market and stigmatize dependency and care.¹⁴¹ It is these notions, in other words, that justify a retrenchment—rather than Fineman’s preferred expansion—in the state’s role in promoting and subsidizing caretaking relationships.

Fineman’s views, of course, run counter to recent changes in American welfare policies. The federal government, for example, has drastically reduced welfare benefits intended to assist needy families and has made the benefits contingent on mothers working outside of the home. This has made it more difficult for single mothers who have limited financial resources to care for their children.¹⁴² These changes in American welfare policy are based on an understanding of autonomy that links it to notions of independence and self-sufficiency. In our culture, those who need government assistance (often, as is the case of many single mothers, to care for others) are marginalized and stigmatized for their lack of independence and self-sufficiency.¹⁴³

In the United States, Fineman points out, everyone, regardless of socioeconomic status or background, is expected to be independent and self-sufficient. As she puts it, under this prevailing view, “[a]utonomy is synonymous with a concept of self-governance, and is characterized by self-sufficiency and independence, individual qualities that are seen as prerequisites for individual freedom of will and action.”¹⁴⁴ Fineman adds that “[o]ur all-American hero is therefore the autonomous individual, protected by law from unwarranted interference with his rights by other individuals and by government on any level, and free to conquer the frontier, be it westward or upward into space.”¹⁴⁵

Fineman argues that the conception of autonomy held by many Americans today is a myth because it ignores the inevitability and universality of dependency.¹⁴⁶ All of us were part of relationships of dependency as children; many of us are part of them as parents; some of us are part of them as disabled individuals; and some of us are part of them as caretakers to children, the aged, and the disabled. The prevalence of dependency and caretaking, Fineman argues, makes them necessary subjects of public concern.¹⁴⁷

¹³⁹ *Id.* at 272.

¹⁴⁰ *Id.* at 273.

¹⁴¹ *See id.* at 31–54.

¹⁴² *See id.* at 52–53.

¹⁴³ *Id.* at 35–40.

¹⁴⁴ *Id.* at 19–20.

¹⁴⁵ *Id.* at 20.

¹⁴⁶ *See id.* at 33–37.

¹⁴⁷ *See id.*

Therefore, the focus of family law and policy, according to Fineman, should be on caretakers rather than on marriage. She argues that we need to replace the current privileging of marriage (or form) with the privileging of caretaking (or function).¹⁴⁸ In deciding which families deserve societal support through subsidies, we should ask whether caretaking (rather than marriage) is present. As Fineman asks,

[i]f we are concerned with dependency and want to ensure caretaking through social and economic subsidy of the family, then why not focus on the direct relationship between caretaker/dependent? It is not necessary to support this unit indirectly through marriage when we can do so directly with caretaker/dependent directed policies.¹⁴⁹

According to Fineman then, the state should have no interest in marriage as such; the state should instead focus on the social good of caretaking by directly supporting and aiding those who care for others.¹⁵⁰

Fineman believes that abolishing the institution of marriage as a legal construct is preferable to seeking to reform or change it by, for example, allowing lesbians and gay men to marry.¹⁵¹ The struggle for same-sex marriage has little appeal to Fineman because it continues to privilege marriage while failing to address directly issues of dependency and caretaking.¹⁵²

There is, then, a clear disagreement between a feminist theorist such as Fineman and those in the gay rights movement who support same-sex marriage on the advisability of pursuing such marriages as a civil rights goal. The point I want to emphasize, however, is that there is, at a deeper level, considerable common ground between the feminist understanding of autonomy articulated by Fineman and the conception of autonomy promoted today by an important segment of the gay rights movement (i.e., that which supports same-sex marriages). Fineman's conception of autonomy, in

¹⁴⁸ See *id.* at 95–120.

¹⁴⁹ *Id.* at 108.

¹⁵⁰ See *id.* at 284–87; see also FINEMAN, THE NEUTERED MOTHER, *supra* note 23, at 232 (arguing that “[f]amily and welfare law [sh]ould be reconceived so as to support caretaking as the family intimacy norm”).

¹⁵¹ See FINEMAN, *supra* note 17, at 133–38.

¹⁵² As Fineman puts it,

[t]hose who try to use law to push new and emerging forms of family into old molds seem doomed to frustration and failure. Our energy should be turned from obsessing over the changing nature of marriage to rethinking the expectations and assumptions we have for the family of the future.

Id. at 67; see also FINEMAN, THE NEUTERED MOTHER, *supra* note 23, at 230 (arguing that abolishing “the category [of marriage] as a legal status [would] render all sexual relationships equal with each other and all relationships equal with the sexual”).

fact, is in fundamental ways similar to that of Friedman's, which, as we saw in Part III, is quite consistent with the understanding of autonomy held by many lesbians and gay men today.¹⁵³

In *The Autonomy Myth*, Fineman does not side with those feminists who argue that autonomy is neither valuable nor realizable; instead, she critiques the view of autonomy that equates it with independence and self-sufficiency. Like Friedman, Fineman emphasizes the role that social conditions play in providing individuals with choices that are meaningful and through which they can exercise their capacities for autonomy. For Fineman, true autonomy is promoted by providing meaningful choices to individuals. This leads her to a very different understanding of the proper role of the state in the promotion of autonomy than that held by many, if not most, Americans. Fineman's proposed

paradigm would present an alternative to that which now drives our politics, because it would explicitly build upon the premise that there is a fundamental connection between autonomy—an individual's ability to make choices in her or his life—and equality, which demands that the state exercise some responsibility to ensure that each individual has the necessary basic resources to allow choices to be made and to be meaningful. In this paradigm the state is not a default (therefore stigmatized) port of last resort, but an active partner with the individual in realizing her or his capabilities and capacities to the fullest extent.¹⁵⁴

Although it is clear, then, that Fineman and many in the lesbian and gay community disagree about whether the state should be encouraged to provide the particular choice of marriage to lesbians and gay men, there is a more fundamental agreement on the role of the state in the promotion of autonomy. Both Fineman and the contemporary gay rights movement believe that the state promotes autonomy not only through restraint and noninterference,¹⁵⁵ but also through providing meaningful choices to in-

¹⁵³ See *supra* notes 92–124 and accompanying text.

¹⁵⁴ See FINEMAN, *supra* note 17, at 271. Fineman explicitly prioritizes equality over autonomy, arguing that the latter is impossible without the former. Unless the state provides “[t]he assurance of some fundamental level of economic security guaranteed to all caretaking units,” she argues, autonomy for many will be beyond reach. *Id.*

¹⁵⁵ It is difficult to imagine a conception of autonomy that would not place some restrictions on the ability of the state to act in some circumstances. In emphasizing, as I have done in this Article, the state's affirmative obligations that arise from the value of autonomy, I do not mean to disparage the importance of also requiring the state, in some instances, not to interfere with the lives of individuals. Even Fineman recognizes the need for governmental restraint; she calls for protecting the privacy of the caretaking unit to “provide autonomy for that unit.” *Id.* at 293. Fineman notes, however, that under her formulation, the right to family privacy—which would not be limited to the marital unit but would apply to all caretaking relationships—“would not be a right to separation, secrecy, or seclusion, but [would] rather [be a] right to autonomy or self-determination for the fam-

dividuals.¹⁵⁶ The disagreement between Fineman (and other feminists who agree with her) and many politically active lesbians and gay men is on the important but relatively narrow issue of whether the specific option to join one particular social institution—marriage—is a worthwhile civil rights goal. There is considerable common ground between the two on the broader issue of the proper role of the state in promoting autonomy.

Furthermore, Fineman's understanding of autonomy, like Friedman's,¹⁵⁷ emphasizes the role played by relationships of support and care. Autonomy, Fineman argues, "is as much a product of the caretaking that takes place within the family as it is of individual action. It is that caretaking that sees us through our periods of dependency and (hopefully) provides us with the tools we need to operate in other parts of the world."¹⁵⁸

Fineman's perspective on autonomy, by emphasizing dependency and relationships rather than independence and self-sufficiency, is consistent with the understanding of autonomy held by many in the gay and lesbian community.¹⁵⁹ Both understandings are rooted in caretaking relationships rather than in individualism. Although the gay rights movement has not, as such, emphasized the idea of dependency in its autonomy-based demands, its understanding of the bearer of autonomy, at least in the area of

ily, even as it is firmly located within a supportive and reciprocal state." *Id.* at 294.

¹⁵⁶ See *supra* notes 92–124 and accompanying text.

¹⁵⁷ See *supra* notes 64–74 and accompanying text.

¹⁵⁸ FINEMAN, *supra* note 17, at 233. If there is a disagreement—or at least a difference in emphasis—between Friedman and Fineman, it is that the latter limits her discussion of relational autonomy to caretaking relationships, such as that between parents and children, that explicitly raise issues of dependency. In contrast, Friedman also explores the role that relationships between supposed equals, such as romantic partners, can play in the leading of autonomous lives. She notes, for example, that "[r]omantic [relationships] that nurture and affirm us can promote our autonomy as individuals by promoting our self-understanding, self-esteem, and capacities to act effectively in concert with others." FRIEDMAN, *supra* note 3, at 123–24; see also FRIEDMAN, *supra* note 52, at 187–255 (discussing the important role of friendship in the lives of individuals).

Consistent with her critique of marriage as a legal institution, Fineman, in *The Autonomy Myth* and elsewhere, argues that the state should not establish default rules that apply to individuals in sexually intimate relationships; instead, those individuals should be left to their own devices to reach contractual arrangements that determine their rights and obligations vis-à-vis each other. See FINEMAN, *supra* note 17, at 124–30; see also FINEMAN, THE NEUTERED MOTHER, *supra* note 23, at 228–30. However, (1) if romantic relationships play an important role in the ability of individuals to lead autonomous lives (as Friedman argues), and (2) if those relationships can also involve the nurturance of and care for others, and (3) if the state should play an active role in promoting the autonomy of individuals (as Fineman argues), then it is not clear why the state has a legitimate role to play in recognizing and supporting some relationships of care (such as those between parents and children) but not others (such as those between romantic partners). I do not in this Article elaborate on this critique of Fineman's call for the "privatization" of marriage because the goal here is to move beyond possible disagreements related to state recognition of intimate relationships between adults and focus on deeper commonalities relating to what autonomy means and what it requires of the state. For a further elaboration of the connection between relationships of care, autonomy, and same-sex marriage, see BALL, THE MORALITY OF GAY RIGHTS, *supra* note 118, at 91–117.

¹⁵⁹ See *supra* notes 92–124 and accompanying text.

family law and policy, is that of an individual who is embedded in relationships of support and care.¹⁶⁰ Both the gay rights movement and Fineman (as well as Friedman), then, hold a conception of autonomy that is relational, as opposed to atomistic, in nature.

Although it is likely that the disagreement between some feminists and many members of the lesbian and gay community on the advisability of pursuing same-sex marriage as a civil rights goal will continue for some time to come, I have attempted in this Section of the Article to show that there is nonetheless considerable common ground between the two groups on deeper issues relating to the true meaning and value of autonomy. This common ground bodes well for the collaboration of feminists and gay rights proponents in the future in helping to create legal constructs that acknowledge the reality that heterosexual marriage is only one way of organizing the intimate and familial lives of individuals.

V. CONCLUSION

I have sought in this Article to explore a feminist/relational conception of autonomy that sustains the idea that the state has an obligation to recognize and support lesbian and gay relationships and families. I believe that this type of exploration is important for two reasons. First, the recent backlash against gay rights in general, and same-sex marriage in particular,¹⁶¹ requires gay rights supporters to articulate as clearly as possible the reasons why values, such as autonomy and equality, which most Americans profess to cherish, are inconsistent with many of the nation's current legal and social policies as they relate to lesbians and gay men.

Second, in this critical and difficult period in the history of the gay rights movement, it is important for progressives to work hard at finding common ground in opposing conservative efforts to curtail or deny basic civil rights. As I have argued here, despite the disagreement between many feminists and supporters of same-sex marriage about the advisability of seeking recognition of such marriages as a civil rights goal, there is a broader and more fundamental agreement on the issue of what autonomy means and what it requires of the state.

The idea that marriage implicates notions of autonomy may appear paradoxical because it may seem that autonomy only requires a lack of state interference or involvement in the lives of individuals rather than the kind of regulation that accompanies state-created institutions such as marriage. I have attempted in this Article to explain why, when viewed from the perspective of many lesbians and gay men today, marriage is intimately connected with notions of autonomy. I have done this by exploring the understanding of autonomy held by the feminist thinker Marilyn

¹⁶⁰ *See id.*

¹⁶¹ *See supra* notes 24–25 and accompanying text.

Friedman. That understanding allows us to clarify the apparent paradox by emphasizing that the value of autonomy imposes obligations on the state to assist in the creation of social conditions that provide individuals with meaningful options. The state does not contribute to autonomy, in other words, only by leaving individuals alone.

It may also appear paradoxical to argue that the denial of the opportunity to marry is a denial of autonomy because it may seem that whenever individuals bind themselves in relationships that bring with them commitments and obligations, they limit rather than expand their opportunities for autonomy. The paradox exists, however, only if we believe that individuals exercise their autonomy in isolation from others. If we view autonomy, as feminist theory counsels us to do, from a relational perspective, then we begin to see how relationships are a necessary part of the experience and realization of autonomy. As I have argued here, the kind of interdependence and commitment that can be experienced within a relationship such as the marital one can contribute to the autonomy of its participants when the relationship is consistent with the participants' wants, values, concerns, and commitments. A society that denies all lesbians and gay men the opportunity to marry denies at least some of them the opportunity to make choices and engage in actions that are consistent with who they are. That society, in the end, fails to provide lesbians and gay men with the opportunity to live autonomous lives.

