

**MARRIAGE AND THE ELEPHANT:
THE LIBERAL DEMOCRATIC STATE'S
REGULATION OF INTIMATE RELATIONSHIPS
BETWEEN ADULTS**

MAXINE EICHNER*

Since [all six men were] blind, none had ever seen [an elephant]. . . . [T]he men took turns to investigate the elephant's shape and form.

The first blind man to approach the elephant . . . cried out, "it is as sure as I am wise that this elephant is like a great mud wall baked hard in the sun. . . ."

"Now, my brothers," the [second] man exclaimed with a cry of dawning recognition, "I can tell you what shape this elephant is—he is exactly like a spear"

Now it was the turn of the third blind man. . . . "Why dear brothers, do you not see—this elephant is very much like a rope," he shouted

"Ha, I thought as much," [the fourth man] declared excitedly. "This elephant much resembles a serpent"

"Good gracious, brothers," [the fifth man] called out, "even a blind man can see what shape the elephant resembles most. Why, he's mighty like a fan"

At last, it was the turn of the sixth old fellow Feeling it wonderingly with both hands, he called to the others. "This sturdy pillar, brothers mine, feels exactly like the trunk of the great areca palm tree."¹

* Associate Professor of Law, University of North Carolina School of Law; Ph.D., University of North Carolina-Chapel Hill, 2006; J.D., Yale Law School, 1988; B.A., Yale College, 1984. I owe my thanks to a number of people who have given me insightful comments on earlier drafts of this Article, including Kathryn Abrams, Jennifer Collins, John Conley, Marion Crain, Adrienne Davis, Clare Huntington, Michael Lienesch, William Marshall, Linda McClain, Hiroshi Motomura, Elizabeth Scott, Mary Shanley, Thomas Spragens, Eric Stein, Mark Weisburd, and Deborah Weissman. Special thanks are due to my research assistants, Carolyn Pratt and Cameron Contizano, as well as to Julianne Johnston and the other editors at the *Harvard Journal of Law & Gender* for their very thoughtful editing.

¹ JAMES RIORDAN, *Six Blind Men and an Elephant*, in AN ILLUSTRATED TREASURY OF

For much of the twentieth century, the state's position with respect to marriage and other intimate relationships between adults sparked little conversation in legal and political theory. Instead, the state's role in putting its seal of approval on marital relationships and discouraging other intimate relationships was generally treated as an unquestioned fact. To the extent that the state's position on intimate relationships was raised at all, commentary centered on the relative ease with which persons generally, or particular classes of persons specifically, could be married² or divorced,³ and on the consequences of divorce.⁴ The legitimacy of the state's

FAIRY AND FOLK TALES 30, 30–33 (1986).

² For example, a considerable amount of the literature on marriage during the 1980s and early 1990s focused on the right of members of particular groups to marry. Prison inmates were one of the groups that received the most attention. *See, e.g.*, Bradford L. Thomas, *Restricting State Prisoners' Due Process Rights: The Supreme Court Demonstrates Its Loyalty to Judicial Restraint*, 22 CUMB. L. REV. 215 (1992) (highlighting the Court's deference to state decisions when reviewing challenged prison regulations, including restrictions on marriage); Virginia L. Hardwick, Note, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. REV. 275 (1985) (arguing against marital restrictions on prisoners). The rights of those with HIV and AIDS to marry also provoked conversation. *See, e.g.*, Robert D. Goodman, *In Sickness or in Health: The Right to Marry and the Case of HIV Antibody Testing*, 38 DEPAUL L. REV. 87 (1988) (discussing the implications of HIV testing on the rights of those with AIDS to marry); Lawrence O. Gostin, *The Future of Public Health Law*, 12 AM. J.L. & MED. 461, 469 (1986) (arguing that a Utah statute prohibiting any person with AIDS from marrying would likely be found unconstitutional). The issue of immigrants' rights to marry was also explored. *See, e.g.*, Jesse I. Santana, *The Proverbial Catch-22: The Unconstitutionality of Section Five of the Immigration Marriage Fraud Amendments of 1986*, 25 CAL. W. L. REV. 1 (1988) (arguing that the Immigration Marriage Fraud Amendments violate the Procedural Due Process and Equal Protection clauses of the Fourteenth Amendment); Eileen P. Lynskey, Comment, *Immigration Marriage Fraud Amendments of 1986: Till Congress Do Us Part*, 41 U. MIAMI L. REV. 1087 (1987) (arguing that the restrictions Congress placed on the distribution of marriage benefits to aliens in the Marriage Fraud Amendments violate immigrants' constitutional rights to equal protection and due process of law as well as the constitutional rights of Americans who wish to marry aliens); Vonnell C. Tingle, Note, *Immigration Marriage Fraud Amendments of 1986: Locking In By Locking Out?*, 27 J. FAM. L. 733 (1989) (assessing the effectiveness of the 1986 Marriage Fraud Amendments in appropriately deterring fraudulent marriages).

³ For example, in the period between the 1970s and the mid-1990s, a great number of law review articles focused on the then-occurring no-fault divorce revolution sweeping the states. *See, e.g.*, Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291 (1987) (describing policy issues driving the no-fault divorce movement and evaluating the social effects of no-fault divorce laws on women and children); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1 (1987) (arguing that no-fault divorce laws can help women achieve greater equality in their divorces); Nora J. Lauerma, *A Step Toward Enhancing Equality, Choice, and Opportunity to Develop in Marriage and at Divorce*, 56 U. CIN. L. REV. 493 (1987) (describing potential benefits of no-fault divorce laws for women); Thomas B. Marvell, *Divorce Rates and the Fault Requirement*, 23 LAW & SOC'Y REV. 543 (1989) (presenting evidence that no-fault divorce laws significantly increased divorces in only a minority of states); Doris Sybella Vivaz, Note, *Balancing Children's Rights into the Divorce Decision*, 13 VT. L. REV. 531 (1989) (arguing that the no-fault divorce laws ignore the best interests of children).

⁴ *See, e.g.*, Charles F. Basil, *The Divisibility of Pension Interests on Divorce: The District of Columbia Ups the Ante*, 33 CATH. U. L. REV. 1087 (1984) (evaluating the practice of treating pension interests as marital property); Helen A. Boyer, *Recent Development, Equi-*

involvement in and support for marriage itself, however, went largely undisputed.

Recent legal, political, and social events, however, have turned this state of affairs on its head. The string of legal cases involving same-sex marriage challenges, beginning with the Hawaii Supreme Court's decision in *Baehr v. Lewin* in 1993,⁵ and extending through the recent decision of the New Jersey Supreme Court in *Lewis v. Harris*,⁶ in combination with the continuing political reaction to these decisions,⁷ has fomented a vigorous debate

table Interest in Enhanced Earning Capacity: The Treatment of a Professional Degree at Dissolution—In Re Marriage of Washburn, 60 WASH. L. REV. 431 (1985) (arguing that the supporting spouse of a partner who earned a graduate degree should be deemed to have a property interest in his or her spouse's increased earning capacity); Michelle Dorsey Deis, Case Comment, Gross v. Gross: *Ohio's First Step Toward Allowing Private Ordering of the Marital Relationship*, 47 OHIO ST. L.J. 235 (1986) (discussing the difficulty of applying family law and contract law principles to validate antenuptial agreements with divorce provisions); Michael Diehl, Note, *The Trust in Marital Law: Divisibility of a Beneficiary Spouse's Interests on Divorce*, 64 TEX. L. REV. 1301 (1986) (discussing the ways in which divorce courts in different jurisdictions apply and interpret marital property laws involving trusts); Barb Mattei, Comment, *1984 Deficit Reduction Act: Divorce Taxation*, 1986 WIS. L. REV. 177 (1986) (evaluating results of the Deficit Reduction Act on marriage and divorce law).

⁵ 852 P.2d 44 (Haw. 1993).

⁶ 908 A.2d 196 (N.J. 2006). Thus far, however, only one state's supreme court, Massachusetts, has declared that its state constitution requires that the state allow same-sex marriage. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), *related proceeding at* 802 N.E.2d 565 (Mass. 2004). Massachusetts, which began issuing licenses to same-sex couples on May 17, 2004, is the only state that currently permits same-sex marriage. See Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES, May 17, 2004, at A16; see also David W. Chen, *Trenton Court Considers Gay Marriage Issue*, N.Y. TIMES, Feb. 16, 2006, at B8.

Two other states' supreme courts, New Jersey and Vermont, have declared that their state constitutions require that the state afford same-sex couples the same rights and benefits as married couples, but that the state need not formally admit such couples into the institution of marriage. See *Lewis*, 908 A.2d at 224; *Baker v. Vermont*, 744 A.2d 864, 886 (Vt. 1999). In the mid-1990s, Hawaii courts seemed poised to strike down the state's ban on same-sex marriage, see *Baehr*, 852 P.2d at 44; *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), but before courts ruled on the issue, the state's citizens amended the Hawaii Constitution to allow the legislature to prohibit same-sex marriage. See HAW. CONST. art. I, § 23; see also Editorial, *Hawaii's Ban on Gay Marriage*, N.Y. TIMES, Dec. 20, 1999, at A36.

Recently, same-sex marriage challenges have failed in other state courts. On July 6, 2006, in *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006), New York's highest court ruled against extending marriage to same-sex couples. Twenty days later, in *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (en banc), the Washington Supreme Court upheld the state's same-sex marriage ban in a 5-4 vote. On October 5, 2006, the California Court of Appeals for the First District, an intermediate level court, held that the state's ban on same-sex marriage did not violate the California Constitution. See *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006). That case is expected to be appealed to the California Supreme Court. See *Gay Marriage Ban Upheld by Calif. Court*, WASH. POST, Oct. 6, 2006, at A11.

⁷ See *supra* note 6 (discussing the political reaction to Hawaii courts' likely striking down the state's ban on same-sex marriage). On the national level, reaction to *Baehr* led to the Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419 ("DOMA"), which declares that no state must give effect to a same-sex marriage celebrated in another state, and that the term "marriage" for purposes of federal law is confined to the union of a

in legal and political theory regarding the state's appropriate role in relationships between adults. This debate has been spurred on, as well, by social developments, including the increasing visibility of same-sex relationships,⁸ the mushrooming rates of single-parent families,⁹ and the increasing numbers of couples who cohabit without marriage.¹⁰

The resulting conversation among political and legal theorists has been complex. Many in the conversation have argued that marriage rights should be extended to same-sex couples.¹¹ Others have argued that states

man and woman. *Id.* As of 2006, thirty-nine states had adopted legislation similar to the federal DOMA, often called "mini-DOMAs," which bar the state from recognizing a same-sex marriage celebrated in another state. See HUMAN RIGHTS CAMPAIGN, STATEWIDE MARRIAGE LAWS, <http://hrc.org/Template.cfm?Section=Center&CONTENTID=28225&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (last visited Nov. 28, 2006). Twenty-seven states have also adopted state constitutional amendments that bar same-sex marriage. See Monica Davey, *Liberals Find Rays of Hope on Ballot Measures*, N.Y. TIMES, Nov. 9, 2006, at P16. This includes Hawaii, whose state constitution does not ban same-sex marriage, but authorizes the state legislature to do so. See HUMAN RIGHTS CAMPAIGN, STATE PROHIBITIONS ON MARRIAGE FOR SAME-SEX COUPLE [sic], <http://hrc.org/Template.cfm?Section=Center&CONTENTID=28225&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (last visited Nov. 28, 2006). As of the end of 2006, only in one state, Arizona, have voters rejected a proposed constitutional measure to ban same-sex marriage. See Davey, *supra*.

⁸ The 2000 U.S. Census counted 601,209 same-sex unmarried partner households. See DAVID M. SMITH & GARY J. GATES, GAY AND LESBIAN FAMILIES IN THE UNITED STATES: SAME-SEX UNMARRIED PARTNER HOUSEHOLDS 1 (2001), http://www.urban.org/UploadedPDF/1000491_gl_partner_households.pdf. That is a 314% increase from the 1990 Census, although the manner of coding these responses probably caused significant undercounting in the earlier census. *Id.* at 1, 3. It is likely that actual numbers are higher than even the 2000 Census reveals due to underreporting of these relationships. *Id.* at 2–3.

⁹ In 1960, 9% of children lived in single-parent homes; by 1999, that figure had risen to 27%. STEPHANIE SADO & ANGELA BAYER, POPULATION RESOURCE CENTER, EXECUTIVE SUMMARY: THE CHANGING AMERICAN FAMILY (2001), <http://www.prcdc.org/summaries/family/family.html>. The rise in single-parent families is attributable not only to increased divorce rates, but to an increase in the number of families in which the parents were never married. *Id.* The percentage of children born out of wedlock increased at an accelerated pace beginning in the 1960s. *Id.* It has recently climbed to a record high, accounting for almost four in ten children born in 2005. See *Babies Born to Singles Are at Record: Nearly 4 in 10*, N.Y. TIMES, Nov. 22, 2006, at A22. During the same period, fertility rates of married women declined. *Id.* Overall, almost one in every three families with children is headed by a woman who has never been married. KRISTEN LUKER, DUBIOUS CONCEPTIONS: THE POLITICS OF TEENAGE PREGNANCY 103 (1996).

¹⁰ "Census estimates indicate that in 1977 there were 1.1 million cohabiting couples, about 1.5% of all households . . ." Renata Forste, *Prelude to Marriage or Alternative to Marriage?*, 4 J.L. & FAM. STUD. 91, 91 (2002). By 1997, that number had risen to 4.9 million couples, or 4.8% of all households. *Id.*

¹¹ See, e.g., William N. Eskridge, Jr., THE CASE FOR SAME-SEX MARRIAGE (1996) (contending that same-sex marriage would be good both for the United States and for homosexuals); William N. Eskridge, *Comparative Law and the Same-Sex Marriage Debate: A Step-By-Step Approach Toward State Recognition*, 31 MCGEORGE L. REV. 641 (2000) (arguing that commitment to equality dictates recognition of same-sex marriage); Andrew Koppelman, *The Decline and Fall of the Case against Same-Sex Marriage*, 76 ST. THOMAS L.J. 5 (2004) (arguing that the arguments against same-sex marriage fail); Elizabeth S. Scott, *Marriage, Cohabitation, and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225 (2004) (defending marriage's privileged status but arguing that benefits should be extended to same-sex couples); Jennifer Wriggins, *Marriage Law and Family Law: Auton-*

should retain the institution of marriage, but continue to restrict it to heterosexual couples.¹² Some have contended that particular rights and privileges presently confined to married couples should be extended to cohabiting couples,¹³ as well as to a variety of other relationships.¹⁴ Still others, including some gay rights advocates, believe that the state has no legitimate business regulating adult relationships, and assert that the state should remove itself completely from sanctioning marriage and other intimate relationships.¹⁵ Finally, even those who agree that the state should support marriage disagree about the amount of financial, legal, or social support that it should extend.¹⁶

omy, Interdependence, and Couples of the Same Gender, 41 B.C. L. REV. 265 (2000) (contending that states' failure to recognize same-sex marriage is incoherent and bad policy).

¹² See, e.g., COUNCIL ON FAMILY LAW, *THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA* (2005) (arguing that the institution of marriage properly links bonding sexual difference and caring for children); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581 (1999) (arguing that states have strong reasons to favor traditional marriage, and to exclude same-sex marriage from legal protection); Lynn D. Wardle, *Is Marriage Obsolete?*, 10 MICH. J. GENDER & L. 189, 223–24 (2003) (arguing that same-sex relationships do not provide the social benefits that marriage, as the “building block of society,” provides); Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimize a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735 (1998) (challenging justifications for state recognition of homosexual relationships).

¹³ See, e.g., AM. LAW INST., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS*, §§ 6.01–6.06 (2002) (providing that support provisions and property distribution rights should apply at the end of certain nonmarital relationships); Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265 (2001) (proposing periodic support payments and property division to members of cohabiting couples who separate); Mary Coombs, *Insiders and Outsiders: What the American Law Institute Has Done for Gay and Lesbian Families*, 8 DUKE J. GENDER L. & POL'Y 87 (2001) (supporting American Law Institute proposals); Ira Mark Ellman, “Contract Thinking” Was Marvin’s Fatal Flaw, 76 NOTRE DAME L. REV. 1365 (2001) (arguing for a greater recognition of same-sex couples through the application of status-based rules and the granting of benefits to such couples); Martha Ertman, *The ALI Principles’ Approach to Domestic Partnership*, 8 DUKE J. GENDER L. & POL'Y 107, 114 (2001) (proposing that members of intimate relationships select from a range of legal regulations, without bias for any particular affiliation).

¹⁴ See, e.g., Nancy D. Polikoff, *Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201 (2003) (advocating equal state support for equally valuable intimate relationships, rather than state support solely for marriage); Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. CHI. LEGAL F. 353 (2004) (praising the ALI Principles’ support for property rights for unmarried cohabitants as a positive step toward equal recognition for all committed relationships); Judith Stacey, *Toward Equal Regard For Marriage and Other Imperfect Intimate Affiliations*, 32 HOFSTRA L. REV. 331, 340 (2003) (arguing for “the need to give legal recognition and form to the rich diversity of intimate bonds that have emerged beyond marriage”).

¹⁵ See, e.g., MARTHA FINEMAN, *THE AUTONOMY MYTH* (2004) (asserting that the state should abolish civil marriage as an institution); MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999) (arguing that queer ethics favor the abolition of marriage); Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U. J. GENDER SOC. POL'Y & L. 167 (2000) (arguing that the state should stop privileging marriage altogether).

¹⁶ Compare Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the*

What explains these vastly disparate claims regarding the state's position concerning intimate relationships? And how should these very different views be resolved? I argue here that commentators reach such widely divergent results because they tend to focus on only a part of the range of important goods and principles at stake in these relationships. For example, many advocates of eliminating marriage argue that the state's support of the institution violates important principles of individual freedom and equal regard for all persons.¹⁷ Advocates in favor of marriage, by contrast, often point to the association between that institution and children's well-being.¹⁸ Intimate adult relationships, however, implicate not just one or two goods and principles, but a number of important goods and principles that the state should take into account in crafting its family policy. To complicate matters further, the pursuit of some of these goods and principles may conflict with other goods and principles. To derive the state's policy on intimate relationships from consideration of just one or two of

Nurturing of Children?, 42 SAN DIEGO L. REV. 847, 876–79 (2005) (contending that the state should encourage marriage, but cautioning that providing too many incentives for marriage could induce couples to obtain the marriage certificate without a serious commitment), and Scott, *supra* note 11 (arguing for a limited range of incentives to support marriage), with Lynn D. Wardle, *Relationships Between Family and Government*, 31 CAL. W. INT'L L.J. 1 (2000) (broadly arguing that the state should foster marriage as against all other relationships among adults), and PATRICK F. FAGAN, ROBERT E. RECTOR & LAUREN R. NOYES, THE HERITAGE FOUNDATION BACKGROUNDER, No. 1662, WHY CONGRESS SHOULD IGNORE RADICAL FEMINIST OPPOSITION TO MARRIAGE 1 (2003), http://www.heritage.org/Research/Features/Marriage/upload/44139_1.pdf (arguing that marriage is good for men, women, children, and society, and supporting initiatives such as President George W. Bush's pilot program to promote healthy marriage), Patrick F. Fagan, *Marriage and the Family*, in THE HERITAGE FOUNDATION, ISSUES 2006: THE CANDIDATE'S BRIEFING BOOK 7, 7–8 (2006), <http://www.heritage.org/Research/features/issues/pdfs/Family.pdf> (advocating strengthening marriage and the family through federal and state law, through easing economic and other burdens on marital families, and through encouraging healthy marriages through welfare reform), and NATIONAL FATHERHOOD INITIATIVE ET AL., CAN GOVERNMENT STRENGTHEN MARRIAGE? EVIDENCE FROM THE SOCIAL SCIENCES (2004), <http://www.marriagedebate.com/pdf/Can%20Government%20Strengthen%20Marriage.pdf> (proposing government funding of marriage programming, such as marriage preparation and education services, vouchers for low-income marriage education, tax policies, Medicaid marriage penalties, and job training for low-income fathers, in order to strengthen marriage).

¹⁷ See, e.g., FINEMAN, *supra* note 15; WARNER, *supra* note 15. I am borrowing Judith Stacey's term "equal regard." See Stacey, *supra* note 14, at 331. Stacey, in turn, borrows the term from Don Browning, *Critical Familism, Civil Society, and the Law*, 32 HOFSTRA L. REV. 313, 317 (2003), although she changes his intended meaning in borrowing it. I use the term in much the way that Stacey uses it, to refer to the principle—which is bedrock in liberalism—that all humans are entitled to an equal level of respect simply by virtue of their humanity. It is this principle that Michael Warner calls to mind when he distinguishes the conception of dignity that is "modern and democratic" from the older meaning of the term. WARNER, *supra* note 15, at 36. Dignity in this modern sense "is not pomp and distinction; it is inherent in the human." *Id.*

¹⁸ See, e.g., William A. Galston, *A Liberal-Democratic Case for the Two-Parent Family*, THE RESPONSIVE COMMUNITY, Winter 1990–1991 14, 14–17 (highlighting association between marriage and children's well-being); COUNCIL ON FAMILY LAW, *supra* note 12; see also William C. Duncan, *Law and Culture: The State Interests in Marriage*, 2 AVE MARIA L. REV. 153, 165–68 (2004) (arguing that traditional two-parent families provide the complete nurturing that children need to develop into responsible, committed citizens).

the goods and principles at stake in relationships among adults—freedom, or equal regard, or ensuring that children develop into good citizens, to give only a partial list—recalls the Indian story of the blind men who, on encountering an elephant, all felt different parts of the animal and emerged with radically different descriptions of the nature of the beast. It is only through an approach that recognizes the multiplicity of important goods and principles implicated in the state’s approach to relationships between adults, and that seeks to give each its due, that a workable approach appropriate to intimate relationships can be fashioned.

My argument in this Article is grounded in a particular conception of the role of the state in a liberal democracy.¹⁹ Proponents of this form of government generally acknowledge its commitment to the equal worth of all human beings, the importance of limits on government, respect for individual rights, and the view that legitimate government rests on the consent of its citizens. More controversially, this form of government has become associated with the view that these commitments limit the state to furthering only individualistic versions of the goods of liberty and equality.²⁰ The account that I develop in this Article rejects this narrower vision of liberalism.²¹ It is grounded in the belief that the goods and normative principles that should animate a liberal democracy, and that the liberal democratic state should pursue, are both broader and more complex than the admittedly important goods of liberty and equality.²² Among them, given

¹⁹ I use the term “liberal” throughout this Article to refer to the Anglo-American line of political thought stretching from John Locke through John Stuart Mill and on to such contemporary thinkers as John Rawls, whose work focuses on the importance of liberty, self-government, and equal rights for citizens. This use of the term is therefore broader than the use of the term “liberal” in common parlance to refer to those who hold political beliefs at the opposite end of the political spectrum from conservatives. Under my use of the term, both thinkers such as John Rawls, who might qualify as a liberal under common usage, and Robert Nozick, who might be considered a political conservative, are “liberals.”

²⁰ See, e.g., Ronald Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 113 (Stuart Hampshire ed., 1978) (arguing that a liberal society is one that embodies no particular views regarding the ends of life; society, instead, is united around a procedural commitment to treat people with equal respect); JOHN RAWLS, A THEORY OF JUSTICE 4, 7, 302–03 (1971) (conceiving justice in terms of the good of autonomy through Rawls’s first principle, which guarantees to all persons such liberty as is consistent with the same liberty to others, and equality through Rawls’s second “maximin” principle, which would distribute social and economic resources to benefit the least advantaged in society).

²¹ This Article is one part of a larger project in which I consider the role of the liberal democratic state in dealing with issues of dependency and family ties. For other parts of this project, see Maxine Eichner, *Dependency and the Liberal Polity: On Martha Fineman’s The Autonomy Myth*, 93 CAL. L. REV. 1285 (2005); Maxine Eichner, *Civic Education and the Liberal Democratic Polity*, 75 U. CIN. L. REV. (forthcoming 2007); Maxine Eichner, *Children, Parents, and the State: Rethinking Relationships in the Child Welfare System*, 12 VA. J. SOC. POL’Y & L. 448 (2005); Maxine Eichner, *Square Peg in a Round Hole: Parenting Policies and Liberal Theory*, 59 OHIO ST. L.J. 133 (1998).

²² In the last few years, several liberal theorists have argued that the ideals underlying the liberal project are more ambitious and broader than versions often associated with it. See, e.g., WILLIAM GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 7–15 (1991) (contending that a liberal state cannot and should not be neutral with respect to all versions of the good); STEPHEN MACEDO, DIVERSITY AND DIS-

the significant role that dependency plays in the human condition, are furthering caretaking and human development.²³ Put another way, although a liberal democracy should give significant pride of place to the goods of individual liberty and equality, it must also pay attention to an array of other goods and principles relating to human dependency and human development that are necessary to a robust democracy and that too often have been excluded from standard liberal accounts.²⁴ In my view, it is only by considering this richer range of goods and principles, and by seeking more nuanced approaches that ameliorate the tension among them, that the appropriate relationship between families and the state can be brought into focus.

My hope in this Article is to offer such a workable approach. In Part I, I consider four prominent entries in the debate over the state's treatment of relationships between adults. The first two of these views—Martha Fineman's and Michael Warner's—argue that the state should eliminate civil marriage. The other pair of entries—William Galston's and the Council

TRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY x–xi (2000) (contending that liberalism cannot be neutral on its need to perpetuate liberal democratic character in its citizens); MARTHA C. NUSSBAUM, SEX AND SOCIAL JUSTICE 10 (1999) (articulating liberalism's role in supporting development of citizens' capabilities); Amy Gutmann, *Undemocratic Education*, in LIBERALISM AND THE MORAL LIFE 71, 79–80 (Nancy L. Rosenblum ed., 1989) (arguing against the state pursuing only the “best interests of its individual members,” and defending an alternative ideal of collective self-determination). In my view, Thomas Spragens's reconceptualization of liberal democratic theory, which he calls “civic liberalism,” is particularly convincing. See THOMAS A. SPRAGENS, JR., CIVIC LIBERALISM: REFLECTIONS ON OUR DEMOCRATIC IDEALS xv (1999). Spragens argues for a “[l]iberal democratic practice . . . guided by a complex idealism—differentiated from liberal realism by its higher reach and from the other liberalisms by its greater breadth of aspirations.” *Id.*

²³ A number of feminist theorists have insightfully pointed out how human dependency must change the way in which we think of the state's role. See, e.g., FINEMAN, *supra* note 15, at 54 (positing that, because dependency is an inevitable part of the human condition, “political and policy questions should focus on an optimal reallocation of responsibility for dependency across societal institutions”); EVA FEDER KITTAY, LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY 188 (1999) (arguing in favor of a social and political commitment to meet dependency needs); LINDA McCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 4 (2006) (arguing that families are central to the “formative project” of a liberal democracy); JOAN C. TRONTO, MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE 157–80 (1993) (arguing that dependency and care are fundamental parts of human life, and, consequently, that the political framework must be reformulated to incorporate them); Eva Feder Kittay, *Taking Dependency Seriously: The Family and Medical Leave Act Considered in Light of the Social Organization of Dependency Work and Gender Equality*, 10 HYPATIA 8, 24–25 (1995) (“What is required is that the public understanding of social cooperation include respect for the importance of caring for one another and the value of receiving care and giving care. It then becomes a matter of political justice for basic institutions to *make provisions for and facilitate satisfactory dependency relations.*”).

²⁴ As Charles Taylor says about modern thought generally, “[w]e have read so many goods out of our official story, we have buried their power so deep beneath layers of philosophical rationale, that they are in danger of stifling. Or rather, since they are our goods, human goods, *we* are stifling.” CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 520 (1989).

on Family Law's²⁵—asserts that the state should continue to privilege marriage as an institution. I demonstrate that the arguments opposing marriage reach different conclusions from those supporting it because they focus on different goods and principles important to a liberal democracy.

In Part II, I develop an approach, which I call the “supportive state,”²⁶ that takes into account the range of goods and principles implicated in intimate relationships among adults. These include not only principles of freedom and equal regard, but also ensuring caretaking for adults and children, sex equality, equality of opportunity, and civic fellowship. The supportive state seeks to reconcile this diverse range of goods by ensuring a threshold level of liberty and equal regard for all adults, whether or not they are involved in intimate relationships, while at the same time according limited privileges to a range of intimate relationships because of the important goods they produce. In doing so, however, the supportive state also actively seeks to remedy the negative consequences associated with such relationships—particularly increased gender inequality, increased inequality of opportunity, and the possibility that these relationships will cause their participants to turn away from civic life.

In Part III, I consider two difficult issues that the state must confront with respect to regulating intimate relationships. The first of these is the form that state recognition of such relationships should take. Specifically, I pose the question of whether the state should eliminate marriage as a distinct category and instead recognize all adult intimate relationships under a single civil status such as “domestic partnership.” Or should the state make available a number of different types of formal relationships that citizens can enter? In the latter case, the state would presumably retain a civil status for conjugal relationships such as marriage, but also recognize other forms of adult-adult relationships, such as domestic partnerships among siblings or friends who are committed to caretaking. I then turn to consider the complicated issue of the manner in which the state may legitimately seek to encourage two-parent families over single-parent families, and marital relationships over other relationships between adults.

²⁵ The Council on Family Law is jointly sponsored by the Institute for American Values, the Institute for Marriage and Public Policy, and the Institute for the Study of Marriage, Law, and Culture. COUNCIL ON FAMILY LAW, *supra* note 12, at 2. It is chaired by Harvard Law School Professor Mary Ann Glendon. *Id.*

²⁶ I introduced the term “supportive state” in an earlier work, to develop a conception of the liberal democratic state that conceives of family members as responsible for caretaking of, or organizing the caretaking for, other family members, but also conceives of the state as having a concurrent responsibility to support dependents and ensure that societal institutions support caretaking. See Eichner, *Children, Parents, and the State*, *supra* note 21.

I. THEORETICAL POSITIONS IN THE EXISTING CONVERSATION

In the discussion about the state's treatment of relationships between adults, a significant portion of the recent debate has focused on the controversy between those who believe that the state has no business interfering in relationships between adults and those who argue precisely the opposite. In this section, I consider the arguments of theorists on both sides of this issue: Martha Fineman and Michael Warner, who both argue for eliminating the state's involvement in marriage; and William Galston and the Council on Family Law, who both argue that the state should promote the institution. I contend that both sides point to important goods at stake in the state's treatment of such relationships, but that these goods cannot be considered independently. Instead, they must be weighed against the other important goods and principles at stake in these relationships.

A. *Martha Fineman—Marriage as a Misguided Quest for Autonomy*

Martha Fineman, one of the country's foremost feminist legal theorists, takes a strong stand against state support for marriage.²⁷ Current public policy, she argues, is based on the myth that families should be autonomous.²⁸ Because the marital family is seen as a strong and independent unit, it is viewed as representing the ideal that the state should be promoting.²⁹ As a result, Fineman points out with irony, married couples receive hundreds, if not thousands, of subsidies and privileges from the state that are unavailable to other, supposedly less autonomous, family forms.³⁰

Fineman objects to state support for the marital family on several grounds. Most importantly, she contends that the state's pursuit of the good of autonomy for its citizens is misguided.³¹ Complete autonomy, she asserts, is possible for no one, including married couples: in contemporary society, everyone exists within a web of institutions that provide for at least some of everyone's needs.³² Because of this, Fineman argues, the state's

²⁷ See FINEMAN, *supra* note 15, at 57. Fineman's views on this issue have been the subject of significant critical debate. See, e.g., Scott, *supra* note 11, at 227–29 (arguing that Fineman's call to eliminate civil marriage ignores the stabilizing effects of formalizing relationships); McCLAIN, *supra* note 23, at 193 (claiming that Fineman's proposal removes “the intimate, committed bonds between adults and the role that such relationships play in fostering goods as well as interdependencies.”); Mary Lyndon Shanley, *Just Marriage: On the Public Importance of Private Unions*, in JUST MARRIAGE 3, 14–16, 19–20 (Mary Lyndon Shanley ed., 2004) (criticizing Fineman for advocating a contractual approach to relationships between adults).

²⁸ FINEMAN, *supra* note 15, at xviii.

²⁹ See *id.* at 57.

³⁰ See *id.* at 104–05; see also TERENCE DOUGHERTY, NAT'L GAY AND LESBIAN TASK FORCE POL'Y INST., ECONOMIC BENEFITS OF MARRIAGE UNDER FEDERAL AND MASSACHUSETTS LAW (2004), available at <http://www.thetaskforce.org/downloads/EconomicCosts.pdf> (listing marital benefits under federal and Massachusetts law).

³¹ See FINEMAN, *supra* note 15, at xviii.

³² See *id.*

pursuit of autonomy should be abandoned in favor of ensuring that human needs are humanely and justly met for all citizens, not just those who live in families.³³ Insofar as the state uses the rationale of children's welfare to justify its support of the marital family, she contends, it wrongly ignores the large numbers of children raised out of wedlock.³⁴ A state that truly seeks to support the welfare of children should therefore support child-rearing in all the contexts in which it occurs, not just for children whose parents are married.³⁵

Fineman argues that instead of subsidizing a particular *type* of family, i.e., the marital family, the liberal state should subsidize the particular *functions* that it has a legitimate interest in supporting, in whatever relationships these functions take place.³⁶ She contends that the inevitability of dependency in children and in others creates a need for caretaking that gives the state a legitimate interest in subsidizing caretaker-dependent relationships.³⁷ By contrast, Fineman argues that the state has no legitimate stake in furthering relationships between capable adults, and therefore should abandon civil marriage as an institution.³⁸ In the new regime she proposes, legal relationships between adults would be governed by private contracts negotiated between them. This would leave marriage as a purely religious institution for those couples who choose to enter it, with no civil consequences.

Assessing Fineman's argument produces mixed results. Fineman is certainly right that complete autonomy is possible for no one, and that the state should therefore give up its quest for totally autonomous families. However, Fineman reaches the conclusion that the state should withdraw from supporting relationships among adults by ignoring important goods. As care theorists have made abundantly clear,³⁹ and as Fineman herself ar-

³³ See *id.* at 199, 285.

³⁴ See *id.* at 67, 110–12; see also *supra* note 9.

³⁵ See FINEMAN, *supra* note 15, at xvii, 140.

³⁶ See *id.* at 67 (“It is time to build our family policy around these emerging norms, to focus not on form but on the function we want families to perform.”); see also *id.* at 68, 105–07 (arguing that the focus needs to shift away from the historic, symbolic form of the marital relationship and towards the role or function that the institution of the family is seeking to serve in society).

³⁷ See *id.* at 67; see also *id.* at xix, 108, 138–41.

³⁸ See *id.* at xix. In Fineman's words:

Why create policies based on a seriously weakened family affiliation—the marital couple—when it is really caretaking that we as a society should want to ensure? Society has a responsibility to adjust to these changing patterns of behavior by guaranteeing that the emerging family forms are supported in performing the tasks we would have them assume.

Id.; see also *id.* at 123 (“I argue that for all relevant and appropriate societal purposes, we do not need marriage and we should abolish it as a legal category. I argue that we should transfer the social and economic subsidies and privilege that marriage now receives to a new family core connection—that of the caretaker-dependent.”).

³⁹ See KITTAY, LOVE'S LABOR, *supra* note 23; TRONTO, *supra* note 23.

gues,⁴⁰ it is not just children and those with disabilities who need care: *all* humans need care, even generally healthy adults. Recognition of the fact of dependency therefore gives the state an interest in furthering the good of caretaking among adults.⁴¹ And as our society is organized, some large portion of the care that adults need will come, if it comes at all, from other adults with whom we share close relationships. In such relationships, although neither person is always the caretaker or the dependent (as they are, for example, in relationships between adults and young children) caretaking still occurs.

Adult-adult relationships are, at their best, marked by what might be called “reciprocal dependency,”⁴² in which each person sometimes performs caretaking activities for the other and meets the other’s dependency needs; in turn, the other partner does the same for that person at other times. These relationships, when they function well, involve countless small acts in which each adult takes care of the other: one partner makes the other a cup of coffee when the other gets up; the other picks up groceries on the way home from work; one runs to the store for cold medicine when the other is sick; and so on. This sort of caretaking, at its best, produces a society in which adults are knit into webs of care that help them to support one another. In these webs, one partner’s cold does not develop into something worse because the other partner insists on taking him or her to a doctor. Moreover, this caretaking helps keep families stable so that partners are there for one another at times when one of them has greater needs, such as during periods of disability. The state has an important interest in these relationships because of its interest in the dignity of its citizens, not to mention their health and well-being.

As my description suggests, moreover, recognition of the fact of dependency need not and should not lead to rejecting family autonomy completely as a good. Instead, it should lead to recognition of the value of a more limited and transformed version of family autonomy, and the role that the state can play in supporting it. This revised version of autonomy would recognize the fact of dependency and the consequent need for caretaking, as well as understand that in contemporary society no individual or family stands completely apart from the state. Yet it would also recog-

⁴⁰ See FINEMAN, *supra* note 15, at xviii, 35–36.

⁴¹ See Linda McClain, *Intimate Affiliation and Democracy: Beyond Marriage*, 32 HOFSTRA L. REV. 379, 414–15 (2003) (“To [relegate adult-adult sexual affiliation solely to private contract] seems to undervalue adult-adult interdependency and to miss the important facilitative role government may play in supporting such forms of adult affiliation.”); McCLAIN, *supra* note 23, at 218 (“Fineman gives insufficient attention to government’s interest in supporting emotional and economic interdependency in adults.”); Scott, *supra* note 11, at 236 (“I argue that government can and should maintain and support [marriage], and that doing so is one means by which the state can protect vulnerable members of society and respond to the dependency needs that all individuals have over the course of a lifetime.”).

⁴² Joseph Kennedy came up with this term during a faculty workshop at the University of North Carolina School of Law held in October 2005, at which I presented an earlier draft of this Article.

nize the important benefits that come from families having the capacity to meet their family's basic dependency needs. This level of capability and self-sufficiency helps ensure that human dependency needs are not only met, but met in a manner superior to that which the state could provide, in the sense that caretaking is delivered by family members who know and respond to the needs of the dependent. Achieving this level of familial capability, though, requires not state engagement, but state support.

This does not mean that Fineman is wrong when she argues that the state's obligation to children and other dependents should lead it to support caretaking in whatever family forms caretaker-dependent relationships occur. The state has an obligation to support the well-being of societal dependents that stems directly from the liberal democratic state's respect for human dignity. This obligation undoubtedly requires the state to support children, no matter into which family forms they are born. Yet this duty to support the well-being of all children does not necessarily require that the state treat all caretaker-dependent relationships the same in all respects, as Fineman seems to suggest. Instead, a liberal democracy may legitimately decide that its interest in the well-being of its young citizens makes some family forms better for children than others because these forms generally promote the capacity to meet family members' dependency needs. The state may, in such a case, legitimately take some measures to encourage the rearing of children in these family forms, so long as it does not jeopardize the well-being of children not raised in these families.

*B. Michael Warner—Marriage as the Misguided Search
for Respectability*

While Fineman argues against marriage on the ground that we should eliminate autonomy as a goal and instead focus on children's well-being, queer theorists have argued for the same result by focusing on the liberal democratic commitment to liberty and equal regard of all citizens. Among these theorists, Michael Warner's arguments stand out for their eloquence and theoretical acuity. Warner contends that the gay community's current push for same-sex marriage runs the risk of requiring the wholesale "repudiation of queer culture's best insights on intimate relations, sex, and the politics of stigma."⁴³ He argues that the early years of the gay rights movement in the United States developed a vision of queer politics centered on the recognition that all humans, and all human relationships, are worthy of equal respect. The ethical heart of this lesson of equal respect comes, paradoxically, from queer culture's experience with the shamefulness of sex:

[T]he ground rule is that one doesn't pretend to be *above* the indignity of sex Sex is understood to be as various as the people

⁴³ WARNER, *supra* note 15, at 91.

who have it. It is not required to be tidy, normal, uniform, or authorized by the government. This kind of culture is often denounced as relativist, self-indulgent, or merely libertine. In fact, it has its own norms, its own way of keeping people in line A relation to others, in these contexts, begins in an acknowledgement of all that is most abject and least reputable in oneself. Shame is bedrock. Queers can be abusive, insulting, and vile toward one another, but because abjection is understood to be the shared condition, they also know how to communicate through such camaraderie a moving and unexpected form of generosity The rule is: Get over yourself. Put a wig on before you judge. And the corollary is that you stand to learn most from the people you think are beneath you. At its best, this ethic cuts against every form of hierarchy you could bring into the room

For this reason, paradoxically, the ethic of queer life is actually truer to the core of the modern notion of dignity than the usual use of the word is Dignity in [this] sense is not pomp and distinction; it is inherent in the human And the paradoxical result is that only when this indignity of sex is spread around the room, leaving no one out, and in fact binding people together, that it begins to resemble the dignity of the human. In order to be consistent, we would have to talk about dignity in shame⁴⁴

This ethic of queer politics, Warner contends, is undercut by the current advocacy in the gay community for same-sex marriage. Warner argues that marriage is the means through which the state has historically sought to privilege and promote a particular, monogamous model of heterosexual sexuality, and to stigmatize all other models as morally tainted.⁴⁵ According to Warner, this represents the blatant imposition of the majority's view of what is morally proper on the minority, and the denial of equal regard. He argues:

[T]his kind of social engineering is questionable. It brings the machinery of administration to bear on the realm of pleasures and intimate relations, aiming to stifle variety among ways of living. It authorizes the state to make one form of life—*already normative*—even more privileged. The state's administrative penetration into contemporary life may have numbed us to the deep coerciveness in this way of thinking. We take it for granted. Yet it is blind majoritarianism, armed not only with an impressive battery of prohibitions and punishments, but with an equally impressive

⁴⁴ *Id.* at 35–36.

⁴⁵ *See id.* at 123.

battery of economic incentives and disincentives, all designed to manipulate not just the economic choices of the populace, but people's substantive and normative vision of the good life.⁴⁶

For many of us (myself included), there is much that is attractive about Warner's vision. Its power comes from his mobilization of some of the goods that are fundamental to liberal democratic ideals. Warner's argument rests on the recognition of the human dignity and essential equality of all persons—the very recognition that distinguished the liberal tradition from the feudalism that preceded it. At the same time, Warner makes a powerful case for the personal freedom that liberals hold dear: it is up to citizens rather than the state to determine what course in life is right for them. Further, the state has no business in the bedrooms of its citizens. And neither should the state delegitimize some relationships and activities (such as sex outside of marriage) based on the preferences of the majority. Somewhat less obvious but still a clear contributor to the persuasiveness of Warner's account is the good of civic fellowship: as Warner presents it, the recognition that all are partners in shame leads to camaraderie, a recognition that we are all in this together, a willingness to learn from one another, and generosity and a spirited sense of community.

The importance of all these goods—the recognition of the human dignity and essential equality of all persons, the importance of freedom, and the value of civic fellowship—to a liberal democracy cannot be understated. (And, indeed, the value of civic fellowship is too often left out of liberal democratic accounts.) Yet they do not occupy the entire field of important goods. While respect for individual freedom gives a liberal democracy strong reason to allow its citizens to enter into consensual relationships of their choice, it is simply not the case that the state has an equal interest in the success of all consensual relationships. Neither is it the case that respect for human dignity requires that all relationships be treated in an even-handed manner. Long-term caretaking relationships contribute particular, important benefits to the polity because they satisfy dependency needs in a way that casual sex between two (or more) persons in an apartment or a bathhouse—whether these people are straight, gay, bisexual, or queer—does not. While its deep respect for liberty should therefore mandate that the state permit casual sex (barring some legitimate public concern of the state), it should not have to treat these relationships on a par with relationships necessary to perpetuate the health of the polity. To do otherwise recalls Robert Frost's definition of a liberal as someone who cannot take his own side in an argument.⁴⁷

⁴⁶ *Id.* at 112.

⁴⁷ See MORROW'S INTERNATIONAL DICTIONARY OF CONTEMPORARY QUOTATIONS 298 (William Morrow ed., Jonathan Green comp., 1982).

At the heart of the difficulties with Warner's vision is the fragility of its ethical base, which makes it ill-equipped to accomplish the human caretaking that must occur in any good society. The question is not whether Warner's esteem for liberty, equal regard, and human dignity is normatively attractive—it certainly is. The question is whether this vision alone could reasonably be expected to support the responsibility and commitment that human dependency and the consequent need for caretaking entail. Warner dismisses the claim that his vision, as effectuated in queer culture, will lead to relativism, self-indulgence, or libertinism, arguing that queer culture polices itself, and that the recognition of the common bond between queers creates a generosity and sense of ties among them that overcome these tendencies.⁴⁸ While this may be the case within queer subculture, that kind of self-policing seems far less likely to happen in the more heterogeneous culture outside of queer life. Warner, then, is overly optimistic that the state's promotion of evenhanded respect for all forms of life will lead to the committed ties that human dependency requires. Given their importance, a liberal democracy can and should be able to encourage the norms of commitment and responsibility that foster caretaking.

C. Galston—Marriage as a Means To Support Children's Well-being

Fineman's and Warner's arguments against marriage stand in stark contrast to arguments from William Galston favoring marriage.⁴⁹ Galston wisely recognizes that a number of goods are implicated in the state's position with respect to family forms, and that these goods can conflict with one another.⁵⁰ Because of this, Galston focuses on the single good he believes should be paramount in fashioning the state's family policy—children's well-being:

With regard to what is called "family policy," here is my question: What would we do if we really want to create a society that puts children first, that allows every child the maximum feasible

⁴⁸ See WARNER, *supra* note 15, at 36.

⁴⁹ See William A. Galston, *Public Morality and Public Policy: The Case of Children and Family Policy*, 36 SANTA CLARA L. REV. 313 (1996).

⁵⁰ See *id.* at 314. In Galston's words:

As a starting point, let me declare my own philosophical position as briefly as possible. I believe that we live in a world in which the things that we value are not only plural, but also conflicting. We cannot have in full measure all of the good things that we want. Most debates in public policy, and most choices in life, are not between good and bad. They are between good and good—between some worthy aims and other worthy aims. We are compelled to decide what is more important and what is less important in specific circumstances within particular dimensions of our existence.

scope for the development or actualization of talents and personal relationships and the ability to make use of those developed talents and relationships in a way that is personally gratifying as well as socially beneficial? If we take that question seriously, many other worthy aims may have to give way to some extent, which include aims that men and women, as parents, may value.

It is my holding that there is no necessary harmony, at all times and in all circumstances, between the well-being of parents and the well-being of children. Families, however configured, are an area in which interests both overlap and conflict in significant ways.⁵¹

Having posed the question of which family structures best further children's welfare, Galston considers the link between the rising rates of children being raised outside of marriage and children's well-being. He argues, "[a]s I read the evidence, which is of course eminently contestable, divorce does matter even after you take income into account. The same conclusion is reached when looking at teen parenthood matters."⁵² Galston then proposes a multi-pronged initiative to deal with improving children's well-being, which includes state support for marriage.⁵³ In making the case for his initiative, Galston argues against the view that marriage is a failed social institution that the state should abandon. In his words, marriage

is not a panacea, but it is a vital part of the solution. In at least a majority of cases, marriage can make a positive contribution, not only to the well-being of children, but also to the well-being of their parents.

Does this represent nostalgia? Does it imply the reaffirmation of patriarchy? On the contrary: it means the simple recognition that for economic, emotional and developmental reasons, marriage is the most promising institution yet devised for raising children and forming caring, competent, responsible adults. . . . I am deeply skeptical that the abolition of marriage, with all of its imperfections, can possibly yield better lives, or a better society for our children.⁵⁴

Galston's discussion offers some strong insights. Galston eloquently recognizes what Warner's account omits: a vigorous liberal democracy should be able to privilege some relationships over others for important pub-

⁵¹ *Id.*

⁵² *Id.* at 316.

⁵³ *See id.* at 317–20, 322–23.

⁵⁴ *Id.* at 323.

lic ends. And certainly creating a stable environment for children is such an important end. All other things being equal, stable family relationships are better for children than unstable or nonexistent relationships. Further, while many of the greater difficulties associated with single-parent families can be attributed to lack of adequate legal and social supports,⁵⁵ having the emotional and financial resources of two loving adults available to a child, again, all other things being equal, is better than having the resources of just one.

Yet all other things are seldom equal. By considering children's well-being alone among all the other important goods implicated by family policy, Galston's framing of the discussion elides some of the most difficult and important issues that family policy raises. Galston certainly is correct that there is often a tradeoff among important goods, including children's welfare, and that, in assessing this tradeoff, children's interests should be weighed heavily. To take from this that children's well-being is the only good to be considered in crafting family policy, however, is seriously myopic. It should not be the case that any gain to children's welfare, no matter how small, should trump serious losses to other important goods. To do so would be to fetishize children's interests above the range of other important goods for which a liberal democracy should strive. Moreover, without considering the other important interests at stake, Galston cannot begin to assess the relevant degree of tradeoffs.

In fact, Galston's proposal to benefit children would impinge on a number of important goods. Among the most important of these is sex equality. The institution of heterosexual marriage that Galston seeks to foster in order to promote children's welfare has historically been linked, and continues to be linked, with women's enduring inequality in society. As Martha Fineman bluntly puts it, public policy that encourages marriage for the sake of children therefore constitutes the state's willingness to sacrifice women's interests for children's.⁵⁶ Galston's framing of family policy only in terms of children's well-being therefore prevents him from asking a series of questions that might better reconcile this good with sex equality and other important goods at stake: Are there other family structures or other ways to organize social life that would give children the benefits and adequate financial resources that marriage currently does? Are there ways that marriage could be organized to reduce or eliminate sex inequality, or are there other forms of adult associations that would do the same while still supporting the well-being of children? To what other goods should family policy be aimed besides those that marriage encompasses?

⁵⁵ See Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 34-35 (1995) (arguing that lack of social and economic support for single parent families, rather than inherent deficiencies in this family form, creates disadvantages for children raised in these families).

⁵⁶ See FINEMAN, *supra* note 15, at 87-88.

D. The Council on Family Law—Marriage as a Form that Combines the State's Interests in Raising Children, Bonding Sexual Difference, and Protecting Women

In its recent report *The Future of Family Law: Law and the Marriage Crisis in North America*, the Council on Family Law agrees with Professor Galston that marriage should continue to be the state's privileged institution for relationships between adults, but grounds this conclusion on a somewhat different rationale.⁵⁷ The Council's report argues that the goal of marriage should be to recognize "the fundamental importance of the sexual ecology of human life: humanity is male and female, men and women often have sex, babies often result, and those babies, on average, seem to do better when their mother and father cooperate in their care."⁵⁸ This understanding of marriage as the promotion of a stable framework for biological parents procreating and raising children, the report argues, should be retained by the state.⁵⁹

The report therefore decries proposals like Fineman's and Warner's, which argue for state disengagement from marriage. Sounding a chord similar to Galston's, the Council asserts that such arguments "den[y] the state's legitimate and serious interest in marriage as our most important child-protecting social institution and as an institution that helps protect and sustain liberal democracy."⁶⁰ The Council also argues against proposals that seek to expand the category of relationships privileged by the state beyond married heterosexual couples. According to the Council, doing so would unwisely "celebrate relationship diversity" to the exclusion of fostering the important goals that have traditionally been supported in marriage.⁶¹ Further, to treat relationships that have not been formalized as the equivalent of marriage, the Council argues, would not only undercut couples' own intent regarding the effects of their relationships, it would also fail to encourage couples to enter into formal commitments, and the state would therefore miss an important opportunity to encourage the stability of these relationships and the welfare of any children who result from them.⁶² The Council argues that advocates who support the state awarding privileges to a broader category of relationships than marriage miss "the specificity of *marriage* as a form of life struggling with the unique challenges of bonding sexual difference and caring for children who are the products of unions."⁶³

⁵⁷ COUNCIL ON FAMILY LAW, *supra* note 12.

⁵⁸ *Id.* at 13.

⁵⁹ *See id.* at 40–41.

⁶⁰ *Id.* at 6.

⁶¹ *Id.* at 40.

⁶² *See id.* at 24–25.

⁶³ *Id.* at 21.

The Council makes valuable points about the important role the state can play in creating a stable environment that fosters the well-being of children by formalizing and privileging relationships such as marriage.⁶⁴ And certainly the Council's focus on children's welfare is normatively appealing. However, it is less successful in following through with its focus on this important good. Many same-sex couples, like many heterosexual couples, have children. And the children of these same-sex parents, like the children of opposite-sex parents, benefit from the stability of their parents' relationships. Given this, it makes sense for the state to seek to stabilize these relationships with the same supports that the Council argues work so well with opposite-sex couples.

In addition, by focusing only on the bonding of "sexual difference"⁶⁵ (in the Council's words) and supporting children's welfare, and therefore encouraging the state to privilege heterosexual marital relationships to the exclusion of other intimate adult relationships, the Council disregards a number of other important goods and principles. Among these, the Council ignores the other goods that relationships between adults can foster, such as the caretaking of adults accomplished within these relationships. While the Council criticizes those who seek to extend the state's support beyond heterosexual marriage on the ground that such policy advocates too narrowly focus on "values such as commitment, mutual support and the rest" in the absence of childrearing,⁶⁶ it ignores the important mutual support and related goods that offer powerful reasons for the state to privilege relationships that promote these goods, even in the absence of children. This is the case whether or not these relationships further the other values that the Council believes are crucial to the state's protection of marriage.

The Council's approach to state support of adult relationships also ignores a cluster of important values and principles that go to the heart of liberalism's suspicion about the use of state power and its staunch insistence on a limited state. These values include a respect for individuals' choosing their own life course, a belief that citizens' freedom will generally redound to the health of the polity, a profound vigilance against standardization by the state, and the concern that the majority will use state power to impose its own beliefs on the minority without valid reasons to do so.⁶⁷ The Council's argument for imposing a single, privileged vision of

⁶⁴ See also Scott, *supra* note 11, for an eloquent defense of the state's retention of some formalized civil status for relationships among adults, on the ground that such a status helps stabilize these relationships.

⁶⁵ COUNCIL ON FAMILY LAW, *supra* note 12, at 21.

⁶⁶ *Id.*

⁶⁷ John Stuart Mill's harm principle, set out in his essay *On Liberty*, is probably the most well-known liberal explication of the legitimate limits of the state. See JOHN STUART MILL, ON LIBERTY 80 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859) (arguing that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others"). Likewise, Mill's defense of individuality and the benefits to society of allowing freedom and experimenta-

the good life on citizens' personal lives raises warning flags with respect to all of these values. Taking them seriously counsels that the state's privileging of particular courses of life over others should occur only for very good reasons and, when this privileging occurs, it should be handled in a manner that seeks to preserve as much liberty as possible for its citizens. Or, as the same sentiment is more colorfully phrased by Michael Warner, "Get over yourself. Put a wig on before you judge. . . . [Y]ou stand to learn most from the people you think are beneath you."⁶⁸ The Council's narrow vision of the relationships entitled to state support, and its seeking to justify this narrow vision based on tradition and religion, are an uneasy fit with this set of values.⁶⁹ By the same token, the Council's depiction of one type of sexuality—heterosexual sexuality—as the preferred form of sexuality for state support sits uncomfortably with these tenets.⁷⁰

The Council's position that the state should support marriage to the exclusion of all other relationships also ignores liberalism's deep recognition of the limits on the institutional competence of the state to accomplish particular ends—what might be called liberal humility. Liberal humility requires the recognition that the state has a limited ability to encourage citizens to acquire and formalize healthy caretaking relationships. While the state can establish certain institutional preconditions and incentives for couples to make relationships work, ultimately whether or not healthy relationships will develop and be sustained has a great deal to do with sheer chance and characteristics of the individuals involved that are

tion remain classic evocations of this cluster of values. *See id.* at 74, 120–21, 128.

⁶⁸ WARNER, *supra* note 15, at 35.

⁶⁹ The Council's argument that the value of family diversity should not trump "what tradition, religion, and even now the social sciences tell us about family formation, parenting, and children's well-being," also raise concerns that the Council is seeking to justify the use of state power to further its own private comprehensive views. COUNCIL ON FAMILY LAW, *supra* note 12, at 41. Certainly liberalism decries the view that tradition and religion can themselves justify the exclusion of citizens from institutions that the Council concedes are basic to society and a fundamental means through which the state funnels resources. One of the fundamental breaks between liberalism and the patriarchal political theory that preceded it was over the view that religion and tradition are themselves adequate rationales on which to premise state action.

⁷⁰ In several places, the Council's report argues that the state should support only heterosexual relationships because only those relationships, in which children are born unexpectedly, "can cause immense personal and social damage." *Id.* at 12; *see also id.* at 13 ("From this basic human reality arises the need for the wider society to direct immense energy into helping manage the reality of individual men's and women's desire for sex and intimacy in ways that ultimately protect them, their children, and the interests of the community."). While this rationale supports the view that marriage is a corrective institution to forestall the damage that would otherwise occur in dangerous heterosexual relationships, other parts of the report indicate that the Council believes that heterosexuality is more natural and more preferable than homosexuality. Marriage, in this view, is less a corrective institution than a desired end for citizens. *See id.* at 12 ("Conjugal marriage cannot celebrate an infinite array of sexual or intimate choices as equally desirable or valid."); *see also id.* at 12–13 ("Marriage, like the economy, is one of the basic institutions of civil society. It provides an evolving form of life that helps men and women negotiate the sex divide, forge an intimate community of life, and provide a stable social setting for their children.").

beyond the state's ability to affect. Ignoring these limits on the state's competence can cause the state to over-invest resources in an institution that it has only moderate power to affect. The state could, of course, still provide sufficient incentives to cause citizens to enter into and remain in relationships in which they are miserable, conflict is high, and little caretaking occurs. As Linda McClain points out, however, these are not the relationships that the government has an interest in supporting, since these are not the relationships that produce the goods in which a liberal democracy has a stake.⁷¹ The state's limited competence in this area makes the question posed by Martha Fineman even more pressing: should children who, through no fault of their own, are born or are raised outside of wedlock be deprived of state support,⁷² particularly where the state's lack of support will only have a limited impact on whether future children are born into the marriage institution?

Further, it should be recognized that even if eligible citizens seek to marry, entering and remaining in this institution will be beyond the control of many. For example, one partner may simply decide that he or she no longer loves the other partner and leave, with no fault on the part of the other partner. The state's investing its resources only in marriage means that this wider group of citizens, many through no fault of their own, will be ineligible for these benefits.

What's more, those citizens left out of the institution of marriage will likely be those who most need state subsidies. Because of economies of scale, adults in live-in relationships generally have an easier time financially than those who live alone.⁷³ Distributing resources to adults in relationships therefore is generally a regressive measure based on need. Further, insofar as two-parent families have particular advantages that make them more conducive to rearing healthy, stable children than single-parent families, distributing privileges to dual-parent families is also regressive based on need.⁷⁴ As Judith Stacey argues, "The more eggs and raiments our society

⁷¹ See McClain, *supra* note 23, at 117, 129 ("But quality of family of life is important: just as healthy marriage may promote adult and child well-being, unhealthy marriage (for example, high-conflict marriage) may hinder it:").

⁷² See Fineman, *supra* note 15, at 67, 110–12.

⁷³ See Ann Crittenden, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* 150 (2001) (demonstrating that "two households are much more expensive than one": "In one study researchers found that after divorce a family will need about one-third more income in order to maintain its previous standard of living. According to another researcher, if a family's total income stays the same, 'the couple can expect a drop in standard of living between 21 and 26%, depending on the number of children and how they are divided between the parents.'").

⁷⁴ Distributing resources generally to families with children, however, accords with distributing based on need. As Elizabeth Warren and Amelia Warren Tyagi demonstrate, "having a child is now the single best predictor that a woman will end up in financial collapse." Elizabeth Warren & Amelia Warren Tyagi, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE* 6 (2003) (emphasis omitted). In their words, "married couples with children are more than twice as likely to file for bankruptcy as their childless counterparts." *Id.* They are also 75% more likely to be late in paying their

chooses to place in the family baskets of the married, the hungrier and shabbier will be the lives of the vast numbers of adults and dependents who, whether by fate, misfortune, or volition, will remain outside the gates.⁷⁵ The principle that societal resources should be distributed based on need, although not always followed, is certainly well enough grounded in liberal democracies that it should be undercut only for good reason.

Finally, the Council's proposal risks impeding marriage's movement toward sex equality. At common law, marriage was an institution premised on the hierarchical ordering of husband and wife,⁷⁶ in which different rights and responsibilities were assigned to husbands and wives based on gender. Since the 1970s, and the recognition by the Supreme Court that the United States Constitution protects against sex discrimination,⁷⁷ marriage has gradually been stripped of this explicit hierarchical legal ordering, as well as of its gender-based legal duties.⁷⁸ The Council's insistence on retaining marriage's gender-based entry requirements and its determined attention to the difference between genders maintains the underpinnings of marriage's gender-dependent origins.⁷⁹ Indeed, the Council's description of the political and natural order as containing a gap between women and men that must be bridged echoes this same outmoded logic of gender classification.⁸⁰

credit card bills than a family with no children and far more likely to face foreclosure on their homes. *Id.* at 6–7.

⁷⁵ Stacey, *supra* note 14, at 344. Stacey adds: "In my view, this is an unacceptably steep and undemocratic social price for whatever marginal increases in marital stability might be achieved for those admitted to the charmed circle." *Id.*

⁷⁶ William Blackstone, who wrote a treatise on the laws of England that was widely considered authoritative in the United States, described the institution of marriage at common law in the following way: "By marriage," he wrote,

the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing . . . Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.

WILLIAM BLACKSTONE, 1 COMMENTARIES 430 (1825); *see also* *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring) ("So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state . . .").

⁷⁷ *See* *Reed v. Reed*, 404 U.S. 71 (1971).

⁷⁸ *See, e.g.,* *Stanton v. Stanton*, 421 U.S. 7, 10, 14–15 (1975) (rejecting the "notion" that "generally it is the man's primary responsibility to provide a home and its essentials" and noting that "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas") (citation omitted).

⁷⁹ *Cf.* *Scott*, *supra* note 11, at 237–38 (arguing that allowing same-sex couples to marry "would clarify that marriage enjoys a special legal status because of its tangible and intangible social benefits and not because of its moral superiority as a family form that preserves traditional gender roles").

⁸⁰ *See, e.g.,* COUNCIL ON FAMILY LAW, *supra* note 12, at 12–13 ("Marriage, like the

Likewise, the Council's argument that marriage should be limited to heterosexuals to protect women on account of the vulnerability they experience from childrearing and childbearing must be taken with significant caution.⁸¹ The Supreme Court has repeatedly pointed out that reliance on gender classifications "carr[ies] the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection."⁸² For this reason, it has counseled that where the state's "ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex."⁸³ In the case of marriage, women's interest in equality would be better served by an institution that protects those who enter it in a sex-neutral way, detached from notions that women are in need of special protection. In addition, to the extent that homosexual relationships do not replicate these same patterns of vulnerability,⁸⁴ the state's interest in sex equality supports including and encouraging same-sex relationships rather than denying them recognition and rights.

In sum, each of these positions—Martha Fineman's, Michael Warner's, William Galston's, and the Council on Family Law's—focuses on important goods and principles that a vigorous liberal democratic polity should seek to draw upon. Yet none of them steps back enough to pay adequate attention to the range of important goods and principles at stake. Considering this broader range of goods and principles together yields a more complicated—but ultimately a more satisfying—picture of what the state's role should be with respect to adults' relationships.

II. THE "SUPPORTIVE STATE" AND RELATIONSHIPS BETWEEN ADULTS

What stance would the state take on relationships between adults if it considered the broader range of important goods and principles implicated in intimate adult relationships? These goods include not only principles of freedom and equal regard, but also furthering caretaking and human development for children and adults, equal opportunity for all citizens, sex equality, and civic fellowship. This Part sets forth an approach that takes

economy, is one of the basic institutions of civic society. It provides an evolving form of life that helps men and women negotiate the sex divide, forge an intimate community of life, and provide a stable social setting for their children."); *id.* at 40 ("Marriage is the complex cultural site for opposite-sex bonding."); *id.* at 41 ("[Marriage] sustains a complex form of social interdependency between men and women.").

⁸¹ See *id.* at 12.

⁸² *Orr v. Orr*, 440 U.S. 268, 283 (1979); see also *Frontiero v. Richardson*, 411 U.S. 677, 685–87 (1973) (condemning state's reliance on outmoded or overbroad stereotypes).

⁸³ *Orr*, 440 U.S. at 283.

⁸⁴ See Linda C. McClain, *The Liberal Future of Relational Feminism: Robin West's Caring for Justice*, 24 *LAW & SOC. INQUIRY* 477, 510 (1999) (citing studies showing that lesbian couples generally do not organize their relationship on a provider-homemaker model).

into account this array of important principles and interests, seeking to give each due weight, as well as to ameliorate the tension among them.⁸⁵

To begin sorting out these matters, let me point out that there are actually two separate but related issues that must be considered with respect to the state's approach to relationships. The first issue is whether the state should *recognize* relationships between adults for the purpose of assigning rights and responsibilities *between these adults*. The second is whether the state should *privilege* relationships between adults, in the sense that those who participate in these relationships should receive either *benefits from or rights against the state or third parties*. I argue that both of these issues should be answered in the affirmative, although the first issue is an easier one to answer than the second.

A. State Recognition of Adult-Adult Relationships

When it comes to whether the state should recognize relationships between adults for the purpose of assigning rights and responsibilities between them, the answer seems to me to be clearly "yes." The interdependent nature of intimate relationships between adults, particularly when they are long-term, can create large economic inequities and imbalances of power in the absence of regulation. These issues are best addressed through laws that, at a minimum, establish a fair default position between the parties to the relationship.

For example, in couples who have children, one member often assumes more household and childrearing responsibilities—generally, the woman—while the other member assumes the role of primary breadwinner—traditionally, the man. In the absence of laws regulating intimate relationships, under rules governing property in the majority of states, the breadwinner is legally entitled to his or her own earnings.⁸⁶ This leaves the primary caretaker, who has generally received fewer earnings than the breadwinner or no earnings (depending on whether she also worked outside of the home), significantly disadvantaged by her contribution to the family. Because she has invested her human capital in the home rather than the labor market, and the skills she develops are not easily transferable outside of that realm, she will also be less well positioned to rejoin the labor market compared to her partner, who will have invested his human capital in advancing his career and improving his salary.⁸⁷ In the face of these inequi-

⁸⁵ In her recently published book *The Place of Families*, Linda McClain offers a thoughtful account of how the state should regulate families in order to foster their and their members' capacity, equality, and responsibility. See McCLAIN, *supra* note 23. In doing so, she, too, argues that liberalism must recognize the multiple goods at stake in the relationship between families and the state.

⁸⁶ See generally LESLIE J. HARRIS, LEE E. TEITELBAUM & JUNE CARBONE, FAMILY LAW 35–39 (3d ed. 2005) (describing common law system of property ownership).

⁸⁷ See generally PAULA ENGLAND & GEORGE FARKAS, HOUSEHOLDS, EMPLOYMENT, AND GENDER: A SOCIAL, ECONOMIC AND DEMOGRAPHIC VIEW 44–45, 55–56 (1986) (set-

ties, a state's failure to establish such laws, as Mary Shanley recognizes, would abandon the state's interest in securing justice and equality in these relationships.⁸⁸ In this way, the state's failing to act could encourage those in relationships to turn away from caretaking that supports their family's welfare in order to look out for themselves financially.

Martha Fineman argues that considerations of justice and equality dictate the opposite conclusion—state disengagement.⁸⁹ She asserts that the state's withdrawal from regulating adult-adult relationships "would mean that we are taking gender equality seriously."⁹⁰ According to Fineman:

If people want their relationships to have consequences, they should bargain for them, and this is as true with sexual affiliates as with others who interact in complex, ongoing interrelationships, such as employers and employees. This would mean that sexual affiliates (formerly labeled husband and wife) would be regulated by the terms of their individualized agreements, with no special rules governing fairness and no unique review or monitoring of the negotiation process.⁹¹

Fineman glosses over serious difficulties, however, in suggesting that a contractual regime will result in fair and equal agreements between parties in relationships. First, she fails to take into account the ways in which those entering into a relationship based on affective ties may not be looking solely after their own interests rather than the other person's (and the state may not want to encourage them to be solely self-regarding). As a result, a "sexual affiliate" may agree to an unfair contract. Furthermore, the courses of lives and relationships are often so difficult to predict that contracts entered into *ex ante* may not fairly and justly resolve what occurs *ex post*. In addition, in a regime of contract, those in a weaker bargaining position—traditionally women—will be less able to negotiate favorable terms for themselves, which can lead to further inequality both in the course of the relationship and also if and when it ends. For these reasons, the state's establishment of a fair default position—for example, requiring that earnings by either partner during the relationship be owned jointly by the partners—is a better alternative than requiring that partners bargain individually.

Moreover, in a regime governed exclusively by contract, even those who negotiate unfavorable contracts may be more fortunate than those who negotiate no contracts. For some, the failure to enter into a contract will be because they cannot afford a lawyer; for others, this will be because

ting out the "human capital" theory of relationships).

⁸⁸ See Shanley, *supra* note 27, at 16.

⁸⁹ See FINEMAN, *supra* note 15, at 134.

⁹⁰ *Id.*

⁹¹ *Id.*

the motivation to express one's love publicly, which many would say is their motivation to enter marriage,⁹² would not similarly impel them to enter into a contract to protect themselves against their partner. If and when these relationships end, the partners would have no contractual claims against one another, again to the detriment of primary caretakers, since they would have no claim to income earned by their partners through the joint efforts of the family.⁹³ A regime in which the state recognizes relationships among adults for the purpose of apportioning rights and obligations fairly among them therefore furthers the ends of fairness and justice.

Of course, the state could assign such rights and obligations without providing couples with a route to formalize these relationships. For example, the state could assign rights and responsibilities based on the functional characteristics of the relationship without considering whether the relationship was ever formalized. The American Law Institute's *Principles of the Law of Family Dissolution* proposes that such a scheme should apply to unmarried cohabitants;⁹⁴ in a regime in which civil marriage and other formalized commitments between adults were eliminated, a similar scheme could be applied to all couples. Under such an approach, what would matter in assigning such rights would be the couple's functional characteristics—how long they lived together, whether they had children together, etc.—rather than whether they had formalized their relationship. For example, progressively more property sharing might be required of couples who lived together for longer periods of time or who had children together, regardless of whether the couple had made a formal commitment to stay together.

In my view, however, eliminating a civil route for formalizing relationships would be a mistake for two reasons. First, in entering into a marriage, participants indicate their assent to a specific formal status that comes with a set of enforceable legal rights and responsibilities. This formalization therefore helps to identify the intent of its members and their own understandings with respect to the intended primacy and permanency of the

⁹² See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954–55 (Mass. 2003) (“Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. ‘It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.’” (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965))).

⁹³ It might be argued, however, that although some individuals who enter into conjugal relationships may fare worse in the event of a break-up if civil marriage were eliminated, many other individuals would fare better because, in the absence of such recognition from the state, they would cease to enter into conjugal relationships. And certainly Fineman and other commentators have suggested that women as a group would fare better if they avoided entering into marriage or marriage-like relationships with men. See FINEMAN, *supra* note 15, at 135. Whether or not this is the case, my strong hunch is that ending civil recognition will have little effect on the numbers of people who enter into conjugal relationships—they will simply do so without the imprimatur of the state, or its protections.

⁹⁴ See AM. LAW INST., *supra* note 13, §§ 6.01, 6.03–6.06 (providing that unmarried cohabitants who share a residence and life together for a significant period of time be subject to property division and spousal support, in the absence of an agreement to the contrary).

relationship. And surely such understandings should be relevant in determining the default rules that apply to that particular relationship.⁹⁵ For example, a commitment to a permanent relationship should be pertinent to the state's determination of how long income should be redistributed between parties who have separated.

Second, the state's making available a route through which citizens can formally commit to the permanency and depth of their relationship serves the state's interest in increasing the stability of familial caretaking relationships.⁹⁶ As Elizabeth Scott thoughtfully explains:

[M]arriage is an institution that has a clear social meaning and is regulated by a complex set of social norms that promote cooperation between spouses—norms such as fidelity, loyalty, trust, reciprocity, and sharing. These norms express the unique importance of the marriage relationship. They are embodied in well-understood community expectations about appropriate marital behavior that are internalized by individuals entering marriage

The social norms and conventions surrounding marriage influence spousal behavior in a variety of ways that reinforce the stability of the relationship. For example, the wedding ceremony and accompanying traditions can be understood as a public announcement of an important change in status. The ceremony usually includes the couple's exchange of vows and declaration of commitment before friends and family. Symbolically at least, this represents an expression of each spouse's willingness to be held accountable for the faithful performance of marital duties, not only by the other spouse, but also by the broader community. Marital status also signals to the community that spouses are not available for other intimate relationships, and thus discourages outsiders interested in intimacy from approaching married persons

The formality of marital status, together with the requirement of legal action for both entry into marriage and divorce, clarifies the meaning of the commitment that couples are making and underscores its seriousness The package of substantive legal ob-

⁹⁵ See Scott, *supra* note 11, at 229.

⁹⁶ The Law Commission of Canada's important report, *Beyond Conjugalities*, argues that there are a broad range of relationships that could benefit from the stability and certainty provided by state formalization of their relationships. LAW COMM'N OF CANADA, BEYOND CONJUGALITY (2001), available at http://www.lcc.gc.ca/about/conjugalities_toc-en.asp. It argues that the government should "provide an orderly framework in which people can express their commitment to each other and voluntarily assume a range of legal rights and obligations." *Id.* at 113.

ligations that goes with the formal status of marriage serves independently to promote stability in the relationship.⁹⁷

Providing a route for adults to formalize their commitments therefore increases the likelihood that they will provide one another the care that each needs, establish a stable relationship in the event of children, and try hard during tough times to weather difficulties with their partners.⁹⁸

B. State Privileging of (Some) Adult-Adult Relationships

I have argued that the supportive state should *recognize* relationships between adults and impose, at the least, default rights and responsibilities among participants in such relationships for the purpose of seeking to ensure equality and fairness, as well as to foster caretaking while preserving gender equality. The issue of whether the supportive state should seek to *privilege* such relationships is a much tougher issue for a liberal democracy. In my view, the answer should be “yes” because of the goods that these relationships further. These privileges, however, must be limited in particular ways since they stand in tension with other important liberal goods and values, such as principles of liberty and equal regard.⁹⁹ Part of the challenge of a more robust liberalism that recognizes a richer diversity of goods is to seek a course of action that ameliorates the tensions among these varied goods to the extent that is possible. In what follows, I set out four principles for the supportive state’s treatment of adults’ relationships that, together, seek to accomplish this purpose.

1. Freedom To Enter into Consensual Relationships

First, liberalism’s great respect for individuals forming and carrying out their own life plans requires that the state allow individuals the freedom to engage, or not engage, in consensual relationships with others. The right to determine one’s own personal relationships free from interference by the state is central to liberalism’s respect for individual self-determination.¹⁰⁰ John Stuart Mill’s counsel that society benefits from allowing dif-

⁹⁷ Scott, *supra* note 11, at 241–43.

⁹⁸ See Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 476–84 (1983).

⁹⁹ Elizabeth Scott reaches a similar conclusion, arguing that granting limited privileges to formal marriage serves a legitimate means to encourage couples to formalize their relationships, and therefore serves the state’s ends of stabilizing caretaking. Scott, *supra* note 11, at 252–53. She argues that “[t]he level of privilege should be sufficient to encourage couples to formalize their unions, but not so excessive that the social cost of maintaining a special status exceeds the benefits.” *Id.* at 253.

¹⁰⁰ This respect is embodied in both the Constitution and constitutional jurisprudence. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (“In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside

ferent “experiments of living” to flourish also supports the state’s interest in ensuring such freedom.¹⁰¹ Under this principle, for example, a citizen whose vision of the good life is to have sexual relationships with as many other citizens as possible should be able to fulfill that vision without interference by the state (barring issues such as public health concerns), regardless of whether the majority’s own private views of morality condemn such action. This would prohibit state criminal statutes still on the books in several states that outlaw fornication and cohabitation outside of marriage.¹⁰²

2. *Encouragement of (a Broad Range of) Long-Term Caretaking Relationships*

Second, although the liberal state must tolerate all consensual relationships, it need not give all such relationships a level playing field. It is true, as Michael Warner argues, that the liberal democratic state should not favor some relationships over others based on citizens’ private notions of morality.¹⁰³ It can and should, however, seek to support relationships that further important public goods in which the liberal state has a legitimate interest. Among the most important of these is caretaking. Without minimizing the violence and other harm that sometimes occurs in relationships between adults, or ignoring the sex inequality that has marked heterosexual relationships, the crux of the matter is that dependency is an inevitable fact of life for adults as well as children, and a liberal state must contend with that fact. Because of its interest in the health, well-being, and dignity of its citizens, the liberal state has a vital interest in the success of relationships that foster caretaking, and should provide these relationships with the institutional support that will help them flourish.

Given that a primary reason for the state to privilege adult intimate relationships is caretaking, the state has an interest in supporting a considerably broader range of relationships than the heterosexual couples who now choose to formally marry. The state has an interest in supporting, for

the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”); *id.* at 567 (“This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”).

¹⁰¹ See MILL, *supra* note 67, at 122, 144.

¹⁰² There are currently seven states that have such laws: Florida, Michigan, Mississippi, North Carolina, North Dakota, Virginia, and West Virginia. FLA. STAT. § 798.02 (2006); MICH. COMP. LAWS § 750.335 (2006); MISS. CODE ANN. § 97-29-1 (2006); N.C. GEN. STAT. § 14-184 (2006); N.D. CENT. CODE § 12.1-20-10 (2006); VA. CODE ANN. § 18.2-345 (2006); W. VA. CODE § 61-8-4 (2006).

¹⁰³ WARNER, *supra* note 15, at 112.

example, relationships of nonmonogamous couples, or, at the opposite end of the spectrum, those whose relationships are not sexual, insofar as these relationships foster caretaking. By the same token, the state also has an interest in supporting caretaking in family groupings that involve more than two adults.¹⁰⁴ Thus, the state has valid reasons to support all of the following horizontal relationships involving caretaking: two elderly sisters who live together and take care of one another, a nonmonogamous homosexual couple, a commune of five adults who live together with their children, and a heterosexual married couple.

3. *Limits on the Privileges Available to Long-Term Caretaking Relationships*

Third, promoting the health and stability of relationships among adults is only one goal that a flourishing liberal democracy should pursue, and only one of many principles that should affect the state's decision making. State distribution of privileges in favor of these relationships therefore has to be weighed against alternative principles of distribution, including distribution based on need. As I pointed out before, considerations of need will often conflict with distributing privileges to adults in long-term relationships. Further, the recognition of the limits on the state's and individuals' abilities to ensure the existence and stability of relationships must also be factored into the state's family policy.

These considerations should cause the state to limit the privileges that support these relationships in two specific ways. First, the state's seeking to aid caretaking relationships between adults cannot undercut the state's responsibility to ensure that all its citizens have the means and opportunity to pursue dignified lives. This means, at a minimum, as Martha Fineman argues, that a just society should seek to deliver basic social goods such as health care to everyone in society, regardless of family membership.¹⁰⁵ Insofar as the state distributes these goods based on marital status, it neglects its most basic responsibilities.

Second, the state should limit privileges for relationships to those tied to the specific public good in which the state has a legitimate interest—for example, caretaking or sex equality.¹⁰⁶ Singling out families for more

¹⁰⁴ There may be administrative rather than theoretical reasons to limit the number of persons that the state should recognize. There is, however, no reason that two persons should necessarily be the limit.

¹⁰⁵ See FINEMAN, *supra* note 15, at 284–85.

¹⁰⁶ The Law Commission of Canada's groundbreaking report, *Beyond Conjugal*, sets out a different set of principles that seek to limit the extent to which law distributes rights and privileges based on relationship status, in order to further equality among all citizens, whether or not they are involved in particular kinds of relationships. See *supra* note 96. The Commission suggests that laws that use relational categories to accomplish their objectives be subjected to a four-question interrogation:

First question: Are the objectives of the law legitimate?

generalized favorable treatment—while it might still further the goal of encouraging and supporting families—stands in tension with principles of fairness and equal regard among all citizens, both those within and those not in such families, particularly insofar as it redistributes economic resources to those who are, on average, better off. Under my proposed principle, the state could allow caretaking leaves from work or special immigration privileges for the partners of citizens, but not general tax breaks for those in caretaking relationships that are unrelated to the extra expenses incurred in caretaking. Thus the state would have little justification for funneling general economic support to those in adult-adult relationships, given that these adults, on average, do better financially due to the economies of scale of living together. In contrast, economic redistribution to caretaker-dependent relationships could be better justified by the consideration of the cost to caretakers of caring for dependents, including the interruption from working continuously in the paid workforce.

One important way in which the state can legitimately foster relationships among adults that conform to this principle is by, as I suggested earlier, providing a civil route through which adults can formalize their commitment to others. As Elizabeth Scott notes, formal commitments increase the likelihood that a relationship will last.¹⁰⁷ They also serve as an expressive vehicle for the state to announce its support for stable caretaking relationships without redistributing tangible privileges in favor of such relationships and, hence, away from those who might need them more. The state's endorsement of such formal commitments is still not, of course, without cost to those who do not enter them: to the extent that the state endorses such commitments, those who do not enter into them may feel a lack of societal respect, or even societal disapprobation. However, given the importance of caretaking relationships, the stability that such formalization contributes to these relationships in my view outweighs the costs of this potential stigmatization.

If not, should the law be repealed or fundamentally revised?

Second question: Do relationships matter?

If the law's objectives are sound, are the relationships included in the law important or relevant to the law's objectives?

Third question: If relationships matter, can individuals be permitted to designate the relevant relationships themselves?

Could the law allow individuals to choose which of their close personal relationships they want to be subject to the particular law?

Fourth question: If relationships matter, and self-designation is not feasible or appropriate, is there a better way to include relationships?

Id. at xii–xiii.

¹⁰⁷ See Scott, *supra* note 11, at 244–45.

4. *Guarding Against Injury to Other Important Goods*

Fourth, in privileging caretaking relationships between adults, the state must also seek to remedy the negative consequences to public goods associated with these relationships. Three of these possible consequences bear particular attention: (1) increased sex inequality; (2) increased inequality of wealth and opportunity; and (3) disengagement from civic life. I discuss each in turn.

a. *Sex Inequality*

Any proposals that the state should promote intimate caretaking relationships must deal with the fact that heterosexual relationships, as well as the institution of marriage, have been deeply intertwined with women's continued gender inequality. Leaving current political realities aside, the state might, of course, deal with this troubling association by privileging only those long-term caretaking relationships that do not involve heterosexual relationships, such as homosexual relationships or platonic relationships. Alternatively, and far more palatable politically, the state could privilege heterosexual relationships along with other relationships, at the same time that it seeks to increase the equality within these relationships.

One way to pursue this latter goal would be for the state to adopt policies that encourage the shared caretaking of children within families, as much gender inequality is associated with women assuming the greater portion of childrearing responsibilities.¹⁰⁸ To accomplish this goal, the state could adopt models of public support for caretaking that encourage men to take an equal role. For example, requiring that employers adopt family leave and flex-time policies that can be taken by parents sharing child-care between them, rather than policies that are limited to full-time caregivers, would encourage shared caretaking. Public schools, too, could play a role in this endeavor, teaching children that both fathers and mothers can have equal roles in nurturing their children, and helping them to understand the importance of these caretaking tasks. In Anita Shreve's words, "the old home-economics courses that used to teach girls how to cook and sew might give way to the new home economics: teaching girls *and* boys how to combine work and parenting."¹⁰⁹

b. *Inequality of Wealth and Opportunity*

Second, with respect to inequality of opportunity, the state's encouragement of tighter family ties runs the risk that wealth will be more tightly

¹⁰⁸ See Katharine T. Bartlett, *Brigitte M. Bodenheimer Memorial Lecture On The Family: Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 844–45 (1998).

¹⁰⁹ SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* 177 (1989) (quoting ANITA SHREVE, *REMAKING MOTHERHOOD* 237 (1987)).

held within particular families' hands, therefore increasing disparities of wealth and consequently, opportunities across families.¹¹⁰ What this threat to equality calls for, however, is not state efforts to loosen family ties, but rather efforts to lessen the disparities of wealth and opportunity that may result from these ties through mechanisms such as taxation. The state's goal should be to reduce, although probably not eliminate, disparities in wealth passed on between generations. As Michael Walzer argues, there are significant reasons to allow family members to express their love through bequests to family members, as well as significant reasons to tax these bequests for reasons of equality and funding legitimate state expenditures.¹¹¹ Walzer concludes, rightly in my view, that the state should moderate between these goals by giving some weight to both when determining the extent of taxation of such gifts.¹¹² The state, in turn, should use these taxes and other means to ensure that all citizens have the financial means and education to achieve (at the very least) some basic equality of opportunity, even when their families cannot provide this without aid.

c. Families as a Respite, Not an Island

Finally, the state should also seek to encourage families to serve as a source of support, but not be islands unto themselves. The social circles of adult Americans have narrowed dramatically in the past decades. Increasingly, adults are turning toward their families and away from developing the close ties with friends and broader social networks in neighborhoods and communities that a healthy liberal democracy requires.¹¹³

¹¹⁰ In fact, Frederick Engels argued that the monogamous family structure originated specifically to keep private property in genetic family lines. See FREDERICK ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* 128 (Eleanor Burke Leacock ed., Int'l Publishers Co. 1972) (1884).

¹¹¹ See MICHAEL WALZER, *SPHERES OF JUSTICE* 127–28 (1983) (“[I]mproper power must be controlled if the integrity of the political sphere is to be upheld. . . . [T]he chief purpose of limiting bequest and inheritance, as of every other form of redistribution, is to secure the boundaries of the different spheres But surely the gift is one of the finer expressions of ownership as we know it. And so long as they act within their sphere, we have every reason to respect those men and women who give their money away to persons they love or to causes to which they are committed, even if they make distributive outcomes unpredictable and uneven.”).

¹¹² *Id.*

¹¹³ A study by sociologists at Duke University and the University of Arizona, comparing data from 1985 and 2004, found that the mean number of people with whom Americans can discuss matters important to them dropped by nearly one-third, from 2.94 people in 1985 to 2.08 in 2004. Miller McPherson, Lynn Smith-Lovin & Matthew E. Brashears, *Social Isolation in America: Changes in Core Discussion Networks Over Two Decades*, 71 *AM. SOC. REV.* 353, 353 (2006). In the same time period, the percentage of people who talk to at least one person outside of their family about important matters decreased from about 80% to about 57%, while the number of people who depend totally on their spouse has increased from about 5% to about 9%. *Id.* at 359. The study shows that citizens have turned away from close ties formed in neighborhood or community contexts and toward relationships with close kin, especially spouses. *Id.* at 358, 371. The studies' authors suggest that this narrowing of interpersonal relationships poses risks for the health of the pol-

Some substantial part of this change appears to be fueled by the increasing time bind in which American families find themselves.¹¹⁴ Mothers' increased labor force participation,¹¹⁵ combined with the increasingly long hours that all employees work,¹¹⁶ as well as longer commutes,¹¹⁷ place American families in a far greater time crunch than their European counterparts.¹¹⁸ The influx of women into the workforce in the last four decades means that families have added ten to twenty-nine hours working outside the home per week.¹¹⁹ However, recent time analysis studies suggest that adults in families still spend roughly the same number of hours each week caring for children as they did forty years ago.¹²⁰ This leaves parents

ity given the links, emphasized by scholars such as Robert Putnam, between interpersonal ties, membership in voluntary associations, civic participation, and levels of trust among citizens. *Id.* at 354, 366; see ROBERT PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

¹¹⁴ See McPherson, Smith-Lovin & Brashears, *supra* note 113, at 373.

¹¹⁵ Between 1960 and 2000, employment of married mothers nearly tripled overall, with the employment rates for mothers with children under six increasing the most rapidly. JANET C. GORNICK & MARCIA K. MEYERS, *FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT* 27–28 (2003). All told, women's participation in the labor market rose from 28% in 1940 to 60% in 2000. *Id.* at 27.

¹¹⁶ In 2002, men worked forty-nine paid and unpaid hours per week at all jobs, an average of two more hours than men worked in 1977. FAMILIES AND WORK INSTITUTE, *GENERATION & GENDER IN THE WORKPLACE* 27 (2002), <http://familiesandwork.org/eproducts/genandgender.pdf>. Women's increase in work has been even greater. *Id.* Women now work an average of 43.5 paid and unpaid hours per week at all jobs, compared with thirty-nine hours in 1977. *Id.* Americans report the longest annual work hours of any in the industrialized world, 1966, compared to Sweden (1552), France (1656), Germany (1560), and the United Kingdom (1731). GORNICK & MEYERS, *supra* note 115, at 59.

¹¹⁷ According to the Bureau of Labor Statistics, United States workers spend an average of 3.7 hours per week commuting to and from the job. GORNICK & MEYERS, *supra* note 115, at 322 n.8.

¹¹⁸ Janet Gornick and Marcia Meyers report that American parents in two-earner families together spend an average of eighty hours a week at their jobs, compared to seventy-one hours for dual-earner couples in the United Kingdom, and sixty-nine hours per week in Sweden. GORNICK & MEYERS, *supra* note 115, at 60. They also find remarkable the high percentages of American couples with children working very long hours: "Nearly two-thirds of American dual-earner couples with children report joint workweeks of eighty hours or more." *Id.* at 60–61. They note that except for in Canada, no more than one-third of couples in their eleven comparison countries spent this much time in the workplace. *Id.* at 61.

¹¹⁹ Jerry A. Jacobs & Kathleen Gerson, *Overworked Individuals or Overworked Families?*, 28 *WORK & OCCUPATIONS* 40 (2001); Michael Hout & Caroline Hanley, *The Overworked American Family: Trends and Nontrends in Working Hours, 1968–2001* 11–12 (June 2002) (unpublished manuscript, on file with The Harvard Journal of Law and Gender), available at http://ucdata.berkeley.edu/rsfcensus/papers/Working_Hours_HoutHanley.pdf.

¹²⁰ A recent study of parents' weekly hours reached the unexpected conclusion that since 1965, when 60% of all children lived in families with a breadwinner father and a stay-at-home mother, compared with 30% of all children today, the hours that married and single parents spend teaching, playing, and caring for children actually has risen. Robert Pear, *Married and Single Parents Spending More Time With Children, Study Finds*, N.Y. TIMES, Oct. 17, 2006, at A12. For married mothers, the time spent on childcare activities increased to an average of 12.9 hours a week in 2000, from 10.6 hours in 1965. *Id.* For married fathers, that time more than doubled, to 6.5 hours a week, from 2.6 hours. *Id.* Single mothers, too, reported an increase in childcare hours—11.8 hours a week on child care, up from 7.5 hours in 1965. *Id.*

far less time for socializing with other adults and for community activities than they once had.¹²¹ This time crunch is particularly evident among the highly educated middle class, which is the group that most contributes to voluntary community associations.¹²²

To foster the strong ties that a healthy polity requires, the state should seek to support the caretaking relationships associated with families at the same time that it also seeks to ensure strong bonds between citizens and communities. Some part of this goal could be accomplished through measures that are both family and community friendly, in the form of policies that support reducing workers' long work hours and commuting time. These include regulations to shorten the workweek for all workers, measures to ensure that part-time workers receive wage and benefit parity (including health insurance) with full-time workers, minimum mandatory vacation time, more generous—and paid—family leave, and affordable high-quality childcare.¹²³ It also includes public transportation and zoning policies that discourage urban sprawl and its attending long commute times.

At the same time, the state should seek to foster at least some deprivatization of the nuclear family form, as it has taken shape in the United States. The pattern of childrearing in which parents have sole responsibility for childcare inside a private home isolates children and caretaking parents from the larger community. In privileging caretaking relationships, the state should seek to construct institutional arrangements that incorporate parents and dependents into the life of the community and share caretaking responsibilities within the community. Tax subsidies for co-housing developments, in which some cooking and childcare are performed cooperatively, and supports for childcare cooperatives, are two measures by which the state can pursue this end.

III. DIFFICULT ISSUES IN REGULATING INTIMATE ADULT RELATIONSHIPS

I have argued that the state should both recognize and encourage intimate relationships among adults that foster caretaking. In this last section, I consider two difficult issues that the state must confront with respect to regulating intimate relationships. The first concerns the form or forms that the state makes available to formalize intimate relationships. Specifically, should the state make available a single status such as “domestic partnership” for all formalized adult intimate relationships? Or should the state make available a number of different formalized statuses for different types of relationships? In the latter case, the state would presumably continue to formalize some relationships as “marriages,” while

¹²¹ See McPherson, Smith-Lovin & Brashears, *supra* note 113, at 373.

¹²² *Id.*

¹²³ These measures and more to ease work-family conflict, as well as discussions of their increased availability in Europe, are discussed in detail in Janet Gornick and Marcia Meyer's excellent book. See GORNICK & MEYERS, *supra* note 115.

also formalizing other types of relationships. I then turn to the second issue, the measures that the state may legitimately use to encourage two (or more) parent families over single-parent families and formalized relationships over de facto relationships between adults.

A. Domestic Partnership or Marriage?

The most difficult issue with respect to how the state should treat adult's long-term caretaking relationships is not, in my view, whether or not the state should accord some civil status to these relationships, or even the issue of whether the state should provide subsidies to caretaking relationships. As I have said, in my view the answer to each of these questions is "yes," in large part because of the importance of caretaking to society. The most difficult issue is whether all such horizontal relationships should be formalized within a single category, such as "domestic partnership," or whether relationships should be categorized separately according to the general type of relationship at issue. In the latter case, the state would presumably retain a civil status for conjugal relationships such as marriage (which, out of justice and fairness, as well as for the goods associated with them, would need to be expanded to same-sex couples), but also recognize other forms of adult-adult relationships, such as domestic partnerships between friends who cohabitate.

Each of these two courses has significant benefits and costs. Grouping all adult-adult relationships into a single legal status has the advantage of guarding against the possibility that any particular subcategory of relationship, particularly marriage, would be unfairly privileged in the political process as against other horizontal relationships. By the same token, clustering different types of horizontal relationships together into the same legal category would send a strong message that marriage occupies no paramount place in the legal hierarchy, announcing clearly that there are a number of ways that caretaking relationships can be forged and maintained in society, all of which should be equally respected.

Yet this approach comes with two significant downsides. First, it would keep the state from tailoring the particular obligations and benefits assigned to that status to the type of caretaking relationship at issue. For example, when a child is born to or adopted by one of the parties within a conjugal relationship, it makes sense to accord a presumption of parenthood and right to adopt to the other partner. There is less reason to accord such a presumption in a non-conjugal caretaking relationship, however. The same is true for inheritance rights: as a default matter, it makes sense to assign a presumption that conjugal partners intend their partner to inherit (in the absence of agreements to the contrary), since most individuals in such rela-

tionships leave their estates to their partners.¹²⁴ It may make less sense to apply this presumption to other types of long-term caretaking relationships.

Second, although moving away from the category of marriage has the benefit of eliminating marriage as *the* privileged category, it has the related disadvantage that much of the positive cultural resonance associated with marriage—the notion that the institution is a serious, long-term bond of commitment based on love between two people who come together and take one another permanently as family—will also be lost.¹²⁵ Eliminating marriage may therefore weaken the resolve of those in relationships to work through rough periods. It could also dissuade those who would otherwise have married from formalizing their relationships, since the new form of formalization the state adopts will not have the same cultural resonance that swearing one's love through marriage does.¹²⁶ This could leave many of those made vulnerable by intimate relationships without legal protection.

The alternative of retaining a conjugal status such as marriage, but developing other formalized categories of relationships that adults could choose to enter, has the benefit of retaining the cultural and legal force associated with marriage and the accompanying benefits of stabilizing this category of relationships through the relevant social and legal norms. This alternative would also allow the state to tailor a specific bundle of rights to the particular types of relationships at issue. For example, the state could adopt a formalized legal status for partners (not necessarily limited to two) who live together but are not involved in a sexual relationship, including adult siblings, for couples who do not live together but are in a long-term, committed caretaking relationship,¹²⁷ and more. The downside of this approach, however, is that it runs the risk that marital relationships will continue to be perceived as superior to other relationships and disproportionately assigned privileges.

At the level of theory, in my view, there is no clear winner between these two alternatives—each has its own set of benefits and costs.¹²⁸ At the level of political reality, though, the popular ideology (not to mention the

¹²⁴ See J. Thomas Oldham, *What Does the U.S. System Regarding Inheritance Rights of Children Reveal about American Families?*, 33 *FAM. L.Q.* 265, 269 (1999) (noting that “if a parent dies survived by a spouse and children, most decedents leave their whole estate to the surviving spouse”).

¹²⁵ See Scott, *supra* note 11, at 241–45.

¹²⁶ See *id.*

¹²⁷ See Stacey, *supra* note 14 (making a persuasive case for giving formalized legal status to those in committed caretaking relationships even when they do not share the same household); see also Iris Marion Young, *Reflections on Families in the Age of Murphy Brown: On Gender, Justice, and Sexuality*, in *REVISIONING THE POLITICAL: FEMINIST RECONSTRUCTIONS OF TRADITIONAL CONCEPTS IN WESTERN POLITICAL THEORY* 251, 258 (Nancy J. Hirschmann & Christine Di Stefano eds., 1996); James Herbie DiFonzo, *Unbundling Marriage*, 32 *HOFSTRA L. REV.* 31, 65–66 (2003).

¹²⁸ As a result of the difficulty of this issue, Mary Shanley shifted positions in this debate, first arguing that the state should continue to support civil marriage, and more recently arguing that the state should discard civil marriage and treat all horizontal relationships as domestic partnerships. See SHANLEY, *supra* note 27, at 111–12.

\$50 billion a year wedding industry)¹²⁹ is so invested in the value of marriage that eliminating civil marriage is well nigh impossible. As a result, those (including myself) who seek to topple marriage from its pedestal as the preferred family form and to increase the equal regard for a broader category of relationships would likely do better to focus their attention on decentering marriage by proliferating other categories of status relationships among adults, rather than seeking to eliminate marriage as a civil status and replacing it with a civil partnership category.¹³⁰ This strategy of broadening the categories of relationships that receive legal protections and support and distributing a subset of the bundle of rights now received by marriage among these different relationships¹³¹ is not only the most pragmatic course to take given existing political realities, but a course that offers significant promise in furthering the goods that a liberal democracy needs to flourish. Disaggregating the privileges awarded based on the ranges of goods at issue also helps deconstruct the monolithic notion of “The Family” and the orthodoxy surrounding it. This approach makes clear that there are many kinds of relationships that contribute many different public goods, and that no one-size-fits-all family is the ideal.

B. Encouraging Marriage and Two (or More)-Parent Families

I have argued that the state has a legitimate interest in preferring two (or more)-parent families over single-parent families where children are involved.¹³² However, the thorny issue of *how* the state should seek to encourage multi-parent families merits additional discussion. As I have argued elsewhere,¹³³ the state has a duty to ensure that children have the caretaking and other resources necessary to support their well-being and develop their capabilities. This duty exists whether or not the state believes that parents have made a wise choice about their family form and even if the state fears that ensuring that today’s children have necessary resources will send the wrong signals about better and worse family forms and therefore hurt future children: the duty to support the existing children is paramount. Based on this rationale, for example, it is illegitimate for the state to withhold welfare benefits to low-income families based on mothers having additional children out of wedlock, if doing so would deprive the children in these families of necessary resources.

¹²⁹ Dina ElBoghdady, *For Love and Money: Amid Economic Sickness, Bridal Industry Radiates Health*, WASH. POST, May 25, 2003, at F1.

¹³⁰ See Judith Stacey, *The New Family Values Crusaders: Dan Quayle’s Revenge*, NATION, July 25, 1994, at 119; see also McCLAIN, *supra* note 23, at 191–219.

¹³¹ See Young, *supra* note 127; see also DiFonzo, *supra* note 127.

¹³² See *supra* note 55 and accompanying text.

¹³³ Eichner, *Dependency and the Liberal Polity: On Martha Fineman’s The Autonomy Myth*, *supra* note 21.

Above this required threshold of support, however, the state does have legitimate reasons to adopt measures that encourage multi-parent families. In doing so, however, the state should still seek to harmonize the important liberal goods at stake. In other words, the state's goal should be to construct policies that avoid zero-sum situations in which furthering some goods operates to the detriment of others. Developing such policies will, however, require careful attention to the ways in which relevant goods may conflict. By this criterion, the state's seeking to further two-parent families by awarding them economic resources not awarded to single-parent families is a peculiarly bad tool to harmonize these goods. Not only would doing so keep resources from the very families who need them most, it also risks stigmatizing the very children who are most vulnerable. The state would do better to seek measures that do not pose such a stark tradeoff among goods. For example, the state could encourage multi-parent families through job training programs and educational subsidies for youths who are at risk of becoming parents, since studies show that increasing the prospects for young adults' futures makes it significantly less likely that they will bear children while they are young and single.¹³⁴ Such programs do not pit the important interests of current children against the important interests of future children, and they also have the virtue of increasing equal opportunity.

The state should deal in a similar manner with proposals to shore up the institution of marriage (or whatever categories of adult-adult relationships that the state retains). Proponents of marriage have proposed a number of policies recently to strengthen marriage, including making divorce more difficult through returning to fault divorce laws,¹³⁵ adopting covenant marriage provisions,¹³⁶ encouraging premarital counseling,¹³⁷ and even awarding bonuses for marriages where no premarital abortions occurred.¹³⁸ In choosing policies to strengthen the health and permanency of horizontal

¹³⁴ See MARIAN WRIGHT EDELMAN, *FAMILIES IN PERIL: AN AGENDA FOR SOCIAL CHANGE* 58-60, 88 (1987).

¹³⁵ See, e.g., Lynn D. Wardle, *Divorce Violence and the No-Fault Divorce Culture*, 1994 UTAH L. REV. 741 (1994); Barbara Dafoe Whitehead, *Dan Quayle Was Right*, ATLANTIC MONTHLY, Apr. 1993, at 47, 71 (describing two-tiered system of divorce law for couples with and without minor children).

¹³⁶ Three states have adopted such provisions. See ARIZ. REV. STAT. ANN. §§ 25-901 to -906 (2006); ARK. CODE ANN. §§ 9-11-801 to -811 (2006); LA. REV. STAT. ANN. §§ 9:272-9:276 (2006).

¹³⁷ See, e.g., FLA. STAT. § 741.0305 (2006) (offering reduced license fees to couples that participate in premarital counseling); OKLA. STAT. tit. 43, § 5.1 (2005) (reduced fees for premarital counseling); UTAH CODE ANN. §§ 30-1-30 to -39 (2006) (requiring couples to participate in premarital counseling before applying for a marital license, with certain exceptions).

¹³⁸ See, e.g., Marriage Restoration Fund, H.B. 1917, 89th Gen. Assem. (Mo. 1999) (proposing that couples who marry after attaining the age of twenty-one, without having had any children or (in the woman's case) any premarital abortions, and having tested negative for sexually transmitted diseases, be paid \$1,000 from a fund, which would be raised by assessing a \$1,000 fee against parties whose actions provided the grounds for a divorce).

relationships, the state should here, too, seek to avoid policies that require large tradeoffs among important goods. In this light, tightening up divorce laws through a return to fault divorce, despite furthering the state's interest in promoting marriage, severely infringes on citizens' autonomy interests.¹³⁹ The state would therefore do better to adopt proposals such as pre-marital counseling requirements that would avoid this stark tradeoff of goods. By the same token, as Linda McClain argues, many marriage promotion policies risk perpetuating sex inequality within marriage.¹⁴⁰ Given that women more often seek divorces than men, as Katharine Bartlett points out,¹⁴¹ the state could usefully support such relationships by encouraging men to be better partners through assuming an equal share of housework and carework.¹⁴² Such measures would infringe less on individual's autonomy than stricter divorce laws and, at the same time, increase sex equality.

In determining the measures that the state should take to further such relationships, it is important to keep in mind the limits of the state's institutional competence to deal with the complexities of these relationships. The state can make it more difficult for individuals to get out of marriage. It cannot, however, keep affection and caretaking alive within such relationships.¹⁴³ As I argued before, recognition of the state's lack of institutional capacity in this area, as well as of limits on citizens' own capacities in this area, should cause the state to limit benefits awarded to families out

¹³⁹ Covenant marriage laws, in which individuals getting married can choose whether or not heightened standards will apply at divorce, pose less of a conflict among important goods. See *supra* note 136. Given the small number of couples who choose to enter into covenant marriage where it is available, though, as well as the problems with requiring parties to remain in a marriage that one party wants to exit, the state would be wise to seek alternative policies. In Louisiana, 2%, in Arizona, 0.25%, and in Arkansas, only 71 out of approximately 38,000 marrying couples elected covenant marriage. Scott Drewianka, *Civil Unions and Covenant Marriage: The Economics of Reforming Marital Institutions* 3 (2003), <http://www.uwm.edu/~sdrewian/MEApaper2003.pdf>.

¹⁴⁰ See McClain, *supra* note 23, at 131–54.

¹⁴¹ Bartlett cites figures from a 1986 study which indicate that women initiate divorce in sixty-two to sixty-seven percent of cases. Bartlett, *supra* note 108, at 842 n.135. A more recent study gives approximately the same result, placing the figure at slightly above two-thirds. Margaret F. Brinig & Douglas W. Allen, "These Boots Are Made for Walking": *Why Most Divorce Filers Are Women*, 2 AM. L. & ECON. REV. 126, 127–28 (2000).

¹⁴² See Bartlett, *supra* note 108, at 842. Recent data indicate that married mothers perform an average of 19.4 hours of housework per week, while married fathers perform an average of 9.7. See Pear, *supra* note 120.

¹⁴³ The difficulties associated with the state's promotion of marriage, for example, were made eminently clear in President G. W. Bush's plan to promote marriage for women on welfare. See generally David S. Broder, Editorial, *An Unlikely Marriage Broker*, WASH. POST, Mar. 31, 2002, at B7 (discussing the dispute among conservatives over whether the government should actively promote marriage); Robin Toner & Robert Pear, *Bush's Plan on Welfare Law Increases Work Requirement*, N.Y. TIMES, Feb. 26, 2002, at A23 (explaining Bush's initial introduction of the plan and the response from Democrats). Despite the administration's \$1.5 billion initiative, the administration had no clear plan for how states might successfully promote marriage once Wade Horn, the top official at Health and Human Services, withdrew his earlier proposal to award those who married with cash bonuses. See Barbara Ehrenreich, Op-Ed, *Let Them Eat Wedding Cake*, N.Y. TIMES, July 11, 2004, § 4, at 13.

of concern for individual fairness. It should also cause the state to investigate means to encourage alternative caretaking networks for those who are not, either through chance or choice, members of intimate relationships, such as “mothers houses,” where single parents can raise their children more communally, or the types of informal networks among friends that helped provide caretaking for men in the gay community stricken with AIDS in San Francisco at the height of the epidemic.

CONCLUSION

Determining the stance that the state should take with respect to adult intimate relationships is so difficult because these relationships implicate a number of goods that are central to our liberal democratic ideals and, at best, jibe uneasily with one another. Each of these goods—liberty, equal regard for all persons, insuring the caretaking necessary for human dignity and human development, sex and economic equality, civic fellowship—is too important to the liberal democratic project to be sacrificed wholesale to any of the others. By the same token, none ranks so supreme that it should be deemed completely to trump the others. What is called for, then, rather than focusing on a single good or two and ignoring the others, is a family policy that stitches the relevant goods together into a more nuanced set of principles that allows each of these goods to be given its due.

This does not mean, of course, that a set of principles can be arrived at that allows each of these goods unmitigated scope, uncompromised by the others. As Isaiah Berlin eloquently states, the world is full of situations “in which we are faced with choices between ends equally ultimate, and claims equally absolute, the realization of some of which must inevitably involve the sacrifice of others.”¹⁴⁴ It does mean, however, that there will be places in which this tension among goods can be ameliorated through thoughtful policies. It also means that, where these tensions cannot be mitigated, choices among these goods must be made carefully. To do so requires a clear recognition of the important goods at stake. An approach that fails to do so, as Indian folklore tells us, would take one part of the elephant for the whole.

¹⁴⁴ ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 168 (Oxford Univ. Press 1969).