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Recommended Citation

Franke, Katherine M., "Longing for Loving" (2008). *Columbia Public Law & Legal Theory Working Papers*. Paper 08145.
http://lsr.nellco.org/columbia_pllt/08145

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Longing for Loving
Katherine M. Franke¹

Our task in this symposium is to place Loving v. Virginia² in a contemporary context. To interpret, if not re-interpret, its meaning in light of the settings in which race, sexuality and intimacy are being negotiated and re-negotiated today. So, we might ask: In what way are Mildred and Richard Loving role models for us today? How, if at all, does the legal movement for marriage equality for interracial couples help us think through our arguments and strategies as we struggle today for marriage equality for same sex couples?

One way to frame these questions is to ask whether there is a shared etiology in the racial and sexual orientation contexts. That is to say, can or should the contemporary struggle mirror the arc of justice in the racial equality context 50 years ago - does getting the justice project right today mean that same sex couples are entitled to our own Loving moment, and that we're entitled to it soon? Surely that's the overwhelming view in the lgbt legal community.

But I'll say here, as I have said elsewhere, that there are good reasons to resist the analogy to Loving and to resist the pull of a Loving-like notion of justice. As we push to create a less heteronormative society we ought rely less on lawyers and more on politics, and in so doing,

¹ Professor of Law, Director of the Center for the Study of Law and Culture and Director of the Program in Gender and Sexuality Law, Columbia Law School. This paper benefitted enormously from conversations with Kate Bartlett, Liz Emens, Suzanne Goldberg, Janlori Goldman, Melanie Leslie, Sally Merry, Carol Sanger, Bob Scott, Buffie Scott, and Anna Marie Smith, as well as from Sarah Hinger's excellent research assistance.

² Loving v. Virginia, 388 U.S. 1 (1967).

we may find different analogies that inspire our political and legal strategies in the present.

Having said that, we should be clear about where the decriminalization accomplished in Lawrence v. Texas³ has left us. Of course, we are not now in a Loving v. Virginia moment, notwithstanding Goodridge v. Department of Public Health.⁴ In fact, we're in a McLaughlin v. Florida⁵ moment - or something kind of like it. McLaughlin was the Supreme Court's 1964 case that invalidated laws criminalizing interracial sex on equal protection grounds.⁶ In a recent article Ariela Dubler reminded us of the importance and significance of McLaughlin,⁷ pointing out that McLaughlin has been neglected in our collective memories of the Court's jurisprudence of racial and sexual equality. It was not viewed as having its own significance, but rather was regarded as an intermediate step toward the invalidation of laws criminalizing or prohibiting interracial marriage. Loving was what the stakes were all about, and McLaughlin was merely a pit stop along the way. This understanding of McLaughlin is wrong, Dubler argues, because the case was really about the legitimate bounds of regulation of non-marital sex, and we do it a disservice if we understand it as only having had instrumental value as a stepping stone toward another goal: setting the legitimate bounds of the regulation of marriage.

But Lawrence leaves us in a different place than did McLaughlin. Indeed, Lawrence is

³ Lawrence v. Texas, 539 U.S. 558 (2003).

⁴ Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

⁵ McLaughlin v. Florida, 379 U.S. 184 (1964).

⁶ *Id.*

⁷ Ariela Dubler, *From McLaughlin v. Florida to Lawrence v. Texas: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165 (2006).

not the gay McLaughlin. McLaughlin was an equal protection case, and the Court's ruling expressly left intact the state's power to punish sex outside of marriage. If a state chose to regulate non-marital sex it simply had to do so in a manner that did not differentiate on the basis of race. In that sense, McLaughlin merely extended the force of a pre-existing non-discrimination norm to one more site in which the state was exercising otherwise legitimate police power. By contrast, Lawrence, as a liberty case, explicitly limits the state's ability to punish non-marital sex, and in so doing recognized new rights to sexuality outside marriage.

To my mind, it would be a terrible mistake legally and politically to read Lawrence in such a way that turns it into a gay McLaughlin. That's what I'm afraid is happening when our advocates urge an analogy between sexual equality today and racial equality in the Loving era. We've got something much better to work with here than they had 50 years ago, and we need to take a breath, take in that difference, and let it inform our politics.

What I will argue in this essay is that post-Lawrence efforts to secure marriage equality for same sex couples must be undertaken, at a minimum, in a way that is compatible with efforts to dislodge marriage from its normatively superior status as compared with other forms of human attachment, commitment and desire. Resisting the normative and epistemic frame that values non-marital forms of life in direct proportion to their similarity to marriage, we must unseat marriage as the measure of all things. To this end, I'll suggest a thought experiment: substituting friendship for marriage at the center of the social field in which human connection takes place. No longer the sun around which all other relationships and relations orbit, our investments in marriage and marriage's investments in us are likely to yield in such a way that we can imagine making the argument for same sex couples' right to marry while imagining and cultivating

different longings than that for Loving.

Before I move to the next step in the argument, I want to make something perfectly clear: I support the invalidation of marriage laws that are limited to different sex couples. Said another way, I condemn the legitimacy and legality of laws that prohibit same sex couples from marrying on the same terms as different sex couples. Why? Not because I believe strongly in a right to marry, but rather because the refusal to distribute this public benefit and status to same sex couples is motivated by and perpetuates both heterosexism and homophobia. I'll return to the significance of this particular formulation of the reason for supporting marriage equality. But I wanted to get this one issue out of the way up front. My critique of today's marriage movement and the uses of history that it makes does not mean that I oppose the idea that same sex couples should be able to marry. I hold a kind of "knock yourselves out if that's what you want" view of the matter. Just don't make all the rest of us sign up for that project.

* * *

The turn to Loving as the proper analogy through which to understand the civil rights stakes today is one that comes at some cost. In a Loving-like strategy, decriminalization finds its opposite in legalization. The legal effect of the Loving's victory in the Supreme Court was the validation of their marriage. On June 11, 1967 the Lovings were criminals in the Commonwealth of Virginia, but on June 12, 1967 (the day the Supreme Court issued the decision in their favor) they were not. On June 11, 1967 the Lovings were not legally married in the Commonwealth of Virginia, but on June 12, 1967 they were. In this frame when a court invalidates the criminalization of a particular behavior, the logical consequence of the court's action is to render the group subject to positive legal regulation. In this circumstance, there is no

social or legal daylight between being subject to the regulation of criminal laws and being subject to the regulation of civil laws. The effect of winning the constitutional challenge to a status-based disadvantage of this kind is that the district attorney walks the file containing your criminal case over to the clerk in the marriage license office. You and your relationship never leave the building. But then, in cases brought under a Loving-like paradigm, the civil rights plaintiff never looks for the exit sign to get out from under the direct control of government and governance. Being shown the door gets framed as a set back for equality rather than as a viable, indeed progressive, remedy to a constitutional violation.

Returning to the breath that I urge we all take before we rush into the world of Loving, my aim is that we imagine the political possibilities of the current moment more expansively. How's that? Well, in a sense, we, the gay community, find ourselves and our sexualities in a unique spot of un- or under-regulation by the state. No longer subject to criminal law after Lawrence, and not yet subject to the governance of state marriage laws, we occupy a kind of gap in the regulatory reach of the state. It's a "kind of " gap, to be sure, because we're beyond the day when we can think social locations that stand fully outside of law - whether in law's shadow,⁸ in social fields constituted by Weberian legal orders that in complex ways mimic state legal regulation,⁹ in spaces constituted by a Foucauldian sense of law's circulatory power,¹⁰ or in

⁸ Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

⁹ MAX WEBER, ON LAW IN ECONOMY AND SOCIETY 18-19 (1954).

¹⁰ MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972-1977, at 98 (Colin Gordon ed., 1980).

legally pluralistic domains conceptualized by Sally Moore's idea of "semi-autonomous social fields."¹¹

How might we understand the relative absence of regulation of homo-sexualities as an opportunity rather than as an injury? The challenge we face is in crafting arguments that support the extension of marriage rights to same sex couples who want them, while not doing so at the price of denigrating or shrinking and affective sexual liberty outside of marriage.¹² At present, the debate within the gay community has largely been framed as between those who favor marriage rights and those who regard the marriage equality movement as regressive, unenlightened and far too traditional. I happen to think we can argue that same sex couples be allowed to marry, while also offering strong critiques not only of the institution of marriage but of those who wish to marry.

If not an injury, how best to characterize the non-marital status of same sex sex so as to better appreciate what its penumbral location in law permits rather the focusing entirely on what it is denied? Are there ways of conceptualizing the gap such that it might both permit and germinate new and broader forms of sexual liberty than those that lie in a regime that puts all its eggs in the marriage basket? Marriage as we all know, offers certain rights and responsibilities to those who are willing to conform their sexual and affective affiliations to its constrained

¹¹ Sally Frank Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 LAW & SOC'Y. REV. 719 (1973).

¹² Among legal scholars Nancy Polikoff has done the best job of undertaking this hard task. See NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008).

demands: only two adults, not married to anyone else, who pledge to be monogamous, are financially interdependent in a particular way, and will be bound by a set of non-negotiable default rules when one or both parties seeks to terminate the marriage. Thus, the institution of marriage demands the surrender of a great deal of the liberty rights acknowledged in Lawrence, rights that unmarried people enjoy much more robustly. For those willing to surrender to the regulatory demands of marriage, the pay-off is great in terms of legal and social entitlements, legitimacy and validation.

If the institution of marriage compromised only the sexual liberty of those people who choose to marry, I would be less concerned about the terms of the commitment it demands. But, of course, its influence extends well beyond the boundary of its official territory. There exists a rich literature, to which I have made only a marginal contribution,¹³ that explains how the legitimacy and respectability that law confers on marital couples reinforces the illegitimacy and deviance of those whose sexual, intimate and affective commitments, if not merely contacts, lie in non-marital contexts.¹⁴ But we can say more. The normative centrality and, indeed, priority of the institution of marriage establishes the standard by which all other forms of kinship, family, friendship, temporary alliance, and love are both rendered legible and assigned value. In this, and in most societies, marriage is the measure of all things. Thus affective associations that lie outside the formal paling of marriage are evaluated and understood by virtue of their likeness to

¹³ Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236 (2006).

¹⁴ Chapter 3 of Michael Warner's *The Trouble with Normal* (1999) offered one of the first of such arguments. See MICHAEL WARNER, *THE TROUBLE WITH NORMAL* 81-148 (1999).

or dissimilarity from marriage. Thus the significance that motivates a term such as “significant other” finds its source in marriage, and this term is meant to signify the simulacrum of spouse, ie: “Spouses and significant others are invited to the office holiday party.” In so doing, it crowds out the plausibility, in fact the legibility, of alternative forms of significance and otherness that do not nod to the normative primacy of the marital form.

This challenge is not something that surfaces for the first time in the context of same sex marriage. Its early and perhaps most profound articulation is to be found in Antigone’s insistence on a kind of love and loyalty that lay outside of and challenged the official notion of kinship licensed by the state. In so doing, she risked social, legal and ultimately physical death by insisting on honoring the demands of kinship that defied the state’s official law of the family.¹⁵

The challenge of this moment is to conceptualize a legal strategy that challenges the exclusivity of marriage by at once repudiating the homophobia that underwrites the exclusion, while not ratifying the normative priority of marriage. How can marriage equality be won, but not at the cost of the liberty value Lawrence recognized? How do we demand access to the legal institution of marriage while at the same time undertaking the project of unsettling marriage as the institutional measure of all things? This is the hard work that I think lies ahead of us. It requires us to think more and differently about the domain of affective and sexual attachments and encounters that occupy the outside of marriage. This is the domain of queer culture.

The law and society, legal pluralism, and critical legal literatures offer several analytics

¹⁵ Judith Butler offers such a reading of Antigone. *See* JUDITH BUTLER, IN ANTIGONE’S CLAIM: KINSHIP BETWEEN LIFE AND DEATH (2000).

that might be useful in mapping the positive space of the middle ground - the gap - between criminalization and marriage. This literature may be helpful in protecting a domain of norm generation within counterpublics, to borrow a term from Michael Warner,¹⁶ that do not owe fealty to marriage. Too little of this important work has been looked to, to my mind, in the theorizing of queer sexuality in the era of the same sex marriage movement.

An obvious place to turn is a legal system that recognizes pluralistic sources of law, one that has rejected the idea that civil, state law has a monopoly on the regulation of marriage, family and sexuality. South Africa offers a salient example of a post-colonial context in which a modern legal order explicitly incorporated a notion of legal pluralism into its conception of governing law. The South African Constitution allows for the recognition of both civil state-sanctioned marriage as well as “marriages concluded under any tradition.”¹⁷ Notably, Albie Sachs, Justice of the South African Constitutional Court, relied on this language in the South African Constitution in finding that it was unconstitutional to refuse same sex couples access to civil marriage, “The provision is manifestly designed to ... allow for a degree of legal pluralism under which particular consequences of such marriages would be accepted as part of the law of the land.”¹⁸ Thus, the legally pluralistic nature of the South African Constitution meant that the society as a whole committed to a broad and inclusive understanding of fundamental institutions such as marriage, and the opponents of same sex marriage therefore could not invoke a narrow

¹⁶ MICHAEL WARNER, *PUBLICS AND COUNTERP-PUBLICS* (2002).

¹⁷ SOUTH. AFRICAN. CONSTITUTION., §15(3)(a) (1996).

¹⁸ *Minister of Home Affairs v. Fourie* 2006 (3) BCLR 355 (CC) at ¶ 108 (S. Afr.), CCT 60/04 (Dec. 1, 2005). Need cite. ¶ 108 in slip op.

notion of tradition to limit marriage to different sex couples.¹⁹

The reasoning used in the Fourie case suggests that legal pluralism, particularly in post-colonial contexts, might offer a fruitful avenue for those who seek the expansion of sexual liberty through the vehicle of same sex marriage, rather than having the (intended or unintended) effect of accomplishing its contraction.

Unfortunately, the scholarship in this area instructs some caution in making this particular move. Early and robust anthropological studies of colonial and post-colonial legal systems in Asia, Africa and the Pacific sought to understand how indigenous populations maintained social order in the absence of, or as an alternative to, European law. Bronislaw Malinowski's *Crime and Custom in a Savage Society*²⁰ represents one of the early and most formative of these monographs. These approaches sought to differentiate formal, positive law brought to the colonies by Europeans from customary or informal law that the natives had developed on their own, in order to study the civilizing potential of modern European law on the savage natives.²¹ Such orientalist²² accounts promptly gave way to more nuanced studies that acknowledged that customary law was not a relic of some pre-colonial era, but rather was an epiphenomenon of the colonial enterprise itself. As colonists developed dual legal systems with one set of laws and courts for the Europeans and another for the natives, the law that was applied

¹⁹ *Id.*

²⁰ BRONISLAW MALINOWSKI, *'S CRIME AND CUSTOM IN A SAVAGE SOCIETY* (1926).

²¹ *See generally* Sally Engle Merry, *Law and Colonialism*, 25 *LAW & SOC'Y. REV.* 889 (1991).

²² This is, of course, Edward Said's term. from EDWARD SAID, *ORIENTALISM* (1978).

in the native courts was a construct of the colonial project - enabling the better control and discipline of the natives in the service of the colonial project.²³ But, as noted by numerous scholars of sexuality and colonialism, such as Franz Fanon in *Wretched of the Earth*²⁴ and *Black Skin White Masks*,²⁵ Sally Engle Merry in *Colonizing Hawai'i*,²⁶ Anne McClintock in *Imperial Leather*,²⁷ and Ann Stoler in *Carnal Knowledge and Imperial Power*,²⁸ in colonial settings

²³ See MARTIN CHANOCK, LAW, CUSTOM, AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA (1985); M.B. HOOKER, LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS (1975); Francis G. Snyder, *Colonialism and Legal Form: The Creation of 'Customary Law' in Senegal*, 19 J. OF LEGAL PLURALISM 49 (1981).

²⁴ FRANZ FANON, WRETCHED OF THE EARTH (Constance Farrington, trans., 1963).

²⁵ FRANZ FANON, BLACK SKIN, WHITE MASKS (Charles Lam Markmann, trans., 1967).

²⁶ SALLY ENGLE MERRY, COLONIZING HAWAI'I (2000).

²⁷ ANNE MCCLINTOCK, IMPERIAL LEATHER: RACE, GENDER, AND SEXUALITY IN THE COLONIAL CONQUEST (1995).

²⁸ ANN STOLER, CARNAL KNOWLEDGE AND IMPERIAL POWER: RACE AND THE INTIMATE IN COLONIAL RULE (2002). See also PAUL GILROY, 'THERE AIN'T NO BLACK IN THE UNION JACK': THE CULTURAL POLITICS OF RACE AND NATION (1987); Jean Comaroff & John Comaroff, *Christianity and Colonialism in South Africa*, 13 AM. ETHNOLOGIST 1 (1986); JOCK McCULLOCH, BLACK PERIL, WHITE VIRTUE: SEXUAL CRIME IN SOUTHERN RHODESIA, 1902-1935 (2000); DIANA JEATER, MARRIAGE, PERVERSION AND POWER: THE CONSTRUCTION OF MORAL DISCOURSE IN SOUTHERN RHODESIA, 1894-1930 (1993); LUISE WHITE, THE COMFORTS OF HOME:

human sexuality is a particularly ripe domain for social control through the invention, manipulation and juridification of the concepts of customary, native, natural, savage, modern, Western and civilized. As I have written elsewhere, “the epistemic violence of rule ... can be most effective when done by and through sex and sexuality.” manipulating native and colonial understandings of these concepts in the service of both colonization and decolonization.²⁹

When understood in light of this literature, the “victory” in the Fourie case in South Africa becomes all the more complex. Pluralistic legal systems can draw from their multiplicity to expand or contract sexual liberties depending upon the context. Respectable gay men and lesbians were able to deploy post-colonial pluralism to their benefit in Fourie. But South African sex workers were not in State v Jordan,³⁰ when they brought a constitutional challenge to a statute that criminalized prostitution on the ground that it interfered with economic activity, violated the privacy and sexual equality rights of sex workers, and discriminated against sex workers as compared with their customers. Pluralistic approaches to sexuality, public and private, were of no aid to the plaintiffs in this case. Instead the Court deferred to the State’s representation that the criminalization of commercial sex was required to improve “the quality of life in South Africa.” That there might be diverse accounts of what might make up a life of quality was not considered by the Court, choosing to defer in this instance to the majoritarian values that lay behind the Sexual Offences Act. In so doing, the Court relied upon familiar

PROSTITUTION IN COLONIAL NAIROBI (1990).

²⁹ Katherine M. Franke, *Sexual Tensions of Post-Empire*, 33 STUDIES IN LAW, POLITICS, AND SOCIETY 63, 90 (2004).

³⁰ *State v Jordan* 36.2002 (11) BCLR 1117 (CC) 2002 (6) SA 642 (CC) (S. Afr.).

liberal dichotomies characterized by public/private, market/non market transactions, and kin/stranger to find that the sex workers had no constitutional rights to dignity, freedom of the person, or privacy that they argued were at stake in the case. “[T]he prostitute invites the public generally to come and engage in unlawful conduct in private,”³¹ concluded the Court in finding against the plaintiffs. The colonial history of the criminalization of prostitution in South Africa was not addressed by the Court nor were the tribal or customary law notions of private, public, market, kin or stranger. Thus, even under the new post-apartheid South African Constitution, notions of customary, native, tradition and modern are indeterminately put to work in particular legal disputes. Those that pose little or no threat to the normative superiority of modern sexual citizenship, middle class gay and lesbian couples as opposed to sex workers, are able to draw from the advantages of legal pluralism, while those whose conduct poses a challenge to the notion that the sexual should lie in a domain of private, non-market relations of the family can find no refuge in the normative force to be found in the customary or tribal.

Given the pluralistic commitments of the South African Constitutional system, the courts now, as in the colonial period, continue to palliatively invoke notions of fidelity to plural legal orders in ways that demonstrate the state’s modernity, welcome domesticated legal and social subjects, and discipline the unruly. Thus, I am pessimistic about the utility of the legal pluralism scholarship to the project of rescuing sexual liberty from the vice of liberal same sex marriage arguments.

Another strain of law and society scholarship holds out better hope of understanding the gap between criminalization and marriage as something we ought celebrate rather than lament

³¹ *Id.* ¶ 28.at 654-55.

for the potential it holds for innovation, experimentation and the expansion of sexual rights more generally. I'm not suggesting that we adopt the idea of a gap between law on the books and law in action that forms one of the central objects of study by law and society scholars.³² I've got another kind of gap in mind. Almost 30 years ago, Robert Mnookin and Lewis Kornhauser introduced to the empirical legal literature the notion of "bargaining in the shadow of law."³³ In their study of the bargaining tactics and patterns exhibited by married couples who were divorcing, they offered an account of the role of law in the dissolution of marriages that went beyond the four corners of positive law, instead focusing on the bargaining that took place outside the courtroom, where the parties undertook private ordering in law's shadow. Rather than regard family law rules and procedures as determining the terms of a divorce, Mnookin and Kornhauser argued that those background or default rules merely created bargaining chips or endowments that were used by each party in their efforts to privately order a dissolution agreement.³⁴ No-fault rules, as well as other modern reforms that have liberalized divorce laws, have made this kind of bargaining in the shadow of law more integral to the nature of modern

³² This law and society gap can be crudely understood as: the inherent inability of legal rules to translate to all real world problems, the fact that the vast majority of cases are resolved outside the courts and law, the fact that the language of law is inevitably subject to interpretation, and the "violence" that is done to real life when it is translated into legal forms of action. *See e.g.*, Mark Galanter, *supra* note __ at *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. OF LEGAL PLURALISM 1, 4-5 (1981).

³³ Robert H. Mnookin and Lewis Kornhauser, *supra* note __ 8.

³⁴ *Id.* at 968.

divorce, they argue.³⁵ H.L. Ross applied the idea of law's shadow to torts,³⁶ Mirjan Damaska found it's relevance in criminal law,³⁷ and Mark Galanter found it everywhere.³⁸

How might the "shadow of law" idea be useful in thinking through the positive value of the current under-regulation of same sex sexual activity? Is there a way in which to imagine law's shadow as liberty-enhancing when applied to the domain of extra- or non-matrimonial affective or sexual behavior? Given law's current disinclination to regulate same sex sex on terms similar to that of different sex sex, one can't say that the shadow of law is invested with the bargaining endowments that law's jurisdictional presence creates. Nor can we understand same sex sex in the world of Ellickson's Shasta County cattle ranchers who, while technically regulated by law, ignore or are indeed ignorant of the positive law that grants rights and responsibilities in connection with cattle-related trespass and fencing costs.³⁹ Rather than resolving disputes from the starting point of Mnookin/Kornhauser-ian bargaining endowments created by positive law, Ellickson argued that positive law was irrelevant to their dealings,

³⁵ *Id.* at 953-54.

³⁶ H. L. ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* (1970).

³⁷ Mirjan Damaska, *A Foreign Perspective on the American Judicial System*, in *STATE COURTS: A BLUEPRINT FOR THE FUTURE* (T.J. Fetter ed., 1978)

³⁸ Mark Galanter, *supra* note 33..Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law, 19 *J. of Legal Pluralism* 1-47 (1981).

³⁹ ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

preferring instead work-a-day norms of neighborliness. Ellickson's order without law works, by his own admission, only in close-knit communities that are characterized by necessary interdependence. Their mutual obligations and the availability of informal sanctions to enforce them keep almost all residents within the bounds of civility. Non normative sexual conduct in which I have an interest may or may not take place within such a community, and to the extent that there is a community involved, it is surely less likely to be close-knit in the ways that characterized Ellickson's cattle ranchers.

Notwithstanding the limitations of these accounts in helping us get better purchase on the nature of the gap on which this essay is focused, it would be premature to abandon the "shadow of law" concept altogether. The utility of Mnookin and Kornhauser's model is limited in this context in part because they were studying the bargaining patterns of those who sought *exit* from the institution of marriage, whereas a significant part of the present project – and of the Loving case as well – has to do with the implications of the terms of *entrance* to the institution of marriage, for those who seek admission and for those who do not. The marriage contract has always been different from other civil contracts in so far as the state interjects itself as an interested third party that can override the interests of either or both of the parties. The exercise of the state's power means that, more than in most other private contractual contexts, the state sets the terms of capacity to enter into the contract as well as the substantive nature of the agreement itself. Modern divorce reform has diminished the role of the state in determining the conditions in which exit is legally possible, thus enabling greater bargaining in the shadow of law as described by Mnookin and Kornhauser. By contrast, the state has not disengaged itself to the same degree in setting the terms and conditions of entrance into a marital contract. Thus,

while two parties of different races are permitted to marry after Loving, it remains the case that one is not able *as a matter of law* to contract to a non-monogamous marriage,⁴⁰ a marriage between more than two persons,⁴¹ a marriage for a term,⁴² a marriage in which sex is explicitly

⁴⁰ Twenty states have laws criminalizing adultery. *See*, ALA. CODE § 13A-13-2 (2007); ARIZ. REV. STAT. ANN. § 13-1408 (West 2007); COLO. REV. STAT. § 18-6-501 (2004)C.e § - (2); FLA. STAT. ANN. § 798.01 (West 2007); GA. CODE ANN. § 16-6-19 (West 2007); IDAHO CODE ANN. § 18-6601 (2007); 720 Ill. Comp. Stat. Ann. 5/11/-7(a) (West 2007); KAN. STAT ANN. § 21-3507(1) (2006); MD. CODE ANN., CRIM. LAW §10-501 (2007); Ma MICH. COMP. LAWS ANN. § 750.30 (West 2004); MINN. STAT. ANN. § 609.36 (West 2007); MISS. CODE ANN. § 97-29-1 (West 2007); N.H. REV. STAT. ANN. § 645:3 (2008); N.D. CENT. CODE § 12.1-20-09 (2007); OKLA. STAT. ANN. tit. 21, § 871 (West 2007); R.I. GEN. LAWS § 11-6-2 (2007); S.C. CODE ANN. § 16-15-60 (2007); UTAH CODE ANN. § 76-7-103(1) (West 2007); VA. CODE ANN. § 18.2-365 (West 2008); W. VA. CODE ANN. § 61-8-3 (West 2007). h

⁴¹ *See Reynolds v. United States*, 98 U.S. 145 (1878) (affirming conviction for practicing polygamy and rejecting argument prohibition on polygamy violated Free Exercise Clause); *State v. Holm*, 137 P.3d 725 (Utah 2006), petition for cert. filed, 75 U.S.L.W. 3220 (U.S.Oct. 13, 2006) (prohibition against polygamy did not violate defendant's first amendment right to free association.). Forty-nine states and the District of Columbia have statutes criminalizing polygamy. *See, e.g.*, ALA. CODE § 13A-13-1 (1994); DEL. CODE ANN. tit. 11, § 1001 (2001); NEB. REV. STAT. § 28-701 (1995); 18 PA. CONS. STAT. ANN. § 4301 (West 1983); VT. STAT. ANN. tit. 13 § 206 (1998).

⁴² *Campbell v. Moore*, 189 SC 497 (1939); *Delfino v. Delfino*, 35 NYS2d 393 (1942);

offered in exchange for financial support,⁴³ or a marriage between two persons of the same sex.⁴⁴

Given the ongoing strong investments of the state⁴⁵ in setting the terms of entrance to the

Erickson v. Erickson, 48 NYS2d 588 (1944); Wagner v. Wagner 59 Pa D & C 90 (1947); Shibi v. Shibi, 136 Conn. 831 (1949); Sheils v. Sheils, 32 A.D.2d 253, 301 N.Y.S.2d 372, N.Y.A.D. (1969). *But see* Osgood v. Moore 38 Pa D & C 263 (1940).

⁴³ *See* Ruosh v. Battin, 30 N.W.2d 453, 454 (Wis. 1947) (“illicit cohabitation” cannot be consideration for an agreement to marry.); *cf.* Restatement (Second) of Contracts § 190 (1981) (any promise to “change some essential incident of the marital relationship” is unenforceable.).

⁴⁴ The federal government and most states have statutes and/or constitutional amendments defining marriage as between a man and a woman. *See, e.g.*, 1 U.S.C.A. § 7 (1996); AK CONST. Art. 1 § 25; AR CONST. Amend 83 § 1; GA. CONST. Art. 1 § 4 ¶ I; HI CONST. Art. 1 § 23 ; ID CONST. Art. III §28; KY CONST. §233A; LA CONST. Art. 12 § 15; MI CONST. Art. I, § 25 Mich .Co; MS CONST. Art. 14 § 263A; MO CONST. Art. I, § 33; MT CONST. Art. 13, § 7; NE CONST. Art. I, § 29; NV CONST. Art. I, § 21; ND CONST. Art. 11 § 28 ; OH CONST. Art. XV, § 11 3; OK CONST. Art. 2, § 35; OR CONST. Art. XV, § 5a; SD CONST. Art. 21, § 9; TX CONST. Art. 1, § 32; UT CONST. Art. 1, § 29; VA CONST. Art. 1, § 15-A; WI CONST. Art. 13, § 13. Va

⁴⁵ *Maynard v. Hill*, 125 U.S. 190 (1888) (“[marriage] is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and society, without which there would be neither civilization nor progress.”); *State v. Heath*, 2006 WL 1817455 *3 (Wis.App.), (“marriage is the institution that is the foundation of the family and

institution of marriage, bargaining in its shadow is something one can do only in connection with divorce. The state does not see itself as setting background rules or bargaining endowments which the parties can chose whether or not to include in their marital vows. It's a take it or leave it kind of thing that the state is making available to particular kinds of couples who meet the state's eligibility criteria.⁴⁶

of society. Its stability is basic to morality and civilization and of vital interest to society and the state.”); *Vandervort v. Vandervort*, 134 P.3d 892, 895 (Okla.Civ.App. Div. 2, 2005)(“the rights of the plaintiff and defendant are not isolated from the general interest of society in preserving the marriage relation as the foundation of the home and the state.”).

⁴⁶ Having said that, it is important to note that if you are able to meet the formal criteria of marriage (a man, a woman, not rendered incapacitated by age or other disability, not married to another person, and not of a specified degree of relation by blood) *anyone* can get married, no matter how unwise that marriage may be. The clerk who issues marriage licenses does nothing more than the bureaucratic task of assuring that the formal requirements of marriage have been met by applicants. Divorce is another matter altogether. Notwithstanding the no-fault revolution, it is much harder to get divorced than it is to get married. To varying degrees and with varying intensity of effort, states and the federal government spend substantial public resources on efforts to keep married couples married. The 2006 reauthorization of the federal “welfare” law authorized \$150 million to support programs designed to help couples form and sustain healthy marriages. From these funds, the U.S. Department of Health and Human Service’s Office of Family Assistance has made numerous grants to public and private organizations to set up programs for the purpose of marriage education, marriage skills training,

What is worse, the normative investment that the state articulates in the institution of marriage casts a shadow of a different kind than that described by Mnookin and Kornhauser. In *In the Shadow of Marriage: Single Women in the Construction of the Family and the State*,⁴⁷ Ariela Dubler noted that the study of marriage law's normative significance in organizing the family, gender and sexuality is incomplete if we merely focus our optic on those people who are married. She shows how never married, not yet married and widowed women existed in a social and legal world that, despite its location outside the law, remained highly regulated by the norms of marriage and the forms of social life and commitment that is valued. The regulation of these non-marital lives shows how there is no "outside of marriage," but rather social positions that are defined in terms of their proximity to and stake in marriage itself. "Marriage continues to regulate the terrain outside of its formal borders, preserving its legal and ideological supremacy as a normative model for all intimate relations as an arbiter of which relationships deserve legal recognition and protection."⁴⁸ Dubler concludes that "single women ... constitute the sociopolitical terrain on which lawmakers craft their descriptive and aspirational visions of

public advertising campaigns, high school education on the value of marriage and marriage mentoring programs. Deficit Reduction Act of 2005, § 7103, 42 U.S.C.A. §603(a)(2) (2006) ("Healthy Marriage Promotion and Responsible Fatherhood Grants"); HHS, Office of Family Assistance, *Healthy Marriage and Promoting Responsible Fatherhood Initiatives*, <http://www.acf.hhs.gov/programs/ofa/hmabstracts/summary.htm> (last visited Feb. 19, 2008).

⁴⁷ Ariela Dubler, *In the Shadow of Marriage: Single Women in the Construction of the Family and the State*, 112 YALE L.J. 1641 (2003).

⁴⁸ *Id.* at 1712.

marriage proper ... understanding the meaning of marriage requires a still further foray, beyond marriage's margins and into the territory outside of its formal borders."⁴⁹

Just as "marriage's shadow,"⁵⁰ according to Dubler, was materialized in the nineteenth century law of dower, common-law marriage, and heartbalm actions, today we still find marriage eclipsing the possibility of a viable domain exterior to or untethered to the values and investments of marriage. Closer to our own era, courts continue to enforce marriage-like agreements even though they lie technically outside the legal requirements of marriage,⁵¹ so long

⁴⁹ *Id.* at 1644, 1646-47.

⁵⁰ *Id.* at 1712.

⁵¹ These are circumstances in which heterosexual couples have represented themselves as married although they have not obtained a marriage licence, or were married by a person not legally empowered to marry two people. *See, e.g.,* *Persad v. Balram*, 724 N.Y.S.2d 560 (2001). Yet, courts have been willing to annul marriages taken on by youthful exuberance, on the ground that there was no intent to undermine the institution of marriage. *See, e.g.,*: *Porter v. Cook* 31 Del. Co. 277 (1932) (two minors got married in a spirit of levity and not in sincerity and truth, the court, in equity, granted an annulment at the insistence of the girl's father, stating that to constitute a valid marriage there must be an understanding and an appreciation of what the ceremony is and what the legal consequences naturally deductible therefrom are.); *Meredith v. Shakespeare*, 96 W. Va. 229 (1924)(wherein two infants went through a marriage ceremony in a spirit of jest growing out of the excitement and exuberance of a party, but never lived together, the court granted an annulment on the ground that even though an actually and legally performed marriage ceremony had taken place, the parties had no intention of being bound thereby, or of

as those agreements conform to the form and substance of marriage proper. Indeed, New York State officially recognizes those marriages as fully valid, notwithstanding their technical infirmity.⁵² On the other hand, courts have been unwilling to enforce ante- or post-nuptial agreements in which the parties sought to modify, amend or personalize the contractual commitments of legal marriage.⁵³

Dubler's work teaches us that marriage as currently defined and governed by law, not

assuming the duties, rights, privileges, and obligations of such status.); *Davis v. Davis*, 119 Conn. 194 (1934).

⁵² N.Y. DOM. REL. L.AW § 25 (2007);. *Ssee Estate of Harold H. Whitney*, N.Y.S. Surrogate's Court, 7/16/2007 N.Y.L.J. 32, (col. 1) ("Although persons who intend to be married in New York State must secure a marriage license from a town or city clerk in the state (DRL §13), a failure to procure such a license will not render a duly solemnized marriage void (DRL §25). DRL §25 directs, in pertinent part, that nothing contained in that article shall be construed to render void, by reason of a failure to procure a marriage license, any marriage solemnized between persons of full age."); *Cardozo v. Holden-Cardozo*, 4/19/2004 N.Y.L.J. 19, (col. 3) Suffolk County Supreme Court (marriage valid although marriage certificate never filed with the town clerk as required by law).

⁵³ *See Sheils v. Sheils*, 301 N.Y.S.2d 372 (1969) (man and pregnant woman married for the purposes of legitimizing their future child, and simultaneously executed a separation agreement in which she waived all claims of support and gave to him a power of attorney authorizing a "Mexican divorce." Terms of separation agreement held not enforceable when husband later sought to enforce it.); *Mitchell v. Mitchell*, 310 A.D. 2d 837 (1973).;

only severely limits the scope of any bargaining that might take place between parties who want to be and/or are married, but also seeks to govern - and indeed does govern - the lives of those who lie outside the pickets of marriage itself. In 2000, the American Law Institute adopted new principles relating to the formation and dissolution of domestic partnerships, whether involving same or different sex couples.⁵⁴ The ALI Principles recommend that courts adopt a default rule recognizing a domestic partnership if, among other things, two persons have maintained a joint household for a cohabitation period, understood as two or three years.⁵⁵ To escape the presumption in favor of a domestic partnership, a couple must have made an enforceable contract to the contrary.⁵⁶ Thus, the law opts them into a marriage-like regime whether or not they reached a mutual explicit agreement that they desired or intended to acquire this status. The form of the relationship, not the parties' intent, is fundamental here. If a relationship is found to be a domestic partnership, a wide range of rules will be applied to the parties relating to the distribution of property upon the termination of the relationship.⁵⁷ The intended effect of the ALI's Principles of the Law of Family Dissolution is to enlarge marriage law's shadow.

The ALI principles illustrate the nub of the problem of the shadow of marriage: those who fall within marriage's shadow find themselves locked into a social field in which the meaning of attachments we take up have meaning already determined by the state. As such,

⁵⁴ ALI, Principles of the Law of Family Dissolution: Analysis and Recommendations, ch. 6, at 907 (2000) ("Domestic Partnerships").

⁵⁵ *Id.* § 6.03(2)-(5), § 6.03 cmt. d, at 916-17, 921.

⁵⁶ *Id.* § 6.03 cmt. b, at 919.

⁵⁷ *See id.* § 6.04-.05, at 937-41.

once in that field one is denied the power to determine or negotiate the meaning and implications of sexual or emotional intimacy, cohabitation, monogamy, intermingling of finances, the joint purchase of property, or the naming of the other party on one's health or life insurance policy, for instance. Indeed, the principles enumerate as one consideration relevant to the determination of whether the relationship is one that will be governed by marriage-like law "the extent to which the relationship wrought change in the life of either or both parties."⁵⁸

⁵⁸ *Id.* at § 6.03(7)(e). The full list of factors to be considered are: (a) The oral or written statements or promises made to one another, or representations jointly made to third parties, regarding their relationship; (b) The extent to which the parties intermingled their finances; (c) The extent to which their relationship fostered the parties' economic interdependence, or the economic dependence of one party upon the other; (d) The extent to which the parties engaged in conduct and assumed specialized or collaborative roles in furtherance of their life together; (e) The extent to which the relationship wrought change in the life of either or both parties; (f) The extent to which the parties acknowledged responsibilities to one another, as by naming one another the beneficiary of life insurance or of a testamentary instrument, or as eligible to receive benefits under an employee benefit plan; (g) The extent to which the parties' relationship was treated by the parties as qualitatively distinct from the relationship either party had with any other person; (h) The emotional or physical intimacy of the parties' relationship; (i) The parties' community reputation as a couple; (j) The parties' participation in some form of commitment ceremony or registration as a domestic partnership that, under applicable law, does not give rise to the rights and obligations established by this Chapter; (k) The parties' participation in a void or voidable marriage that, under applicable law, does not give rise to the economic incidents of

These principles, largely applauded by the lesbian, gay, and progressive legal communities,⁵⁹ though with some notable exceptions,⁶⁰ frustrate, if not render impossible, the formation of economic, emotional and sexual attachments and intimacies that aren't overdetermined by their similarity to the architecture of marriage. The ALI principles, together with existing laws of marriage that grant or impose marital status on relationships that look enough like marriage and/or share its values, threaten to darken and lengthen the shadow that marriage law casts on the social worlds technically outside of its jurisdiction. To borrow a term Janet Halley has recently put to much use, all of us are conscripted into the cause of "carrying a brief for"⁶¹ marriage whether or not we so wish.

The reach and insistence of marriage's shadow teach us how difficult it will be to pull off marriage; (l) The parties' procreation of, adoption of, or joint assumption of parental functions toward a child; and (m) The parties' maintenance of a common household.

⁵⁹ See, e.g., Nancy Polikoff, *Making Marriage Matter Less: The ALI Domestic Partnership Principles Are One Step in the Right Direction*, 2004 U. CHI. LEGAL F. 353; Grace Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125 (1981); Grace Blumberg, *The Regularization of Non-Marital Cohabitation*, 76 NOTRE DAME L. REV. 1265 (2001).

⁶⁰ See Elizabeth Scott, *Domestic Partnerships, Implied Contracts, and Law Reform*, in RECONCEIVING THE FAMILY: CRITIQUE OF THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 331 (Robin Fretwell Wilson, ed., 2006).

⁶¹ See Janet Halley, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006).

the twin tasks of securing marriage rights for same sex couples while seeking to shrink or hem in the shadow that marriage casts more structurally over those people who seek to have their sexual and affective lives and attachments take place in a social terrain they intend to occupy ground outside of governance of marriage. Understood as such, rather than enhancing liberty in ways understood by Mnookin and Kornhauser, law's shadow threatens to regulate as much of social life as it can plausibly extend its reach.

* * *

Returning to the law and society literature, Sally Moore's notion of a "semi-autonomous social field" may offer a model that helps adapt Mnookin and Kornhauser's idea of "bargaining in the shadow of law" to the social/sexual domain of which I am presently concerned. The semi-autonomous social field is one that

can generate rules and customs and symbols internally, but that ... is also vulnerable to rules and decisions and other forces animating from the larger world of which it is surrounded. The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance.⁶²

The semi-autonomous social field is not dependent upon close-knitedness or the economic or social attachments of a particular insular social group. "The outside legal system penetrates the field but does not dominate it; there is room for resistance and autonomy."⁶³

⁶² Moore, *Law and Social Change*, *supra* note __11 at 720.

⁶³ Sally Engle Merry, *Legal Pluralism*, 22 *LAW & SOC'Y. REV.* 870, 878 (1988).

To illustrate the nature of the semi-autonomous social field, Moore offers an example that may be useful here. The production of “better dresses” in the garment industry in New York City, she reports, requires a unique combination of formal collective bargaining between the workers and management, and an informal system of gifts, favors, flattery, sexual attention, and voluntary acts of friendship between management and labor.⁶⁴ The demand for “better dresses” is quite volatile, given the whims of fashion and the change of seasons, thus producing swings between periods of frenzied work and virtually no work at all. To respond to these fluctuating demands and remain competitive, management and labor must work flexibly and often in violation of the terms of the union contract. The labor representatives, both within the shop and in the union, agree to this flexibility and in return receive the many gifts and favors described above.

Moore interestingly points out that “all of these givings of gift and doings of favors are done in the form of voluntary acts of friendship, and the occasions when they are given are holidays such as Christmas or other times when this would be in keeping with a relationship of friendship,”⁶⁵ such as birthdays, weddings, christenings and anniversaries. Thus the relationship between management and labor is officially characterized by all as one of friendship, in some cases even kinship or family, while at the same time it is unofficially one that is structured by law and the terms of a legally enforceable labor contract.

Moore’s example of the “better dress” industry’s semi-autonomous social field offers an interesting, and potentially productive analytic for thinking through the opportunity for norm

⁶⁴ Moore, *Law and Social Change*, *supra* note __11, at 726.

⁶⁵ *Id.* at 726.

generation in sexual and intimate relationships that lie outside legal marriage, and that neither aspire to its governance nor are involuntarily drawn into its normative precincts. These actors are able to develop forms of attachment, express intimacies, and renegotiate relationships that are otherwise well-defined by market and labor law in ways that supplement and defy the legal rules that govern the industrial workplace. What renders it “semi-autonomous” is the degree to which “it can generate rules and customs and symbols internally... The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes as its own instance.”⁶⁶

This model offers a conceptual framework with which to imagine how we might loosen the grip of law’s shadow. Is there a way to understand the domain of intimacy and sexuality outside marriage as something like the world of “better dresses”? Moore’s work on the semi-autonomous social field offers one way of imagining more flexibility in the zones of social life found within the shadow of marriage law.

Yet I fear that the semi-autonomous social field, like Mnookin and Kornhauser’s work on the shadow of law and Merry’s work on legal pluralism, may not offer the tools that are needed to loosen the gravitational pull of marriage for those who desire to set up camp outside its lot lines. Moore is careful to note that the “favors” that both sides provide one another are, of course, made possible as favors by virtue of the fact that they are departures from what the law and the contract require or entitle them to do.⁶⁷ Thus law operates as a background condition

⁶⁶ *Id.* at 720.

⁶⁷ *Id.* at 728.

that implicitly enables the affective relationships to occupy the normative field as foreground. So too, “[n]one of [the favors and promises of gifts] are legally enforceable obligations. One could not take a man to court who did not produce them. But there is no need for legal sanctions where there are such strong extra-legal sanctions available.”⁶⁸

For the most part, the legal rules embodied in labor law gain coercive force by and through one party’s election to enforce those rights. As H.L.A. Hart put it in describing the aspects of law that fit poorly in Austin’s command theory of law, some laws “do not require persons to do things, but may confer power on them.”⁶⁹ Power-conferring laws “appear then as an additional element introduced by the law into social life over and above that of coercive control.”⁷⁰ Labor law, like the law of contracts and trusts and wills, creates private power that has regulatory force only to the extent that one or more of the private parties subject to the law chooses to exercise the power the law enables either directly (by asserting a claim before a legal authority) or indirectly (through the bargaining endowments the law as background norm creates).

In contrast to the role of labor law in the “better dresses” industry, marriage law would be far more resistant to its demotion to background norm. Like it or not, marriage remains a contract between two consenting parties *and the state*. The law of marriage represents a hybrid of public and private power that renders it quite different from those laws that merely advantage or enable private action. As third party to the marriage contract, the state will insist that its

⁶⁸ *Id.* at 726.

⁶⁹ H.L.A. HART, *THE CONCEPT OF LAW* 48 (1st edition Oxford U. Press 1991) (1961).

⁷⁰ *Id.* at p. 40.

interests and values remain in the foreground of the domains in which it asserts its jurisdiction. As we saw above, courts have not tolerated creative or resistant efforts to renegotiate the form that matrimonial contract takes.

While it is disappointing that the ideal of the semi-autonomous social field proves less useful than at first suspected in mapping a domain of greater normative flexibility in the domain of law's shadow, it offers no help in thinking through how we might limit the reach of the legal shadow and preserve a domain that resists the gravitational pull of marriage. Put another way, we need something else to unsettle the power that marriage possesses as the measure of all things that possess elements of intimacy, love, commitment, sex, or the like. Their viability, legibility and even their meaning are judged along a yardstick that measures their similarity or dissimilarity to marriage.

Advocates on behalf of the cause of same sex marriage have played a role in reinforcing the benchmark status marriage enjoys. Their arguments have rendered the viability of counterpublics that lie beyond the social field of marriage all the more difficult to imagine. These arguments assert the desire to fall within marriage law's shadow, and seek to prove as close a proximity to the ideal form of marriage as possible. In so doing, advocates of same sex marriage make it all the more difficult for others to renounce the sentimentality of the couple, to pledge moral commitments that intend something distinctly different from the rights and responsibilities of normative kinship, and that not only refuse the familiar architecture of marriage, but refuse an architecture altogether. Michael Warner and Lauren Berlant have defended the integrity and possibility of these social fields as queer counterpublics.⁷¹

⁷¹ See Lauren Berlant and Michael Warner, *Sex in Public*, 24 CRITICAL INQUIRY 547

It strikes me that there are two fronts on which the battle for marriage rights should be fought, but at present only one of them is at all visible or valued in the movement to secure rights for same sex couples. The stakes in this struggle are obvious for those who want into the institution of marriage. But there remains a significant group of people, regardless of sexual orientation, who want no part in marriage and find themselves swept into its regulatory embrace despite the absence of an intent or desire to have their sexual or affective lives governed by the law of matrimony or be brought within a particular normative frame of kinship. This is our challenge: to argue for and accomplish same sex marriage without foreclosing the possibility of queer counterpublics. Put another way, how can we keep Lawrence from turning into McLaughlin when we long for and argue for “our” Loving?

Having explored the literature from several fields above and having found them wanting in accomplishing this project, one further option suggests itself as offering a viable approach with which to make some headway. Striving to carve out a zone of liberty that resides at sufficient distance from marriage to repel or evade its normative pull leaves marriage at the center of the universe. Everything starts looking quite different, however, if we interpose a different central case around which all forms of human connection orbit. This kind of move aims to displace marriage as the measure of all things, by interposing a competing and normatively disorienting gravitational pull that could result in the disorganizing of bodies, intimacy, sexuality, and publics in interesting and productive ways.

Instead of surrendering to a normative landscape that seeks to establish the conventional meaning of relationships by virtue of their similarities or dissimilarities to a marriage (are they

(1998); MICHAEL WARNER, PUBLICS AND COUNTERPUBLICS, *supra* note 16 (2002).

two people, one male, one female, who are sexually monogamous, cohabitate, have comingled their financial resources, and are raising children together, etc.), we might rezone the whole affair by interposing a different form of attachment as the benchmark. Several possibilities are worth pursuing, such as the bonds of siblings, the norms governing relationships between parents and child, stepparents and stepchildren, or even the social conventions that surround the giving and receiving of gifts.⁷² In the end, I urge that we focus on the concept of friendship which, among its many virtues, occupies a social space largely unregulated by law.

So this is the thought experiment: rather than assessing the relative virtues of a

⁷² The works of Marcel Mauss's, MARCEL MAUSS, THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES (1967), and Claude Levi-Strauss, CLAUDE LEVI-STRAUSS, THE ELEMENTARY STRUCTURES OF KINSHIP (1969), 's work on the gift and its role in the construction of not only the social but of gender have been formative in a number of important feminist and queer projects. *See, e.g.,* =MARCEL MAUSS, THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES (1967); CLAUDE LEVI-STRAUSS, THE ELEMENTARY STRUCTURES OF KINSHIP (1969); Gayle Rubin, *The Traffic in Women: Notes on the 'Political Economy' of Sex, in TOWARD AN ANTHROPOLOGY OF WOMEN* 171-183 (Reiter ed., 1975).

One colleague suggested using the norms that surround the relationship between a person and her pet(s). Given the ease with which the likes of Senator Rick Santorum have conjured up a slippery slope that ends in sex with animals were the courts to recognize a right to same sex marriage, *see Excerpt from Santorum Interview, USA TODAY, Apr. 23, 2003, http://www.usatoday.com/news/washington/2003-04-23-santorum-excerpt_x.htm*, I feel obligated to resist using this as a new benchmark for present purposes.

relationship by dint of its similarity or dissimilarity to marriage, what if we did so by dint of its formal or family resemblance to friendship? As Peter Goodrich has noted, the rules, the norms, and the social field of friendship are developed beyond the scope and even interest of law. Friendship is “quite literally the unthought of law.” It is “the antonym or obverse of the relationships that legal practice enacts.”⁷³ Recent scholarship urging the legal regulation of friendship strike me as radically wrong-headed.⁷⁴ Unfortunately, this work indulges the misplaced view that if something important is at stake, law should regulate it.

From this vantage point the range of acts, pledges, commitments, loyalties and desires that make up our sexual and affective lives are amenable to more promiscuous meanings. When friends choose to live together, sharing a new level of domestic intimacy, we don’t in advance know what commitments and responsibilities that intimacy necessarily entails. Friendship can, but need not, entail reciprocal commitments, can be casual or intimate, long-term or short-lived, and can be playful or quite profound, or all these things. It takes quite a thick set of acts and intentions to drag the conduct of friends out of its autonomous social field into the jurisdiction of law. That’s part of what we prize about friendship, indeed why its fictive form in the “better dress” industry does so much work. The promiscuous economies of attachment that characterize friendship are not rule-based, subject to due process, or - god forbid - subject to the demands of justice that we associate with law. Friendship, in contrast to marriage, resists the status of status that marriage enjoys. For all these, and no doubt other reasons, friendship exerts no

⁷³ Peter Goodrich, *Laws of Friendship*, 15 LAW AND LIT. 23, 28 (2003).

⁷⁴ See Ethan J. Leib, *Friendship & The Law*, 54 U.C.L.A. L. REV. 631 (2006); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007).

gravitational pull of the sort we see with marriage, and as such, is unable to cast a shadow in the Mnookin and Kornhausian sense.

Thus, there are structural reasons why we might want to substitute friendship for marriage as the benchmark that grounds our reasoning about sexual and affective liberty. “Freedom to marry” argued from a perspective that accepts the normative centrality of marriage imagines “freedom” very differently than it does when we make the argument from a place that privileges the centrality of friendship. The former is hopelessly entangled in the logics and values of marriage, while the latter renders legible a domain of not-marriage that has positive and multiple possibilities. The current most prominent arguments in favor of same sex marriage conceptualize the notion of marital freedom in terms that pay no mind to the problematic of “compared to what?” They don’t see it as their project to imagine a social life outside of marriage, yet the kind of sentimentality that underwrites their claims renders that social life less viable.

The turn to friendship can do more. It offers a way to destabilize the meanings and the makings of meaning of fundamental human life. For instance, elsewhere I have questioned how feminist legal theory can account for “the domain of sexuality that is the surplus above mere procreation, for it may be that its greatest value lies precisely in its excess.”⁷⁵ To understand non-reproductive sex as a kind of excess already accepts a paradigm that figures sex’s primary purpose as reproductive. To the extent that marriage continues to be valued as the proper and best social and legal structure for the bearing and raising children, we have very hard, if not

⁷⁵ Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law and Desire*, 101 COLUM. L.REV. 181, __187 (2001).

impossible, work to do to rescue non-reproductive sex from its liminality. Knowing this, same sex marriage advocates carefully pick their plaintiffs in ways that embrace the values of the repronormative domestic, preferring nice looking couples with children who, like “regular” people, take their kids to little league and school plays. These ways of casting the homosexual family have perversely, though not intentionally, played a role in recent court decisions that have denied them the right to marry on the ground that the structure of marriage is necessary only for heterosexual people because their sex practices can result in “accidental pregnancies.”⁷⁶ In these decisions and the arguments that the same sex couples’ lawyers are making, non reproductive sex recedes further and further from view.

At the same time, the turn to friendship gives us another way to think the meaning of reproductive sexuality as well. When inside the law or the shadow of marriage, the normative ideal of the family requires certain attachments, certain expectations and certain subject positions which, if not present, produce profound forms of melancholia and longing. Consider the woman who chooses to get pregnant with a male friend, a male stranger, or someone who lies in the complex domain between the two. This person is not intended to be nor expects to be a father in the traditional social sense. Yet it is inevitable that the child of such a reproductive sexual act will suffer melancholic longing for the phantom father whose significance to the child is overdetermined by his absence. Breaking loose from the architecture of marriage and the heteronormative domestic that it entails renders it more possible to imagine and then construct

⁷⁶ See *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (“Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not.”); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. 2005)(same).

other forms of attachment that are not always already a betrayal or disappointment of marriage's demands and the expectations they engender. Interrupting marriage's preemptory normalization of the social field by substituting friendship in its place opens up a range of possible conceptions of the meaning of reproductive sex - between friends, between strangers, in fact, all reproductive sex. Escaping the social field of marriage enables new forms of commitment, responsibility, love, care and relatedness than those of idealized "mother" and "father."

When we think about sex from the vantage point of friendship, excess gets located in very different wards. Friendship, unlike marriage, does not have an official role for sex - reproductive or otherwise. Some see sex between friends as a benign event, others fear it as a threat to the friendship, while still others think that the absence of a sexual component is precisely what distinguishes a friendship from other kinds of attachment, loosely called "lovers". But surely there is no consensus on this issue, nor is there a common sense that a consensus is a desirable thing to achieve. We are content to let each person hold their own views on the matter, and most likely are not offended if a person's views are somewhat in flux on the matter. That's the beauty of the social field of friendship. Thus the domain of excess that lies at the limit of what sex is "supposed to be about" in this context is in some fundamental way incomprehensible.

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The implications of this paradigm shift should effect the drafting of something like the ALI's Principles of the Law of Family Dissolution. As presently written, they create a default presumption that opts into the governance of marriage law those couples whose actions manifest a family resemblance to marriage. What motivates this presumption is the view and the value that certain types of adult relationships have a teleology, "first comes love, then comes marriage

...” and accepts, indeed encourages the pull of marriage. A counter-commitment to the viability of lifeworlds well outside the wards of marriage would reverse the presumption, requiring those who seek the bargaining endowments of marriage law to expressly and mutually indicate a desire to be so governed. I recognize that shifting this presumption comes at a cost, but after much deliberation it is a cost I urge us to pay. There remain other ways to address the problem of structural inequality in intimate relationships that do not so effectively extinguish the viability of sexual and affective life outside marriage.

I confess that friendship doesn’t get me everything I hoped for in a paradigm shift that is designed to displace the normative priority and draw of marriage. Yet, it does significant work in the service of launching that very important and necessary project. As Abraham Lincoln once remarked: “I hope to have God on my side, but I must have Kentucky.”⁷⁷ The turn to friendship may be a necessary move, but may not be all we hope for in a project of this sort.

Friendship proves a disappointment as the central case in this context when we consider the possibility of what Michael Warner, among others, seeks to valorize: stranger sociability. Warner imagines a domain of counterpublics that, at least in some cases, are constituted by relations among strangers. “In modern society, a stranger is not as marvelously exotic as the wandering outsider would have been to an ancient, medieval or early modern town. In that earlier social order, or in contemporary analogues, a stranger is mysterious, a disturbing presence requiring resolution ... Publics orient us to strangers in a different way. They are no longer merely people whom one does not know; rather, an environment of strangerhood is the necessary

⁷⁷ “Rev. M. D. Conway on His Late Visit to Washington,” 2 THE CRISIS 24 (February 12, 1862).

premise of some of our most prized ways of being.”⁷⁸ Warner’s stance with respect to strangers allows us to open up counterpublics in which sex, intimacy, and other forms of attachment can be forged with someone understood to be a stranger. Certain forms of queer sex come to mind as easily identifiable examples of this idea - the erotic encounters to be found among strangers in bars, airport bathrooms or bookstores are what he has in mind.⁷⁹ But so does the ecstasy shared by and among strangers at, for instance, one of Barack Obama’s rallies, or the kinds of attachment that form among various sorts of on-line communities or shared readers of a text. For the turn to friendship to do the robust work that I intend in this project, the conception of friendship must be understood in a way that does not figure the stranger as its opposite. To that end, the notion of friendship cannot be allowed to reduce to a form of kinship-lite. The full elaboration of this part of the project awaits my work on another day, but the articulation of these concerns points out the direction that work must take.

* * *

I must add one last observation about the longing for Loving that motivates so much of present day arguments for marriage equality. Often the argument that couples and lawyers lead with is the legitimacy and dignity that legal marriage would afford “our” relationships. This argument must be abandoned, and radically critiqued. That critique should form the bedrock of this movement if we are to make something of the liberty right secured in Lawrence as securing the conditions precedent for the formation of queer counterpublics.

⁷⁸ WARNER, PUBLICS AND COUNTERPUBLICS, *supra* note __16, at 75.

⁷⁹ Chapter V of *Publics and Counterpublics*, which he co-wroteauthored with Lauren Berlant, elaborates this idea. *See id.* at 187-208.

The mere fact that some members of our community suffer an affective injury when they are denied the option to marry does not mean that that pain should coagulate into a right, and be argued as such. Take for instance the movement to desegregate public transportation in the South. When Rosa Parks refused to get off that bus, she was among a group of women in Montgomery who felt that the treatment they received at the hands of public bus drivers was uncourteous.⁸⁰ I'm sure it felt that way. But the right that was ultimately articulated as the motivating force behind the Montgomery bus boycott and the actions that followed thereafter were not ones that were exhausted by a demand that black women be treated with courtesy, but rather much more: that racial segregation was an expression of white supremacy.

The translation of the experience of segregation as an affront to courtesy into one that sought to undermine the structural subordination of black people to white should inspire similar hard thinking in today's same sex marriage movement. The dignity argument in these cases is premised upon an acknowledgment of marriage's normative superiority and legitimacy of its command. The argument based in dignity risks transforming Lawrence into McLaughlin, thereby eroding the liberty interests articulated in Lawrence and setting back the struggle for a promiscuous form of sexual liberty that can be elaborated alongside the efforts to open up the institution of marriage to same sex couples. The simultaneous projects of marriage equality and of enabling lifeworlds that are not structured by the architecture of marriage, or little architecture at all for that matter, are impossible so long as we cling to and indulge a longing for Loving.

⁸⁰ See Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 *Yale L.J.* 999, 1003 (1989) ("They primarily demanded courtesy and formal even-handedness, taking for granted the continued existence of racial separation.").