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COLLEGIALITY AND INDIVIDUAL DIGNITY

*Tobias Barrington Wolff**

This Essay is a direct transcription of the remarks that I offered at the Fordham Law School Symposium out of which this volume grows. I have made very minor edits to remove superfluous words and verbal tics, and I have restructured a pair of sentences for clarity, but I have otherwise left the transcript intact as delivered. I did not originally plan to publish these remarks and spoke without notes, so I beg the reader's indulgence. In preparing this transcript for publication, I have added what I consider to be the bare minimum of footnotes, principally to account properly for my discussion of the work of other scholars.

What I want to spend my time talking about today is a more serious issue, an issue that is very personal for me. It is the deep tension that exists for LGBT scholars and lawyers who work on these issues between principles of collegiality and basic principles of individual and human dignity.

By principles of collegiality, what I mean is not just the social politeness and nicety that we try to abide by in the Academy, but also what I see as a particular feature of academic collegiality that is important to the profession. We, as scholars, come to fellow scholars with a strong presumption that the ideas that our fellow scholars are articulating and exploring are entitled to be "treated with" in a serious fashion—are entitled to be accorded a presumption of good-faith effort to sort through a set of difficult ideas, even when we come to different conclusions and have strong disagreements with our colleagues. I think that there are at least two reasons why we embrace that norm of collegiality within the profession. One is a scholarly reason: it is a norm that reinforces the mindset of a serious academic or a serious scholar in being prepared to question ideas, in being prepared always to revisit one's own conclusions despite one's own certainty about those conclusions.

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* Professor of Law, University of Pennsylvania Law School. I am grateful for the opportunity to publish these remarks, and to Professor Joe Landau for his hard work and good judgment, and I thank Peter Pazzaglini for his intellectual inspiration, spiritual guidance and irreplaceable friendship. I dedicate this address to the millions of courageous lesbian, gay, bisexual, transgender, and questioning Americans who must struggle with these issues every day without the privilege of the Academy to augment their voices and the safety of tenure to guard them from harm.

But it also reflects what I think is one of the characteristic challenges of doing serious scholarly work. The effort to undertake a sustained analysis of difficult issues over time and to articulate those ideas in writing or in presentations like this, to submit oneself for criticism, is not just an intellectually difficult endeavor; it is an emotionally difficult endeavor. I think that scholars—it is something that we don't talk about a lot in the profession, but I think it is a challenging and threatening thing to do the work that we do and to try to do it well and to try to do it in a responsible fashion. The norm of collegiality is in part a recognition of that dynamic of the work of a scholar: that it is difficult to explore ideas in a sustained fashion, to present the results of one's work and to submit one's work for criticism and the possibility that you're going to be publicly proven wrong or publicly shown not to be as clever as you would like people to think you are, and so forth. That's hard work. And I think that the norms of collegiality are partly defined and enforced in order to reinforce the scholarly norms of the profession but also to reinforce the ability of scholars to do that work. These norms are very important to me and I take them very seriously.

As a gay man and a scholar who works on these issues, I have found over the past twelve years that I have been a full-time scholar that this norm comes into conflict with some basic principles of individual and human dignity for me—specifically, when I am encountering scholars who are making arguments about me and about the ten million other Americans with whom I share the experience of being an LGBT person that are dehumanizing and that feel like, and I think by any objective standard constitute, an assault upon one's most basic sense of safety and belonging in a civil community, and one's most basic sense of being able to hold one's head up with a certain measure of dignity in these kinds of difficult intellectual and scholarly and public policy discussions that we have. That tension between those two important principles characterizes, certainly for me and I think probably for a lot of LGBT scholars and lawyers as well, a lot of the work that we do in this field. Let me say a couple of words specifically about what I mean and the way that these arguments get deployed in the field.

I will talk about three of the arguments that opponents of equal treatment for gay and lesbian couples in general, and specifically with respect to marriage, often rely upon. The first has to do with kids and the ability of same-sex couples to be successful parents for their kids. You hear constantly in public discourse, and you see constantly in litigation and in public policy debates, arguments about how the reason why gay and lesbian couples need to be excluded from the civil institution of marriage, and indeed often from civil union and domestic partnership relationships as well, is because we need to safeguard the best interests of children and secure children a household in which they have both a mother and a father, which is the ideal environment in which they can raise children. Professor

Wardle has developed these arguments in some of his writing, and many other scholars and lawyers in the field have talked about these arguments.[1]

Now, there are a number of things to say about this argument. The first, which has been much discussed but is worth articulating once again, is that these are arguments that fly in the face of all of the actual social science experiments and evidence and empirical data which have attempted to measure the question of what are the types of environments in which kids do best and are most likely to come out well-adjusted and have successful outcomes. It is the consensus of professional organizations that do this kind of work, both psychiatric and child welfare organizations, that this is simply a spurious argument and, indeed, there is a wealth of information and a wealth of social science data making very clear that what matters to the adjustment of kids and successful outcomes of kids is the nature of their relationships with their parents, the nature of their parents' relationships with each other, and the economic and social resources that they have available to them as kids, and that in fact the sex and the sexual orientation of their parents makes absolutely no difference to the outcome of these kids.[2]

You see a lot of scholars attempting to make the argument on the other side by doing things like pointing to studies that simply study straight couples—opposite-sex parents—and that point to various different deficits that kids can experience when they are raised in various different forms of problematic or challenged opposite-sex households in which one or another parent is absent through divorce, or is disengaged because only a step-parent and not terribly invested in the children, and so forth. They point to this and say, "See, this demonstrates that kids do best when they have a

1. *See, e.g.*, Lynn Wardle, *The Disintegration of Families and Children's Right to Their Parents*, 10 AVE MARIA L. REV. 1 (2011); *Marriage Talking Points*, NAT'L ORG. MARRIAGE, http://www.nationformarriage.org/site/c.omL2KeN0LzH/b.4475595/k.566A/Marriage_Talking_Points.htm (last visited Oct. 20, 2012) ("Marriage is about bringing together men and women so children can have mothers and fathers."); *see also* Tracye Hansen, *Same-Sex Marriage: Not in the Best Interest of Children*, THERAPIST, May/June 2009, *available at* http://www.drtraycehansen.com/Pages/writings_notinthebest.html. Tracye Hansen describes herself as a "Psychologist, Cultural Commentator & Author," *id.*, and her work is promoted on the Ruth Institute website, which is a project of the National Organization for Marriage website.

2. Professor Michael Lamb, Professor of Psychology and Head of the Department of Social and Developmental Psychology at Cambridge University and one of the world's leading experts on child development and parental relationships, summarizes the state of the social science and the consensus of serious professional and scholarly associations regarding child welfare and gay parents in an affidavit that he submitted in conjunction with a challenge to the federal Defense of Marriage Act brought in the Northern District of California by Karen Golinski. *See* Declaration of Michael Lamb in Support of Plaintiff's Motion for Summary Judgment & Plaintiff's Opposition to Defendants' & Defendant-Intervenor's Motions to Dismiss, Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968 (N.D. Cal. 2012) (No. 3:10-cv-0257-JSW), 2011 WL 7472740 [hereinafter Lamb Declaration]. The Williams Institute at UCLA Law School has collected a significant amount of the social science research and meta-analysis in the parenting section of its electronic research center. *See Parenting*, WILLIAMS INST., http://williamsinstitute.law.ucla.edu/category/research/parenting/ (last visited Oct. 20, 2012).

biological mother and a father. Therefore, same-sex couples should not be allowed to get married."[3] Well, of course, that has nothing to do with the question of whether same-sex couples can be successful parents. These are studies that measure various different variations on opposite-sex households, and they reinforce the notion that having successful outcomes with your kids depends upon having engaged parents with good relationships with their kids, parents who have good relationships with each other, and parents who have access to resources, time, and status that allow them to create a successful child-rearing environment for their children. Indeed, to be perfectly blunt, scholars who attempt to point to these studies about problems that various different kinds of heterosexual households have as evidence that there is some reason why gay couples should not be parenting kids, or should not be supported and reinforced in parenting their kids, are either guilty of extraordinary incompetence or they are engaged in willful misrepresentation of the data. There is no other way to describe the way that these studies are being made use of.

That is a very important fact to discuss about the way in which these social science data get used, but there are two issues that it is more important to discuss. First of all, even if there were any truth to the proposition that, on average, opposite-sex couples have better outcomes with their kids than same-sex couples, why would that be a justification for excluding same-sex couples from the various different kinds of state support and state reinforcement that we offer to parents in order to help ensure that they have successful outcomes for their kids? What we know is that poor parents have much greater challenges having successful outcomes with their kids and having well-adjusted kids because access to resources is directly correlated with having unsuccessful or problematic outcomes with kids—at least, a greater chance of a problematic outcome with kids.[4] And yet, of course, appropriately, our public policy response to parents that have not very much access to resources is to try to give them more support, or at least to try to reinforce their ability to parent their own children, rather than saying, "You're poor? You shouldn't get married. We're not going to let you get married, because you're going to have less good outcomes with your kids."

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3. *See, e.g.*, Wardle, *supra* note 1, at 33–36, which describes the children of same-sex couples as suffering from "parental absence" and projects onto kids raised by loving same-sex couples the greater risk of poor outcomes experienced by kids from homes characterized by divorce or single parenthood. *See also, e.g.*, Lynn Wardle, *Parentlessness: Adoption Problems, Paradigms, Policies, and Parameters*, 4 WHITTIER J. CHILD & FAM. ADVOC. 323, 324–25 (2005) (conflating the "parentlessness" of children raised by same-sex couples with the circumstances of orphans, homeless persons, and "children in refugee camps"). To eliminate any possibility of confusion, the text in quotation marks in the body of the Essay above is a stylized account of the arguments made by Professor Wardle and others, not a direct quote from the cited articles.

4. *See, e.g.*, Lamb Declaration, *supra* note 2, ¶ 16 (explaining that "poverty and social isolation [are] associated with maladjustment" while "adequate resources support[] healthy adjustment").

It constitutes a sort of magical thinking on the part of antigay advocates that, if you can point to some supposed deficit on the part of gay parents—which, once again, is invented and indeed a misuse of social science data—then that is a reason to deny them equal treatment under law, because somehow they're not going to have kids if you just deny them equal treatment under law and otherwise don't take them into account under law. But of course, gay parents exist, and gay parents are going to exist whether we give them equal treatment under our laws or not. The question that we should be addressing is, what is the best way to support these parents in light of the social realities in which they live? And the social reality in which they live is that their sex and sexual orientation have nothing to do with their ability to have successful outcomes with their kids.

Perhaps even more important, there is this seeming willingness on the part of antigay advocates to go around calling LGBT people unfit parents, and to expect to be treated with courtesy in response. I've been doing this for a dozen years, and I have to tell you, in very personal terms: I'm getting a little tired of being courteous in response to this kind of argument.

A second species of argument that gets deployed in these conversations a lot is associated with what are often called the New Natural Lawyers—a group of scholars and advocates in the Academy most strongly identified with Robbie George at Princeton, in the advocacy world most strongly identified with the National Organization for Marriage, which is an antigay organization that Robbie George had a lot to do with founding. Here, this is an attempt to take natural law arguments, update them to a twenty-first century vocabulary, and then apply them to current issues of social disputation.

I've read a good deal of the work of Robbie George in this field. It is extraordinarily erudite work. Robbie George is a very smart man, he writes very analytically complicated and dense work. And it is analytically complicated and dense work that has two characteristics that are particularly relevant to this discussion. First of all, George makes a point of differentiating his work from the work of other natural law writers who have justified legal regulation based on a sociological assessment of the content of majoritarian moral sentiment—the Lord Devlin approach to natural law analysis from the Devlin-Hart debates[5]—or that is more explicitly tied to Catholic doctrine and to the Christian tradition, which of course is the tradition in which Thomas Aquinas was writing.[6] Robbie George makes a big point of saying, "I am writing about moral propositions that I believe to be self-evident or at least rationally derivable and these are simply correct moral propositions. And so I am now going to set forth

5. *See* LORD PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965) (collecting Devlin's lectures on the subject).

6. Aquinas develops his theories on natural law in the *Prima Secundae of the Summa*. *See* THOMAS AQUINAS, SUMMA THEOLOGICA Parts I–II (Fathers of the English Dominican Republic, trans., Encyc. Britannica 1952).

arguments about policy prescriptions that we should adopt because they represent correct moral judgments."[7]

He goes on to talk about gay people and gay relationships. And what Robbie George says about gay people and gay relationships is that we are base, and we are degraded, and we are morally evil, and we are unfit for human beings in the ways in which we conduct our relationships.[8]

Now, in fairness, Robbie George is fairly ecumenical in his condemnation. He also has some similar things to say about fornicators, about sodomists (including married sodomists), and about masturbators.[9] I must admit, when I was reading his work and came across this last term, it took me aback, because it is a way of classifying human beings that had not occurred to me—that somehow, the category of people for whom masturbation is a meaningful part of their lives is a meaningfully distinct category. And it is work that, for all of its genuine learning and intelligence, betrays a kind of fearful and desperate sexual repression, which on one level provokes a reaction of human compassion. I must say that, in reading George's work, I have a powerful reaction of compassion.

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7. Professor George sets forth his approach to natural law theory most fully in MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY (1993). Thus, for example, in differentiating his work from that of Lord Devlin, George writes, "I argue that Devlin's defense of morals legislation should be rejected just in so far as it deviates from the traditional and correct view that morals laws are morally justified only when the morality they enforce is true." *Id.* at 5. Professor George writes in a similar vein in a recent collection of essays:

> The thesis I set before you is that a key source of the pathologies afflicting marriage in contemporary societies is not . . . the substitute of reason for tradition [but rather] the significant erosion . . . of a sound understanding of marriage . . . . The problem, in other words, is that many people have lost their grip on the nature of the marital good, or goods, and on the *reasons* for marrying and supporting marriage that these goods supply. The failure is precisely a failure of practical understanding—of *reason*.

Robert P. George, *Marriage, Morality, and Rationality*, *in* THE MEANING OF MARRIAGE 147–48 (Robert P. George & Jean Bethke Elshtain eds., 2006). Once again, to eliminate any possibility of confusion, the text in quotations marks in the body of the Essay above is my own account of George's approach and not a direct quote from his work.

8. Professor George explores these ideas at great length in ROBERT P. GEORGE & PATRICK LEE, BODY-SELF DUALISM IN CONTEMPORARY ETHICS AND POLITICS (2008). *See, e.g.*, *id.* at 176–77 ("[N]onmarital sexual acts (including homosexual acts) are intrinsically incapable of actualizing or promoting a genuine human good. . . . [and] are always in principle contrary to intrinsic personal goods . . . and as such harm the character of those freely choosing to engage in them."); *id.* at 178 (intimacy between same-sex couples "is a degradation of persons"); *id.* at 186 (describing the intimacy of a same-sex couple as "[s]exual acts done for the sole immediate purpose of pleasure, and not intended as embodying, expressing, or symbolizing personal communion" and hence constituting "masturbatory sex [that] is objectively morally wrong"); *id.* at 188 ("Masturbatory sex is a choice to use one's sexuality (and perhaps that of others) as a mere means toward pleasure and thus involves treating one's sexuality (and perhaps others' sexuality) as a mere object for use and as *subpersonal*."); *id.* at 189 ("[Mutual masturbatory sex] involves treating a bodily person as if he or she were not a person, for here the sexuality of the person, which includes both the body and personal expression, is used as a mere extrinsic means.").

9. *See id.* at 188 ("masturbator"), 194–96 ("sodomy"), 196–97 ("fornication").

But I also have a reaction of having to take a step back, if you'll permit me to say it colloquially, and to ask myself: Exactly how far do I have to extend the norms of collegiality to be engaging with somebody whose entire work is based upon the assertion that, as a rational moral proposition, I am base, and degraded, and morally evil, and behaving in a way that is not fit for a human being?

The third species of argument that I think warrants some critical attention is often termed "complementarity," sometimes called "gender integration" in relationships. This is, if I may say so, a rather opportunistically coined set of phrases that are seeking to discuss the inherent need or the inherent importance or value of having two people of different genders in a marriage, and that that is somehow essentially what a marriage is about. Robbie George writes about this as well and many others do, there are Catholic scholars who write about this in recent disputation about social issues.[10]

Scholars who emphasize this notion of complementarity make a point of saying that they are emphasizing differences in the complementary qualities of men and women not just in their physical characteristics but also in their intellectual, their emotional, and their spiritual characteristics.[11] It is these large sources of difference and complementarity, they say, that we ought to be recognizing in order to say that marriage is a unique relationship.[12]

Now, number one, of course, this species of argument transparently and almost brazenly accentuates the nature of the sex classification in sex-differentiated marriage laws. I find it astonishing that these are the same people who are arguing either in their scholarly work or in court that—despite this "complementarity," "gender integrated" set of assertions about the inherent nature of men and women on intellectual, emotional, and spiritual levels as well as physical levels—that discrimination in the marriage laws based upon sex does not constitute a classification that should be enforceable under the Equal Protection Clause.

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10. *See, e.g.*, Roger Scruton, *Sacrilege and Sacrament*, *in* THE MEANING OF MARRIAGE, *supra* note 7, at 25–28 (2006); Lynn Wardle, *The Boundaries of Belonging: Allegiance, Purpose and the Definition of Marriage*, 25 BYU J. PUB. L. 287, 291 (2011) ("Gender integration, uniting a man and woman in a gender-complementary union, is an essential, perhaps the most indispensable, purpose of marriage.").

11. *See, e.g.*, Elizabeth Schiltz, Does Sarah + John = 3? The History and Future of Complementarity in Catholic Feminism, Keynote Memorial Lecture at The Family: Searching for the Fairest Love, Notre Dame Center for Ethics and Culture, Ninth Annual Fall Conference (Nov. 7, 2008), *available at* https://sites.google.com/a/nd.edu/the-notre-dame-center-for-ethics-and-culture/video/fall-conference-videos/the-family-searching-for-fairest-love-videos (emphasizing the complementarity of men and women in their physical, emotional, intellectual, and spiritual characteristics in seeking to articulate a Catholic feminist worldview).

12. *See, e.g.*, George, *supra* note 7, at 151 ("The bodily union of [opposite-sex] spouses in marital acts is the biological matrix of their marriage as a comprehensive, multilevel sharing of life: that is, a relationship that unites the spouses at the bodily (biological), emotional, dispositional, and even spiritual levels of their being.").

But, more broadly, I don't disregard the notion that there is something distinctive about having a relationship with two people of opposite sexes, and having them explore their differences of experience as part of what it is that they are doing as they travel through the world together. Just as I take very seriously that there is something distinctive and beautiful and important about two people of the same sex sharing experiences through a common lens, through a common set of shared understandings of what the demands of the world are upon them in their gender and the ways in which they do or don't experience those demands in a similar fashion. The complementarity argument simply takes as a given that the opposite-sex experience is the one that public policy ought to be accentuating, and that the same-sex experience is simply to be differentiated through the construction of an argument, rather than to be taken seriously on its own terms.

That kind of not being taken seriously—having that be the starting point that one has to begin with in engaging in a collegial fashion with these arguments—over time it has a corrosive impact upon one's individual dignity. The question is what to do about that.

Now, I have run out of time, so I'm not going to spend a lot of time talking about what to do about it. I'll just say quickly: One can refuse to engage with these arguments and the people who make them, which is a choice that some LGBT scholars make and is a choice that has obvious costs associated with it. One can continue engaging in a collegial fashion, which is the choice that I have made for most of my career, but carries serious individual costs. Or one can engage with a somewhat sharper-edged critique of the nature of the arguments that are being made, which is part of what, of course, I am doing today, which has its own set of costs and disruptions of the normal collegial atmosphere about it. I acknowledge that.

But I think that the impact upon the individual dignity of LGBT scholars from having to confront these ugly, ugly arguments over and over again is something that needs to be acknowledged as one of the central, central dynamics that warrants attention in conversations about these issues.

Thank you.