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Undoing Marriage

This article presents a foundational critique of marriage through a linguistic and historical analysis of this legal institution as it has developed in the Philippines. The author argues that the consequences of legalized marriage are the normalization of desire, the standardization of the lived experience for the body, and the idealization of heterosexual association as the paradigm for lifelong intimacy, goals that constrict the possibilities by which human beings can envision meaningful lives for themselves and others. The entanglement of religious beliefs and the State is accomplished through the Family Code whose main program is to privilege heterosexual coupling over all other forms of associations. The paper proposes to delegitimize marriage by deregulating entry and exit mechanisms as well as to decriminalize marriage-related offenses such as bigamy, adultery, and concubinage. These proposals, the author argues, will not only release human beings from freedom-restricting institutions sponsored by the State but will also allow policymakers to focus their regulatory lenses on inequality and abuse of power present in many types of human relationships.

"The law must begin to realize that all talk of 'rights' and 'rights of action' is barbarous and out of date in relation to human hearts and affection; for these cannot, like heads of cattle or pieces of land, be assigned irrevocably to this person or that.... Legal actions concerning the personal relationships of men and women are thus odious to a civilized community."

—MP Herbert
in Fowl v. Myer

"An enterprise has a fifty percent failure rate. The female participants are injured sixty-three percent of the time. Children in the system are physically and sexually abused from thirty to eighty percent of the time. If this were a business, its doors would soon be closed. If this were a workplace, OSHA would shut it down. If it were a school, the principal would be arrested. Instead politicians extol it, courts ruminate over its value to society, and business, religious, and cultural leaders pander to its mystique. It is, of course, marriage and the family."

—Dianne Post
Why Marriage Should Be Abolished

When the Family Code describes marriage as a legal institution, I start worrying about how this combination of legalization and institutionalization is able to contain and distort an ancient manifestation of desire—the will to be associated.[1] This form of wanting *to be,* which normally takes the human form of a touch, a linguistic expression, or a signifying act is the stuff that I think only poets can talk about, for the commonplace use of language finds itself insufficient to the task of description. Because it is only in metaphors that we are somehow able to extract from language a meaning beyond the ordinary, we find ourselves waxing poetic whenever this desire—this wanting to be associated—takes a strong urge to be communicated.[2] It is the closest we will ever get to being metaphysical. And yet, in the name of the social order,[3] we have legalized and institutionalized—pun intended—this species of desire and brought it down to the level of the describable; worse, we have codified the rules of its game. We have dictated our freedoms and lost them in the process of dictation.[4]

One cannot overemphasize the importance of the desire to associate. After all, wanting to be with another is a treasure chest of the significations that arise out of the tension, if not irony, of individuality and sociality. Ordinarily, we associate the phrase "wanting to be" with the desire of the self to attain a certain ontological status; thus, one wants "to be" as a mode of *being for oneself.* On the other hand, wanting to be *with someone* (or *some others*) requires for its fruition that this desire for an ontological status be *beyond oneself,* not simply a matter of willing but also of someone else's desire to be associated with the desiring body. This self is decidedly relational. This revelation is almost, though not quite, a paradox: the individuality of the self is derived from the web of relations in which it is immersed. From here it follows that being for and beyond oneself must be converted into a ritual that is performed, reiterated, and renewed by its participants for it to be a source of continuing meaning; otherwise, the connection is lost and reduced to memory, to be played over and over again whenever the occasion calls for it. And because we are separate bodies, the character of our associations, be it weak or strong, single or multiple, flash-in-the-pan or enduring, ultimately depends on and returns to this "will to associate."

This will to associate takes many forms, is founded on different purposes, and crosses age, gender, race, and economic status. The forms of relation among human beings are so diverse that the only limit to the range of their describability is the fullness of language

itself. One may analogize kinship, friendship, and relationship to the way that the trichotomy of primary colors mix and match to generate an unimaginable set of ways to associate. How is it then that we have ended up privileging some forms of associations over others?[5] Why is it that certain relationships have been co-opted by the legal system while others have been marginalized?[6] Is it because some associations prove better instruments of ideological state apparatuses, as Althusser would say, while some pose a threat to existing powerful institutions, such as the free market and the church?[7] Or is it simply because, as post-colonial subjects, we have casually, unconsciously, and uncritically followed the ways of the colonizers?[8] Why is it that of all configurations, the legal regime has chosen a particular legal instrument—marriage—as an inviolable social institution, *the* foundation of the family, and subject to protection by the state?[9] What is so special about marriage and how is it that this legal device has become so intrinsically associated with the heterosexual family? And what is the business of the State in labeling the ways in which desire is expressed by individuals and groups, favoring particular forms, entitling *one* and discouraging many others?

In this essay, I would like to talk about an idea of marriage and a program for de-containing desire, of giving back to our bodies the right of wanting to be and defining for ourselves the meaning of belonging. In general, I propose to disentangle marriage from the hold of the state by de-legalizing, radically "disestablishing"[10] and "unbundling"[11] this "highly popular institution."[12] The effect would be similar to repealing the Family Code and, at least in many cases, making relationships subject to either contract or special legislation focusing on specific regulatory concerns such as violence, inequality, parental responsibility, dependence, and succession. The project is therefore essentially one of subtraction and deletion.[13] It is structural, not doctrinal[14] or judicial.[15] In this way, marriage becomes separated from the policy aspects of relationships which regulators can respond to on an *ad hoc* basis. De-legalization also results in a more embracive view of human relationships, thereby allowing individuals and groups that are marginalized by the law to cohabit and even "marry," if they want to. It also does away with many other inequitable impositions that follow from the current regime of marriage such as the present inability of individuals to divorce their spouses, the shaming effects of illegitimacy, and the property bias against illegitimates. At the same time, this proposal will allow traditional couples to maintain the kind of arrangements that heterosexual couples have been used to. It is

likewise religion-tolerant, as it allows god-believers and religious institutions to participate in a de-legalized marriage culture, but minus the legitimating effects of a marriage sanctioned by the State.

My aim in this article is not to provide a specific program detailing the host of consequences that follows from de-legalization; rather, it is to underscore the conceptual basis for the rejection of an institution that is more harmful than beneficial. My attack is therefore foundational, and not programmatic—I am measuring the entire weight of the institution and not, separately, the parcels of regulation that come with it. I carry no pretense that the institution will disappear in the short term, although one must always be conscious of the fact that social arrangements are never fixed, and the meanings we attach to the same labels evolve to reflect the predispositions of every era. This paper is thus an invitation to a discourse, not an encyclopedia of the implications of an idea, and I would consider the objectives of this piece happily satisfied if people devoted some time to asking the question: what is the relationship between marriage, as an institution of law and culture, and desiring? As the reader may have already noticed, my answer is "none, except the psychological effects of legal regulation (the feeling of security, settlement, constraint)." This short answer explains the attitude that envelopes the arguments I present here—negation.

INSTITUTIONALIZED DISCRIMINATION

Marriage discriminates. Its domineering over- and under-inclusiveness is definitionally self-evident: "Marriage is a special contract of permanent union between a man and a woman entered into in accordance with law for the establishment of conjugal and family life. It is the foundation of the family and an inviolable social institution whose nature, consequences, and incidents are governed by law and not subject to stipulation, except that marriage settlements may fix the property relations during the marriage within the limits provided by this Code."[16] This definition[17] is overinclusive because its regulatory impact touches not only those that are willing to enter the institution but also those that are unwilling and uninterested[18]; it is underinclusive because it excludes from State certification many of those that are willing and interested.[19] This definition is a theory that doesn't fit the facts; it is a template that imposes itself on a very narrow band of desiring. There is a gap between the family in the casebooks and the family in action.[20]

The prejudices of the institution are multi-faceted—the characterization of the contract as "special" provides the regulatory justification for the barrage of exclusion that follows: that marriage is a "status" means that our concept of this relation is of 18th century vintage[21]; that it is a permanent union in this country means that, along with Malta, the Philippines is one of two countries on the entire planet that refuses to formally[22] recognize divorce; that we do not have an exit strategy for marriage means that it functions as a sort of legal trap, allowing heterosexual couples in and luring them with the enticements of the Family Code (not to mention the nod of an approving society) and forever binding them in the name of the sanctity of the family; that marriage is between a man and a woman means that entry is limited to a pair of bodies, one with a penis and another a vagina, and no other pair/s or any other combination of relationships is recognized by the regime; that it must be entered into in accordance with law means that non-compliant relationships are either illegal or immoral or tolerated and that the process of certifying relationships as legal or non-legal is the monopoly of the State; that marriage must be for the establishment of conjugal and family life means that the substance of legalized desire is set by law, that there are legal (and in many cases, social) consequences for manifestations of intimacy that are foreign to the legal regime.

Marriage is an ideology for the containment and categorization of desire; it is a mode of establishing limitations on windows of possibilities and experiences for the human body.[23] As a State-imposed norm-system, it operates as legal jargon for speaking about intimacy and its associated values. In turn, the narrowness of its language affects our cultural space by limiting the way we view human associations. The consequence is the normalization of desire, the standardization of the lived experience for the body, and the idealization of heterosexual association as the paradigm for lifelong intimacy. These perspectives form the core of the view that marriage is an oppressive institution that reduces human beings into unconscious ideologues of the present regime of heterosexual monogamy, conditioning their minds for lives of enforced permanent union, blind to other possibilities for the deployment of desire, and unable to accommodate "changing patterns of intimate behavior,"[24] while simultaneously ignoring or obscuring the nature and extent of individual dependency.[25] The Family Code is an illegitimate "use of marriage as a proxy for desirable outcomes in social policy."[26]

The singling out of heterosexual coupling as the legal standard

of human relationships attenuates our ability to engage in genuine acts of self-authorship, and in defining for ourselves the livable life. To this extent, legalized marriage functions as a mechanism for channeling desire, producing the architecture for creative space of the self's movement and discovery of authenticity. The marriage highway is well-paved, reliable, and safe; any other road is bumpy, unstable, and dangerous.

This legal privileging of the road to marriage is artifice. The state should have no right to privilege or impose one form of family structure or sexuality over another.[27] And if we are to envision greater possibilities for the body as a source of meaning, we must be able to problematize the language of legal institutions that generate and dictate possibilities for both self-creation and self-definition. This we can only do through a discourse of unsettlement.

Preliminarily, we may characterize this institutionalized legal discrimination as part of a more general problem with the way people view the use of language—as simply a tool for naming things or the idea that for every object there is a label. As Saussure pointed out quite a long time ago, the idea of language as a naming process is rather naïve, as one cannot assume that ready-made ideas exist before words. The notion that language is a system of naming finds its roots in Platonic idealism, which sees the reality of things we presently apprehend as imperfect copies of a perfect ideal. This view of language results in a strong conceptualist view of phenomenon.[28] In particular, this conceptualism is manifested in the very definition of marriage. Ask anyone: why is marriage limited to two people? Why must it be limited to heterosexual couples? Why must it be a special contract of permanent union? Why must the law codify its nature, terms, and consequences? Why must it be for conjugal and family life?

Any given set of answers will involve a host of tautologies, moralisms, universalisms, naturalisms, and a list of other *-isms* that essentially say, "because that is what marriage is all about." This belief that marriage is (and therefore must be) *about* or *for* something provides the normative bias for the use of regulatory power for parentalistic and moralizing purposes,[29] and drives the overwhelming majority among us to not only misguidedly hold that marriage should be heterosexual, procreative, and eternal but also to impose such conceptualism by using State authority to privilege a certain form of human relationship over many others.

The linguistic position I have just described is fueled by a history of intermingling between church and colonial State. The

Spanish crown, at a time when it was indistinguishable from the church, adopted this conceptualist view of language for pragmatic reasons as part of the colonial project. By sheer inertia, we have continued to allow this imposed idealism. Even now, we continually fail to acknowledge the arbitrariness not only of words as they relate to ideas but, more importantly, the arbitrariness of concepts themselves. Marriage, as a sign, need not be anything, for there is nothing "inherent" in a jumble of marks.[30] It needn't be between a woman and a man (or a vagina and a penis); it needn't be procreative; it needn't be eternal. Marriage, as text, is merely a linguistic marker that makes communication possible. As a combination of letters, it might as well refer to a cat.[31]

This means that if we want a society of the free and the tolerant, we must rescue our linguistic freedom from the regulators and reclaim our right to re-cast human relations in the kind of language that we want. We must ask the regulators: what gave you the right to channel desire by holding out certain organizational forms as privileged, sanctifying them as if they were the only ones that could hold society together? This is no trivial question, for our control over our bodies depends on how we answer this query.

I do not have to defend the position that no amount of State certification can confirm my desire for someone (or some others) or any such person's (or persons') reciprocal desire for me; whether desire (or love) is felt by anyone is beyond government confirmation. Neither is the form taken by such desire relevant—whether we end up frolicking like rabbits, holding hands, staring at each other till our eyes get sore, sleeping in separate beds, not having sex or children, or just e-mailing, what really matters is that we are able to deploy our desire in ways that satisfy our want for meaning and our yearning for self-narration. The lesson here is that the intervention of any regulator in the business of desiring should carry a heavy burden, similar to what constitutional law scholars would refer to as strict scrutiny,[32] or a very high standard of justification that starts with the question: what is the government's compelling interest in legalizing marriage? Lest I be misconstrued, I am not making a legal argument here that the institution of marriage is a violation of some clause of the Constitution such as the Due Process, Equal Protection, or the Privacy Clause, although such an argument could in fact be made.[33] Instead, I'm asking you, the reader, to locate yourself in a time before legalized marriage, when the government was still selling the idea of enacting something like a Family Code that uses marriage as a foundational organizing

principle for society. Having done this, shouldn't everyone ask: why is the government even doing this? Why is it so interested in heterosexual coupling? And why the fixation with permanence, procreation, and surnames?[34]

Marriage largely impinges upon the individual by affecting the social.[35] The legalization of marriage sets up an artificial hierarchy of human relations,[36] structuring the various forms of desiring and creating incentives and disincentives to the will to associate. At the top of the hierarchy is the heterosexual, procreating couple—they get the tax benefits, legitimate offspring, a choice of property relations, and the right to inherit. The marrying types are the model citizens and their pairing produces the basic social organization, the so-called building block of society. What happens to non-marital relations such as live-in arrangements, same sex partnerships, fly-by-night liaisons, and a host of other manifestations of desire? Society has evolved certain metaphors of discouragement for these arrangements: out of wedlock, living in sin, illegitimate, unlawful, queer.

The consequence of the institutionalization of desire through marriage is the politicization of relationships and the reification of a specific form of desiring. This reification furnishes, in turn, the discriminatory motive against other forms of desiring. Indeed, the only way for this institutionalization to survive is by creating a discourse of politicization—of the penis and vagina, of legitimate and illegitimate children, of adultery[37] and bigamy, of heteros and homos—that rationalizes the entrenchment of marriage, its entitlements, and the views of the moralizing majority.[38] Because the economy of this discourse produces a language that inhibits our ability to imagine alternative realities, we must now produce a counter-discourse,[39] one that provides a better set of metaphors for the kind of lives we want to live and allows us to create the very channels through which desire may more freely flow. The transformation starts with the recognition of the dark history of marriage and ends with the moral commitment to end it.[40]

DE-LEGALIZING MARRIAGE[41]

For purposes of clarity, suspend momentarily your disbelief and consider a legal regime where marriage is not a legal institution—visualize perhaps an act of Congress repealing the Family Code. From now on, Congress will limit itself to certain regulatory concerns such as violence, child care, religious indoctrination of children, support,

inequality, and (quite possibly) incest, and no longer involve itself in procedural and substantive issues related to relationships like licensing, certifying, or nullifying marriages and determining legitimacy or illegitimacy.[42] By privatization, I am not simply referring to a regular contractual agreement,[43] such as, say, a contract of sale where the parties may go to court in case of breach and seek assistance through state enforcement machinery; rather, I am referring to a regime where marriage is legally invisible—de-legalized—where it is not a source of legal rights at all and any interference by the State will be directed at particular problems with specific relationships. The general outlines of the implications of this idea can be concretized through the following sets of hypotheticals. Imagine:

—A—*Entrance.* A couple belonging to a religious denomination (Catholic, Protestant, Muslim, etc.) wants to get married. Under the Family Code, entry into marital status would require that they fulfill procedural and substantive barriers meant to ensure their fitness for the kind of marriage the State allows.[44] In a regime of non-legalized marriage, this couple, instead of going to the city hall in order to obtain a marriage license, could go directly to their preferred church and get married according to the customs established by that institution. Under a de-legalized marriage regime, there is no need for the solemnizing authority to obtain any license from the government. Religious institutions will thus be self-regulating entities insofar as their marriage rules are concerned, so long as they do not affect the regulatory concerns mentioned before. In this situation, everything that "ordinary" (under the law, all) couples do in preparation for marriage can still be done by anyone who wants to get married under traditional rites, with one exception—their ceremony will be purely personal and religious, having no legal effect whatsoever.

With respect to those who have neither the patience nor taste for such formalities or ceremonies, be they religious or not, living together would produce the same non-legal effect. Or they could simply talk and, then and there, draw the status line that separates the moment they call themselves "not married" from "married." The regime I have in mind would thus allow people to get married for any reason, anytime and anywhere they want—in the cafeteria, at some flashy restaurant, in bed, or while driving. Under the new rules, language attains its greatest performative potency. People could even invent a new word for "marriage" if they wanted to.

The hypothesized marriage regime is also inclusive of homosexuals.[45] Because the only barrier to homosexual marriage is

the law itself, the de-legalization of marriage would allow homosexuals to enter into such relationships, the only distinction being that the kind of discrimination to which they are now subjected will have no legal effect—congregations or religious institutions that do not allow homosexual marriages, such as the Catholic church, may continue with their discriminatory ways. As in the case of heterosexuals who see no need for having some god/s or priest/s witness their vows, homosexuals could, at any time they want, simply call themselves married.

De-legalized marriage doesn't stop with couples, simply defined as a pair of bodies, regardless of sex. One important consequence of legalized marriage on the right to associate is the privileging of coupling, viewing society not only as grounded on couples as the core unit of the family but, more importantly, that all such relationships should be the norm. Even if we accept as fact that the dominant social organization in our present culture is coupling, such a fact does not validate discrimination nor furnish any justification against alternative forms of social organizations. To believe that "heterosexual marriage is the worst basis for family formation save any other that has been tried"[46] is to mistake an imagined necessity with the need to imagine; it is to miss the fact that marriage today is nothing less than "compulsory monogamy."[47] Indeed, the dominance of coupling in present society could even be attributed precisely to the mandatory push of the marriage regime to favor coupling. As Martha Fineman so eloquently notes—

> Inconspicuously complementing the myth of individual autonomy are assumptions about the context in which individuals exist in our society, particularly the assumption that we belong to or aspire to belong to families. A traditional family is typically imagined: a husband and wife—formally married and living together—with their biological children. The husband performs as the head of the household, providing economic support and discipline for the dependent wife and children, who correspondingly owe him duties of obedience and respect. This assumed archetypal family provides the normative expectations for the institution of the family.[48]

The de-legalization of marriage leads to the de-privileging of coupling by allowing any number of human beings to define for themselves the character of intimacy they wish to engage in.[49] To be sure, there is nothing biologically or morally wrong about three or more people deciding to live together for mutual convenience, companionship, or support. In fact, there are people who engage in polyamorous unions. The singular reason society does not refer to such social arrangements

as marriage is because the law does not call it so.

We ought to realize the danger associated with the moralizing tendency of law in instances where the legal label itself is the only source of a judgment between what is good and evil.[50] No one would raise hell about three people, say, two females and a male, living, eating, watching tv, and paying bills together, except perhaps some ultra conservative who would view such arrangement as "inherently dangerous." But, once these three become a threesome, once they engage in sexual activities together, for love or sex or whatever, and then appropriate the term "marriage" for the kind of social arrangement they've created, all hell breaks loose and society brings them to the altar of judgment and declares them immoral, perverted, and sinful. How did it ever become the government's business to tell us "only two are ok" or "one partner at a time"?[51] Even progressives who advocate same-sex unions distinguish between legal twosomes and threesomes.[52] When did it ever become our business to tell others, "you can have threesomes and foursomes in the privacy of your condos (just please don't give us details) but you can't call yourselves a family?"[53]

It is worth emphasizing that by questioning the right of the government to intervene in these relationships, I am not trying to promote them. I am not saying that just because the marriage regime should be de-legalized, we ought to experiment with threesomes and foursomes. Neither do I seek to characterize heterosexual coupling as bad, vanilla, and uninspiring. My real problem is not with alternative forms of social organizations being seen as intrinsically good or bad; it is the arrogant position that because heterosexual coupling is dominant, then all other associations should be discouraged, if not legally prohibited. As I have said, marriage, as a legal term, is but a word. And those who seek deep truths in words are bound to miss out on the fact that the ultimate source of meaning in the way we associate with others is to be found in the sheer facticity of a relationship that is unique, shared, and human.

—B—*Exit*. We change, all the time. And not only are we always changing, we can also never, with absolute confidence, control the way we modify ourselves and are modified. Yet, when it comes to legalized marriage, we Filipinos, either because of some mass hallucination or sheer politicizing by the church, have yet to realize the impact of this fact. Our failure to recognize the fundamentality of our own malleability is a tragedy that affects the lives of millions everyday.

Let's be honest. We cannot legislate what our later selves will feel at any time past the immediate present. And yet this is exactly what the Family Code dictates—that human beings eternalize their present selves with promises of tomorrow that cannot be broken by a change of heart, because the law will make sure they are fulfilled in spite of it.[54] Of course, every now and then, or even more often than not, we intend—and hope—that some of our desires last for so long as we live; but a healthy dose of self-skepticism should be enough to make us realize that our confidence in even our deeply held beliefs at any present moment is always subject to the contingencies of time and circumstance. Besides, it is one thing to make a personal commitment to bind oneself to another "till death do you part"; it is another to be compelled by law to keep that promise.[55] While one may rely on the law to compel another to give what's been promised to deliver by a contract of sale, it would be absurd to compel another to deliver love, companionship, and fidelity notwithstanding any promises.

The de-legalization of marriage remedies this coercion of status by giving back to the citizen the right to say *it's over* if and when she wants to. Even on a doctrinal level, this idea is so fundamental to the right to associate and incompatible with state parentalism. The decision to terminate marital association lies well within the core value—if it exists at all—of personhood and is so constitutive of the self that I'm always appalled at rationalizations made by many about the supposed right of the State to make sure couples do not make hasty decisions about the decision to separate and that children be protected from such choices.[56] For such arguments border on the irrational. They assume that all couples are immature about these decisions or that they are always hasty when it comes to these matters. These arguments also presume that compelled status can proxy for meaningful companionship; or that children are better off if their parents are compelled to stay married even if they do, in fact, wish for nothing more than to leave each other. It seems quite clear that there is a yawning chasm of logic between ensuring that children be well taken care of and compelling divorce-bound parents to stay together in order to achieve that goal. It is no exaggeration to say that the projected needs and well-being of children have become the rhetorical engines that drive much of the marriage discourse.[57] Why can't we leave to the individuals whose lives are directly affected by such relations the right to determine for themselves whether their marriage ought to continue, with the state ensuring that decisions made approach a

relation of parity? What makes the State a better decisionmaker than we are on these questions?

At least insofar as the decision to change one's mind is concerned, divorce under a de-legalized marriage regime is decidedly more efficient than divorce under any legalized marriage regime. In the former, all the parties have to do in case they decide to get back together is to re-marry by declaring their intention to live together just like before. They would not need any formal requirement to justify their renewed status. In the latter, the parties would have to undergo the same licensing procedure they went through the first time they got married.

—C—*Legitimacy.* Traditional marriage produces an associated system—the morality of blood ties—which further institutionalizes discrimination against those who happen to be outside of relationships sanctioned by law. One blatant example is the prejudice against so-called illegitimate children.

No one chooses the conditions under which one is born. Color, sex, height, and other physical attributes are all contingent variables that are intertwined with the biology of reproduction. Apart from our genotype, there is another layer of contingency that goes with reproduction. We may call this the socio-type, which could very well refer to all non-physical attributes a person acquires at birth—nationality, economic status, and social status. Because one's status as a legitimate or illegitimate child is completely out of a person's control, it matters to ask: why does the Family Code label children as either legitimate or illegitimate in the first place?

One could venture into a host of possible reasons for this practice of labeling children—this fixation with legitimacy. For one, this is the kind of labeling system we've gotten used to as Spanish subjects. The Civil Code of Spain devotes Title V of Book I to issues of paternity and filiation,[58] whose rules have survived to a large extent through our present Family Code. The concomitant effect is that the Spanish policies on the rights of illegitimate children to support, inheritance, and use of surnames have become Filipinized. But what drives this law is the feudal notion of an exclusive community constituted by blood. Legitimacy rules, from this perspective, are predominantly devices for those with economic wealth to perpetuate themselves through the exclusions provided by the legal system. Naturally, those with properties to transfer would have the greatest interest in these kinds of rules, driven as they are by a Darwinian need to be altruistic to those who share a similar set of genes.[59] The

other variable that drives this system is the theistic belief that those who engage in procreative relationships without the benefit of marriage are living lives that go southwards from heaven, which explains the property bonanza for legitimate relationships and the penalty, in terms of reduced property rights, against illegitimates.

De-legalized marriage deals with this irrationalism by simply eliminating the labeling system, or at least, doing away with the label's legal punch. In short, the new marriage regime simply follows the rule, "pay for your own offspring; anyone you bring out onto this earth is your responsibility." All children, whether born in or out of wedlock, ought to have the right to a share of their parents' properties without discrimination, along with an assurance that the state will be present in those areas where the parents are not. This satisfies a basic rule of fairness.

—D—*Bigamy, Adultery, & Concubinage.* One important question for students of constitutional and criminal law is the extent to which regulators may engage in morals legislation, especially in matters that impact on rights of privacy and intimacy.[60] People should be concerned about the government, in the guise of some vague notion of "public interest"—order, morals, or policy—intruding, as it were, into bedroom matters. The key word is parentalism, the assumed right of the regulators to tell people what to do for their own good, usually on very slippery grounds.[61]

There is also the matter of efficiency, particularly the question of how scarce government resources should be allocated in order to promote the general welfare. Criminalization is not simply about prohibiting acts the state considers inimical to public welfare, but also about ensuring that the threats of public sanction can actually be carried out, considering the meager resources government can employ in enforcing its declared policies.

Crimes such as bigamy, adultery, and concubinage serve as good examples of punishable acts that highlight concerns about parentalism and efficiency.[62] What these laws say is this: by signing on the dotted line, spouses are authorizing the State to insure the parties against marital infidelity and that, in case of breach, the aggrieved party may go to court for relief. The State, as parent, will do the punishing for you—it will spend public time, money, and effort to ensure that married people (and only those that are legally married) will be faithful. This is the classic conversion of a private harm into a public injury.

I doubt if anyone would ever propose the criminalization of

"non-marital infidelity." If someone gives her partner some Jerry Maguire line like "you complete me" or "my word is stronger than oak" and later on changes her mind because she found someone else, I doubt that anyone in Congress would propose some bill, say, An Act To Regulate Non-Marital Infidelity, to address what are otherwise considered "private matters," in spite of their daily occurrence. This fact is important because it indicates how tautological the justification for criminalizing these crimes is: infidelity within marriage is a crime but infidelity without marriage is not so. Infidelity outside marriage is *damnum absque injuria* but marital infidelity will land you accommodations in jail. Adultery, bigamy, and concubinage are crimes simply because of the status validated by a contract. They are about protecting the institution of marriage, and the only infidelity being punished is infidelity to the State's legalized notion of intimacy.

This ought to lead many to realize that criminalization is a rather narrow response to sexual infidelity. A host of diverse remedies already exists to provide couples who are interested in sexual fidelity with a wide range of options for solving marital disputes in private deliberations, instead of a public trial before bureaucrats: civil penalty or damages, forfeiture of certain conjugal property rights, enforced counseling, maybe even loss of parental authority, and forgiveness, among other things. This diversity of options can hardly be accommodated within a marriage regime that threatens married people with imprisonment for deviating from legalized norms.

DE-STABILIZING MARRIAGE

The story of Soledad Escritor is a curiosity of an administrative proceeding.[63] She is an interpreter working in Branch 253 of the Regional Trial Court in Las Piñas, one of many employed by a judiciary that still believes systemic justice is possible even if dispensed in foreign tongue. For some reason, a certain Alejandro Estrada charged her with "disgraceful and immoral conduct," an offense under the Revised Administrative Code. The basis of the charge was that she had been living with a man not her husband, and had borne a child by him. For this sin, the court was asked to have her expelled from government service, lest it appear that the judiciary was condoning her non-marital arrangement.

Soledad answered by way of confession and avoidance, admitting having entered into such a relationship "more than twenty years ago when her husband was still alive but living with another

woman" and that indeed a son was the fruit of such intimacy. She likewise averred that by the time she entered government service her legal husband had already died, thereby re-capacitating her to marry. Her partner, however, was not so capacitated as he himself still had a subsisting, though botched, marriage with another woman.

But irrespective of the legalese, what was more important for Soledad was that her relationship was sanctioned by her congregation, the Jehovah's Witnesses, through a "Declaration Pledging Faithfulness." Apparently, such undertaking makes an otherwise unlawful union "moral and binding within the congregation all over the world except in countries where divorce is allowed," subject to certain requirements. This religious dispensation, she then claimed, was covered by the constitutional guarantee of freedom of religious exercise.

Quite surprisingly, and in a rather tortured essay in doctrinal manipulation, a majority of the members of the Court dismissed the administrative charge. Never mind that the Court's reading of American church/state history evinces a rather casual historicism; never mind the failure to notice that the idea of a 'benevolent neutrality-accommodation' framework is oxymoronic, like 'kind fairness-bias' or 'cold neutrality of a partial judge'; never mind the universalized claim of the subscription of the finite man 'to the infinite' and the notion of man's (even though this case involves a wo-man) accountability 'to an authority higher than the state'; never mind the happy contradiction of the use of the right to religious freedom to destabilize a religious ceremony masquerading as legalized marriage; never mind how adultery/bigamy/concubinage ever got to be part of the exercise of one's religion (something like the right to fornicate as a means to get to heaven or as a passport to the infinite); never mind that the Witnesses or some other religious groups offering the same privileges would probably increase their numbers because of this decision. What matters is that this case is a clear instance of individualized justice for which we should commend the Court *pro hac vice.*

In the first place, I have no idea how Soledad's intimate relationship—legal or illegal—could have any bearing on the work of a court interpreter: as if her ability to translate testimony from one language to another would be affected by her living with a man she cannot yet legally marry; as if she would be more susceptible than

* Popular child-characters in Philippine children's books

anyone else to falsifying her work simply by virtue of her unsanctioned relationship. In the second place, to allow an eavesdropper to file cases of this nature is to grant any *Pepe* and *Pilar** a roving commission to check the morality of all public employees. Surely, the government bureaucracy and private citizens have more pressing problems than making sure stenographers slept only with their legitimate spouses.

There is justice in this result if only because this case, shorn of the doctrinal spin, is one where desire triumphed over formal legality. Soledad did nothing more than express a fundamental human desire to associate, to find meaning in the intimacy of another, and to seek happiness within the confines of her circumstances. She neither stole public money nor forsook her professional responsibility. She fell in love. And that is all that there is to it. Indeed, it is a wonder how the hegemony of legalistic discourse has at times tended to blind us to the practical demands of existential justice. Life in the here and now is, so far as I know, the only life Soledad and her partner will ever live—this is their only chance to extract meaning from their association. To deprive her of employment because some stranger felt the need to glorify the public symbol of marriage is to trump practical justice with idolatry of concepts.

There is also a broader aspect to this case, of which Soledad's story is but a manifestation. This is the inherent tension in standardizing public morality through legalized marriage in a community of diverse values. This tension is unbearable, for I doubt whether the forceful idealization of marriage will ever result in happy and lasting relationships. So long as this tension exists, human beings will find ways to channel their desire, regardless and in spite of the coercive architecture of regulation. They will find meaning in the intimate and familiar embrace of loved ones, even if they are strangers in the eyes of the law.

In the meantime, we ought to ask: why can't the government just leave us with our own desires?

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END NOTES

[1] See **Theodore Zeldin**, *An Intimate History of Humanity* (1994). The will to associate that I describe in this Essay is the core of the right some legal scholars have written about. Considering the policy proposal that I outline in this Essay, it has to be stressed that this will to associate can never be contained in a discourse of rights similar to those some scholars have written about. See **Kenneth L. Karst**, *The Right of Intimate Association*, 89 YALE L. J. 624 (1980). The freedom of intimate association is "a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship. An intimate association, like any group, is more than the sum of its members; it is a new being, a collective individuality with a life of its own. Some of the primary values of intimate association depend on this sense of collectivity, the shared sense that 'we' exist as something beyond 'you' and 'me,'" at 629; **Laurence H. Tribe**, *The Right That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004); **Collin O'Connor Udell**, *Intimate Association: Resurrecting A Hybrid Right*, 7 TEX. J. WOMEN & L. 231 (1998); **Cass R. Sunstein**, *The Right to Marry*, 26 CARDOZO L. REV. 2081 (2005), "The right to marry, then, comprises a right of access to the expressive and material benefits that the state affords to the institution of marriage." *Id.*, at 2083-2084.

[2] This is probably what William O. Douglas, writing for the majority in *Griswold v. Connecticut* [381 U.S. 479 (1965)], felt when he described the institution—"Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

[3] The pawns in this game of social ordering through marriage are children, morality, civilization, and god.

[4] The legalization of this discourse of intimacy has led to a battle over characterization of rights: is it a positive or a negative right? See **Sunstein**, *supra* note 2; **Joseph A. Pull**, *Questioning The Fundamental Right To Marry*, 90 MARQ. L. REV. 21 (2006), "the Supreme Court's 'fundamental right to marry' needs to be reinterpreted as a negative liberty—a claim of individual autonomy against the encroaching hand of the state—rather than a positive right that obligates the state to provide all persons a particular set of options under the heading 'marriage.'" *Id.*, at 23-24.

[5] See **Ann Laquer Estin**, *Marriage And Belonging*, 100 MICH. L. REV. 1690 (2002), "The observation that marriage is a valuable source of private and public meaning does not explain why law and policy continue to privilege particular forms of marriage." *Id.*, at 1700.

[6] As **Martha Fineman** in *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (1995) has argued, so long as marriage exists, "[i]t will continue to occupy a privileged status and be

posited as the ideal, defining other intimate entities as deviant."

[7] Of course, the links between marriage and religion all over the world are secure. No one denies the heavily sectarian form of marriage. The only difference is the extent to which religious institutions continue to hold sway over the character of legalized marriage.

[8] Estin, *supra* note 6, "the monumental public character of marriage is generally its least noticed aspect," citing Nancy Cott's PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION.

[9] CONST., Art. XV, §2.

[10] Estin, *supra* note 6, at 1700.

[11] James Herbie DiFonzo, *Unbundling Marriage*, 32 HOFSTRA L. REV. 31 (2003).

[12] Twila L. Perry, *The "Essentials Of Marriage": Reconsidering The Duty Of Support And Service*, 15 YALE J.L. & FEMINISM 1 (2003).

[13] This project of subtraction thus makes it conceptually different from the growing trend towards legislative or judicial efforts towards accommodation of marginalized groups which runs in the opposite direction: that of addition. See Udell, *supra* note 2: *Inching Down The Aisle: Differing Paths Toward The Legalization Of Same-Sex Marriage In The United States And Europe*, 116 HARV. L. REV. 2004 (2003). I am therefore with Martha Fineman in this project when she asks, "[w]hy not just abolish the category as a legal status and, in that way, render all sexual relationships equal with each other and all relationships equal with the sexual? On the other hand, the relationship that needs the resources and protection of society is the relationship between inevitable dependents, paradigmatically children, and their caretakers." *Cracking The Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER, SOC. POL'Y & L. 13 (2000) 21.

[14] The problem with the doctrine of "the right to marry" is straightforward: "If a state can define the boundaries of marriage, then it can manage its citizens' access to marriage through those boundaries. But if marriage is a fundamental constitutional right, such state attempts to restrict access to it should be viewed with great suspicion by the courts." PULL, *supra* note 5.

[15] Cf. Jane S. Schacter, *Sexual Orientation, Social Change, And The Courts*, 54 DRAKE L. REV. 861 (2006).

[16] FAMILY CODE, Art.1.

[17] Maggie Gallagher, *What Is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 790 (2002), "Normal marriage is normative. Marriage does not merely reflect individual desire, it shapes and channels it. Marriage as a social institution communicates that a certain kind of sexual union is, in fact, our shared ideal: one where a man and a woman join not only their bodies, but also their hearts and their bank accounts, in a context where children are welcome."

[18] See Jennifer Jaff, *Wedding Bell Blues: The Position Of Unmarried People In American Law*, 30 ARIZ. L. REV. 207 (1988).

[19] During the 19th century, 'marriage became central to the definition of citizenship, and marriage norms were deeply embedded in debates over the civil and political rights of former slaves, Native Americans, Asian Immigrants, and women.' Cott, *supra* note 9, at 1691. Today, the exclusion is, among others, against

same-sex couples, commitment partnerships and friendships, and polyamorous relationships.

[20] *Introduction: Nuclear Nonproliferation*, 116 Harv. L. Rev. 1999 (2003).

[21] See **Arturo M. Tolentino**, *Commentaries And Jurisprudence On The Civil Code Of The Philippines, Vol. 1*: The act produces a change of status; and the new status or relation is also called marriage. In this sense, marriage is a status involving duties and responsibilities which are no longer matter for private regulations, but the concern of the State. In this aspect, it is a civil or social institution, being the foundation of the family and the origin of domestic relations of the utmost importance to civilization and social progress. As such, it is defined as '*the civil status of one man and one woman, legally united for life, with rights and duties which, for the establishment of families and the multiplication of the species, are, or from time to time may thereafter be, assigned by law to matrimony*, at 220-221; **John Witte Jr.**, *From Sacrament To Contract: Marriage, Religion and Law In The Western Tradition* (1997).

[22] I say formally because of Art.36 of the Family Code, which really operates as a divorce clause. I tackle this provision in the article, *Chi Ming Choices: Art.36, A Coasean Analogue*, to appear at 82 Phil L.J __ (2007).

[23] **Estin**, *supra* note 6, at 1707, "Like a coin or a sword, the public structure of marriage has two sides. One, more benevolent, lends symbolic and material support to private family commitments. The other, more coercive, marshals the state's authority to control and regulate the most personal aspects of our lives."

[24] **Martha Albertson Fineman**, *Progress And Progression In Family Law*, 2004 U. Chi. Legal F. 1 (2004).

[25] **Martha Albertson Fineman**, *Masking Dependency: The Political Role Of Family Rhetoric*, 81 Va. L. Rev. 2181 (1995),

[26] **Vivian Hamilton**, *Mistaking Marriage For Social Policy*, 11 Va. J. Soc. Pol'y & L. 307 (2004).

[27] **Drucilla Cornell**, "Fatherhood And Its Discontents: Men, Patriarchy, And Freedom," in *Lost Fathers: The Politics Of Fatherlessness In America* 199, 200 (Cynthia R. Daniels ed., 1998).

[28] This conceptualism is almost ironic, when applied to Greek society in comparison with ours. As **Martha Naussbaum**, writing about Greek culture, pointed out: "We see, in particular, that it was possible not to single out the sexual appetite from the other appetites, as a source of special anxiety and shame; that it was possible not to categorize persons in accordance with a binary division between the homosexual and the heterosexual; that it was possible to regard the gender of one's sexual partner as just one factor in a sexual coupling, and not the most morally relevant at that; that it was possible to hold that same-sex relationships are not only not per se shameful, but potentially of high spiritual and social value." *Platonic Love And Colorado Law: The Relevance Of Ancient Greek Norms To Modern Sexual Controversies*, 80 Va. L. Rev. 1515, 1598 (1994).

[29] Gallagher, confident that marriage is for something because it is a "universal human institution," criticizes Drucilla Cornell's anti-marriage stance, at 780: "Drucilla Cornell is correct, but she does not see far enough. If marriage is just another word for an intimate union, then the state has no legitimate reason to insist that it even be intimate, unless the couple, or the quartet, want it so." The answer to this criticism is simply, yes, of course: the state has no legitimate reason to insist that any relationship be intimate in the first place, assuming the word "intimate" can even be defined. See **Gallagher**, *supra* note 18.

[30] How many, including some legal scholars, in this day and age, continue to speak of marriage as some out-of-this-world institution is a heavy tax on credulity. See, Katherine Shaw Spaht, *Covenant Marriage: An Achievable Legal Response To The Inherent Nature Of Marriage And Its Various Goods*, 4 Ave Maria L. Rev. 467, 468 (2006). "For Catholics, marriage is not simply a covenant, but by Christ's act, it is also a sacrament, 'the intimate mystery of God, manifested across the centuries.' The covenant represents the agreement between husband and wife, an exchange of promises, with God as a party, to join together for life for two fundamental purposes: (1) mutual love and support and (2) procreating and rearing the next generation. Marriage, which the covenant creates, is a natural, social institution, universally recognized across generations and culture, and is 'a response to God's design and the inherent necessity in the nature of man and woman, invited by God himself, to form a very special unity, 'one flesh.'" (citations omitted).

[31] Cass Sunstein demonstrates the same linguistic problem, viewed from the perspective of marriage as legal right or "the right to marry." "And what relationships are included within the right to marry? People do not have a right to marry their dog, their house, their refrigerator, July 1, or a rose petal. At most, people have a right to marry people. But the Supreme Court cannot possibly have meant to suggest that 'people' have a general right to marry 'people'; it did not mean to say that under the Due Process Clause, any 'person' has a right to marry a dozen other people, or five, or even two. We might conclude that the Court is saying at most that one person has a right to marry one another person. But if a right to marry exists, what is the basis for this particular limitation on the right?" See Sunstein, *supra* note 2.

[32] See Pull, *supra* note 5.

[33] See, Sunstein, *supra* note 2, at 2906. "[t]he 'right to marry' entails both some right of intimate association in the private sphere and...an individual right of access to the official institution of marriage so long as the state provides that institution. With respect to the access right, the best analogy is to the right to vote. As the Constitution is now understood, states are not required to provide elections for state offices. But when elections are held, the right to vote qualifies as fundamental, and state laws that deprive people of that right will be strictly scrutinized and generally struck down. The analogy between the right to marry and the right to vote is quite close. In both cases, the state may not be required to create the practice in the first instance. But so long as the practice exists, the state must make it available to everyone." 2096.

[34] Anita Benstein asks related questions in *For And Against Marriage: A Revision*, 102 Mich. L. Rev. 129, 210-211 (2003), "Why marriage? Who needs it? Not children and their parents, with whom the state can deal separately. Not believers in the sanctity of marital union: such persons remain free to perform rituals celebrating the pair bond. Why shouldn't American law abandon the status of marriage—just as it has abandoned other notorious comprehensive personal status related to race, gender, and mental condition—and allow the ordinary law of torts, property, crimes, and (especially) contracts to govern relations between adults?" 210-211.

Harry D. Krause provides an alternative formulation of the question: A pragmatic, rational approach would ask what social functions of a particular association justify extending what social benefits and privileges. Marriage, *qua* marriage, would not be the one event that brings into play a whole panoply of legal consequences. Instead, legal benefits and obligations would be tailored according to the realities—speak social value—of the parties' relationship. Put crudely, what does society/the taxpayer get in return from parties to a relationship in exchange for granting the partners specific rights and social (including tax) benefits? See *Marriage For The New Millenium: Heterosexual, Same Sex-Or Not At All?* 34 Fam. L.Q. 271, 276 (2000).

[35] For marriage's effect on single women, see Ariela R. Dubler, *In The Shadow of Marriage: Single Women*

And The Legal Construction Of The Family And The State, 112 YALE L.J. 1641 (2003). "Historically, marriage has functioned as a gnomon, the central pillar of a sundial, casting shadows outward and covering even women not formally under the law of coverture—the common-law system of husband-wife relations that 'covered' a married woman's legal identity with her husband's identity—or more modernized forms of marital status law." 1645.

[36] See **Herma Hill Kay,** *From the Second Sex to the Joint Venture: An Overview of Women's Right and Family Law In The United States During The Twentieth Century,* 88 CAL. L. REV. 2017 (2000).

[37] See **Martin J. Siegel,** *For Better or For Worse: Adultery, Crime, & The Constitution,* 30 J. FAM. L. 45 (1991). "While any constitutional challenge before the [] Court to state laws criminalizing adultery would be a longshot at best, there is much in the Court's older privacy jurisprudence that would lead the uninitiated, at least, to wonder why that is so.' The Article also proposes 'ways to recognize adultery as implicating the fundamental right of privacy: adultery as a protected marital choice, adultery as a relationship embraced by the freedom of association and adultery as an act protected by the individual's interest in sexual privacy."

[38] This is apparent in the discourse of those against gay marriage. **George W. Dent, Jr.,** in *Traditional Marriage: Still Worth Defending,* 18 BYU J. PUB. L. 419, 425 (2004), argues—"Nothing in the Constitution should bar a state from denying recognition to same-sex unions simply because the state considers them intrinsically immoral. However, that justification will not persuade anyone who doesn't already accept it." 420. He therefore states "[r]ecognizing gay marriage would impair the honor conferred on the institution. Neither American nor, with a few recent exceptions, any other society in history has recognized gay marriage. Most cultures have, at best, frowned on homosexuality. Many cultures, including those influenced by Christianity, Judaism, and Islam,,, have considered it a sin and, often, a crime. Most Americans would consider gay marriages a caricature of the real thing or even an insult to a relationship that they consider to have a sacred as well as a legal dimension. Even if one opposes that view, it is a fact we must acknowledge, just as we would have to note the rejection of pork in formulating a food policy for Jewish or Muslim populations."

[39]This discourse is similar to that promoted by feminist scholars during the second half of the 20th century in many Western countries. See, for example, **Katherine T. Bartlett,** *Feminism And Family Law,* 33 FAM. L. Q 475 (1999). "Feminism's principal contribution to the law of the family in the United States has been to open up that institution to critical scrutiny and question the justice of a legal regime that has permitted, even reinforced, the subordination of some family members to others. The family has long been idealized as a refuge—a 'haven in a heartless world'—requiring privacy and freedom from public interference. It still is. Feminists have attempted to pierce this shield of privacy, to reach the injustice of family relationships and the law that permits them."

[40] For a consciousness-raising account of the history of marriage, see **Dianne Post,** *Why Marriage Should Be Abolished,* 18 WOMEN'S RTS. L. REP. 283 (1997).

[41] See **Jana B. Singer,** *The Privatization Of Marriage,* 1992 WIS. L. REV. 1443 (1992).

[42] I can envision another strong area of public policy associated with marriage that ought to concern the regulators: reproductive health. If the State must have any obligation related to the deployment of desire, it is that obligation to ensure that everyone has a say as to whether they want to participate in the so-called circle of life and reproduce. If they do, then regulators should ensure that conditions for reproduction are such that the next population will be, at a minimum, healthy bodies; if they don't or can't, the State should not only not prevent access to birth control, but also actually provide such access through

information dissemination and subsidy as a form of positive right.

[43] For a contracts approach to marriage, see **Marjorie Maguire Schultz**, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204 (1982); **Elizabeth S. Scott and Robert E. Scott**, *Marriage as a Relational Contract*, 84 VAL. L. REV. 1225 (1998); *Marriage as Contract and Marriage as Partnership: The Future of Antenuptial Agreement Law*, 116 HARV. L. REV. 2075 (2003); **Martha M. Ertman**, *Contractual Purgatory for Sexual Marginorities: Not Heaven, But Not Hell Either*, 73 DENV. U. L. REV. 1107 (1996), offering "a model that describes how selected sexual regulations progress between the public extremes of condemnation and rights, sometimes stopping along the way in contract' which 'may offer sexual marginorities a legal purgatory, where they suffer until they are sufficiently purified to enter the heavenly realm of public right (or until the law is purified of anti-gay bias)." 1108-1109.

[44] FAMILY CODE, ARTS. 1-34.

[45] I thus concur with **Nancy D. Polikoff**'s views about problems associated with the homosexual agenda to promote same-sex marriage. "The desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism." *We Will Get What We Ask For: Why Legalizing Gay And Lesbian Marriage Will Not "Dismantle The Legal Structure Of Gender In Every Marriage*, 79 Va. L. Rev. 1535 (1993).

[46] **Camille S. Williams**, *State Marriage Amendments, Essentialist Arguments and the Non-Essential Woman*, 7 FLA. COASTAL L. REV. 453 (2005).

[47] **Elizabeth F. Emens**, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N. Y. U. REV. L. & SOC. CHANGE 277 (2004).

[48] **Martha Fineman**, *Masking Dependency. The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181 (1995).

[49] For a proposal to provide some legal protection to unmarried persons in some form of committed relationships, see **David L. Chambers**, *For the Best of Friends and For Lovers of All Sorts, A Status Other Than Marriage*, 76 NOTRE DAME L. REV. 1347 (2000). "The new status, 'designated friends' who register their relationships with the government, are 'empowered to make and undertake the obligation to make financial and medical decisions on behalf of the other in case the other becomes incapacitated; they are entitled to family leave, on the same terms as married persons, to take care of the other if the other becomes seriously ill; they are entitled to the same testimonial privileges as spouses in civil and criminal cases if they enter the designated friend relationship at least two years prior to the event giving rise to the case; if the other dies without a will, they are entitled to some specified modest share of his or her estate; and, finally, if they are government employees, they will be subject to anti-nepotism rules that apply to employees who are married to each other." 1352-1353.

[50] See **Ariela R. Dubler**, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L. J. 756 (2006).

[51] For arguments for and against polygamy and polyandry, see **Michael G. Myers**, *Polygamist Eye for the Monogamist Guy: Homosexual Sodomy...Gay Marriage...Is Polygamy Next?* 42 HOUS. L. REV. 1451 (2006); **Keith E. Sealing**, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691 (2001); **David L. Chambers**, *Polygamy And Same-Sex Marriage*, 26 HOFSTRA L. REV. 53 (1997)'; EMENS, *supra* note 49.

[52] See **Hema Chatlani**, *In Defense of Marriage: Why Same-Sex Marriage Will Not Lead Us Down a Slip-*

pery Slope Toward the Legalization of Polygamy, 6 APPALACHIAN J. L. 101 (2006).

[53] The movement of law in other countries has been to provide legal recognition to many other forms of relationships through civil unions or domestic partnerships. See **Martha M. Ertman**, *The ALI Principles' Approach To Domestic Partnership*, 8 DUKE J. GENDER L. & POL'Y 107 (2001);

[54] This marriage regime is therefore not even comparable to early 20th century United States legislation which provided for fault-based grounds for marital dissolution. The revolution in marriage law worldwide is not about whether divorce ought to be accessible but whether divorce ought to be granted even without proof of fault. For a history of the 'no-fault' revolution, see **James Herbie Difonzo**, *Customized Marriage*, 75 IND. L. J. 875 (2000).

[55] Efforts are underway in the United States to put a break on the no-fault divorce revolution of the second half of the 20th century through proposals that mimic fault-based regimes, not through law but through contract. See **Elizabeth S. Scott**, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9 (1990), proposing 'precommitment mechanisms'; **Katherine Shaw Spaht**, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547 (1998), supporting "covenant marriage."

[56] For arguments and counter-arguments on divorce and children, see **Katherine Shaw Spaht**, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547 (1998); **Linda J. Lacey**, *Mandatory Marriage "For The Sake Of The Children": A Feminist Reply To Elizabeth Scott*, 66 TUL. L. REV. 1435 (1992); **Robert M. Gordon**, *The Limits Of Limits On Divorce*, 107 YALE L. J. 1435 (1998).

[57] **Marthan Albertson Fineman**, *Progress and Progression in Family Law*, 2004 U. CHI LEGAL F. 1 (2004), 10.

[58] See **F.C. Fisher**, *The Civil Code Of Spain* (4TH ED., 1930).

[59] See **Richard Dawkins**, *The Selfish Gene* (1976).

[60] See **Lawrence v. Texas**. 539 U.S. 558 (2003); SYLVIA LAW, COMMERCIAL SEX: BEYOND DECRIMINALIZATION, 73 S. CAL. L. REV. 523 (2000).

[61] For a study of trends in family law as the "diminution in the law's discourse in moral terms," see **Carl E. Schneider**, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).

[62] See **Martin J. Seigel**, *For Better or For Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45 (1992); **Brenda Cossman**, *The New Politics of Slavery*, 15 COLUM. J. GENDER & LAW 274 (2006).

[63] **Estrada v. Escritor**, A.M. No. P-02-1651, 22 June 2006.

[63] **Estrada v. Escritor**, A.M. No. P-02-1651, 22 June 2006.