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UNIVERSALISM, LIBERAL THEORY, AND THE PROBLEM OF GAY MARRIAGE

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I. INTRODUCTION

Liberalism, both contemporary and classical, rests at heart on a theory of human nature, and at the center of that theory lies one core commitment: all human beings, qua human beings, are essentially rational. There are two equally important implications. The first we might call the "universalist" assumption: all human beings, not just some, are rational—not just white people, men, freemen, property owners, aristocrats, or citizens, but all of us. In this central, defining respect, then, we are all the same: we all share in this universal, natural, human trait. The second implication, we might call the "individualist" assumption: because each one of us is rational, each one of us is not only competent to, but best-equipped to formulate and act on his or her own individually held conception of the good life. We are each capable of deciding for ourselves what to think, believe, and do within the sphere of self-regarding behavior. We all share in this capacity equally. Whatever may be our otherwise terribly and radically unequal endowments, we share equally the capacity to decide for ourselves what is our own best conception of our individual self, future, and interests.[1]

Over the last fifty years of American constitutional law, this liberal conception of our nature has provided the foundation for a distinctly liberal legalist understanding of two of our most central constitutional rights—equal protection and due process. First, at least since Brown v. Board of Education[2] the universalist interpretation of human nature has grounded a particular conception of the equality guaranteed by the Fourteenth Amendment. Liberalism holds that we are all in some essential way the same. Accordingly, equality law in the post-Brown era holds that we must be treated the same, unless a

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1. See RONALD DWORKIN, Liberalism and Justice, in A MATTER OF PRINCIPLE 179, 188-204 (1985); ISAIAH BERLIN, Two Concepts of Liberty, in FOUR ESSAYS ON LIBERTY 118, 131-34 (1970). These may be the best modern statements of the universalist and individualist assumptions at the heart of contemporary liberalism.

2. 347 U.S. 483 (1954).

case can be made for the rationality of various distinctions between us. In this sense, equality law and the rights it entails are all about what follows from our universality. Second, the rationalist conception of human nature, over roughly the same time period, has been at the heart of a particular interpretation of the liberty guaranteed by the Fourteenth Amendment: we are all rational and equally capable of ascertaining what for us would be a good life. At least since Griswold v. Connecticut,[3] the liberty we are promised gives us the right to do precisely that, unimpeded by the state. Liberty law in a post-Griswold liberal legal conception is, in this sense, the bundle of rights that are entailed by our universally shared but radically differentiating rationality.[4] In the last forty years or so, the constitutional law governing our liberty has been about the scope of our negative liberty to be and do what we want. More bluntly, it is about what has come to be called "the right to be left alone."

There can be no doubt that this liberal understanding of our nature, and the wide range and bewildering variety of interpretations of constitutional rights and norms that it undergirds, have prompted moments of very real moral progress over the course of the second half of this century. Surely it is fair to say that the acknowledgment of our universality lying at the heart of so much of Fourteenth Amendment jurisprudence over the last forty years has not only prompted the creation of a more equal and free society, but has also enabled us to at least glimpse the expansive and inclusive community that is equality's natural complement. The Court's overruling of Plessey v. Ferguson[5] in Brown, the various sex equality cases from the 1970s,[6] and the current Court's recent decision in Romer v. Evans[7] all rest at the heart of the profoundly liberal and universalist claim that what we share is what makes us human. It is by virtue of our commonality that the state must accord all of us, without regard to race, sex, or sexuality, equal protection of the law and the dignity and respect that it entails. The common message of these great liberal cases is that it is, at root, our commonality—our shared, universal nature—that implies that laws segregating some of us from others, or denying some but not others civic duties and responsibilities, or denying some but not others access to the levers of political change, are unconstitutional. These decisions have given us not only a more just legal order, but a larger and more moral community as well.

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3. 381 U.S. 479 (1965).

4. See RONALD DWORKIN, The Moral Reading and the Majoritarian Premise, in FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 1, 21-26 (1996).

5. 163 U.S. 537 (1896).

6. See Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

7. 517 U.S. 620 (1996).

Likewise, in decisions over roughly the same time period, the thoroughly liberal acknowledgment of our individual capacity for rationality has inspired dramatic expansions of our liberty. First, the Court's early insistence on the parent's right to educate his child as he sees fit,[8] and then its insistence in Griswold, Eisenstadt v. Baird,[9] Roe v. Wade,[10] and Planned Parenthood v. Casey[11] on the individual's right to decide for oneself how, whether, and when to parent all rest at heart on the quintessential liberal and rationalist claim that we are each capable of and must be free to formulate our own fallible responses to life's deepest mysteries, and must therefore be free of the state's meddling desire to do it for us. Because of these constitutional developments over the last fifty years, we, as a culture, are more aware than our ancestors were of our shared universal nature and of the demands that universality places upon the state, the community, and the law. Because of these developments, we, as a culture, are more free than they were to decide individually how to live our intimate and private lives, and on which predicated set of beliefs. We are also more free than our ancestors were to make these decisions rationally and by our own lights and chosen goals rather than acquiesce in the presumed imperatives of state, community, tradition, nature, or fate.

There can also be no doubt, however, that these revolutionary, expansive, and liberal changes in our self-understanding have left serious difficulties in their wake, as scores of critics of liberalism and of legal liberalism, in particular, have made clear over the last thirty years or so. I will focus on what strikes me as the two most intractable problems. First, pointed challenges to the liberal legalists' commitment to universalism have come from a range of identity theorists, activists, and indeed, entire peoples. The question, or challenge, posed to liberalism by this eclectic collection of critics is essentially this: is it really true, as the liberal seems to believe as an article of faith, that the flame of inclusion in a hegemonic community, defined by universally shared human traits, is worth the lost candle of identity or distinctiveness a particular subcommunity or culture may be asked to sacrifice?[12] Does the African American community

8. See Meyer v. Nebraska, 262 U.S. 390 (1923).
9. 405 U.S. 438 (1972).
10. 410 U.S. 113 (1973).
11. 505 U.S. 833 (1992).
12. See generally DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987) (exploring through allegory why racial inequality has yet to be achieved in the United States); Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581 (1990) (critiquing feminist legal theorists who posit a universal women's experience because it works to subvert and erase the experience of women of different races, classes, and sexual orientation); Mari J. Matsuda, Voices of America: Accent, Antidiscrimination Law and Jurisprudence for the Last Reconstruction, 100 YALE L.J. 1329 (1991) (arguing that linguistic tolerance should be a goal of the law and offering a

sacrifice too much when in the name of liberalism it integrates its strongest members out of the black community and into the enclaves of privilege, all so as to honor a shared universal nature that transcends race? Does liberal feminism hold, as its many detractors claim, to a false and patriarchal ideal, betraying women, if it aims to do nothing more than increase the number of "women in suits." What will happen to gay and lesbian culture, to say nothing of queer theory, when it is no longer queer to be queer? Should we, or when should we, forego the securities, strengths, and challenges of our distinctive identities for the allure of the community's universalistic embrace? If what distinguishes us is oftentimes as dear and precious as what we share, then the justice of liberalism's admonition to forego particularity for the sake of our universality is not so clear. If there are costs involved in accepting the liberal's promise of universality—costs to our sacrificed distinguishing identities—we need to assess what those costs are. We cannot assume them away by blindly holding onto the preemptive moral importance of our shared human traits as an article of faith.

Equally poignant challenges to the individualist side of liberalism, and hence the libertarian thrust of our constitutional law of liberty and substantive due process, have come from communitarians, relational feminists, and various Marxist scholars. The common question posed, in many different ways, by this group of critics who otherwise have little or nothing in common is something like the following: is the flame of individual freedom (to stick with my original metaphor) worth the candle of community, of connection, of relation, of the ethic of care, and of the responsibilities and duties to others it implies, that may have to be sacrificed to insure it?[13] To put it in selfish terms, does my "right to be left alone" come at too high of a cost to my need not to be? We have a right to be left alone, but needs that can only be met interdependently. For example, we have rights to birth control and early trimester abortions, but grossly unmet needs for quality, publicly funded childcare. Has the right to the former, perhaps, made it more rather than less difficult to meet the need for the latter? Similarly, we have a right, perhaps, to die—or at least prominent liberal legal theorists are now arguing as much—but what we

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reinterpretation of Title VII to address the subordination of linguistic difference); Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (stating that Critical Legal Studies should look to the experience of non-whites in reconstructing legal concepts and strategies); Robin West, Jurisprudence and Gender, 55 U. CHI. L. REV. 1 (1988) (arguing that conceptions of "human nature" in modern jurisprudence are untrue of women's lives).

13. See MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996); PLURALISM, JUSTICE, AND EQUALITY (David Miller & Michael Walzer eds., 1995); MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY (1993).

desperately need is quality, publicly funded health care. Might the gain of the right to die make more, rather than less, difficult the campaign to meet the need for the latter? No doubt, we have a right to educate our children in our own home, in private schools, in any language we please, with our own money, and by our own lights away from the prying eye of the state, but what our children need is a decent and civic education. When put more altruistically, the communitarian's complaint is, if anything, even more pressing: does my right to be left alone come at too high of a cost to my civic responsibilities to others? Does my right to ignore the panhandler on the street—to avert my eyes, keep my wallet in my pocket, and preserve my private space—come at too high of a sacrifice to my responsibility and my civic duties to help others in need? We have a right to be left alone, but both a need for and an obligation to engage in civic, public, deliberative life. If our rights of self-deliberation, self-creation, and self-control, all justified and grounded in our presumed rationality, come to threaten our needs for others and our responsibilities and duties toward them, then we need to assess whether the gain is worth the cost. We cannot assume that the question answers itself, or that the context within which any particular trade-off arises might not make a difference.

The alternatives to liberalism, however, are not particularly palatable. Identity theorists and their legions of followers need to critically rethink the politics, policies, ethics, and societies that follow from a denial of universalism. To reverse the questions posed above: do we really want, in the name of the integrity of identity, a confederation of separatist communities with ethnic houses for every ethnicity, not only on college campuses but in the larger society as well, with the culture balkanized and the state bosnianized, with our differences both emphasized and infinitely subdivided?

Communitarians also need to tread carefully. What politics will, in practice, follow from a denial of the radical rationalist individualism so squarely at the heart of not only modern liberal theory but of contemporary American life? Do we want a return to the constrained choices of the past in our intimate lives, where young girls face mandatory heterosexuality, back-alley abortions, shotgun weddings, and loveless marriages, where divorce is hard to come by, and child raising—an ennobling profession for some, but a life of drudgery for others—is mandated by fate for all? Likewise, as much as we may legitimately worry about the tethering of our bonds of civic engagement, do we really want to embrace a world in which such engagement displaces independent thought? As much as we may legitimately worry, for example, that the independent schools movement siphons the best students and parents from public schools, and weakens considerably the bonds of democracy and community, do we

really want them abolished? Can we even envision, much less endorse, the monotonous, hegemonic conformity that might very well follow on the heels of a serious attack on liberal individualism?

For me, these questions are rhetorical. The answer to all is no. The motivating impulses of both the identity theorists' and the communitarians' critiques of liberalism are understandable, but the political implications of a full-scale rejection of fundamental liberal norms are unacceptable in the end. This Essay will explore the possibility of a mid-way correction, rather than rejection, of liberalism, so as to meet at least some of the objections posed by identity theorists and communitarians respectively. We need to reconstruct liberalism in order to take into account the meaning and weight of these objections without losing the thread of its motivating impulse.

Generally, I propose that liberalism fails to take seriously the differences between groups of people, as identity theorists claim, and the interconnections and interdependencies of all of us, as communitarians insist, and that the failure to do so has had a profound and negative effect on our constitutional law and rhetoric. I suggest it has significantly undermined the classic liberal arguments for many of our most vulnerable and controversial contemporary liberal rights and entitlements. Nevertheless, it would be wrong to jettison either the universalist or individualist aspirations of liberalism, or the liberal legal defenses of the vital and embattled rights that tenuously follow from those assumptions. Rather, in theory, a friendly amendment to liberalism's core convictions is needed. While we share a universal nature, some traits differentiate some of us from the rest of us. While we are in some aspects of our lives individuals first and foremost, we are also interconnected in comparably profound ways to and with others. In liberal constitutional practice and doctrine, we need to recognize that the animating core commitments of liberalism provide, at most, a necessary but insufficient condition for many of the rights that have proven to be most vulnerable today. Where a group seeking a right is different in some way—for example, differently vulnerable to the harms that flow from sexual assault, or differently committed to child-raising, or differently vulnerable to hate speech—what is needed is a showing that the harms occasioned by sexual assault and hate speech are real and demand a response, or that child-raising is a vital human activity and demands greater communal support. Similarly, where an individual right of self-governance impacts social, intimate, or structural connections between persons, as they almost invariably do, we need to show that the interaction is for the good: that abortion rights strengthen the community and the family despite the severance of the connection between mother and fetus; or that birth control, abortion rights, or same-sex marriages would constitute an improvement in, not a

threat to, the bonds of tradition tying our modern institution of family to our history and our larger society. I am certain a commitment to liberalism, universalism, and individualism is necessary to provide a floor for these arguments; without such a commitment, there is just no reason for these arguments to be heard, much less honored or heeded. However, a liberal commitment to universality or individualism provides only the floor because it is not sufficient to make the case for virtually any of our modern rights. In addition, an insistence on these commitments, if it blinds us to the differences and interconnections that also define us, will ultimately frustrate rather than further our attempts to articulate such a case.

In the last section of this Essay, I will attempt to apply my friendly amendment to liberal legalism to the current debates swirling around the problem and promise of same-sex marriage. I will argue, in brief, that the more or less standard liberal arguments for gay marriage are flawed in the ways described above. They relentlessly deny morally salient differences between gay and straight sexuality and same-sex and opposite-sex marriage, and they relentlessly deny the essentially communitarian, rather than individualistic, nature of the institution of marriage itself. In so doing, they not only threaten to win the battle but lose the war by securing an entitlement to gay marriage with an argument that carries a potential for very real backfiring, but they also incur a substantial opportunity cost. The best case for same-sex marriage is one that underscores not only the universality of gay and straight culture, but also the salient differences between them and the interdependencies, rather than the independency, of human individuals. By insisting upon those differences and their moral significance we may not only better secure the human rights of this substantial subcommunity among us, but we may immeasurably strengthen the institution of marriage, which despite its many and heralded flaws, continues to enrich the lives of many of us.

II. EQUALITY

Liberalism rests, again, on the defining conviction that all human beings, by virtue of being human, share an essential nature, and that it is by virtue of that commonality that they are entitled to equal treatment, dignity, and respect. From this conception of our nature, liberal constitutional lawyers have implied a particular interpretation of equality and of the constitutional mandate for equal protection. According to liberal legalists, the liberal state must treat equally people who are the same. Consequently, the constitution demands that the courts correct cognitive mistakes when reviewing the state's work. If a state legislature sees a difference where there is none, then the court is justified in striking down the legislation based

on that faulty premise. Armed with this logic, the United States Supreme Court has, over the last fifty years, struck en masse an entire regime of Jim Crow statutes that treated blacks differently than whites,[14] a goodly number of so-called "Jane Crow" statutes that treated women differently than men,[15] and a host of other bits and pieces of legislation that have, on occasion, irrationally differentiated illegitimate from legitimate children,[16] immigrants from citizens,[17] and even the poor from the rich,[18] depending on the right or entitlement at stake. This liberal understanding of equality, to repeat, has been a source of substantial moral progress over the course of the last fifty years.

However, the liberal understanding of equality has simultaneously been the source of moral regression. At least one of the reasons, albeit not the only one, is that its core logic—we are all essentially the same and, therefore, must be treated the same—inclines the liberal to vastly overstate the degree of our uniformity, and nearly blinds him to the extent of our differences and to the moral significance of these differences. Race, to take only the most obvious example (liberal protestations to the contrary notwithstanding), is not only skin deep. It is not the case that the only difference between me and my African American colleagues or students is the utterly contingent, trivial, and morally insignificant one of skin color, and that in all other respects we are essentially the same. The difference of race, both real and consequential, is that African Americans are, very likely, descended from slaves, and I, very likely, am not. That difference suggests others, equally real and consequential. She has, very likely, suffered by virtue of her ancestry, and I, very likely, have not.[19] This difference matters. It determines to a large measure differences in our opportunities, our vulnerabilities, our sensitivities, our interests, and our needs. By insisting on universality, the liberal understanding of equality undermines the logic of Jim Crow, but just as clearly, by denying or diminishing the magnitude of our difference, the liberal legalist undermines the logic of affirmative action. It

14. See Brown v. Board of Educ., 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).

15. See Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Caban v. Mohammed, 441 U.S. 380 (1979); Parham v. Hughes, 441 U.S. 347 (1979); Craig v. Boren, 429 U.S. 190 (1976); Geduldig v. Aiello, 417 U.S. 484 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

16. See Clark v. Jeter, 486 U.S. 456 (1988); Trimble v. Gordon, 430 U.S. 762 (1977); Levy v. Louisiana, 391 U.S. 68 (1968).

17. See In re Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

18. See Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

19. See PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991).

is now argued by scores of critical race theorists that the consequences of that denial have been nothing short of disastrous.[20]

The same pattern, and the same limitations, beset liberal and liberal feminist attempts to right historical and ongoing wrongs against women. By insisting on the shared universality of male and female nature, and then building rights of nondiscrimination on that foundation, liberal and liberal feminist constitutionalists have achieved major victories parallel to those in the area of race. They have undermined a Jane Crow regime that denied rights and responsibilities to women on the grounds of their intellectual and moral inferiority.[21] However, by virtue of precisely that commitment to universality, liberals and liberal feminists have also felt compelled to deny or diminish important differences,[22] such as women's different biological role in reproduction and the scores of differentiating needs that difference in turn entails;[23] women's different and greater vulnerability to rape, harassment, and sexual assault;[24] women's differential embrace of stereotypically "feminine" rather than masculine ways of self-presentation;[25] women's different perceptions of and reactions to sex and violence;[26] women's different degree of interdependency and in-

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20. See, e.g., Charles R. Lawrence III, Each Other's Harvest: Diversity's Deeper Meaning, 31 U.S.F. L. REV. 757 (1997) (arguing that diversity is an essential tool for eradicating racism).

21. See Wendy W. Williams, Notes from a First Generation, 1989 U. CHI. LEGAL F. 99, 110-11 (1989).

22. See CATHARINE A. MACKINNON, On Difference and Dominance: On Sex Discrimination, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32 (1987) (critiquing liberal feminism's adherence to equality as sameness).

23. See Christine A. Littleton, Reconstructing Sexual Equality, 75 CAL. L. REV. 1279, 1326-27 (1987) (arguing that the workplace should not treat women's biological difference punitively, but should render it costless by not depriving pregnant women of money, status, and opportunity); Wendy W. Williams, Equality's Riddle: Pregnancy and the Equal Treatment/ Special Treatment Debate, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 327 (1984-85) (advocating that the legal treatment of illness and disability should be readjusted to accommodate pregnant workers, thus guaranteeing women's equality in the workplace).

24. See, e.g., Susan Estrich, Rape, 95 YALE L.J. 1087 (1986) (arguing that masculine conceptions of violence and self defense have skewed rape law against women's interests). But see KATIE ROIPHE, THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS 89-90 (1993) ("Rules and laws based on the premise that all women need protection from all men, because they are so much weaker, serve only to reinforce the image of women as powerless.").

25. See, e.g., Mary Anne C. Case, Disaggregating Gender From Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 YALE L.J. 1, 3-4 (1995) (arguing that Title VII should, if correctly applied, provide protection against the discrimination of effeminate men for exhibiting characteristics associated with femininity).

26. See, e.g., Estrich, supra note 24.

volvement with infants and small children;[27] and, arguably, women's different ways of thinking, feeling, and caring for others.[28]

The quintessential liberal-legalistic denial of difference in both the areas of race and sex have had two pernicious consequences, one of which has been detailed in critical race and critical feminist legal literature. The second consequence has been relatively neglected. The first is its potential for backlash. In the race context, the appropriation of liberal, universalistic norms by opponents of affirmative action over the last ten years or so may best exemplify the problem, but the seeds of both the denial and the harm it would cause were present early on. In Brown, the force of liberal legal logic relegated the evidence of difference, as well as its moral significance, to a footnote.[29] Had that difference—the differential harmful effect of de jure segregation on the minds and self esteem of school children—been centralized in the text of the opinion, rather than marginalized in a footnote, our constitutional law governing race relations might look very different today. If we had been clearer from the outset that the trigger of constitutional intervention into the state's affairs on matters of race is not just differential treatment in the face of universality, but the differential and greater suffering by African Americans as a result of our differing histories, then not only might the case for affirmative action, as indicated, have been more straightforward and less riddled with paradox, but the case for the constitutionality of laws criminalizing hate speech might look very different. The segregatory law or ordinance, on such a view, is a paradigm example not of an irrational classification on the basis of a "trivial" distinction, but rather a paradigm example of hate speech.[30] The segregatory law or ordinance is harmful, and so harmful as to be unconstitutional, because of its differentiating effects on the radically different sensibilities of African American and majority citizens.[31]

In the sex or gender context, the liberal insistence on the essential sameness of men and women, or the triviality of any differences, has also caused real harm and threatens to cause more. Part of the harm is the diversion of resources. Rather than strive to change the content of law so that it meets the needs and respects the experiences of

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27. See, e.g., Mary E. Becker, Maternal Feelings: Myth, Taboo, and Child Custody, 1 S. CAL. REV. L. & WOMEN'S STUD. 133 (1992) (advocating a preference for maternal deference in child custody cases).

28. See, e.g., MARY FIELD BELENKY ET AL., WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND (1986) (examining women's ways of knowing); Joan C. Williams, Deconstructing Gender, 87 MICH. L. REV. 797, 810-11 (1989).

29. See Brown v. Board of Educ., 347 U.S. 483, 494 n.11 (1954).

30. See Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 DUKE L.J. 431, 439-41 (1990) (positing that Brown v. Board of Education can be read as regulating the content of racist speech and, in turn, as an exception to the general rule that content regulations are unconstitutional).

31. See id.

women, effort is directed toward the end of rendering the law neutral. For example, the standard of reasonableness defining provocation in criminal law reduces the charge of a man who murders his wife from murder to manslaughter if he harbors a suspicion, whether or not well-grounded, that she engaged in adultery. Rather than change the content of the standard of "reasonableness," liberal legalism directs us toward the end of ensuring that this standard remains unchanged, gender-neutral, and thereby reduces a woman's murder of her husband to manslaughter under similar circumstances.[32] The obvious fact that this standard of reasonable behavior—that even a "reasonable person" might be provoked to kill his wife if he thinks she slept with another man—reflects a norm held by some men, perhaps, but very few women. This results in the exculpation of many men for the killing of their wives and almost no women for killing their husbands, and, accordingly, endangers many women but very few men. These facts simply go unnoticed—and not just incidentally. Again, it is central to liberalism to deny precisely such differences.

Similarly, the reform of rape law was retarded in this country, not advanced, by a comparable diversion of resources. Examples of the law's grotesqueries are the legality of forced and violent intercourse with one's wife, under the so-called "marital rape exemption;" the requirement that a rape victim resist a violent rape to the utmost so as to evidence her non-consent; or the ongoing inability or refusal of prosecutors to bring cases or secure convictions of men who have raped acquaintances or intimates. Rather than address these grotesqueries, liberal reform efforts were instead aimed at the outset of the rape reform movement toward the dubious goal of making the law neutral, to redefining rape as the nonconsensual intercourse with another, rather than a woman, and redefining the marital rape exemption as exempting the rape of one's spouse rather than one's wife, to name a few.[33] Again, the obvious fact that rape is overwhelmingly a crime committed by men upon women, and that consequently, these norms, whether or not gender neutral, overwhelmingly exculpate men rather than women, and endanger women but not men, goes unnoticed, and again, not incidentally. Liberalism is at its heart committed to not notice such differences.

Examples of this phenomenon could easily be multiplied. To cite recent examples, rather than work to change the standards of "masculinity" at Virginia Military Institute (VMI),[34] West Point, the Naval

32. For a compelling critique of heat of passion defenses on this and other grounds, see Victoria Nourse, Passion's Progress: Modern Law Reform and the Provocation Defense, 106 YALE L.J. 1331 (1997).

33. See SUSAN ESTRICH, REAL RAPE 81-82 (1987).

34. See United States v. Virginia, 116 S. Ct. 2264 (1996).

Academy, or the Price Waterhouse accounting firm[35] so that these institutions would be more comfortable places for vast numbers of women, enormous effort has been put toward the goal of insuring access to these institutions by the exceptional women who actually comply with those masculine norms. Obviously, this allocation of resources is not accidental. Liberal feminism is firmly committed to denying the correlation between "feminine" ways of acting and women's behavior, and is accordingly not going to commit itself, in the name of sex discrimination, to the eradication of "discrimination" against the feminine.[36]

In some cases, however, the harm caused to women by the flat assertion of sameness in the face of difference is greater than just that of benign neglect. The insistence on the sameness of men and women made it possible for U.S. Supreme Court Justice Ruth Bader Ginsburg and others to argue, in the seventies, for the unconstitutionality of laws that essentially permitted employed or once-employed widows, but not widowers, to "double-dip" from social security and military benefits plans because of a presumption worked into the relevant regulatory schemes that widows, but not widowers, are fully "dependent" on their spouses.[37] The insistence on the falsity of that presumption—the denial of difference—invalidated the laws, thus freeing us of the burden of a false stereotype, while simultaneously having the effect of depriving widows who had been employed at marginal or depressed wages and who were, nevertheless, dependent on this source of income. The insistence on the sameness of men and women with respect to reproductive and wage labor has had even more pernicious and far-reaching negative effects on women.[38] It has tremendously burdened the effort, whether pursued through legislative or adjudicative means, of securing decent maternity leaves. If pregnancy, childbirth, and nursing—the crux of the difference in the reproductive labor of the sexes—are truly inconsequential differences between men and women, then the logic of denying the different needs of women when bearing children—needs for time away from wage labor, and support while engaged in reproductive labor—is unassailable.

Again, this "backfiring" potential of a liberal or, as it is sometimes called, "formal" conception of equality is broadly acknowledged by

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35. See Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

36. For the best attempt to resist this tendency, see Case, supra note 25, at 3 ("So long as stereotypically feminine behavior, from wearing dresses and jewelry to speaking softly or in a high-pitched voice, to nurturing or raising children, is forced into a female ghetto, it may continue to be devalued.").

37. See Califano v. Goldfarb, 430 U.S. 199, 217 (1977); Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973). Justice Ginsburg argued these cases for the ACLU.

38. See Mary E. Becker, Prince Charming: Abstract Equality, 1987 SUP. CT. REV. 201, 202-09 (1987).

feminist theorists, or at least the possibility of it is understood.[39] There is also, however, a not-so-widely understood opportunity cost. By insisting so adamantly on sameness and on the formal equality that presumably follows from it, the liberal advocate loses the opportunity to put forward precisely those affirmative arguments for change that might most meaningfully move the culture in a morally desirable direction. For example, if we could acknowledge that the case for affirmative action stems from a fundamental difference—in the case of black and white relations, in the difference between a slave and free ancestry—then we could begin to fashion a better understanding than we presently possess of the impact of history, both personal and cultural, on present endowments; of the relation between the personal and cultural stories of our relatives to our present circumstances; of the impact of a slave history on not only our individual circumstances, but also on our perceptions and treatment of others; and ultimately, of course, of the justice of a case for reparations. It is simply not possible to make or hear such arguments in the context of a debate framed so relentlessly around the parameters of universality.

In the context of gender, the opportunity cost of the denial of difference is, if anything, more pronounced. We need to understand as a culture, and we presently do not, that the macho, gunslinging, vengeful, provocation norm cited above is not a good norm of "reasonableness" no matter how many men hold it—that no matter how taunting, teasing, "provocative," or bitchy the behavior of one's cuckolding wife, it really is not reasonable to respond by killing her.[40] It would be better—certainly better for women, but also better as a matter of civic and domestic peace, better as a matter of societal health, and better for justice—if we were to embrace as a legal standard a norm of reasonableness that required of cuckolded spouses' behavior more measured, more pacific, and considerably less violent. Similarly, we need to understand as a culture and as teachers that the confrontational and often explicitly misogynist pedagogical techniques that characterize military training in elite and not so elite academies create graduates unfit for leadership, or even citizenship, in a sexually integrated society, or for that matter a sexually segregated one. It would be better—certainly better for women, but also better as a matter of civic and military virtue—if our norms of excellence in such academies were moved a considerable measure toward a model that attempts an integration of masculine and feminine strengths. The same can be said of police forces, as the Warren Christopher commission investigating the Los Angeles Police Department (LAPD) in the

39. See id. at 201-02.
40. See Nourse, supra note 32.

aftermath of the Rodney King episode apparently concluded.[41] We need to understand as a culture, and as professionals, employers, and lawyers, that our current norms of aggressive, backslapping, confrontational, conquest-obsessed behavior in the legal profession are not good norms to hold. It would be better—certainly better for women, but also better as a matter of professionalism—if our norms of excellence in our chosen profession similarly integrated feminine as well as masculine ideals of justice, care, service, and advocacy.

My main point here is not to make the case for any of these conclusions, but to insist that they are all arguments that deserve development, and they stand in a complicated and precarious relationship with liberalism. On the one hand, their airing requires an unswerving commitment to liberalism; without a conviction that our shared humanity implies equal respect, they will not be heard. However, on the other hand, their airing is presently hampered by the liberals' persistent denial of difference. Equality—understood as the equal treatment of things that are the same—will not be sufficient to imply the conclusion that a "reasonable woman" standard should be the norm against which conduct is measured in the area of sexual harassment law; or that norms of reasonableness that reflect women's rather than men's judgments about sex and violence should govern the law of provocation in criminal law; or that Price Waterhouse should not only not discriminate against the masculine woman, but should rethink its masculine norms as they affect both men and women; or that VMI or the LAPD should begin to teach techniques of conflict resolution or community policing that are grounded in stereotypically feminine rather than masculine ways of being. Liberalism, and the commitment to equality that it grounds, will be sufficient, again, to exculpate the occasional wife who kills a cuckolding husband, the masculine woman denied a promotion or fired from Price Waterhouse, or the would-be female cadet denied admission to an all male military academy. However, there is nothing in the logic of liberalism or the liberal legal understanding of either equality or the rights that it grounds, to generate even a kernel of skepticism about the merits of any of these criminal, cultural, or behavioral norms themselves. Equality doctrine, theory, and politics—so long as equality is understood as grounded in perceptions of universality—is not only insufficient to mount these challenges, but it seriously undermines them as well by masking and then denying the need for them.

Nor is it the case that a serious commitment to equality precludes the articulation of such arguments, as liberal feminists, or formal equality feminists, of the last twenty years have feared. It is simply

41. See Case, supra note 25, at 86.

not the case, to paraphrase from Wendy Williams' early statement of this idea, that we can't have this one both ways.[42] It is not the case, in other words, that we cannot insist on our shared essential nature with men, and also insist that the ways in which we are different might entail differing needs, differing values, and different legal responses, all toward the end of a healthier and more functional society. Equality, and the perception of universality on which it rests, does not imply anything to the contrary. The false conviction that it does involves nothing more than mistaking a shared trait—even an essential one—with a shared identity, or even more fundamentally mistaking a part for the whole.

I can easily list more dissimilarities than similarities of the two kitchen chairs in front of me. One is brown, the other black. One has vertical slats, the other horizontal. One is three feet from the back door, the other is four feet, and so on. Most important to my baby, one is "hers," and the other is her brother's. That they have these differences, any one of which might become important given the proper context, does not detract from what they share. That we are committed, as liberals, to an appreciation of the nature that binds us together hardly precludes us from appreciating that which differentiates us. More to the point, it does not, or should not, disempower us from the work of arguing, or at least showing, the dysfunctionality of a racist or patriarchal social world.

III. LIBERTY

From the rationality of the human subject, liberals have for two hundred years reached the political and moral conclusion that the individual's so-called negative liberty to fashion for himself or herself a conception of the good life, and arrange his or her life accordingly, must be protected. In American constitutional law, again, this has implied for liberal legal scholars one central defining argument: a wide array of so-called "paternalistic" or "moralistic" state legislation, such as laws that prohibit the sale or use of birth control, that criminalize the performance of an abortion on a woman who wishes one, that require parents to send their children to schools that teach English, or that criminalize suicide or sodomitical sex acts are all unconstitutional infringements on our liberty under the substantive Due Process Clause of the Fourteenth Amendment. Such laws violate, as it is variously put, our "right to be left alone," or our "privacy." They are at odds with the fundamental, defining liberal conviction that each of us is rational and, accordingly, best able to decide for our-

42. See Wendy W. Williams, The Equality Crisis: Some Reflections on Culture, Courts, and Feminism, 14 WOMEN'S RTS. L. REP. 151, 170 (1992).

selves when and whom to marry, whether to have children and how to educate them, with whom to have sex, and when to die.

Ronald Dworkin and a number of other liberal and liberal legal philosophers have recently urged the U.S. Supreme Court to accept this argument as dispositive in the so-called right to die cases:[43] the patient and only the patient, not the state, has the ability to decide for himself or herself when and how to die, and the patient and only the patient, not the state, should therefore have the power to make that decision.[44] As I will discuss in the next section, liberals and liberal legalists hope to urge a variant on this same argument upon the Court in an array of potential cases involving the constitutionality of laws prohibiting same-sex marriage: the individual and only the individual, not the state, has the ability to decide for himself or herself whom to marry and with whom to have sex, and the individual and only the individual, not the state, should therefore have the power to make that decision.[45]

In my view, there are many difficulties with this core liberal legalist conviction that the Fourteenth Amendment protects negative rather than positive liberties. Here, I want to make a more internal and more friendly critique that roughly parallels the claims made above with regard to the liberal commitment to equality. The problem with the liberal understanding of liberty, and the liberal legal argument against paternalistic regulation that it is routinely held to imply, is that it inclines the liberal, and the liberal legal advocate, to assert a degree of individualist isolation, independence, and even sociopathological alienation from others that is simply untrue to the facts, and untrue in at least three distinct ways. First, and most obviously, it is rarely truly the individual, in splendid isolation, that is protected in his right to engage in truly self-regarding conduct. There is simply very little conduct that fits that description: riding a motorcycle without a helmet negatively affects both taxpayers and insurance-premium payers. As Anita Allen eloquently argues, so-called "recreational drug use," the now-fashionable cause celebre of academic libertarians, can hardly be regarded as self-regarding once we acknowledge the devastating destruction such behavior more than occasionally wreaks upon family members, friends, and communities.[46] In addition, surrogacy contracts, at least some of the time, in-

43. See Vacco v. Quill, 117 S. Ct. 2293 (1997); Washington v. Glucksburg, 117 S. Ct. 2258 (1997).

44. See Ronald Dworkin et al., Assisted Suicide: The Philosopher's Brief, N.Y. REV. OF BOOKS, Mar. 27, 1997, at 41, 43-44.

45. See Ronald Dworkin, Sex, Death, and the Courts, N.Y. REV. OF BOOKS, Aug. 8, 1996, at 44, 50; Ronald Dworkin, The Moral Reading of the Constitution, N.Y. REV. OF BOOKS, Mar. 21, 1996, at 46, 47.

46. See Anita Allen, Against Drug Use (1996) (unpublished manuscript, on file with author).

flict serious harm not only upon the participants, but also upon the siblings and relatives of both families involved. Whatever conduct does fit the description of being truly self-regarding—thumbsucking, nailbiting, or the personal hygiene habits of David Thoreau in the woods of Walden—will almost certainly not be the subject of serious or consequential legislation.

For the vast majority of cases that fall within the substantive due process net of the last fifty years or so, the "right to be left alone," or the right of "privacy" protected by the liberty prong of the due process clause, has involved not the right of the individual to do whatever he wants in isolation, but rather the right of the individual to form families, free of the intervention of the state.[47] The "right of privacy" is really, if we look at the subject matter of the case law, the right to marry, to have or not have children, and to have them educated as one sees fit. It is, in effect, the privacy, the isolation, and the liberty of family units that is protected, not so much the privacy, isolation, or liberty of individuals. Individuals do not exist in isolation from each other within a family. Rather, families put individuals together. Privacy cases, liberal rhetoric to the contrary notwithstanding, do not by any stretch protect the isolated liberty right of individuals "to be left alone." They protect the right of individuals to form independent societies of interaction with select others, within which the state will not intrude.

Second, the liberal legal construction of privacy and liberty rights as stemming from the individual's right to be left alone tends to deny the impact of these expansions of individual liberty on societal structures external to the particular family or individual himself. Obviously, the individual's decision to ingest birth control pills chemically affects no one but herself. The individual's decision to marry someone of a different race directly affects no one but herself and potential spouse. The individual's decision to home school his children in a language and religion of his own choosing primarily affects his children. But surely, at least in retrospect, it should now be obvious that the freedom of the individual to marry interracially has had profound societal effects. To whatever degree—and I suspect it may have been substantial—the moral point of the institution of marriage in a racist society with a slave past was once, at least in part, about preserving racial purity, it is no longer. This no doubt has both fueled the demise of any so-called moral justification for a racially segregated so-

47. See Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry); Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977) (right of family members to reside together); Roe v. Wade, 410 U.S. 113 (1973) (right to abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to use birth control); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (right to private school education); Meyer v. Nebraska, 262 U.S. 390 (1923) (right to education providing foreign language instruction).

ciety, and contributed to the redefinition of marriage as an institution serving individual rather than communitarian needs.

The freedom of the individual to take birth control pills has had similarly profound societal effects. Effective birth control severs the connection between heterosexuality and reproduction, creating a vastly larger space within which individuals can regard their sexual lives as affective or recreational. In turn, this may have contributed, as many conservatives and some feminists have argued, to a male flight from familial and paternal responsibility for their offspring. It may also have triggered, at least in part, a redefinition of marriage, toward a union serving primarily affective ends and only secondarily reproductive ends. Such a redefinition would hardly be inconsequential. Finally, the freedom of parents to school their children as they please, in any language and in any religion, has had an impact on and continues to impact our understanding of public education as an integral aspect of civic life, the funding of such a public education, and the capacities of individuals privately schooled, in splendid isolation from central expression of the democratic impulse, to engage in civic life.

Finally, the liberal legalist tends to deny the communitarian rather than individualistic nature of the very institutions that she seeks to protect—primarily marriage and the family, but others as well. The decision of the individual to marry or begin a family is not on par with the individual's decision to pursue graduate education, to travel around the world, or to buy a Honda Accord. Unlike the latter, it is a decision that transforms, among much else, the nature of the deciding individual. As Milton Regan has argued in a number of fora, when marriage is well-functioning, it creates a context of individual decision-making that is profoundly non-egoistic, and within which, in fact, the egoistic decision-making characteristic of robust individualism is perverse and even dysfunctional.[48]

Now, I want to make four critical observations about the denial of connection at the heart of the rationalist side of liberalism. First, the liberal's denial of the social reality of the unisolated family individual has done real harm to the individuals, or at least some of the individuals, that liberalism purports to serve. What is created through the delegation of privacy to the family, in the name of individual autonomy, is not necessarily individual freedom, but at least for many, its opposite: a Hobbesian state of nature, within which the strong control, by virtue of their superior strength, and the weak, Stockholm-syndrome-like, learn to comply. For some, the promise of "family privacy" becomes, in reality, not individual autonomy, but a rationale for state indifference towards a nasty, brutish, and short

48. See REGAN, supra note 13, at 94-96.

life.[49] For the losers in this delegation of authority, as Reva Siegel has shown in her study of the 100-year history of the privacy doctrine and family violence, state intervention into the privacy of the family would be a substantial improvement over the status quo.[50] Liberalism's denial of the communal nature of the institution it protects has badly obscured that central truth.[51]

Second, and as Jana Singer has argued, the denial of the communitarian nature of the family and of marriage has resulted, among much else, in the transformation of family law from a branch of public law into a branch of private law within which parenting is construed as the exercise of consumer choice among an array of social, natural, or technological reproductive possibilities.[52] Further, marriage is seen as the equivalent of a long term contract for labor, consortium, and sexual services. Obligations and rights—including the right to end a marriage and the terms by which dissolution will take place—are decided, under this individualized conception, in accordance with whatever preferences and choices the contracting individuals brought to fruition in their agreement, not by reference to understandings societally shared and publicly imposed.[53] There are many reasons and many problems with this reorientation of our understanding of the family and the law that governs it. However, there can be little question that the commitment of liberals and liberal legalists to the peculiar proposition that the sphere of negative liberty protecting self-regarding conduct includes the deeply other-regarding realm of familial decision-making is a part of that story.

Third, specifically by virtue of the denial of connection, the arguments for liberty rights based on such a flimsy foundation contain the seeds of their own destruction. They are perversely easy to deconstruct, and the deconstruction has the potential to cause real damage, particularly to the persons on whose behalf the claims were initially made. Where the case for liberty turns so crucially on its insularity, or lack of consequence, then the demonstration—sometimes difficult, but sometimes quite straightforward—that the behavior has consequences will radically destabilize the right. If, for example, our right to consume pornography in the privacy of our own home[54] turns

49. See Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy 105 YALE L.J. 2117, 2118-19 (1996).

50. See id. at 2206-07.

51. See id. at 2150-74.

52. See Jana B. Singer, The Privatization of Family Law, 1992 WIS. L. REV. 1443, 1478-88 (1992).

53. See id. at 1460.

54. See Stanley v. Georgia, 394 U.S. 557 (1969).

on the Millian liberal argument[55] that such consumption carries no ill effects for anyone other than those who have consented to its manufacture, purchase, or use, then even the allegation, much less the demonstration, that such consumption causes not only attitudinal but behavioral changes that endanger women's lives, will drastically destabilize the right, as it already has. If the right to engage in prostitution, enter surrogacy contracts, or to take drugs is similarly grounded in a right to do what one wishes with one's body where no other persons are affected, those rights will also become similarly unstable in the face of a credible showing of their consequentiality. Such a showing is rarely difficult to make. If these rights are worth having, a defense of them on the grounds that the behavior they protect is inconsequential for anyone other than the primary actor is a peculiarly weak one.

Let me elaborate on this point with just one particularly important example. If the right to procure an abortion turns on the liberally understood right to control one's own body, or to be left alone, or to make moral decisions about self-regarding conduct, and therefore on the inconsequentiality, immateriality, or inhumanity of fetal life, then that right will become unstable in the face of even the bald assertion of the humanity of fetal life, and hence the consequentiality to others of the decision to abort. We are, by virtue of sonograms, intrauterine photographs, and ultrasound imagery, no less than by virtue of pro-life placards and Silent Scream videos, living in an age in which the humanity of fetal life is increasingly palpable to increasing numbers of people. If the pro-choice movement can learn anything at all in the wake of the debacle occasioned by the debate over partial-birth abortions, it should be that the argument for the right to abort based solely on the inconsequentiality of this private choice for anyone but the mother is not a good argument, and will increasingly come to be seen as such.

Finally, as was the case regarding liberal equality doctrine and the denial of difference, the denial of connection at the heart of liberalism's commitment to individualism carries with it an opportunity cost: the lost opportunity to make arguments for these freedoms, not on the basis of the inconsequentiality for others, but rather on the basis of the good they do. If pornography is to receive First Amendment protection, or if surrogacy contracts are to be allowed by law, or if birth control is to be protected by our right to privacy, it must be because of the value of some pornography, of the good done by surrogacy contracts, and of the improvement in the quality of life for parents and children alike, facilitated by family planning. I do not know

55 See ISAIAH BERLIN, John Stuart Mill and the Ends of Life, in FOUR ESSAYS ON LIBERTY 173, 195 (1969); RONALD DWORKIN, MacKinnon's Words, in FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 227, 228, 238 (1996).

whether any of these arguments are ultimately successful; I suspect maybe in the case of pornography, probably not in the case of surrogacy, and very likely so in the case of birth control and planned parenthood. However, the liberal denial of the insularity of all of these decisions mutes them all.

By its hegemonic insistence on the inconsequentiality of fetal life and, hence, the unproblematic privacy of the decision to abort, the profoundly liberal pro-choice movement, I would caution, runs the risk of muffling some of the stronger arguments for reproductive rights that have emerged over the last ten years. Eileen McDonagh recently argued that the consequence of conceding, indeed insisting, on the humanity of the fetus is that not only would the right to abort be placed on a surer footing, but so also would abortion funding.[56] Although we may all—born and unborn alike—have a constitutionally protected right to life, none of us enjoys a right so unconditional as to be guaranteed access to the organs, bodily fluids, and bodily support of another without that person's consent.[57] For example, a born child does not enjoy such a right against his father—and if a grown child in need of a kidney tried to assert such a right against his nonconsenting father, the state in the exercise of its police power would be inclined to come to the aid of the father and to prevent such an assault. Why is the situation of the pre-born child any different? Why is this child, but not the born child, permitted unlimited use of his mother's body without her consent? The father was no less involved in the creation of the grown child than the mother was involved in the creation of the fetus. Again, no one else enjoys such a right, and we all expect our police to protect us from those who would assert it.

I do not aim, here, to convince you of this provocative thesis. However, I do want to suggest that this argument, as well as others that assert the human status of fetal life, deserves a hearing. They are important, meritorious defenses of the right to abort that have the distinctive virtue of not counterfactually denying the connection of the mother to the life growing within her. They also, in turn, have the virtue of clarifying why the decision to abort, while it must be legally protected, is often morally repugnant. While we all support the legality of the father's decision not to donate a kidney or even blood to his child who will die without it, we are also morally appalled by his refusal to do so. Surely the same should be the case of the aborting mother whenever her decision to terminate the fetal life within her is not relatively strongly compelled: while the decision must be legally protected, it should also be morally condemned. Acknowledgment of the need for both legal protection and moral condemnation

56. See EILEEN L. MCDONAGH, BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT 8 (1996).

57. See id. at 9.

follows directly from an acknowledgment of the fetus's human status. The pro-choice movement stifles these arguments, I fear, to the detriment of the embattled right the movement aims to defend.

IV. SAME-SEX MARRIAGE: PROBLEMS AND PROMISE

Let me quickly apply these observations to the promise and potential pitfalls of liberal defenses of same-sex marriage, or liberal legal attacks on laws prohibiting the same. I do not mean to suggest a uniformity within either the gay and lesbian community or their advocates where there is none. There is tremendous internal division over the merits of marriage as an institution, the desirability of entering into it, the efficacy of asserting a right to do so at this point in our history, and the meaning of it all—to say nothing of the strengths and weaknesses of particular constitutional or legal arguments asserting the right itself. Nevertheless, at least a liberal legal consensus of sorts is emerging, and it is one that, I suspect, will carry all of the problems of liberal legalism I have tried to identify here, and then some.

The argument is straightforward. Same-sex and opposite sex marriages are in all legally relevant ways identical. They would serve comparable needs for intimacy and stability, and they would entail comparable rights, duties, and liabilities in the various areas of law that impact family life. The only difference between them lies in the sex of the spouse, but this difference is simply immaterial—in all important or essential respects that matter, the union is of the same sort. Gay men and lesbians, in Andrew Sullivan's liberal formulation of the point, are "virtually normal" in all ways relevant to law.[58]

From this claim of sameness follows a straightforward equal protection claim. The state's denial of a marriage license to two women seeking to marry is impermissible discrimination. There is simply no difference, on this account, as the Hawaii Supreme Court has held, between a woman's decision to marry a man—fully protected as a fundamental right—and a woman's decision to marry a woman.[59] The only difference, again, is in the sex of the intended spouse, and that is a difference of no consequence. To differentiate between them—protecting the former and disallowing the latter—is therefore impermissible because it is based on irrational discrimination.[60]

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58. See ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 178-85 (1995).

59. See Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993) (holding a Hawaii statute that restricted marriage to male and female partners to be subject to strict scrutiny analysis and unconstitutional on its face); Baehr v. Miike, No. CIV.91-1394, 1996 WL 694235, at *18 (Haw. Cir. Ct. Dec. 3, 1996) (finding no compelling state interest supports the Hawaii ban on same-sex marriage), aff'd, 950 P.2d 1234 (Haw. 1997).

60. See Lewin, 852 P.2d at 67; William N. Eskridge, Jr., A History of Same-Sex Marriage, 79 VA. L. REV. 1419, 1425 (1993).

The liberty argument, although not yet elaborated in case law, is not hard to imagine. The right of the individual to marry within his sex is covered by the same right of privacy that protects the individual's right to marry outside his race, to take birth control, or to procure an abortion. It goes to the heart of our right to make fundamental decisions regarding our individual lives. It is quintessentially self-regarding behavior, a clear-cut example of conduct that is simply no one's business but one's own. Expanding the freedom to marry implicates essentially no negative externalities and would constitute a dramatic expansion of individual liberty. Accordingly, it is a paradigmatic freedom that ought to be, and hence is, protected by the Fourteenth Amendment.

Let me first address the assumption of sameness and the denial of difference at the heart of the equal protection argument. I will skip over, or leave to your imagination, the ways in which the assertion of bland sameness may backfire, and focus instead on the opportunity costs inherent in the denial of differences between opposite and same-sex marriage. My claim, briefly, is that there are at least two such differences that, if recognized, could ground an argument for gay marriage that could transform the cultur, in a badly needed and profoundly liberal direction.

The first difference is that same-sex marriage, unlike traditional marriage, has never been predicated on the presumed desirability of subordinating the female sex. There is no record in the history of same-sex marriage of a "marital rape exemption" according to which one of the partners is entitled to sex on demand, regardless of the consent or desire of the other. There is no expectation on the part of those contemplating same-sex marriage, as there still is with vast numbers of individuals contemplating traditional marriage, that one partner is privileged to demand sex and the other obligated to provide it. There is no cultural construct, in other words, of marital roles, obligations, and identities constituted by an axis of subordination, in turn constituted by legally privileged sexual violence. This is a difference that matters, and it matters a lot.

The difference is important because it carries the promised potential to transform the very institution of marriage itself into a truly liberal and even egalitarian institution. Should same-sex marriage ever become a reality in this culture, it would "normalize" the ideal of a for-life union between sexual equals. It would allow us an opportunity to glimpse the possibility of marital life freed of the illiberal, nonegalitarian, and unfree heritage of the institution's deeply patriarchal past. For liberalism to deny that opportunity in the name of formal equality is more than just perverse, although it is surely that. It is also self-defeating. In this instance, denial of difference is a de-

nial, not an affirmation, of liberalism's deepest egalitarian and libertarian impulses.

The second difference between traditional and same-sex marriage is the difference emphasized by conservatives, and particularly by the natural lawyer, John Finnis: same-sex marriage, unlike traditional marriage, would legitimate and sanctify non-reproductive sex acts instead of reproductive sex acts. For Finnis, this difference is fatal because such non-reproductive sex acts are paradigmatically immoral.[61]

Liberals, and most persuasively, Stephen Macedo, have responded true to form by denying the difference. Macedo argues that the differences between the non-reproductive sex acts of a same-sex couple and the non-reproductive sex acts of a sterile, post-menopausal, or heterosexual couple using birth control are surely insignificant.[62] Macedo's point is obviously well-taken. However, here again, we should at least hesitate before insisting so strenuously on sameness in the face of this apparent difference. There may be a relevant difference between a marriage that sanctifies paradigmatically non-reproductive sexual acts and paradigmatically reproductive ones. Further, it may even be a difference that matters morally, but cuts the opposite way of that suggested by Finnis. Reproductive sex acts model a form of physically caring for the other in a marriage that either carries the potential for, or at least symbolizes in the conservative imagination, biological reproduction—an event that, when it occurs, demands considerable altruism, at least on the part of the mother. But it is also an event that, at least as sociobiologists never tire of reminding us, is through and through selfish on a genetic and evolutionary scale.

The care we bestow on family members genetically linked to us carries the same paradoxical quality. We might want to consider the possibility that the non-reproductive sex act sanctified by a legal, religious, and socially recognized same-sex marriage between two individuals committed to the care of each other and no less committed than their heterosexual counterparts to the possibility of raising children, presents a model of caring that, precisely because it does not embed the giving of physical care in a genetic replication, is less constrained by egoism. It is often observed—and quite rightly—that our capacity for care ebbs and flows depending on the strength or weakness of the genetic link between the subject and object of caregiving. The creation of a social institution defined by love-making not

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61. See John Finnis, Is Natural Law Theory Compatible With Limited Government?, in NATURAL LAW, LIBERALISM, AND MORALITY: CONTEMPORARY ESSAYS 1, 15 (Robert P. George ed., 1996).

62. See Stephen Macedo, Homosexuality and the Conservative Mind, 84 GEO. L.J. 261, 287-88 (1995).

aimed toward genetic replication, but nevertheless aimed toward care, might at least expand our imaginative understanding of the limits and promise of the affective source of this communal, connective ethic.

I will be much more brief regarding liberty. There is just no good reason, and much to be lost, by denying the communitarian and communal nature of marriage, and hence of gay marriage. It is also unnecessary. There is nothing in the liberal regard for individual autonomy that commits liberalism to the false claim that marriage is an individualistic institution designed to enhance the autonomy of consenting adults by permitting them to contract with each other for sex, affection, and mutual support. Marriage just is, through and through, anti-individualistic. That is precisely its moral strength, and to no small measure the source of its immense appeal.

Advocates of gay marriage in particular, outside of a dubious loyalty to liberalism, have no reason to deny this. First, gay unions have the potential to be significantly better as communities than their heterosexual counterparts. They may be just as violent, oppressive, suffocating, boring, tedious, or dreary, but they simply are not as vulnerable to the disabling and destructive possibilities of rape, legal and otherwise.[63] Second, they share with heterosexual unions the redemptive potential to transform the individual into a person whose self-regarding preferences and desires are defined communally, and that is a morally desirable, not undesirable, transformation of self-regard and identity. Third, the impact of these marriages on the larger culture would surely be for the good. Aside from the obvious benefits to gay and lesbian citizens themselves, the availability and legality of gay marriage would strengthen heterosexual marriages as well, leaving them more voluntary, less compulsory, more egalitarian, and for all of these reasons considerably more liberal.

V. CONCLUSION

Let me conclude by noting that the liberal denial of difference and connection, in the area of gay marriage, and in the name of equality and liberty respectively, leaves in its wake one additional opportunity cost of a somewhat peculiar theoretical nature. In this culture and at this time, we desperately need a reinvigorated and open dialogue regarding the point of marriage, of married life, and of marital sex. If feminism continues to influence culture in the next century—as it has in the one now ending—then the point of that institution will no longer be, as it was for so much of the last millennium, to order social relations and life through subordinating the female sex. If liberalism holds its ground, nor will its point be the conception and

63. See ESTRICH, supra note 33.

rearing of children—so long as there are individuals who badly want to marry but have no desire or ability to parent. But nor can the point of marriage be what large numbers of liberals and libertarians are now arguing: that marriage is a contract, no different in essence from any other, designed to efficiently coordinate complementary preferences and to maximize wealth and efficiency for all. Marriage cannot be merely a contract for the straightforward reason that if it becomes that it will wither away.

This leaves a void. What is the point of marriage? One possible answer, I think, is raised by the possibility and promise of gay marriage. It is also an old argument, dating at least from Kierkegaard. The point of marriage, in theory as well as in our private lives, may be to provide a structure within which we learn to define and continually redefine ourselves as caring rather than egoistic beings—as connected to rather than alienated from the concerns and well-being of others.[64] If so, then the central point of marriage would indeed be shared by gay and straight marriage alike. It is a shared trait, however, and a common essence that only comes into focus, and can only come into focus, when the transformative difference gay marriage might make in the institution itself is highlighted, not obscured. It is by highlighting difference, in other words, that we might discard the institution's ignoble but ultimately inessential heterosexual and misogynist past. By blurring or denying those differences, the liberal advocate, perversely, obscures the very universality among us that, entirely to his credit, he relentlessly seeks to foster.

64. See PETER SINGER, HOW ARE WE TO LIVE: ETHICS IN AN AGE OF SELF INTEREST 143 (1995); PETER SINGER, THE EXPANDING CIRCLE: ETHICS AND SOCIOBIOLOGY 33 (1981).