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Zachary A. Kramer

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**EXCLUSIONARY EQUALITY AND THE  
CASE FOR SAME-SEX FAMILIES:  
A Reworking of Martha Fineman's  
Re-visioned Family Law**

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Zachary A. Kramer<sup>1</sup>

I. INTRODUCTION

For many years now, scholars, activists, and even the general public have debated the legal issues related to same-sex families.<sup>2</sup> This debate, while ostensibly academic, has become far more acute in the wake of a handful of groundbreaking court decisions. The first of these cases is the United States Supreme Court's decision in *Lawrence v. Texas*.<sup>3</sup> In *Lawrence*, the Court struck down Texas's criminal sodomy law and overruled its decision in *Bowers v. Hardwick*,<sup>4</sup> which sustained Georgia's anti-sodomy law and denied homosexuals a fundamental right to engage in same-sex sodomy.<sup>5</sup> Following close on *Lawrence*'s heels were the Massachusetts Supreme Judicial Court's two same-sex marriage opinions, where, taken together, the court determined that the state must confer gays and lesbians<sup>6</sup> the same marital rights that heterosexuals possess,<sup>7</sup> and that only full-scale civil marriage rights, not civil unions, would suffice under this standard.<sup>8</sup> In spite of these substantial victories, the United States Court of Appeals for the Eleventh Circuit handed gays and lesbians a devastating loss by upholding the constitutionality of a Florida law prohibiting homosexuals from adopting children.<sup>9</sup>

These four opinions, however, do not mark the end of the debate over same-sex families. Instead, they suggest a new beginning for the gay rights movement, one with extremely heightened stakes. For instance, shortly after the Massachusetts Supreme Judicial Court held that the state's marriage laws must be open with equal force to same-sex couples, those

who oppose same-sex marriage floated the idea of a federal constitutional amendment that would define marriage as a heterosexual union.<sup>10</sup> President Bush expressed support for such an amendment in his State of the Union Address on January 20, 2004.<sup>11</sup> Soon thereafter, the Massachusetts legislature began considering a similar amendment to its own constitution.<sup>12</sup> This area of the law is in constant flux, which suggests that much may change regarding same-sex families by the time this article goes to print. These recent developments do not, however, nullify the general debate over same-sex families. Because there is still a great deal of room to advocate for same-sex families, this article addresses the larger, more theoretical question of how advocates can frame their arguments in support of same-sex families.<sup>13</sup> In addressing this question, this article puts forth one such argument.<sup>14</sup>

As the debate over same-sex families has unfolded, numerous scholars have articulated a variety of arguments directed at either supporting or opposing same-sex marriage and adoption.<sup>15</sup> Regardless of their breadth, such discussions can never be exhaustive. With that in mind, this article seeks to add another dimension to the debate by reworking Martha Fineman's "Re-visioned Family Law" theory to enhance and support the case for same-sex families. Professor Martha Fineman is both a highly regarded feminist theorist and an expert in family law. Although Fineman does not normally write on issues involving gay and lesbian families, her work is nevertheless applicable to the issues of same-sex marriage and parenting.

This article utilizes Fineman's re-visioned family law to show how advocates for same-sex families can formulate an original argument in favor of same-sex families. The thrust of Fineman's theory is that the state should abolish legal marriage and replace it with legal protection for caregiving units, primarily those comprised of parent and child. I will use this general theory not only to demonstrate why gays and lesbians could champion it,<sup>16</sup> but also to discuss a larger theoretical construct that I have

termed “exclusionary equality.” The thrust of the exclusionary equality concept is that gays and lesbians can articulate positions in support of homosexual rights by arguing that no one, gay or straight, should be entitled to the rights in question. Thus, the exclusionary equality model renders gays and straights equal not because they both can exercise the rights associated with legal marriage, but because neither can. Those rights would simply no longer exist.<sup>17</sup>

The remainder of this article proceeds in three parts. Part II contains both objective and subjective sections. It begins objectively by briefly introducing Martha Fineman and providing a general description of her work.<sup>18</sup> This introduction is all the more relevant here because Fineman’s work is rarely discussed in the context of gay and lesbian relationships and families. From there, Part II presents Fineman’s theory, focusing primarily on the Mother/Child Dyad and the role of contract law as a replacement for legal marriage.<sup>19</sup> The third and final section in Part II—the subjective part—presents a brief criticism of Fineman’s theory—namely, that the hetero-centricity of Fineman’s theory is harmful to gays and lesbians and therefore frustrates the interests of same-sex families.<sup>20</sup>

Part III reworks Fineman’s model so that it addresses two of the main issues facing same-sex families: marriage and parenting.<sup>21</sup> Clearly, such a discussion is important, considering that gay and lesbian marriage and adoption have, in recent years, become particularly divisive legal issues. Building on this argument, Part IV relates my analysis—that is, my reworking of Fineman’s theory—to the larger debate surrounding same-sex families. To explore “exclusionary equality,” this part first assesses how Fineman’s theory implicitly conceives of equality on an exclusive, rather than inclusive, basis.<sup>22</sup> Finally, I address two likely counter-arguments to this conception of equality.<sup>23</sup> These discussions will prove helpful in transposing Fineman’s theory to the realm of same-sex families.

## II. BACKGROUND: MARTHA FINEMAN AND HER RE-VISIONED FAMILY LAW

### A. *Martha Fineman: An Introduction*

Martha Fineman is currently the Robert W. Woodruff Professor of Law at Emory Law School.<sup>24</sup> Prior to joining Emory, she was the Dorthea S. Clarke Professor of Feminist Jurisprudence at Cornell Law School.<sup>25</sup> Before teaching at Cornell, Fineman taught at Columbia University and the University of Wisconsin law schools and clerked for U.S. Court of Appeals for the Seventh Circuit.<sup>26</sup> Over the years, Fineman's scholarship has focused primarily on family law and feminist jurisprudence. In these areas, Fineman has published eight books (with at least three more forthcoming), eleven book chapters, and countless articles, essays, and reviews.<sup>27</sup>

This article focuses exclusively on one of Fineman's books, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (*The Neutered Mother*). *The Neutered Mother* is a comprehensive book, ranging from discussions of the failings of feminist legal philosophy and the history of child custody laws to a criticism of the social standing of single mothers.<sup>28</sup> The scope of this article, however, is limited to one chapter from *The Neutered Mother*, in which Fineman's presents her re-visioned family law.

Fineman's theory is not a gay rights theory per se; it is, rather, a traditional feminist theory in that its primary subject is both heterosexual and female.<sup>29</sup> This is not to say that the fields of feminism and gay rights do not overlap, for they surely do; hence, lesbian feminism.<sup>30</sup> But I bifurcate feminism and gay rights here to emphasize that Fineman's theory implicitly separates them by not extending her discussion to same-sex families. That is, the marriage Fineman speaks of in *The Neutered Mother* is almost exclusively heterosexual marriage, whereas I will focus exclusively on same-sex marriage. Nevertheless, recognizing that the schools overlap and are interrelated, I recommend that those advocating for

gay and lesbian families study and consider Fineman's proposed reforms advanced in *The Neutered Mother*.<sup>31</sup>

*B. Fineman's Re-visioned Family Law*

The central purpose of Fineman's theory is to overcome family law's reliance on what she calls the traditional, idealized family.<sup>32</sup> Even though American family law has adopted gender-neutral terminology, Fineman believes that the law has not actually equalized the sexes and that gendered lives continue unaffected by the equality-driven aims of family law.<sup>33</sup> Accordingly, the current family law scheme reinforces the idealized family as a social norm by subsidizing the nuclear family, giving idealized families tax breaks and various benefits that non-nuclear family units do not receive.<sup>34</sup> Fineman also believes that because it exalts the idealized family unit, family law does not adequately support or encourage people to take on the role of familial caretaker.<sup>35</sup> Because the law focuses on the sexual relationship between a child's parents, child nurturing does not seem to be at the forefront of the state's concerns. For obvious reasons, Fineman finds this problematic, and she seeks to revise our notion of The Family to avoid this trend.

There are two main components to Fineman's theory: the abolition of legal marriage and the Mother/Child Dyad. The following two subsections will discuss these components, focusing both on the purposes behind the proposals and how the proposals will work once implemented. It is important to remember two things when considering Fineman's theory. First, because this is a work of theory, the following discussion may raise concerns regarding the practicality of Fineman's proposals.<sup>36</sup> Although relevant, such concerns should not be at the forefront of an analysis of Fineman's work.<sup>37</sup> As with most theoretical inquiries, it may prove more beneficial to first consider the analytical questions raised by the theory rather than the practical questions that are sure to arise.<sup>38</sup> Second, because Fineman's proposals are interrelated, adopting only one would undermine

her theory entirely. The Dyad construct both requires the abolition of legal marriage and acts as its replacement.

### 1. Abolishing Legal Marriage

The first part of Fineman's theory calls for the abolition of both the legal category of marriage and the subsidized benefits that normally accompany such relationships.<sup>39</sup> It is imperative to note at the outset that Fineman is only referring to the *legal* significance of marriage. Although couples would still be able to engage in ceremonious and religious marriages (i.e. symbolic marriages), those relationships would not have any legal significance, and the state would not recognize marital partners in a formalized manner.<sup>40</sup> Relationships between men and women<sup>41</sup> would instead be governed by the legal rules that control most other aspects of society—namely those of property, contract, criminal, and tort law.<sup>42</sup> Of these bodies of law, however, contract law would play the most vital role in the lives of the men and women who wished to enter into formalized, sexual relationships.

The role of contract law in Fineman's theory is paramount.<sup>43</sup> Fineman's construct enables men and women to negotiate freely the terms of their relationships instead of having to rely on the state to create the terms of their marriage.<sup>44</sup> Abolishing the legal recognition of sexual relationships privatizes them by denying states the power to subsidize the ideal, romanticized family.<sup>45</sup> Moreover, such contracting satisfactorily reflects the recent trend in family law. As Fineman points out, society already recognizes the value of prenuptial and antenuptial contractual agreements. According to Fineman, "[o]pportunities for individual bargaining about economic and other aspects of sexual relations typically now occur at the termination of the relationship . . . [this] proposal would merely mandate that such bargaining occur *prior* to the termination of the relationship, ideally before the couple becomes too 'serious.'"<sup>46</sup>

Fineman recognizes two major benefits that would follow from the abolition of legal marriage. First, the state's interest in bolstering marriage and the idealized family form would disappear because all sexual relationships would be permitted in this construct, so long as they were voluntary and between consenting adults.<sup>47</sup> The flip side of this, however, is that consenting adults could contract into deviant sexual relationships.<sup>48</sup> This is not much of a concern for Fineman, though, because she believes the state should not have an interest in voluntary sexual relationships between consenting, contracting adults.

The second major benefit of the abolition of legal marriage is that it would "render indefensible the differential treatment of children based on their parents' marital status."<sup>49</sup> This benefit really concerns Fineman's refocusing the scope of family law, which is the subject of the following subsection. It is worth pointing out, however, that abolishing legal marriage directly leads to Fineman's Mother/Child Dyad. The abolition of marriage and the creation of the Dyad work together to shift the state's focus from the sexual relationship between parents to the child-nurturing relationship between caretaker and dependent.

## **2. Mother/Child Dyad**

The Mother/Child Dyad reflects Fineman's interest in securing legal protections for familial nurturing units because the primary concern of the Dyad is to protect dependents, whom she refers to as the "weaker" members of society.<sup>50</sup> With the legal significance of marriage eliminated, Fineman theorizes that society would take greater notice of these dependents. The state, in turn, would react to the general social concern regarding these dependents, assume responsibility for them, and publicly fund caretaking relationships.<sup>51</sup> Conceived of as a caregiving unit, the Dyad is the focal point for the reallocation of the social and economic subsidies that are currently awarded to traditional families.<sup>52</sup> Rather than subsidizing marital unions, the state would instead subsidize the caretaker-dependent



relationship. The purpose of this reallocation would be to enable families to function independently, with the state only concerning itself with familial caretaking.<sup>53</sup> Fineman's scheme would require a massive restructuring of social roles and institutions; essentially, she proposes revising the ideology of family and switching the focus of the law from the traditional family to the nature of dependency. Thus, the obligations imposed on third parties by an individual's marital status would not simply disappear. These benefits and obligations would continue, but the third parties would instead provide them based on an individual's status as a caretaker or dependent, not as a married person.

For example, the revised system would require employers to provide health benefits to an employee's partner if the partner is a caretaker. More specifically, if Mark and Mary decided to have a child, then Mary's employer would provide health benefits to Mark and the child. This would not be required, however, if Mark and Mary did not to have a child because the employer would have no *legal* obligation to provide benefits to a non-caretaking partner.<sup>54</sup>

The role of the "mother" in Fineman's theory, moreover, is sex-neutral. As the above hypothetical suggests, either a man or a woman could be a child's mother. It is not accidental, however, that Fineman decided to call the caretaker "mother." She sees this as a way to reclaim the term.<sup>55</sup> According to Fineman, "[m]otherhood has unrealized power—the power to challenge the hold of sexuality on our thinking about intimacy; the power to redefine our concept of the family, which may be why men have tried for so long to control its meaning."<sup>56</sup> The Dyad wields the power of motherhood to help shift the law's focus to the necessity of nurturing, which Fineman believes is contained within the social vision of motherhood.

Similarly, the theory does not require that a dependent have only one mother, nor does it impose a limit on the maximum number of mothers a child can have. The specifics of a particular family's structure are private; the theory does not envision an ideal family. If a family wishes to have two

mothers who will share the caretaker role, then it is free to do so. All that is required is that this relationship is negotiated in the contract. Moreover, it is not required that a child's parents maintain a sexual relationship if they wish to form a Dyad.<sup>57</sup> If two friends wish to raise a child together and keep the child separate from their respective sexual relationships, they can similarly enter into a contract and form their own Dyad.<sup>58</sup> The law, in Fineman's framework, simply would not take into account a person's sexual relationships.<sup>59</sup>

### *C. A Critique*

There are two issues that Fineman does *not* address in *The Neutered Mother*,<sup>60</sup> and both relate to a common criticism: that the hetero-centricity of Fineman's theory renders it incomplete. First, because Fineman does not address the applicability of her theory to same-sex families, her re-visioned family law implicitly encourages heterosexism and the compulsory heterosexual norm. Secondly, Fineman's re-visioned family law does not acknowledge the conflation of sex, gender, and sexual orientation.

#### **1. Heterosexism and Compulsory Heterosexuality**

The focus of *The Neutered Mother* is narrow, concentrating almost exclusively on how family law affects straight women in marital relationships. Because Fineman draws her focus so narrowly, however, her re-visioned family law is essentially a heterosexual theory, which reinforces cultural heterosexism and the "valorization of heterosexual activity"<sup>61</sup> over that of homosexuality. For Fineman, marriage is a harmful institution to women because it reinforces traditional sex and gender roles, and because it relegates women and motherhood to the iniquitous private sphere. But this view, however poignant it may be, completely passes over the point that marriage is likewise a harmful institution to gays and lesbians. While we can all join Fineman in attacking the harmful aspects of heterosexual marriage, gays and lesbians and their supporters should highlight that

Fineman's re-visioned family law fails to expressly embrace same-sex families despite its obvious relevance to their struggle.

This criticism comes into full view when one considers the mechanisms of heterosexism. The dynamics of heterosexism dictate that all people should be attracted exclusively to members of the opposite sex.<sup>62</sup> A heterosexist society therefore labels all those who fall outside this model—for instance, gays, lesbians, and bisexuals—as sexual deviants. According to Sylvia Law, “[t]he pervasive cultural presumption and prescription of heterosexual relationships—and the corresponding silencing and condemnation of homosexual erotic, familial and communitarian relations—can aptly be termed ‘heterosexism.’”<sup>63</sup>

Law's framework relies heavily on what Adrienne Rich calls “compulsory heterosexuality,”<sup>64</sup> which is best understood as the pervasive assumption that all people are heterosexual. Heterosexism not only incorporates the notion of compulsory heterosexuality, but it also exploits the compulsory heterosexual norm in the sense that it deems heterosexuality as “right” and homosexuality as “wrong.” This is the essence of homophobia and sexual orientation-based discrimination. Rather than mounting a defense to these ills, Fineman's theory implicitly furthers the heterosexist norm.

Fineman's failure to explicitly embrace same-sex families reinforces the heterosexist model and with it all of heterosexism's attendant consequences. Thus, one could—and I believe should—argue that Fineman abandoned the homosexual community by focusing exclusively on straight women. Her failure to challenge heterosexuality as an “ideological institution implicated in women's oppression”<sup>65</sup> harms not only heterosexual women, but also lesbians and gay men who are excluded from its privileges and protections.<sup>66</sup> Furthermore, Fineman champions her re-visioned family law on behalf of heterosexual women and mothers; however, her theory would be that much more powerful had she further extolled its virtues on behalf of the gay and lesbian community.

## **2. The Conflation of Sex, Gender, and Sexual Orientation**

A second point to consider is that Fineman does not relate her discussion of marriage and sexuality to the law's pervasive conflation of sex, gender, and sexual orientation.<sup>67</sup> Andrew Koppelman has argued for some time that sexual orientation discrimination effectively constitutes a form of sex discrimination because it makes sex-based classifications.<sup>68</sup> Anyone willing to adopt an argument similar to Fineman's must be prepared to address the conflation, inextricability, and interdependence of sex, gender, and sexual orientation. In failing to advocate for same-sex relationships, Fineman limits the applicability of her theory by ignoring the shared political interests of gay and lesbian activists and straight feminists.

### III. REWORKING FINEMAN'S RE-VISIONED FAMILY LAW

In developing the Mother/Child Dyad, Fineman sought to undo the gender inequalities that pervade modern family law institutions. Fineman promotes a new familial model that is not plagued with the implicit gender oppression of the traditional, romanticized family. Although she describes this model in terms of heterosexuality, it is equally applicable to gay and lesbian families under the auspices of an equality-based theory.<sup>69</sup> In fact, Fineman's reforms could greatly improve the legal standing of gay and lesbian families. By examining the effects of Fineman's reforms on the status of gay and lesbian marriage and adoption, this analysis will ultimately conclude that gays and lesbians can utilize Fineman's reforms. Indeed, a reworked version of her re-visioned family law supports, at least implicitly, an equality argument in favor of same-sex families.

#### *A. The Abolition of Marriage: Paving the Way for Same-Sex Relationships*

Notwithstanding the implications of the recent Massachusetts ruling, gays and lesbians cannot enter into a legally binding marriage,<sup>70</sup> though some states and municipalities offer civil unions or domestic partnerships as a legal alternative.<sup>71</sup> But the value of these alternative, quasi-marital

relationships is debatable. For example, Thomas Stoddard and Paula Ettelbrick, both of whom were at one time associated with the Lambda Legal Defense Fund, engaged in a famous debate about whether gays and lesbians should seek the right to marry.<sup>72</sup> Their debate centered on the issue of whether gay and lesbian couples should strive to enter into marital relationships (Stoddard's position), or whether the category of marriage is adverse to the interests of gay and lesbian couples (Ettelbrick's claim). Fineman's reforms, however, would render such debates unnecessary. Her reforms do not recognize marriage in the first place, let alone address whether the right to marry should be a central goal of the gay rights movement.<sup>73</sup>

In Fineman's model, the state cannot regulate who can marry, which means the state has no legal interest in supporting one form of marriage over another. Moreover, there are no legal incentives tied to marriage. Fineman's theory essentially knocks marriage off its pedestal<sup>74</sup> because the state is stripped completely of its power to favor traditional, heterosexual relationships over "deviant," homosexual ones.

It may be unfair to suggest that Fineman did not consider the impact of her reforms on gays and lesbians, even though she does not seem to fully embrace the interests of same-sex families.<sup>75</sup> Throughout her analysis, Fineman frequently differentiates between the idealized family and what she calls "deviant" families. "Deviant" families are those families that are "subject to special regulation and control or to a separate, stigmatized set of social subsidies, increasingly punitive in nature."<sup>76</sup> Surely gay and lesbian families fit within this category: the closest gays and lesbians can come to getting married (despite the implications of the recent Massachusetts rulings) is entering into a civil union or a domestic partnership, both of which are a form of stigmatized, "special regulations."<sup>77</sup>

Fineman does, however, unequivocally endorse the abolition of legal marriage as a source of social equality for all sexual relationships. Fineman's theory would likewise counteract the need for alternative, quasi-

marital relationships like domestic partnerships or civil unions because abolishing marriage would free gays and lesbians from the need to pursue these alternatives.<sup>78</sup> According to Fineman, “[i]nstead of seeking to eliminate [the stigma of ‘deviance’] by analogizing more and more relationships to marriage, why 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?”<sup>79</sup> That said, I must stress that I am inferring this argument from Fineman’s theory. While Fineman does undeniably contend that the elimination of marriage will eliminate the stigma of deviance, she does not take the opportunity to fully bridge the claims between same-sex and heterosexual families. From a gay rights perspective, it is striking that Fineman did not take the extra step to affirmatively state the case for same-sex families, which leads one back to my earlier discussion of heterosexism and compulsory heterosexuality.<sup>80</sup>

*B. The Mother/Child Dyad and Gay and Lesbian Adoption*

Aside from questions of custody (or visitation)<sup>81</sup> and surrogacy,<sup>82</sup> gays and lesbians who wish to be parents currently face two major legal impediments to adopting children. The first (and more blatant) legal barrier is state laws that bar same-sex adoptions.<sup>83</sup> The second major legal impediment is second-parent adoption.<sup>84</sup> Fineman’s framework, if implemented, would not only make it easier for gays and lesbians to adopt children, but it would equalize the status of heterosexuals and homosexuals when it comes to adoption.

The outright ban on homosexual adoption is inconsistent with a main principle of Fineman’s theory—namely, that the state should not have the power to regulate sexual relationships.<sup>85</sup> The purpose of Fineman’s re-visioned family law is to switch the state’s focus from sexual relationships to dependent care.<sup>86</sup> Thus, the state could not forbid gay men and lesbians from adopting based solely on sexual orientation.

Similar reasoning supports the conclusion that the Mother/Child Dyad would make it harder for courts to prevent gays and lesbians from adopting. For instance, Fineman's model undermines the crux of the *per se* rule prohibiting gays and lesbians from adopting<sup>87</sup> because it switches the focus of the law from the parents' relationship with each other to their relationships with the child.<sup>88</sup> And the creation of the Dyad, in conjunction with the abolition of marriage, negates the argument that a same-sex environment would not be in the best interests of the child because a parent's sexual orientation would simply not be relevant to the analysis.<sup>89</sup>

Likewise, the case for second-parent adoption rights seems stronger within Fineman's model. In fact, the argument in favor of allowing gays and lesbians to adopt is strengthened by the role that contract law plays in Fineman's framework. The pre-relationship contract would, in theory, include provisions for the possibility of raising children. Thus, the state would have no reason to terminate the first parent's parental rights upon adoption by the second parent.

For example, imagine that two men, Harry and Mitchell, want to enter into a binding contractual relationship and that Harry adopted a child before he met Mitchell. Currently, depending on which state Harry and Mitchell live in, Mitchell may not be able to adopt the child because his adoption would terminate Harry's parental rights.<sup>90</sup> In Fineman's construct, however, Harry and Mitchell may contract the terms of their union at the beginning of their relationship, including their respective obligations to the child. Moreover, either Harry or Mitchell (or both, if they wish) can contractually agree to be the child's "mother." Fineman's theory successfully eliminates the legal hurdle presented by second-parent adoption. There is, furthermore, an apparent relationship between adoption and the Mother/Child Dyad. For gay men (as opposed to lesbians who can be artificially inseminated), adoption is often the only way for them to become parents.<sup>91</sup> The Dyad would act as a vehicle for securing parental rights for gay men, including both single and second-parent adoption.

#### IV. FITTING THE REWORKED THEORY INTO THE LARGER DEBATE OVER SAME-SEX FAMILIES

The purpose of this article, in addition to discussing the application of Fineman's theory to gay and lesbian families, is to articulate an original perspective to add to the larger debate over gay and lesbian families. To meet that end, this section will discuss briefly two issues that are raised by the preceding discussion. First, I would like to better define this article's conception of equality. The above analysis asserts that Fineman's theory is virtually ideal for gays and lesbians because it treats heterosexuals and homosexuals on equal grounds. Thus, it seems necessary to define how the article conceives of equality.<sup>92</sup> Second, I would like to address two possible counterarguments that one could reasonably raise in response to this article's thesis.

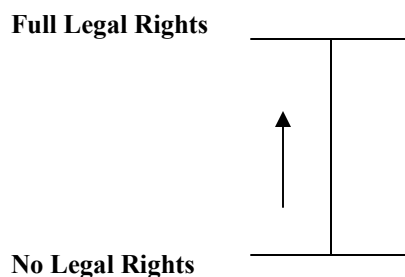
##### *A. Exclusionary Equality*

This article has argued that Fineman's theory would greatly improve the legal standing of gays and lesbians in terms of marriage and adoption because it would treat all people equally, regardless of sexual orientation. Thus, this article reformulates Fineman's theory to express it as an equality model, as opposed to, say, a moral theory.<sup>93</sup> This conception of equality is not as simple as the traditional, or inclusive, equality argument.<sup>94</sup> The traditional equality argument, which is rooted in liberalism, relies primarily on the notion that all couples are entitled to marry regardless of sexual orientation, and that this equality brings with it the ability for couples to choose to marry.<sup>95</sup> This argument is based on the belief that heterosexuals and homosexuals are entitled to have the same rights, and that the state should not exclude either group from exercising the right to marry. The state is capable of granting this right without addressing the morality of same-sex unions.<sup>96</sup> Fineman's model, however, does not treat these groups as mutually entitled to the rights associated with legal marriage.



Fineman believes that an individual's sexual orientation is simply beyond the scope of the law, which stops at protecting a family's dependents. Because neither heterosexuality nor homosexuality is relevant to this aim, Fineman's framework maintains that society should equally exclude legal protection for both classes of people.<sup>97</sup> Queer theory, which asserts an autonomous view of sexuality separate and distinct from gender,<sup>98</sup> is instructive here. Building on the idea that sexual classifications are socially constructed,<sup>99</sup> queer theory posits that the states take on a stricter role in regulating "unnatural" sexual classifications.<sup>100</sup> It is for this reason that queer legal theorists advocate for limited regulation of sexuality, or for none at all.<sup>101</sup>

Similarly, Fineman's model advocates what one could call a "desexualized" notion of equality. Whereas the traditional notion of equality equates homosexuals and heterosexuals on the grounds that sexuality should not prevent either group from living full lives with full rights, Fineman's model suggests that sexuality should not be factored into state delegation of rights at all. Although ostensibly similar, I conceive of the traditional argument as an inclusive model of equality, whereas the latter conception is more of an exclusive model. To understand the difference between the two, consider a vertical continuum:



This continuum displays a framework for understanding how groups possess legal rights. A group at the top of the continuum would possess full

rights, whereas a group closer to the bottom would possess fewer rights. The arrow represents the notion that social change, defined as a marginalized group gaining legal rights, favors vertical growth on the continuum. Here, we are concerned with the legal rights to marry and adopt.<sup>102</sup> With these two rights in mind, heterosexuals are clearly at the top of the continuum because, without delving into the various subtleties and exceptions in certain states, heterosexuals are not barred from the right to marry or adopt a child simply because of their status as heterosexual. On the other hand, homosexuals are positioned more toward the bottom of the continuum because in nearly every jurisdiction they are, as a class, prohibited from marrying.<sup>103</sup> Additionally, certain states make it more difficult for gays and lesbians to adopt.<sup>104</sup> The traditional notion of equality is consistent with this continuum's framework, because it effectively tries to raise homosexuals up to the equivalent of heterosexuals by granting homosexuals access to the same rights that heterosexuals already possess. Thus, the traditional notion of equality seeks to move homosexuals up to the position of heterosexuals on the continuum by way of inclusion and assimilation to the dominant group.

By desexualizing family law, Fineman's model rejects upward movement as the end goal of the search for equality. Instead, Fineman's framework urges that the law should not take a person's sexual orientation into account when it is delegating marital and parental rights. Rather than raising homosexuals up on the continuum, Fineman's model would lower heterosexuals down to the equivalent of homosexuals at the bottom of the continuum.<sup>105</sup> Because it excludes any question of sexuality when it considers the distribution of legal rights, Fineman's model is, therefore, a more exclusive model of equality.<sup>106</sup> This, at least in theory, reverses common conceptions of equality-driven arguments.

For instance, Fineman's model is not consistent with a standard equal protection claim under the Fourteenth Amendment, where plaintiffs normally challenge classifications on the grounds that they restrict a class's

access to certain rights,<sup>107</sup> not that no one is entitled to the right in question.<sup>108</sup> Instead of targeting a specific group or making group-based classifications,<sup>109</sup> Fineman's framework rejects all sex or gender classifications when delegating rights, turning its focus solely to questions of dependency. That is, to equalize homosexuals and heterosexuals, Fineman's model excludes any question of sexual classifications—hence, exclusive rather than inclusive equality.

*B. A Counterargument or Two: Identity and Morality*

This section addresses briefly two likely counterarguments to the above analysis. The first critique focuses on the effect of Fineman's theory on the political identity of gays and lesbians, whereas the second critique points to the failure of this article to address the moral question regarding same-sex families. Although this article only touches on these issues briefly, it is important to note that these issues are complex and deserve further discussion.

**1. The Gay Identity Question**

Paula Ettelbrick maintains that gays and lesbians should not seek to be treated equally because equal treatment compromises the intrinsic value of being a member of a different social group.<sup>110</sup> One major weakness of Fineman's theory as applied to gay and lesbian families, then, is that the equality the theory seeks will deprive gays and lesbians of their outsider status because it will treat gays and lesbians as if they were the same as heterosexuals.<sup>111</sup> Indeed, Nancy Polikoff has argued that, by its nature, marriage is "an attempt to mimic the worst of mainstream society,"<sup>112</sup> and that this leads gays and lesbians to abandon any hope of homosexual liberation.<sup>113</sup>

This criticism of marriage seems likewise applicable to Fineman's model because her theory would eliminate the different treatment of heterosexuals and homosexuals when it comes to forming families. It may not be

necessary, however, to debate this issue at length. The obvious retort to an Ettlbrick-like criticism is that mere equality will not automatically translate into depriving homosexuals of their outsider status.<sup>114</sup> Ettlbrick's position requires that different groups seek out different treatment, or, at the least, that minority group's position themselves to be able to assert their differences.<sup>115</sup> Fineman's model, in its most foundational sense, seeks to do the opposite: to remove the legal and social differences between traditional and "deviant" groups. It is enough to say, however, that some members of gay and lesbian communities may reject my application of Fineman's theory (or of any equality theory at all, for that matter) by arguing that it ignores the inherent value in identifying as a minority group.<sup>116</sup>

## **2. The Morality Critique**

A second critique of my analysis could likely be made on moral grounds, highlighting the failure of Fineman's theory to address the morality of same-sex unions and families.<sup>117</sup> By desexualizing the law and embracing state neutrality, so goes the argument, the exclusionary equality model does not promote the claim that gays and lesbians should live fully human lives and this is, a critic could argue, a case of moral bracketing.<sup>118</sup>

Generally speaking, moral bracketing is the tendency of political philosophers to "sidestep" issues of morality.<sup>119</sup> The gay rights movement has, to a great extent, relied on the morally-neutral principles of equality and privacy rather than moral claims.<sup>120</sup> An increasing number of scholars, however, are embracing moral claims over the equality and privacy-driven arguments of the past. But embracing a neutral equality argument does not necessarily negate the moral claim; certainly there is room for the two to overlap and coincide.<sup>121</sup> And Fineman's theory brackets all morality, not just the morality of same-sex families. One can argue that the morality of same-sex families is not necessarily trumped in this situation because an exclusionary equality argument rejects all morality-based arguments and

does not only bracket the morality of gay rights. Nevertheless, the morality critique is well taken, and it also warrants further discussion.<sup>122</sup>

## V. CONCLUSION

In *The Neutered Mother*, Professor Martha Fineman articulates a re-visioned family law, proposing radical legal changes that would replace marriage with a protected class for nurturing units. Although theoretically feminist in its origins, Fineman's framework is highly relevant in the context of gay and lesbian marriage and adoption. As applied to these issues, Fineman's theory raises interesting questions as to how the law should address gay and lesbian families. Moreover, one can argue, as I have done, that gays and lesbians (and all other champions of same-sex families) should consider raising arguments that address the exclusionary aspects of equality.

My analysis is not meant to be exhaustive; it may be impossible to make a substantial dent in any of the issues raised in this piece. Nevertheless, scholars should continue to address the relationship between feminist thought and gay and lesbian studies, for it is crucial that we address both the normative and descriptive questions regarding homosexuality and the law. Currently, gays and lesbians face numerous hurdles in forming legal families. To overcome these hurdles, it is essential that we consider the legal characteristics of sexuality. Perhaps, indeed, Martha Fineman's work in family law provides a starting point for this process.

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<sup>1</sup> J.D. Candidate, University of Illinois College of Law, 2004; B.A. University of Wisconsin, 2001; Editor-in-Chief *University of Illinois Law Review*, 2003–04; Charles R. Williams Teaching Fellow, UCLA School of Law, 2004–06. I wish to thank Professors Carlos Ball and Martha Fineman; other thanks to Victoria Benson, Shelly Cohen, Becky Ray, Laura Spitz, and Virginia Vermillion; and, for all publication matters, the editors and members of *SJSJ*. I would also like to acknowledge the support I have received for my work on this article from Barry Litwin and all the folks associated with the University of Illinois College of Law's Larry Travis Bushong Student Award. I dedicate this article to the memory of Larry Travis Bushong.

<sup>2</sup> See, e.g., Robert Bork, *Stop Courts from Imposing Gay Marriage*, WALL ST. J., Aug. 7, 2001, at A14; Richard Stengel, *For Better or Worse: As the Debate Heats Up over*

*Same-Sex Marriage, We Take a Look at the Arguments For and Against*, TIME, Jun. 3, 1996, at 52; Barbara Kantrowitz, *Gay Families Come Out*, NEWSWEEK, Nov. 4, 1996, at 50. For a recent scholarly look at same-sex unions, see MARK STRASSER, ON SAME-SEX MARRIAGE, CIVIL UNIONS, AND THE RULE OF LAW: CONSTITUTIONAL INTERPRETATION AT THE CROSSROADS (2002). For an example of scholarly work on the issue of same-sex adoption, see JEFFREY WEEKS ET AL., SAME SEX INTIMACIES: FAMILIES OF CHOICE AND OTHER LIFE EXPERIMENTS (2001).

<sup>3</sup> 123 S. Ct. 2472 (2003).

<sup>4</sup> 478 U.S. 186 (1986).

<sup>5</sup> See *id.* at 190. The *Lawrence* Court has completely discredited *Bowers*'s fundamental rights holding. According to the Court, the *Bowers* Court's framing of its issue as whether "the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy" discloses

the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.

*Lawrence*, 123 S. Ct. at 2478.

<sup>6</sup> In terms of the scope of this article, I will not address larger issues of what I would call the sexuality question, that is, how we determine or define homosexuality. Rather, my use of "gay and lesbian" is intentional. I take my lead here from Marc Spindelman. See Marc S. Spindelman, *Reorienting Bowers v. Hardwick*, 79 N.C. L. Rev. 359, 367 n.10 (2001) ("Instead of the awkward (but perhaps more accurate) locution 'what we think of as the lesbian and gay communities,' throughout the remainder of the Article, I shall say, more simply, 'the lesbian and gay communities.'"). Correspondingly, this article will simply refer to "gays," "lesbians," and "homosexuals" rather than any other "awkward" formulation. For a similar formulation, see Zachary A. Kramer, Note, *The Ultimate Gender Stereotype: Equalizing Gender Conforming and Gender Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. n.1 (forthcoming 2004).

<sup>7</sup> See *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (striking Massachusetts's marriage licensing law, reasoning that it violated the state's constitution).

<sup>8</sup> *In re Opinion of Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004) (declaring that only full civil marriage, and not civil unions, would suffice under state constitution).

<sup>9</sup> *Lofton v. Sec. of Dep't. of Children and Family Servs.*, No. 01-16723, 2004 WL 161275 (11th Cir. Jan. 28, 2004) (upholding, on constitutional grounds, Florida's law banning homosexuals from adopting).

<sup>10</sup> The discussion of a constitutional marriage amendment is, to say the least, divisive. For instance, there are various groups who have publicly supported a proposed amendment, while others have challenged it. See, e.g., AMERICAN CIVIL LIBERTIES UNION, *Stop the Radical Religious Right from Amending the U.S. Constitution*, at <http://www.aclu.org/LesbianGayRights/LesbianGayRights.cfm?ID=9977&c=101> (last visited Mar. 15, 2004); CATHOLIC PLANET, *Pro-Marriage Constitutional Amendment*, at

<http://www.catholicplanet.com/catholic/amendment-marriage.htm> (last visited Mar. 15, 2004).

For a discussion of the politics of such a proposed amendment, see Jacob M. Schlesinger, *Gay-Marriage Issue is Lifted To New Plane—Massachusetts Ruling Will Force Politicians, Nation To Confront Incendiary Subject*, WALL ST. J., Nov. 19, 2003, at A4.

<sup>11</sup> See President George W. Bush, *State of the Union Address* (Jan. 20, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html> (last visited Mar. 21, 2004).

<sup>12</sup> See, e.g., Pam Belluck, *Efforts to Undo Gay Marriage Policy Fails, for Moment*, N.Y. TIMES, Feb. 12, 2004, at A26; Adam Liptak, *A 'Troubled Marriage': Core of Massachusetts Dispute Is Tied to Traditional Exclusivity of the Word*, N.Y. TIMES, Feb. 12, 2004, at A26.

<sup>13</sup> By “framing” an argument, I mean that this article will consider the theoretical foundations of a legal argument. Examples of foundational arguments would include, for example, privacy or morality-based arguments.

<sup>14</sup> There is indeed value in theoretical arguments, especially when it comes to gaining rights and fighting for legal recognition. See, e.g., ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 154 (2002) [hereinafter KOPPELMAN, *GAY RIGHTS QUESTION*] (“Sometimes, at least in the long run, abstract argument is the most effective instrument of politics.”). I think Koppelman would be pleasantly surprised by the recent doings in both Massachusetts and, more importantly, the Supreme Court’s opinion in *Lawrence*. See *id.* at 4 (“Even if the arguments for constitutional protection of gays are persuasive, however, the political reality is that these arguments are not likely to soon prevail in the federal courts (although they have persuaded some state courts).”).

<sup>15</sup> See, e.g., Darren Bush, *Moving to the Left by Moving to the Right: A Law & Economics Defense of Same-Sex Marriage*, 22 WOMEN’S RTS. L. REP. 115 (2001); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993); Richard D. Mohr, *The Case for Gay Marriage*, 9 NOTRE DAME J.L. ETHICS & PUB. POL’Y 215 (1995); Josephine Ross, *Sex, Marriage and History: Analyzing the Continued Resistance to Same-Sex Marriage*, 55 SMU L. REV. 1657 (2002).

<sup>16</sup> This article’s arguments are similar to a lecture by Nancy Polikoff. Nancy D. Polikoff, *Why Lesbians and Gay Men should Read Martha Fineman*, 8 AM. U. J. GENDER SOC. POL’Y & L. 167 (2000) [hereinafter Polikoff, *Read Martha Fineman*]. Admittedly, the general subject matter is, well, similar. But our arguments are really quite different. While Polikoff argues that Fineman’s “transformative” family model forms the needed bridge between competing “choice” and “formal equality” theories, see *id.* at 167, this article is more concerned with how advocates for same-sex families can use Fineman’s construct to articulate a whole new argument for same-sex families. Whereas Polikoff is interested in placing Fineman’s entire oeuvre, albeit with a special focus on Fineman’s Re-visioned family law, into the larger contexts of feminist legal thought and sexual orientation law, this article creates a new construct to place in the sole context of advocating for same-sex families. See generally *id.*

<sup>17</sup> At the outset, I must make clear what this article is *not* arguing. I am not advocating for the abolition of legal marriage because I believe that gays and lesbians should not marry. Indeed, I think that marriage should be open to all who seek it, and that gays and lesbians should seek marital rights on the same footing as heterosexuals. See Zachary A. Kramer, Voice of the People, *Marriage Should Be Open to All Who Honor It*, CHI. TRIB., Jan. 18, 2004, at § 2, at 8. Likewise, I fully support the moral claim that gays and lesbians should be able to marry and raise children free from state interference. See *infra* Part IV.B.2 (discussing the moral claim for same-sex families).

Rather, this article represents my own attempt to understand the full scope of arguments in favor of same-sex families. So, while I support the moral claim for same-sex families and I believe that homosexuals should seek marriage, I would like to use this article to better flesh out an equality-based argument, one that is independent of the moral claim, so gay rights advocates can better understand the fullness of arguments in support of same-sex families.

<sup>18</sup> See *infra* Part II.A (introducing Martha Fineman and briefly surveying her scholarship).

<sup>19</sup> See *infra* Part II.B.1–2 (laying out a cursory explanation of the basic premise of Fineman's re-visioned family law).

<sup>20</sup> See *infra* Part II.C (criticizing Fineman's theory as dangerously heterocentric).

<sup>21</sup> See *infra* Part III (reworking Fineman's re-visioned family law).

<sup>22</sup> See *infra* Part IV.A (describing how this article's concept of equality differs from conventional notions of equality).

<sup>23</sup> See *infra* Part IV.B (discussing potential—and even likely—counterarguments, regarding the value of political minorities' self-identification and the absence of morality in the exclusionary equality theory).

<sup>24</sup> Faculty Biography Page for Martha Albertson Fineman, *at*

<http://www.law.emory.edu/faculty/facbio2.php?userid=mfineman> (last visited Feb. 15, 2004).

<sup>25</sup> Fineman's chair in feminist jurisprudence was the first of its kind in the country. See *id.*

<sup>26</sup> See *id.*

<sup>27</sup> See *Cornell Law Library: Faculty Publications*, *at*

<http://www.lawschool.cornell.edu/library/facbib/showbib.asp?id=26> (last visited Feb. 15, 2004). A rough estimate of Fineman's work totals around 65 publications.

<sup>28</sup> MARTHA A. FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 226 (1995).

<sup>29</sup> It is not uncommon, moreover, for scholars and writers to transpose one school of thought onto issues falling under a different umbrella of thought. See, e.g., Darren Bush, *Caught Between Scylla and Charybdis: Law & Economics as a Useful Tool for Feminist Legal Theorists*, 7 AM. U. J. GENDER SOC. POL'Y & L. 395 (1999). For clarity's sake, this example uses the methodology of the law and economics movement to address issues under a second umbrella of legal thought, feminist legal thought.

<sup>30</sup> See, e.g., Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 201–03 (discussing the various theories of feminist



jurisprudence, including lesbian feminism). The paucity of sources in this footnote is in no way meant to suggest that there is a lack of literature on this area of scholarly thought.

<sup>31</sup> As discussed above, *see supra* note 16 and accompanying texts, Professor Polikoff's aptly-titled symposium lecture likewise urges gays and lesbians to read (rather than champion or advocate) Martha Fineman, *see also* Polikoff, *Read Martha Fineman, supra* note 16, at 167 ("[Fineman's] work should be required reading for all those interested in family law from a gay and lesbian perspective, and most specifically for anyone participating in the debate about legalizing marriage for lesbians and gay men.").

<sup>32</sup> FINEMAN, *supra* note 28, at 226 ("To facilitate its performing of these social roles, the functioning of the traditional family is idealized and romanticized."). The traditional family is most definitely heterosexual.

<sup>33</sup> *See id.* at 47–48 ("The idea of a gendered life is based on the premise that as a socially and legally defined group, women share the potential for experiencing a variety of situations, statuses, and ideological and political impositions in which their gender is culturally relevant.").

<sup>34</sup> *See id.* at 226 ("Tax rules, probate and inheritance laws, zoning ordinances, insurance and benefit regulations, are just some examples of the hidden subsidies that aid middle-class and wealthy family units.").

<sup>35</sup> *See infra* Part II.B.2 (discussing the Mother/Child Dyad and the primacy of caretaking in Fineman's re-visioned family law scheme).

<sup>36</sup> Nor is theory necessarily bad or utterly unhelpful in its own right. Indeed, theory has value within itself that makes it useful to lawyers and those who study law. *See, e.g.*, Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353 (1997) (arguing that lawyers should embrace theory and theoretical approaches to law because theory, in great part, underlies conventional legal reasoning). Dworkin's essay is a scholarly adaptation of his Order of the Coif Lecture at the law school at Arizona State University in 1997. *See id.* at 353 ("I am very grateful . . . for the opportunity to give the Order of the Coif Lecture, not just because of its remarkable auspices, but because the lecture was the culmination of my first visit to the American Southwest, which was spectacular.").

<sup>37</sup> Such a criticism would not be new. *See, e.g.*, F.M. Kamm, *Theory and Analogy in Law*, 29 ARIZ. ST. L.J. 405 (1997); Richard A. Posner, *Conceptions of Legal "Theory": A Reply to Ronald Dworkin*, 29 ARIZ. ST. L.J. 377 (1997); Cass R. Sunstein, *From Theory to Practice*, 29 ARIZ. ST. L.J. 389 (1997). Judge Posner, for instance, has advocated for some time now what he calls his pragmatic approach to legal reasoning and pragmatic adjudication, which shuns moral theory and philosophy from legal reasoning because it is not helpful or useful to practical legal decision making. *See generally* RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* ch. 2, 91–181 (1999) (arguing that morality and philosophy have no bearing on constitutional theory, and preferring social science and scientific theory in its place); *see also id.* at 309 ("We have too much theory in law—of the wrong kind; for of course, I disagree with William Blake that 'to generalize is to be an idiot. To particularize is the alone distinction of merit.' Law needs theory—social scientific theory. . . . What no one needs is normative moral philosophy, or the kind of legal theory that is built on or runs parallel to normative moral theory, or postmodern antitheory.") (footnote omitted).

<sup>38</sup> Fineman likewise recognizes this point:

Rethinking on this scale is a quite grandiose objective, requiring massive reconsideration of many assumed roles and institutions on an ideological level as well as a structural one. . . . The production of practical suggestions is not the only justification for theory, however. Sometimes re-visioning, even if utopian, is valuable simply because it forces us to look at old relationships in new lights and thereby understand some things about how we perceive the natural or normal, as well as how we create the deviant.

FINEMAN, NEUTERED MOTHER, *supra*, note 28 at 232.

<sup>39</sup> See *id.*, at 228.

<sup>40</sup> For a discussion of legal marriage versus symbolic marriage and the various significances of the two, see *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1049 (1998). The previous opinion in that case goes into even greater depth about the distinctions between symbolic and legal marriage. See *Shahar v. Bowers*, 70 F.3d 1218 (11th Cir. 1995), *vacated and hearing en banc granted*, 78 F.3d 499 (1996); see also Polikoff, *Read Martha Fineman*, *supra* note 16, at 173 (“Ceremonies, secular or religious, could continue if they suited a couple’s desire for public or sacred affirmation.”).

<sup>41</sup> I have purposely chosen “men” and “women” because Fineman’s theory is concerned with heterosexual couples. Part III will take up the place of same-sex partners in her theory. See *infra* Part III. A–B.

<sup>42</sup> FINEMAN, *supra* note 28, at 229.

<sup>43</sup> Indeed, the contract metaphor continues to play a significant role in Fineman’s work. See, e.g., Martha A. Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403 (2001). This piece is also significant because it reinforces the ways in which the contract metaphor can fit in discussion of legal feminism and family. I urge anyone interested in the contract metaphor to begin with, after tackling *The Neutered Mother*, Fineman’s *Contract and Care* and the various sources cited therein.

<sup>44</sup> See Polikoff, *Read Martha Fineman*, *supra* note 16, at 173 (“With this, the state would lose its interest in bolstering one form of family intimacy, and voluntary adult sexual relationships would be none of the state’s business. To Fineman, there is no good reason to elevate a monogamous, adult, sexual relationship to an institution with a privileged position in the law.”).

<sup>45</sup> The privatization of the family has its critics, however. Generally speaking, there is a strong argument against allowing families to privately contract for their families because it reinforces the notion of a public/private sphere dichotomy. See, e.g., MARY BECKER ET AL., *CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 642 (2d ed. 2001) (“Privatization also reinforces the notion of the public/private split, which has harmed women in many ways by isolating women within families and supporting the position that the public has little interest in what goes on within the hearth.”) (citing Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1560–64). This criticism is, or at least should be, likewise applicable to gays and lesbians, reasoning that the privatization of the family cannot coexist with a morality-based argument for gay rights. For a similar discussion, see discussion *infra* Part IV.B.2. Nevertheless, Fineman’s model, by shifting the public’s focus to

dependency rather than the marital relationship, may adequately oppose the privatization critique.

<sup>46</sup> FINEMAN, *supra* note 28, at 229 (emphasis in original).

<sup>47</sup> *See id.*

<sup>48</sup> That is, Fineman's model would permit all voluntary sexual relationships—which presumably includes polygamous relationships, for example. *Id.* Fineman does qualify this, however, by insisting that “children would continue to be protected by incest and other laws, and rape would continue to be subject to criminal sanctions.” *Id.* at 230.

<sup>49</sup> *Id.* at 230. The next section discusses this idea further. *See infra* Part II.B.

<sup>50</sup> *See* FINEMAN, *supra* note 28, at 230. Fineman's use of “dependents” is not limited to children, but also includes any family member who would require caretaking, e.g. the elderly or infirmed.

<sup>51</sup> *See id.* (referring to dependents as “weaker” members of society).

<sup>52</sup> *See id.* at 230–231 (“If marriage has no legal significance and the traditional family is not state subsidized and supported, these dependents will be more visible. Hopefully, they will also become the object of generalized societal concern.”).

<sup>53</sup> *See id.* at 231 (“One solution to inevitable dependencies unanchored by the private family would be to direct assumption of responsibility by the state through public institutions.”).

<sup>54</sup> It is unclear what role, if any, a third-party caretaker would play in Fineman's construct. For example, if Mark and Mary hired a nanny to raise their child, presumably an employer would not have to provide benefits to the nanny because the nanny is not contractually bound to either Mark or Mary.

<sup>55</sup> Others, too, have argued for the need to reclaim the term. *See generally, e.g.*, June Carbone, *Equality and Difference: Reclaiming Motherhood as a Central Focus of Family Life*, 17 LAW & SOC. INQUIRY 421 (1992).

<sup>56</sup> FINEMAN, *supra* note 28, at 234.

<sup>57</sup> The following example somewhat mirrors John Stuart Mill's notion of an “experiment in living,” where Mill encourages people to experiment with familial and social structures. *See* JOHN STUART MILL, ON LIBERTY, Chapter IV, *reprinted in* THE GREAT LEGAL PHILOSOPHERS, SELECTED READINGS IN JURISPRUDENCE (Clarence Morris, ed., 1959). Mill's own experiment in living (living with Harriet Taylor and her husband for many years) is not all that different from the discussion of mothers and caretakers here.

<sup>58</sup> For an example of theory imitating pop culture, one can find a similar situation on the television show *Will and Grace*. There, two friends, a gay man and a straight woman, decided that they would raise a child together. *See Will and Grace, A.I.: Artificial Insemination* (NBC television broadcast, May 16, 2002). Fineman's theory would embrace such a scenario.

<sup>59</sup> I do not mean for my succinctness to suggest that Fineman's theory is entirely without flaws, and nor do I mean that it is riddled with flaws, either. My hope in this article is to not focus too much on the weaknesses of Fineman's model, but to show how advocates of same-sex families can rework and utilize her theory to champion same-sex families. *See infra* Part II.C (criticizing Fineman's theory).

<sup>60</sup> While this article is technically not a book review, it most definitely shares aspects of a book review in that it addresses and reworks a theory from one specific book. And

while my defense of Fineman's theory is apparent, I must, to fully embrace this article's similarities to a book review, also present a brief criticism. For a similar discussion of the proper role of a book reviewer, see John Mikhail, *Law, Science, and Morality: A Review of Richard Posner's The Problematics of Moral and Legal Theory*, 54 STAN. L. REV. 1057, 1060 (2002) (discussing how a book review should present both objective and critical analysis, so that a reader can determine whether she wants to read it); Richard A. Posner, *On the Alleged 'Sophistication' of Academic Moralism*, 94 NW. U. L. REV. 1017 (2000).

<sup>61</sup> I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1159 (1991).

<sup>62</sup> Capers calls this the "binary gender system." *Id.* at 1159.

<sup>63</sup> Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 195.

<sup>64</sup> See generally Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631 (1980). Rich's article also discusses what she calls the "lesbian continuum," which theorizes that all women rely on and have a series of female relationships that are not solely sexual in nature. See generally *id.*

<sup>65</sup> SONYA ANDERMAHR ET AL., A CONCISE GLOSSARY OF FEMINIST THEORY 34 (1997).

<sup>66</sup> For one of the first feminist works recognizing the inextricability of racism, sexism, and homophobia, see AUDRE LORDE, *SISTER OUTSIDER* 110–13 (1984).

<sup>67</sup> For a comprehensive discussion of the conflation of sex, gender, and sexual orientation, see Francisco Valdes, *Queers, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995) (displaying in great detail the ways in which the law conflates these three categories).

<sup>68</sup> See generally, e.g., Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988); see also KOPPELMAN, *GAY RIGHTS QUESTION*, *supra* note 14, 53–71 (outlining the sex discrimination argument and assessing the leading objections to it).

<sup>69</sup> Professor Fineman may be surprised to see that I have characterized her theory as an equality model because she has been critical of the equality model in the past. See, e.g., Martha L. A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181 (1995) (arguing that gender-neutral locution of modern family law has not improved the legal and political standing of women in society).

This raises an important question: considering that Fineman primarily rejects equality arguments, how can one characterize her theory as an equality model? My answer, which I hope is sufficient, is that Fineman's rejection of the equality model is a rejection of equality vis-à-vis men and women—namely, because the equality framework has hurt married and divorced women. The discussion of equality in this article is focused on equalizing heterosexuals and homosexuals, not men and women. That is, this article asserts that Fineman's re-visioned family law is, implicitly, an equality model, and that Fineman's rejection of equality as a beneficial model for heterosexual women does not discount the possibility that her theory may, in effect, equalize heterosexuals and homosexuals.

<sup>70</sup> See *infra* notes 2–12 and accompanying text (discussing the recent same-sex marriage case and how that case may affect the legal landscape for gays and lesbians). As I mentioned before, this will surely change, but it is simply too early to predict what will happen to same-sex marriage in Massachusetts.

<sup>71</sup> See VT. STAT. ANN. tit. 15, § 23 (2000) (providing civil unions for same-sex couples). Vermont’s Civil Union legislation is the direct result of the Vermont Supreme Court’s decision in *Baker v. State*, where the court held that the legislature could not limit the right to marry to opposite-sex couples. See *Baker v. State*, 744 A.2d 864 (Vt. 1999) (declaring the state bar on homosexual marriage a violation of the state constitution).

<sup>72</sup> See Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation*, OUT/LOOK, Autumn 1989, at 8–12; Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, Autumn 1989, at 8–12.

<sup>73</sup> Fineman’s reforms would render a great deal of precedent obsolete. In 1993, for instance, the Hawaii Supreme Court held that the state’s restriction against same-sex marriage was unconstitutional under the state constitution. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). In response, however, the state passed a constitutional amendment against recognizing same-sex unions. HAW. CONST. art. I, § 23 (“The legislature shall have the power to reserve marriage to opposite-sex couples.”). Following this amendment, the Hawaii Supreme Court had no choice but to reverse the previous holding in *Lewin*. *Baehr v. Miike* 994 P.2d 566 (Haw. 1999).

<sup>74</sup> I borrow this term from Judge Posner’s discussion in *Irizarry v. Board of Education of the City of Chicago*, 251 F.3d 604 (7th Cir. 2001). In that case, Milagros Irizarry, a heterosexual woman who had lived with the same man for more than twenty years and had two children with him, challenged the Chicago Board of Education’s School policy to only provide domestic partnership benefits to the partners of homosexual employees. For the discussion of Lambda’s role, see *id.* at 608–09. Posner went on to suggest that Lambda Legal was trying to know marriage of its perch. *Id.* at 609 (“Lambda wants to knock marriage off its perch by requiring the board of education to treat unmarried heterosexual couples as well as it treats married ones, so that marriage will lose some of its luster.”).

<sup>75</sup> See *infra* Part II.C (criticizing Fineman for the hetero-centricity of her theory).

<sup>76</sup> FINEMAN, *supra* note 28, at 227.

<sup>77</sup> Massachusetts may soon provide for same-sex marriage; however, at the time of this writing, it was unclear whether the legislature would put a halt to same-sex marriage in the state. See *infra* notes 2–12 and accompanying text (discussing the Massachusetts opinions and how the legislature is considering a marriage amendment to the state constitution).

<sup>78</sup> For both an extensive discussion of same-sex unions and an ethical argument in favor of supporting same-sex families, see RICHARD D. MOHR, *A MORE PERFECT UNION: WHY STRAIGHT AMERICA MUST STAND UP FOR GAY RIGHTS* (1994).

<sup>79</sup> FINEMAN, *supra* note 28 at 230.

<sup>80</sup> See *infra* Part II.C (discussing heterosexism and Fineman’s failure to adequately defend against such discrimination).

<sup>81</sup> The literature on visitation custody in same-sex families is vast—and seemingly beyond the scope of the article. For a detailed treatment of custody and visitation issues

in same-sex families, see WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 828–41 (1997). Nevertheless, an interesting issue raised in custody and visitation cases is whether a court can bar a homosexual parent seeking custody on the grounds that the parent's homosexuality will stigmatize, and therefore harm, the child. *See, e.g.*, *Bottoms v. Bottoms*, 457 S.E.2d 102 (reasoning that the stigma of homosexuality will harm the child).

<sup>82</sup> For a discussion of surrogacy, both in context of homosexuality and in the heterosexual context, see generally Keith J. Hey, *Assisted Conception and Surrogacy—Unfinished Business*, 26 J. MARSHALL L. REV. 775 (1993); Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children*, 12 WIS. WOMEN'S L.J. 113 (1997); Angie Goodwin McEwan, Note, *So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy*, 32 VAND. J. TRANSNAT'L L. 271 (1999).

<sup>83</sup> *See, e.g.*, FLA. STAT. ANN. § 63.042(3) (West 1997) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”). As discussed earlier, the Eleventh Circuit recently upheld the constitutionality of this provision. *See* *Lofton v. Sec. of Dep't. of Children and Family Servs.*, No. 01-16723, 2004 WL 161275 (11th Cir. Jan. 28, 2004) (upholding, on constitutional grounds, Florida's law banning homosexuals from adopting).

<sup>84</sup> Second-parent adoption concerns the problem of how a gay partner can legally adopt his or her partner's child without terminating the first parent's parental rights. For a general discussion of the legal problems associated with second-parent adoptions, see Patricia J. Falk, *Second-Parent Adoption*, 48 CLEV. ST. L. REV. 93 (2000).

<sup>85</sup> Although Fineman does not discuss the issue of harmful relationships, I think it is a safe assumption that she would permit the state to regulate certain sexual relationships that prove harmful to children. For example, the state could presumably regulate a couple that openly performs sadomasochistic acts in front of their children, but the state would probably not be able to regulate two consenting adults engaging in sadomasochism otherwise. For a brief discussion of law and sadomasochism, see WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 259–63 [hereinafter ESKRIDGE, *GAYLAW*] (discussing how the law conceives of sadomasochistic acts).

<sup>86</sup> This raises a further question, concerning the constitutionality of a law that prohibits gays and lesbians from adopting. One of the main things to take away from the Supreme Court's opinion in *Lawrence v. Texas* is that morality is an insufficient rationale to justify a law criminalizing consensual, noncommercial sexual relations between adults. *See* *Lawrence v. Texas*, 123 S. Ct. 2472 (2003). Assuming both that we can take the Court's morality holding seriously and that it applies to other contexts beyond sodomy laws, one could argue that *Lawrence* upends a state's morality-based justification for preventing homosexuals from adopting. At the time of this writing, it is too soon to see how the effects and implications of *Lawrence* will play out. Presumably, however, both scholars and courts will weigh in on the specific question of how the decision affects other, non-sodomy laws.

<sup>87</sup> *See* ESKRIDGE & HUNTER, *supra* note 81, at 843 (“*The Per Se Immoral Argument*. In a few states, adoption by gay people is substantially or wholly forbidden on the old ‘immorality’ ground.”).

<sup>88</sup> Eskridge and Hunter also raise the question, hinted at above in connection with the brief discussion of *Lawrence v. Texas*, of whether such a ban is constitutional in light of *Romer*. *Id.* at 844. Again, I think *Lawrence* makes an even stronger argument that such laws are now unconstitutional.

<sup>89</sup> The data on the question of whether parents' sexual orientation is harmful to children is vast and, at the same time, inconclusive. Two sociologists, however, have recently shown in a meta-analysis that, among other things, children raised in same-sex families express nontraditional gender roles. See Judith Stacey & Timothy J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 AMER. SOC. REV. 159 (2001). This finding, however, can cut either way with those who oppose same-sex families arguing that any gender role expression inconsistent with traditional roles would be harmful and those who support same-sex families arguing the opposite: that children expressing nontraditional gender roles is, in fact, a positive thing. For a discussion of the Stacey and Biblarz article and the argument that their findings should be considered in a normative discussion of the value of nontraditional gender roles in children, see Carlos A. Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691 (2003).

<sup>90</sup> For an overview of laws regarding second-parent adoption, see Jane S. Schachter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933 (2000).

<sup>91</sup> See David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523, 532–42 (1999) (discussing the various approaches gays and lesbians have taken in stretching their rights under adoption laws, including artificial insemination by lesbians). As discussed *supra*, surrogacy is another option for gay men to create a family. See articles cited *supra* note 82 (covering the legal issues surrounding surrogacy).

<sup>92</sup> A disclaimer is appropriate here. My use of the term “equality” is meant more in legal terms rather than philosophical terms. It is likely that most would consider any consideration of the scope of equality to be a philosophical discussion. Not being a philosopher myself, I will not attempt to engage in such a discussion, but instead I will label this discussion as one of legal theory. For general guidance on the subject (or on this subtle distinction), I refer to Richard Posner’s *Overcoming Law*. There, he seems to contrast legal theory with philosophy more generally. “‘Legal Theory’ is the body of systematic thinking about (or bearing closely on) law to which non-lawyers can and do make important contributions, and which lawyers ignore at their peril.” RICHARD A. POSNER, *OVERCOMING LAW*, vii (1995). Compare this with: “But none of these concessions . . . to philosophy’s importance implies that philosophical texts can fruitfully be minded for, or philosophers fruitfully consulted on, *specific* solutions to *specific* problems of social governance.” RICHARD A. POSNER, *What Are Philosophers Good For?*, in *OVERCOMING LAW* 446 (1995) (emphasis in original). Hopefully, my discussion of equality will prove helpful in at least some practical application.

<sup>93</sup> Nor are liberality and morality the only potential foundations for a theory of sexuality. For instance, Judge Posner has espoused an economic theory of sexuality, which contrasts sexual benefits, including procreative, hedonistic and sociable benefits, with the

costs of sex, including personal, social and search costs. See RICHARD A. POSNER, *SEX AND REASON* 111–45 (1992).

Also, I should note again that I am recharacterizing Fineman's model as an equality argument even though she expressly rejects equality arguments in the case of heterosexual relationships. See *supra* note 69 (discussing how I am recharacterizing Fineman's theory as an equality argument).

<sup>94</sup> For an exposition of the traditional equality argument as it pertains to gay and lesbian marriage, see Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbian and Gay Men and the Intra-community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 580, 591, 599 (1994–95); see also Polikoff, *Read Martha Fineman*, *supra* note 16, at 167 (referring to Wolfson's article).

<sup>95</sup> For a discussion of both the scope and history of liberal thought, see JOHN GRAY, *LIBERALISM* (2d ed. 1995).

<sup>96</sup> I make the moral/political distinction here to reinforce the importance of state neutrality in Fineman's theory as it is applied to gays and lesbians. In Fineman's context, the state is able to delegate political rights without passing moral judgment on the various groups (i.e. heterosexuals and homosexuals). This neutrality is reminiscent of the role of the state in John Rawls' philosophy. See generally JOHN RAWLS, *POLITICAL LIBERALISM* (1993); JOHN RAWLS, *A THEORY OF JUSTICE* (1971). For a discussion of the relationship between these two of Rawls's works, see Rex Martin, *Rawls's New Theory of Justice*, 69 CHI.-KENT L. REV. 737 (1994).

<sup>97</sup> I must admit that this proposition is eerily similar to one of the main tenants of queer legal theory—namely, to reject state regulation of sexuality. See, e.g., Laurie Rose Kepros, *Queer Theory: Weed or Seed in the Garden of Legal Theory?*, 9 LAW & SEXUALITY 279, 284–89 (2000) (discussing how queer theory can be applied to legal theory and how it can be taught in law schools).

<sup>98</sup> See ANDERMAHR, *supra* note 65, at 180.

<sup>99</sup> See, e.g., MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOL. I: AN INTRODUCTION* (Robert Hurley, trans., 1990) (presenting what most consider the best statement of the social constructionist rendering of sexuality).

<sup>100</sup> See ESKRIDGE, GAYLAW, *supra* note 85, at 444 n.1 (“Under th[e] assumption [that sexuality is socially constructed] law assumes more critical but also more ambiguous regulatory roles.”). My use of “unnatural,” moreover, is meant to contrast social construction from natural classifications. See, e.g., John M. Finnis, *Law, Morality, and “Sexual Orientation,”* 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11 (1995); John M. Finnis, *Law, Morality, and “Sexual Orientation,”* 69 NOTRE DAME L. REV. 1049 (1994).

<sup>101</sup> See, e.g., Janet E. Halley, *The Construction of Heterosexuality*, in *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* (Michael Warner ed., 1993).

<sup>102</sup> It seems necessary for purposes of this article to ignore the various permutations of state adoption laws. For an overview of current state adoption laws, see Lambda Legal's Overview of State Adoption Laws, at <http://www.lambdalegal.org/cgi-bin/iowa/issues/record?record=5> (last visited Mar. 15. 2004).

<sup>103</sup> Congress's passage of the Defense of Marriage Act (DOMA) solidifies the states' ability not to recognize same-sex marriages. See Defense of Marriage Act (DOMA), Pub. L. No. 104-199, § 2, 110 Stat. 2419 (1996) (codified in scattered section of 1 & 28



U.S.C.). There remains, however, a question of the constitutionality of DOMA: whether DOMA violates the Full, Faith and Credit Clause of Article IV. For a discussion of this issue, see Brett P. Ryan, *Love and Let Love: Same-Sex Marriage, Past, Present, and Future, and the Constitutionality of DOMA*, 22 U. HAW. L. REV. 185 (2000); Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307 (1998); Timothy Joseph Keefer, Note, *DOMA As A Defensible Exercise of Congressional Power Under the Full-Faith-and-Credit Clause*, 54 WASH. & LEE L. REV. 1635 (1997).

For an interesting account of the use of narrative in the Congressional debate over DOMA, see Charles J. Butler, Note, *The Defense of Marriage Act: Congress's Use of Narrative in the Debate over Same-Sex Marriage*, 73 N.Y.U. L. REV. 841 (1998). Moreover, a related issue emerging out of Vermont's civil union law is how other state courts should deal with gay divorces. For a narrative discussion of this problem, see Laurie Essig, *My Gay Divorce*, LEGAL AFF. Sept.-Oct. 2003.

<sup>104</sup> Without considering the states' various attitudes toward second-parent adoptions, there are numerous states that make it hard for a same-sex couple to adopt, but only Florida expressly prohibits homosexuals from adopting. See FLA. STAT. ANN 63.042(3) (West 1997) (prohibiting homosexuals from adopting children).

<sup>105</sup> In fact, if you want to be technical about it, Fineman's model would not just lower heterosexuals down on the continuum. Rather, she would lower both heterosexuals and homosexuals down to the lowest possible place.

<sup>106</sup> Exclusion is significant, moreover, because it removes the question of morality from the debate. Because the state is blind to questions of sexuality, gays and lesbians would not be faced with defending themselves against the argument that they are morally deficient and therefore not entitled to equal access to the good. Admittedly, this flies in the face of Professor Ball's argument against moral bracketing. See CARLOS A. BALL, *THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY* (2003) [hereinafter BALL, MORALITY] (arguing that gays and lesbians should embrace a moral argument rather than bracketing the question of morality and arguing for rights on other grounds).

<sup>107</sup> For instance, take the Virginia Military Institute (VMI) litigation. *United States v. Virginia*, 518 U.S. 515 (1996). There, female plaintiffs challenged the VMI's all-male policy. The crux of their argument was that women, as a class, were equally entitled to the educational value of the VMI experience. That is, they were seeking equality through inclusion, not through exclusion.

<sup>108</sup> To mention this is not to raise the unanswered question from *Romer* of whether homosexuals constitute a suspect class for purposes of a constitutional analysis, which remains unanswered in light the Supreme Court's due process analysis in *Lawrence v. Texas*. See *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

<sup>109</sup> See, e.g., Maimon Schwarzschild, *Constitutional Law and Equality*, in A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 156 (Dennis Patterson, ed. 1996).

<sup>110</sup> See *supra* note 72 and accompanying text (discussing Ettlbrick's argument). Professor Polikoff has similarly argued that gays and lesbians should not seek equal marriage rights. See Nancy D. Polikoff, *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) [hereinafter Polikoff, *Gay and Lesbian Marriage*].

<sup>111</sup> Although Ettelbrick and Polikoff’s critique is framed in political terms, one could also frame this criticism in moral terms, reasoning that Fineman’s model is deficient because it fails to address head on the issue of whether there is an inherent good in the relationship between two people of the same sex. For both a discussion of the issue of morality in cases of same-sex marriage and parenting and the argument that we should consider morality in the context of same-sex relationships, see BALL, *supra* note 106.

<sup>112</sup> Polikoff, *Gay and Lesbian Marriage*, *supra* note 110, at 1536.

<sup>113</sup> Similarly, the editors of the *Harvard Law Review* note that by seeking to marry, gays and lesbians “legitimate[] state paternalism and the ‘hegemonic’ history of marriage.” *Developments in the Law—The Law of Marriage and Family; Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2010 (2003).

<sup>114</sup> Cf. Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidisciplinary, and Responsibility in Social Justice Scholarship or Legal Scholars as Cultural Warriors*, 75 DENV. U. L. REV. 1409 (arguing, in part, that sexuality scholars must move beyond sexual orientation in their quest for social justice).

<sup>115</sup> On the larger question of identity and how groups self-identify, see Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647 (1996). Questions of group identity can be complicated for gays and lesbians. For instance, lesbian women have made pathways within feminist thought to carve out a unique lesbian identity, which is, at the very least, facially and particularly different than simply identifying oneself as either a woman or a feminist. See, e.g., Patricia A. Cain, *supra* note 30 (discussing how different schools of feminist thought identify and label themselves). For the larger discussion of identity in the gay rights movement, see William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2159–94 (discussing role of identity in gay rights movement).

<sup>116</sup> Philosopher Richard Mohr has written on the topic of the identification of gays as a minority. According to Mohr, “Minority status is a moral vision, and gay studies, as the study of a minority, should be viewed chiefly as a normative inquiry rather than as either an empirical study of the world or a nonempirical study of discourses. The normative object of any minority study . . . is the social treatment of a group that is socially defined independently of the behavior of its members.” RICHARD D. MOHR, *GAY IDEAS: OUTING AND OTHER CONTROVERSIES* 252–53 (1992). In the end, Mohr, like Ball, stresses the primacy of morality in gay rights: “[w]e need to be a bit braver and say that gay studies matters because gay people matter—here, now, and breathing.” *Id.* at 253; see also BALL, *MORALITY*, *supra* note 106, at 4 (“I believe that many if not most of the controversies over homosexuality in our society are at their core *appropriately* moral ones.”) (emphasis in original).

<sup>117</sup> See *supra* notes 89 & 106 (discussing Professor Ball’s argument that gay rights advocates must embrace a moral claim in defense of same-sex families).

<sup>118</sup> See Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871 (1997). According to Ball,

[l]iberalism, with its respect for equality, toleration, and state-neutrality, has become the predominant theory of political morality of our time. A central component of contemporary liberalism has been to call for a moral bracketing in matters of public reasoning; namely, for a strict separation between the differing conceptions of the good held by individuals and the broader political discourse that seeks to define individual rights and formulate public policy.

*Id.* at 1883. For a similar rejection of moral bracketing, see Chai R. Feldblum, *A Progressive Moral Case for Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 485 (1998) (discussing Ball's argument and likewise rejecting claims that bracket off moral claims by gays and lesbians).

<sup>119</sup> See BALL, *supra* note 106, at 1–14 (describing, generally, moral bracketing as the sidestepping of moral claims in political philosophy, and rejecting the morally-neutral privacy and equality arguments that have, until now, been the foundation of the gay rights movement).

<sup>120</sup> For instance, the legal theories in *Bowers*, *Romer*, and *Lawrence* all relied on privacy, equality, or some combination of both. But all three strayed away from the moral claims of which Ball speaks.

<sup>121</sup> See *infra* Part II.B.1-2 (discussing how I most definitely support the moral claim for same-sex families but also want to consider the equality argument rendered in this article).

<sup>122</sup> Indeed, I think it worthy of further consideration whether Ball's moral liberalism framework extends beyond the family and into cases of public discrimination, for instance, in the case of sexual orientation discrimination under Title VII. That question, however important it may be, must remain for a later day.