Marriage and the Elephant: State Regulation of Intimate Relationships Between Adults

By
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. . . . As all six men were blind, neither of them could see the whole elephant and approached the elephant from different directions. After encountering the elephant, each man proclaimed in turn:

'O my brothers,' the first man at once cried out, 'it is as sure as I am wise that this elephant is like a great mud wall baked hard in the sun.'

'Now, my brothers,' the second man exclaimed with a cry of dawning recognition, 'I can tell you what shape this elephant is - he is exactly like a spear.' . . .

'Why, dear brothers, do you not see,' said the third man -- 'this elephant is very much like a rope,' he shouted.

'Ha, I thought as much,' the fourth man declared excitedly, 'This elephant much resembles a serpent.' . . .

'Good gracious, brothers,' the fifth man called out, 'even a blind man can see what shape the elephant resembles most. Why he's mightily like a fan.'

At last, it was the turn of the sixth old fellow and he proclaimed,

*'This sturdy pillar, brothers' mine, feels exactly like the trunk of a great areca palm tree.'***

For much of the twentieth century, the state's position with respect to marriage and other relationships between adults sparked little conversation in legal and political theory. Instead, the state's role in putting its seal of approval on marital relationships and discouraging other relationships between adults was generally taken as an unquestioned fact. To the extent that the

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** JAMES RIORDAN, AN ILLUSTRATED TREASURY OF FAIRY AND FOLK TALES (1986).

state's position on relationships between adults was raised at all, commentary centered on the relative ease with which persons generally, or particular classes of persons could be married or divorced,[1] or the consequences of divorce.[2] The legitimacy of the state's involvement in and support for marriage, itself, however, went largely undiscussed.

Recent legal, political and social events, however, have turned this state of affairs on its head. The string of court decisions finding merit in same-sex marriage challenges, beginning with the Hawaii Supreme Court's decision in *Baehr v. Lewin* in 1994,[3] and extending through the Massachusetts Supreme Court's decision in *Goodridge v. Department of Public Health*,[4] to

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[1] For example, in the period between the 1970s and the mid-1990s, a great number of law review articles focused on the then occurring no-fault divorce revolution sweeping the states. *See, e.g.,* Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291 (1987); Thomas B. Marvell, *Divorce Rates and the Fault Requirement*, 23 LAW & SOC'Y REV. 543 (1989); *Balancing Children's Rights Into the Divorce Decision*, 13 VT. L. REV. 531 (1989); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1 (1987); Nora J. Lauerman, *A Step Toward Enhancing Equality, Choice, and Opportunity to Develop in Marriage and at Divorce*, 56 U. CIN. L. REV. 493 (1987).

A considerable amount of the literature on marriage and divorce during the 1980s and early 1990s also focused on the right of members of particular groups to marry. Prison inmates were one of the groups that received the most attention. *See, e.g.,* Bradford L. Thomas, *Restricting State Prisoners' Due Process Rights: The Supreme Court Demonstrates Its Loyalty to Judicial Restraint*, 22 CUMBERLAND L. REV. 215 (1991); Jacqueline B. DeOliveira, *Marriage, Procreation, and the Prisoner: Should Reproductive Alternatives Survive During Incarceration?* 5 TOURO L. REV. 189 (1988); Virginia L. Hardwick, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. REV. 275 (1985). The rights of those with HIV and AIDS to marry also provoked conversation. *See*, *e.g.*, Robert D. Goodman, *In Sickness or in Health: The Right to Marry and the Case of HIV Antibody Testing*, 38 DEPAUL L. REV. 87 (1988); *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274 (1986). Immigrants' rights to marry was also explored. *See*, *e.g.*, Jesse I. Santana, *The Proverbial Catch-22: The Unconstitutionality of Section Five of the Immigration Marriage Fraud Amendments of 1986*, 25 CAL. W. L. REV. 1 (1988/1989); Vonnell C. Tingle, *Immigration Marriage Fraud Amendments of 1986: Locking In By Locking Out?* 27 J. FAM. L. 733 (1988/1989); Eileen P. Lynskey, *Immigration Marriage Fraud Amendments of 1986: Till Congress Do Us Part*, 41 U. MIAMI L. REV. 1087 (1987).

[2] *See, e.g.*, Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C. L. REV. 879 (1988); Michael Diehl, *The Trust in Marital Law: Divisibility of a Beneficiary Spouse's Interests on Divorce*, 64 TEX. L. REV. 1301 (1986); Michelle Dorsey Deis, *Gross v. Gross: Ohio's First Step Toward Allowing Private Ordering of the Marital Relationship*, 47 OHIO ST. L.J. 235 (1986); Barb Mattei, *Deficit Reduction Act: Divorce Taxation*, 1986 WIS. L. REV. 177 (1986); Helen A. Boyer, *Equitable Interest in Enhanced Earning Capacity: The Treatment of a Professional Degree at Dissolution—In Re Marriage of Washburn*, 60 WASH L. REV. 431 (1985); Charles F. Basil, *The Divisibility of Pension Interests on Divorce: The District of Columbia Ups the Ante*, 33 CATH. U. L. REV. 1087 (1984).

[3] 852 P.2d 44 (Haw. 1994).

[4] 798 N.E.2d 941 (Mass. 2003).

today, as well as the continuing political reaction against these decisions,[5] has fomented a vigorous debate in legal and political theory regarding the state's appropriate role in relationships between adults. This debate has been spurred on, as well, by social developments, including the

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Thus far, however, despite some success in courts, *see*, *e.g.,* Baehr, 852 P.2d at 44**;** Goodridge*,* 798 N.E.2d at 941; Baker v. Vermont, 744 A.2d 864 (1999), only the state of Massachusetts, which began issuing licenses to same-sex couples on May 17, 2004, currently permits same-sex marriage. *See* David W. Chen, *Trenton Court Considers Gay Marriage Issue*, N.Y. TIMES, Feb. 16, 2006, at B8. Before Hawaii courts could strike down the Hawaii law prohibiting same-sex marriage, the state's citizens amended the Hawaii Constitution to allow the legislature to prohibit same-sex marriage. HAW. CONST. art. I, § 23. Vermont legislators, meanwhile, adopted a civil union statute that gives members of same-sex unions the same rights as marriage, but does not permit such couples formally to marry. VT. STAT. ANN. tit. 15, § 1204 (2005). Meanwhile, challenges to same-sex marriage bans are still working their way through the courts in other states, including California. *See, e.g.*, Lockyer v. City and County of San Francisco, 33 Cal. 4th 1055 (Cal. 2004); Kerrigan v. Connecticut, No. CV044001813, 2005 WL 834296 (Conn. Super.), 38 Conn. L. Rptr. 827 (Mar. 3, 2005); Lewis v. Harris, 875 A.2d 259 (N.J. Super. A.D. 2005); Castle v. Washington, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super., Sept. 7, 2004).

[5] On the national level, concerns about state courts striking down same-sex marriage bans has led to the Defense of Marriage Act of 1996, Pub. L. No. 104-199 (1996), which declares that no state must give effect to a same-sex marriage celebrated in another state, and that the term "marriage" for purposes of federal law is confined to the union of a man and woman. On the state level, these same concerns had caused 38 states, as of mid-2004 to adopt their own laws forbidding the recognition of same-sex marriage celebrated in other states, four of them in their respective state constitutions. ABA Section of Family Law, Working Group on Same-Sex Marriage, Civil Unions, and Domestic Partnerships 9 (2004).

increasing visibility of same-sex relationships,[6] the mushrooming rates of single-parent families,[7] and the growing number of couples who choose to remain childless.[8]

The resulting conversation among political and legal theorists has been complex. Many in the conversation have argued that marriage should be extended to same-sex couples.[9] Others have argued that the state should retain the institution of marriage, but continue to restrict it to

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[6] The 2000 U.S. Census counted 601,209 same-sex unmarried partner households. This means that roughly 1% of *all couples sharing a household* are same-sex. That is a 314% increase from the 1990 Census, although changes in the manner of coding these responses probably led to significant undercounting in the earlier census. It is likely that actual numbers are higher than even the 2000 Census reveals due to underreporting of these relationships. *See* DAVID M. SMITH AND GARY J. GATES, THE URBAN INSTITUTE, GAY AND LESBIAN FAMILIES IN THE UNITED STATES: SAME-SEX UNMARRIED PARTNER HOUSEHOLDS 2-3(2001), *available at* http:/www.urban.org/urlprint.cfm?ID=8425 (last visited December 20, 2005).

[7] In 1960, nine percent of children lived in single-parent homes. By 1999, that figure rose to 27%. STEPHANIE SADO AND ANGELA BAYER, POPULATION RESOURCE CENTER, EXECUTIVE SUMMARY: THE CHANGING AMERICAN FAMILY (2001), *available at* http://www.prcdc.org/summaries/family/family.html (last visited December 17, 2005). The rise in single-parent families is attributable not only to increased divorce rates, but to an increase in the number of families in which the parents were never married. The percentage of children born out of wedlock increased at an accelerated pace beginning in the mid-1960s. *Id.* In 1970 there were about 400,000 births (out of 3.7 million total births) to mothers who were unmarried; in 1990, that figure rose to 1.2 million. George Akerlof, Janet Yellen and Michael Katz, *An Analysis of Out-of-Wedlock Childbearing in the United States*, 111 Q. J. OF ECON. 277, 285 (1996). During the same period, married women's fertility rate declined. *Id*. Overall, almost one in every three families with children is headed by a woman who has never been married. KRISTEN LUKER, DUBIOUS CONCEPTIONS: THE POLITICS OF TEENAGE PREGNANCIES 103 (1996).

[8] According to the Census Bureau's 1998 Current Population Survey, a greater percentage of women of all ages are not having children. In that year, 5.7 million (or 18.4 percent) married women of childbearing age (defined by the Census as between 15 and 44 years old) were childless. Amanda Bachu and Martin O'Conner, *Fertility of American Women*, Current Population Reports, *at* http://www.census.gov/prod/2000pubs/p20-526.pdf. The National Center of Health Statistics confirms that the percentage of women of childbearing age who define themselves as voluntarily childless is generally on the rise: from 2.4 percent in 1982, to 4.3 percent in 1990, to 6.6 percent in 1995, to 6.2 percent in 2002 (the most recent year for which statistics are available). That amounts to 3.83 million women who chose to forgo motherhood in 2002. National Center for Health Statistics, *Fertility, Family Planning, and Reproductive Health of U.S. Women: Data From the 2002 National Survey of Family Growth*, 23 Vital and Health Statistics 25, pg. 8 (Dec. 2005), *at* http://www.cdc.gov/nchs/data/series/sr_23/sr23_025.pdf.

[9] *See, e.g.,* Gregory Care, *Something Old, Something New, Something Borrowed, Something Long Overdue: The Evolution of a "Sexual Orientation-Blind" Legal System in Maryland and the Recognition of Same-Sex Marriage*, 35 U. BALT. L. REV. 73 (2005); William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011 (2005), and, *Comparative Law and the Same-Sex Marriage Debate: A Step-By-Step Approach Toward State Recognition*, 31 MCGEORGE L. REV. 641 (2000); Andrew Koppelman, *Against Blanket Interstate Nonrecognition of Same-Sex Marriage*, 17 YALE J. L. & FEMINISM 205 (2005), and, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921 (1998); *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684 (2004).

heterosexual couples.[10] Still others, including some gay rights advocates, believe that the state has no legitimate business regulating adult relationships, and assert that the state should remove itself completely from sanctioning marriage.[11] Finally, even those who agree that the state should support marriage disagree about the amount of financial, legal or social support that it should offer these relationships.[12]

What explains these vastly disparate claims regarding the state's position concerning relationships between adults? And how should these very different views be resolved? I argue here that commentators have reached such widely divergent results because they have tended to focus on too narrow a range of goods at stake in these relationships. Relationships between adults, however, implicate not just one or two, but a number of principles important to a liberal democracy. And, to complicate matters further, some of these principles stand in tension with one another. To derive the state's policy on relationships between adults from consideration of just one or two of the relevant goods at stake recalls the Indian story of the blind men who, on encountering an elephant, all felt different parts of the animal and emerged with radically different descriptions of the nature of the beast. It is only through an approach that recognizes the multiplicity of goods at stake in the state's approach to relationships between adults, and that

[10] *See, e.g.*, COUNCIL ON FAMILY LAW, THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA (2005).

[11] *See*, *e.g.*, MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE (2003); MARTHA FINEMAN, THE AUTONOMY MYTH (2004); Judith Stacey, *Toward Equal Regard For Marriage and Other Imperfect Intimate Affiliations*, 32 HOFSTRA L. REV. 331 (2003). Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. CHI. LEGAL F. 353 (2004).

[12] *Compare, e.g.*, Laura S. Adams, *Privileging the Privileged? Child Well-Being As a Justification for State Support of Marriage*, 42 SAN DIEGO L. REV. 881 (2005); William C. Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153 (2004); Phoebe G. Silag, *To Have, to Hold, to Receive Public Assistance: TANF and Marriage Promotion Policies*, 7 J. GENDER RACE & JUSTICE 413 (2003); Kimberly A. Yuracko, *Does Marriage Make People Good or Do Good People Marry*? 42 SAN DIEGO L. REV. 889 (2005).

seeks to ameliorate the tension among these goods, that a workable approach appropriate to a liberal democracy can be fashioned.

My hope in this essay is to offer such a workable approach. In Part I, I consider four prominent entries in the debate over the state's treatment of relationships between adults. The first two of these views argue that the state should eliminate civil marriage: one of these arguments is from Martha Fineman, one of the foremost feminist legal scholars in the United States; the other is from Michael Warner, a leading queer theorist. The other pair of entries argue in favor of the state retaining a privileged status for marriage: these include William Galston, a widely-respected liberal theorist who also served as a domestic policy advisor for President Clinton; and the Council on Family Law,[13] an organization chaired by Harvard Law School Professor Mary Ann Glendon. I argue that each pair of theorists reaches disparate conclusions from the other pair because they focus on different goods important to a liberal democracy. I contend that there are particular elements of each of these four positions that a vigorous liberal democratic polity must seek to draw upon – although others that should be rejected, as well.

In Part II, I discuss the various goods and principles important to a liberal democracy implicated in relationships between adults. I then lay out an approach that seeks to ameliorate the tension among these principles. In this approach, the state continues to provide a civil route to formalize relationships among adults. But since many types of caretaking relationships produce important public goods, it allows formalization of a broader range of relationships than the couples now permitted to marry by states. Further this approach allows the state to provide some privileges to these relationships. Because it is mindful that these privileges conflict with

[13] The Council on Family Law is jointly sponsored by the Institute for American Values, the Institute for Marriage and Public Policy, and the Institute for the Study of Marriage, Law, and Culture.

other important goods, however, this approach limits the permissible extent of these privileges. Finally, this approach requires that the state actively seek to remedy the negative consequences to public goods associated with relationships among adults – particularly increased gender inequality; increased economic inequality; and the possibility that close caretaking relationships will cause their participants to turn away from civic life.

In the closing parts of the essay, I consider two difficult issues that the state must confront with respect to relationships among adults. In Part III, I discuss the form that state recognition of such relationships should take. Specifically, should the state categorize all relationships between adults together under a banner such as "domestic partnership," and therefore give the same rights and privileges to all such relationships? Or should such relationships be categorized separately, and privileges accorded, to each separate type at issue? In the latter case, the state would presumably retain a civil status for conjugal relationships such as marriage, but also recognize other forms of adult-adult relationships, such as domestic partnerships between friends who cohabitate. Finally, in Part IV, I consider the difficult issue of the extent to which the state may legitimately seek to encourage two-parent families over single-parent families and marital relationships over other relationships between adults.

The account that I develop in this essay is unabashedly liberal, in the sense that it assumes the equal worth of all human beings, the importance of limits on government, and respect for individual rights.[14] It takes seriously, however, the recent insights of political theorists who argue that liberalism cannot and should not be completely neutral with respect to

[14] I use the term "liberal" throughout this article to refer to the Anglo-American line of political thought stretching from John Locke through John Stuart Mill and on to such contemporary thinkers as John Rawls, whose work focuses on the importance of liberty, self-government, and equal rights for citizens. This use of the term is therefore broader than the use of the term "liberal" in common parlance to refer to those who hold political beliefs at the opposite end of the political spectrum from conservatives. Under my use of the term, both thinkers such as John Rawls, who might qualify as a liberal under common usage, and Robert Nozick, who might be considered a political conservative, are "liberals."

different versions of the good life, and that a liberal polity must strive to further a broader range of goods than the individualistic versions of liberty and justice that have often been associated with it.[15] And it seeks to combine those insights with those of feminist theorists who have pointed out that the inevitability of dependency, and the consequent need for caretaking, must be accounted for in structuring our common lives together.[16] Put another way, although a liberal democracy should give significant pride of place to individual liberty and justice, it must also pay attention to an array of other goods and principles relating to human dependency and human development that are necessary to a robust democracy, and which have been too often excluded from standard liberal accounts.[17] In my view, it is only by considering this richer range of goods and principles that the appropriate relationship between families and the state can be brought into focus.

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[15] *See*, *e.g.*, WILLIAM GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE (1991) (arguing that a liberal state cannot and should not be neutral with respect to all versions of the good); AMY GUTMANN, *Undemocratic Education*, *in* LIBERALISM AND THE MORAL LIFE 79-80 (Nancy Rosenblum ed., 1989) (stating that is "dangerous" to permit the policies of the state be dictated only according to the "best interests of its individual members," and defending an alternative ideal of "collective self-determination—an ideal of citizens sharing in deliberate determination of the future shape of their society"); MARTHA NUSSBAUM, SEX AND SOCIAL JUSTICE 10 (1999) **(**articulating an expansive form of liberalism that "begins with the idea of the equal worth of human beings as such, in virtue of their basic human capacities for choice and reasoning"; THOMAS SPRAGENS, CIVIC LIBERALISM: REFLECTIONS ON OUR DEMOCRATIC IDEALS 150(1999); *see also* Stephen Macedo, *Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls*, 105(3) ETHICS 468, 487 (1995).

[16] *See*, *e.g.*, FINEMAN, *supra* note 10, at 54 (positing that, because dependency is an inevitable part of the human condition, "the political and policy questions should focus on an optimal reallocation of responsibility for dependency across societal institutions"); EVA FEDER KITTAY, LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY 188(1999) (arguing in favor of a social and political commitment to meet dependency needs); JOAN TRONTO, MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE 157-180 (1993) (arguing that dependency and "care" are fundamental parts of human life, and, consequently, that the political framework must be reformulated to incorporate them**)**; Eva Feder Kittay, *Taking Dependency Seriously: The Family and Medical Leave Act Considered in Light of the Social Organization of Dependency Work and Gender Equality*, 10 HYPATIA 8, 24-25 (1995) (emphasis in original) ("What is required is that the public understanding of social cooperation include respect for the importance of caring for one another and the value of receiving care and giving care. It then becomes a matter of political justice for basic institutions to *make provisions for and facilitate satisfactory dependency relations*.").

[17] As Charles Taylor says about modern thought generally, "[w]e have read so many goods out of our official story, we have buried their power so deep beneath layers of philosophical rationale, that they are in danger of stifling. Or rather, since they are our goods, human goods, *we* are stifling." CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY 520 (1989)(emphasis in original).

I. Theoretical Positions in the Existing Conversation

In the discussion over the state's treatment of relationships between adults, recent debate has focused on the controversy between those who believe that the state has no business with respect to relationships between adults, and those who argue precisely the opposite. In this section, I consider the arguments of theorists on both sides of this issue. I argue that both sides point to important goods at stake in the state's treatment of such relationships, but that these goods cannot be considered independently. Instead, they must be balanced against other important goods and principles at stake in the state's treatment of these relationships.

A. *Fineman and Warner — The Case Against Marriage*

No feminist theorist has taken a stronger stance against civil marriage than Martha Fineman.[18] Current public policy, she argues, is based on the myth that families should be autonomous. Because the marital family, according to popular thought, is seen as a strong and independent unit, it is conceived as representing the ideal that the state should be promoting.[19] As a result of the belief that the marital form should be encouraged because it is autonomous, Fineman points out with irony, married couples receive hundreds, if not thousands, of subsidies and privileges from the state that are unavailable to other, supposedly less autonomous family forms.[20]

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[18] Fineman's views on this issue have received significant critical debate. *See*, *e.g.*,MARY LYNDON SHANLEY, *Just Marriage: On the Public Importance of Public Unions*, in JUST MARRIAGE 14-16 (2004) (criticizing Fineman's advocating a contractual approach to relationships between adults), Elizabeth Scott, *Marriage, Cohabitation, and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 252(2004**)** (responding to Fineman's call to eliminate civil marriage).

[19] FINEMAN, *supra* note 10, at 57.

[20] *Id.* at 104-05. *See also* TERRENCE R. DOUGHERTY, NAT'L GAY AND LESBIAN TASK FORCE POL'Y INST., ECONOMIC BENEFITS OF MARRIAGE UNDER FEDERAL AND MASSACHUSETTS LAW 4-14, (2004) (listing marital benefits under federal and Massachusetts law), *available at* http://www.thetaskforce.org/downloads/EconomicCosts.pdf (last visitedNovember 12, 2005).

Fineman contends that this policy of supporting the marital family is misguided on several grounds. First, she contends that complete autonomy is possible for no one, including married couples. In contemporary society, everyone exists within a web of institutions that provide for at least some of their needs. Because of this, Fineman argues, the state's pursuit of autonomy should be abandoned in favor of insuring that human needs are humanely and justly met for all citizens, not just those who live in families.[21]

Fineman also criticizes other justifications for the multitude of benefits currently awarded to married couples. Insofar as the state focuses on the marital family to support childrearing, Fineman contends, it is sorely out-of-touch: large portions of the population raise children out of wedlock, while, at the same time, many married couples choose to remain childless.[22] A state that truly seeks to support the welfare of children should therefore support childrearing in all the contexts in which it occurs, not just for children whose parents are married.[23] And insofar as the state subsidizes the marital family because it represents the majority's views of how people should order their lives, Fineman contends, its actions are illegitimate: in a diverse and secular liberal society, the state should not privilege one form of affiliation over others simply because that affiliation better comports with the private morality of the majority of citizens.[24] On top of that, Fineman points out, the state's current support for the institution of marriage overlooks significant problems with that institution, most obviously that it is an institution to which (at least until recently, and in most places still) only heterosexual couples are admitted, and that it is rife

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[21] FINEMAN, *supra* note 10, at 199, 285.

[22] *Id.* at 67, 110-112.

[23] *Id.* at xvii.

[24] *Id.* at 105.

with sex inequality. On this latter point, she argues that public policy that encourages marriage for the sake of children demonstrates the state's willingness to sacrifice women's interests for children's.[25]

Fineman argues that instead of subsidizing a particular *type* of family, *i.e.,* the marital family, the liberal state should subsidize the particular *functions* that it has a legitimate interest in supporting, in whatever relationships these functions take place.[26] This means, for Fineman, that the state should not seek to further its interest in childrearing through privileging the marital family grouping, as it currently does; instead, it should subsidize the caretaker-dependent relationship directly in whatever type of configuration in which it occurs.[27] In contrast, Fineman argues that the state has no legitimate stake in furthering relationships between capable adults. In her words:

> Why create policies based on a seriously weakened family affiliation – the marital couple – when it is really caretaking that we as a society should want to ensure? Society has a responsibility to adjust to these changing patterns of behavior by guaranteeing that the emerging family forms are supported in performing the tasks we would have them assume.[28]

As a result, Fineman asserts, the state should eliminate civil marriage as a legal institution.[29] In the new regime she proposes, legal relationships between adults would be governed by private

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[25] *Id.* at 88.

[26] *Id.* at 67 ("It is time to build our family policy around these emerging norms, to focus not on form but on the function we want families to perform."); *see also id.* at 68, 105-107 (arguing that the focus needs to shift away from the historic, symbolic form of the marital relationship and towards the role or function that the institution of the family is seeking to serve in society).

[27] *Id*. at 67*; see also id.* at xix, 108, 138-41.

[28] *Id.* at 67.

[29] *See id.* at 122 ("I argue that for all relevant and appropriate societal purposes, we do not need marriage and we should abolish it as a legal category. I argue that we should transfer the social and economic subsidies and privilege that marriage now receives to a new family core connection – that of the caretaker-dependent.").

contracts negotiated between them. This would leave marriage as a purely religious institution for those couples who choose to enter it, with no civil consequences.

Fineman's view that the state should eliminate civil marriage bears a strong affinity to arguments made by queer theorists, most prominently, Michael Warner. Warner contends that the gay community's current push for same-sex marriage runs the risk of requiring "the wholesale repudiation of queer culture's best insights on intimate relations, sex, and the politics of stigma."[30] He argues that the early years of the gay rights movement in the United States developed a vision of queer politics centered, among other things, on the recognition that a diverse range of sexual and intimate relationships is worthy of respect. That movement, according to Warner, originally sought to develop unprecedented types of commonality and intimacy. In doing so, it rejected the norms of straight culture that granted "legitimacy to some kinds of consensual sex but not others [and] to confer respectability on some people's sexuality but not others'."[31]

This original vision of queer politics, Warner contends, is undercut by the current advocacy in the gay community for same-sex marriage. Warner argues that marriage is the means through which the state has historically sought to privilege and promote a particular, monogamous model of heterosexual sexuality, and to stigmatize all other models as morally tainted.[32] According to Warner, this represents the blatant imposition of the majority's view of what is morally proper on the minority. Warner resists the notion that the state should serve as an instrument of moral judgment, granting "legitimacy to some kinds of consensual sex but not

[30] Michael Warner, *Normal and Normaller: Beyond Gay Marriage*, 5 GLQ: A J. OF GAY AND LESBIAN STUD. 119, 122 (1999).

[31] *Id*. at 123.

[32] *Id*.

others or to confer respectability on some people's sexuality but not others."[33] He argues that instead of calling for same-sex marriage, gays and others who perceive themselves as queer should be striving for "[t]he ability to imagine and cultivate forms of the good life that do not conform to the dominant pattern."[34]

B. *Galston and the Council on Family Law – The Case for Marriage*

Fineman's and Warner's arguments against marriage stand in stark contrast to arguments favoring marriage from William Galston, as well as from the Council of Family Law. In the context of condemning out-of-wedlock births for their negative consequences on children, Galston argues against the view that marriage is a failed social institution that the state should abandon. In his words, marriage:

> is not a panacea, but it is a vital part of the solution. In at least a majority of cases, marriage can make a positive contribution, not only to the well-being of children, but also to the well-being of their parents.
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> Does this represent nostalgia? Does it imply the reaffirmation of patriarchy? On the contrary: it means the simple recognition that for economic, emotional and developmental reasons, marriage is the most promising institution yet devised for raising children and forming caring, competent, responsible adults. . . . I am deeply skeptical that the abolition of marriage**,** with all of its imperfections, can possibly yield better lives, or a better society for our children.[35]

Despite Galston's having served as domestic policy advisor for the Clinton administration, his view that the state should promote the marital relationship bears a significant resemblance to the policies advocated by the socially conservative Council on Family Law, although some of its rationales vary from Galston's. In its recent report, "The Future of Family

[33] *Id.*

[34] *Id.*

[35] Galston, *supra* note 10, at 323.

Law: Law and the Marriage Crisis in North America,"[36] the Council argues that marriage should continue to be the state's privileged institution for relationships between adults. That report argues that "at its core marriage has always had something to do with societies' recognition of the fundamental importance of the sexual ecology of human life: humanity is male and female, men and women often have sex, babies often result, and those babies, on average, seem to do better when their mother and father cooperate in their care."[37] This understanding of marriage as the promotion of a stable framework for biological parents procreating and raising children, the report argues, should continue to be promoted by the state.

The report therefore decries proposals like Fineman's and Warner's that argue for state disengagement from marriage. Such arguments, the Council asserts, sounding a chord similar to Galston's, "den[y] the state's legitimate and serious interest in marriage as our most important child-protecting social institution and as an institution that helps protect and sustain liberal democracy."[38] The Council also argues against proposals that seek to expand the category of relationships recognized by the state beyond married couples. According to the Council, doing so would unwisely "celebrate relationship diversity" to the exclusion of fostering the important goals that have traditionally been supported in marriage.[39] Further, to treat relationships that have not been formalized as the equivalent of marriage, the Council argues, would not only undercut couples' own intent regarding the effects of their relationships, it would also fail to encourage couples to enter into formal commitments, and would therefore miss an important

[36] COUNCIL ON FAMILY LAW, *supra* note 10**.**

[37] *Id.* at 13.

[38] *Id.* at 6.

[39] *Id.* at 40.

opportunity for the state to encourage the stability of these relationships and the welfare of any children who result from them.[40]

Finally, the Council also argues against expanding marriage to same-sex couples.[41] To do so, the report contends, would "strip[] all remaining remnants of sex, gender, and procreativity from the public, shared meaning of marriage."[42] It would therefore, according to the report, fail to recognize "the specificity of marriage as a form of life struggling with the unique challenges of bonding sexual difference and caring for children who are the products of unions."[43]

C. Assessing the State's Interest in Horizontal Relationships

How should we evaluate these diametrically opposed claims regarding the state's correct posture toward marriage and other relationships between adults? In my view, each of these positions focuses on important goods and principles that a vigorous liberal democratic polity

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[40] *Id.* at 24-25.

[41] In doing so, the Council appears to depart from Galston's position. In a recent article, Galston at least implicitly suggests that he supports states' freedom to expand marriage beyond its current boundaries:

> It remains to be seen whether the evolving constitutional jurisprudence will ultimately strike down prohibitions on same-sex marriage. The push for a federal constitutional amendment defining marriage as the union of one man and one woman reflects social conservatives' fears about just such an outcome. By contrast, many advocates of gay marriage would be satisfied with a state-by-state approach, which would inevitably yield long-term differences among the states on this matter. The debate over the right of public authorities to enforce uniformity on the institutions of civil society is far less settled. I agree with [Peter] Schuck when he insists that "the distinction between public and private morality, between the values laws should mandate and those it should leave to the disparate choices of a diverse civil society, lies at the core of a liberal society," and that "the diversity that flows from the[] exercise of individual freedom is presumptively valid." I also agree with Schuck's application of this principle to the freedom of association: "[I]f valuing diversity in a liberal society means anything, it means assuring people's freedom to form exclusive groups that embrace unpopular beliefs in ways permitted by the Constitution and without undue interference by the law."

William Galston, *Liberal Government, Civil Society, and the Rule of Law*, 23 YALE L. & POL'Y REV. 15, 19 (2005)).

[42] COUNCIL ON FAMILY LAW, *supra* note 9, at 26.

[43] *Id.* at 21.

should seek to draw upon. Yet none of them steps back enough to consider the full range of goods and principles at stake.

Fineman is certainly right that autonomy is possible for no one, adults as well as children, and that the state should abandon the quest for the pursuit of autonomy in favor of insuring that human needs are met with justice and dignity. Yet, precisely contrary to Fineman, this gives the state an important stake in relationships between adults.[44] As care theorists have made abundantly clear,[45] and as Fineman herself argues, [46] it is not just children and those with disabilities who need care: *all* humans need care, even generally-healthy adults. And as our society is organized, some large portion of that care will come, if it comes at all, from other adults with whom we share close relationships. In such "horizontal" relationships,[47] neither person is always the caretaker nor the dependent, as they are, for example, in relationships between adults and young children. Instead, adult-adult relationships are, at their best, marked by what might be called "reciprocal dependency," in which each partner sometimes performs caretaking activities for the other and meets the other's dependency needs; in turn, their partner does the same for them at other times. These relationships, when they function well, involve countless small acts in which each adult takes care of the other: one partner makes the other a

[44] *See also* Linda McClain, *Intimate Affiliation and Democracy: Beyond Marriage*, 32 HOFSTRA L. REV. 379, 414-15(2003) ("To do [otherwise] seems to undervalue adult-adult *inter*dependency and to miss the important facilitative role government may play in supporting such forms of adult affiliation"); Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L. J. 57, 60-61 (2002).

[45] *See* KITTAY, LOVE'S LABOR, *supra* note 13; Tronto, *supra* note 16.

[46] *See* FINEMAN, *supra* note 10, at xvii, 35-36.

[47] I use the term "horizontal relationships," to refer to relationships among generally able adults. The term distinguishes these relationships from such "vertical" relationships as those between parents and children, in which one person is the caretaker and the other the dependent.

cup of coffee when they get up; the other drops off dry-cleaning on the way to work; one runs to the store for cold medicine when the other is sick; and so on.[48]

This sort of caretaking, at its best, produces a society in which adults are knit into webs of care that help them to support one another. In these webs, one partner's cold doesn't develop into something worse because the other partner insists on taking them to see a doctor. Moreover, such caretaking helps keep families stable so that partners are there for one another at times when one of them has greater needs, such as periods of disability. The state has an important interest in these relationships because of its interest in the dignity of its citizens, not to mention their health and well-being.

By the same token, Warner focuses on only a limited range of the goods at stake. He is on firm ground in recognizing that the issue of relationships among adults implicates the important values of freedom and diversity. He also, along with Fineman, properly recognizes that in a liberal democracy committed to freedom the state should not be used as a vehicle to promote the majority's own comprehensive views with respect to citizens' private lives. Yet he fails to recognize the public goods that horizontal relationships implicate—including the caretaking that adults require, and the important value of human dignity that this furthers.

Turning to the other side of this debate, both Galston and the Council on Family Law also point to important goods to which a liberal democracy must attend. The liberal democratic state, as both Galston and the Council argue, should be able to privilege some relationships over others for public ends. And certainly creating a stable environment for children is such an end: all other

[48] This is not to say that in all, or even most, horizontal relationships between women and men the carework is evenly divided. Studies have repeatedly shown that women spend significantly more time caretaking than men, even when women work outside the home. *See*, *e.g.,* ARLIE RUSSELL HOCHSCHILD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME 271-78 (1989); *see also* Katharine Kay Baker, *Taking Care of Our Daughters*, 18 CARDOZO L. REV. 1495, 1512 n.63 (1997). There is some suggestion, however, that the deficit between men and women has been decreasing slightly. *See* Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1906-07 (2000).

things being equal, stable family relationships are better for children than unstable or nonexistent relationships. Further, while many of the greater difficulties associated with single-parent families can be attributed to lack of adequate legal and social supports,[49] having the emotional and financial resources of two loving adults available to a child, again, all other things being equal,[50] is better than having the resources of just one. Both Galston and the Council also make valuable points about the important role that the state can have through formalizing and privileging relationships such as marriage in creating an environment that fosters the caretaking of citizens generally, as well as children specifically.

In focusing on the state's promoting marriage (and, in the Council's case, solely heterosexual marriage), however, they too narrowly define the relationships that should be accorded such privileges by the state.[51] The Council argues that advocates who support the state's awarding privileges to a broader category of relationships than marriage miss "the specificity of marriage as a form of life struggling with the unique challenges of bonding sexual difference and caring for children who are the products of unions."[52] Yet the Council gives no convincing reason why the disparate issues of "bonding sexual difference" and "caring for

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[49] *See*, *e.g.*, Nancy Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L. J. 19, 34-35(1995) (documenting ways that lack of social and economic support for single parent families creates problems).

[50] The caveat of "all other things being equal" is a significant one. I am not arguing that having two parents who are unhappy stay together is better for children than having them separate. I am making the more modest claim that, for a child, having two happy parents living together is generally better than having one happy parent because of the extra emotional, caretaking, and financial resources they can contribute. Moreover, having two parents who live together happily is, all other things being equal, generally better for a child than having two parents who live happily apart. *See* William Galston, *Causes of Declining Well-Being Among U.S. Children*, *in* SEX, PREFERENCE, AND FAMILY 299-303 (Martha Nussbaum and David Estlund eds., 1997) (summarizing research findings).

[51] To be fair, while Galston argues in favor of shoring up marriage and discouraging divorce, he would extend other policy measures that he advocates such as making work and family more compatible, and offering tax breaks to many types of families, not simply families headed by a married couple. Elaine Kamarck and William Galston, *Putting Children First: A Progressive Policy for the 1990s*, *in* MANDATE FOR CHANGE 153 (Will Marshall and Martin Schram eds., 1992). *See also* Galston, *supra* note 10, at 317-22 (arguing for a more progressive tax policy that better eases the burdens placed on working families).

[52] COUNCIL ON FAMILY LAW, *supra* note 9, at 21.

children" should both be required in every marriage, and, indeed, why the state shouldn't make available, as well, other packages that promote other legitimate public ends.[53]

Indeed, the Council's arguments against same-sex marriage miss the mark on several counts. While the Council is certainly right that it is generally heterosexual relationships in which children will arrive unplanned, this is not a reason to exclude same-sex couples from receiving state privileges. The Council argues that marriage is a superior family arrangement for both children who are unplanned as well as planned. Many same-sex couples, like many heterosexual couples, plan to have children. And the children of these same-sex parents, like the children of opposite-sex parents, are benefited by the stability of their parents' relationships. Given this, it makes sense for the state to seek to stabilize these relationships with the same supports that the Council argues will work so well with opposite-sex couples.

More than that, the state's interest in ensuring that adults receive care also militates in favor of extending relationship privileges to same-sex couples. While the Council criticizes those who seek to extend the state's support beyond heterosexual marriage on the ground that

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[53] While both heterosexuality and procreation were certainly conceived as central to traditional marriage, *see*, *e.g.*, Reynolds v. Reynolds, 85 Mass. (3 Allen) 605 (Mass. 1862) (stating that "[t]he great object of marriage in a civilized and Christian community is to secure the existence and permanence of the family relation, and to insure the legitimacy of offspring"), at least the procreative purpose of marriage has been, if not quite eclipsed, then at least demoted from its spot of sole star billing to costar alongside the companionate and caretaking aspects of marriage. For example, older American cases restricted annulment for fraud in entering marriage to misrepresentations going to the "essentials" of marriage, conceived in terms of duties connected with consortium and fertility. *See*, *e.g.*, *id.* However, more recently, courts have broadened the fraud for which annulment will be granted more generally for misrepresentations critical to inducing the unplanning partner to marry. As stated in *Kober v. Kober*:

> [T]he fraud [required for annulment] need no longer "necessarily concern what is commonly called the essential of the marriage *relation* – the rights and duties connected with cohabitation and consortium attached by law to the marital status. Any fraud is adequate which is "material to that degree that, had it not been practiced, the party deceived would not have consented to the marriage" and is "of such nature as to deceive an ordinarily prudent person." Although it is not enough to show merely that one partner married for money and the other was disappointed . . . and the decisions upon the subject of annulment have not always been uniform, there have been circumstances where misrepresentations of love and affection, with intention to make a home, were held sufficient . . .

211 N.E.2d 817, 819 (N.Y. 1965); s*ee also*, 389 N.E.2d 1143 (Ill. 1979).

these policy advocates too narrowly focus on "such values as commitment, mutual support and the rest" in the absence of childrearing,[54] the importance of mutual support and related goods offer powerful reasons for the state to privilege relationships that promote these goods, whether or not they further all the other values that the Council believes are crucial to the state's protecting marriage.

Finally, although the Council is right that women have, for a variety of biological and social reasons, been more vulnerable than men historically with respect to both unplanned pregnancies and childrearing, limiting marriage to heterosexual couples for this reason would be unwise. To the contrary, to the extent that homosexual relationships do not replicate these same patterns of vulnerability, [55] the state has grounds to encourage same-sex relationships rather than deny them recognition and rights. Further, the Council's insistence that marriage is an institution designed to protect vulnerable women flouts the Supreme Court's counsel in cases such as *Frontiero v. Richardson* that the state should not rely on overbroad or outmoded sex stereotypes.[56]

In advocating state support for marriage but not other relationship among adults, both Galston and the Council too quickly dismiss other principles important to liberal democracy that militate against the state privileging such a limited range of relationships. The most important of these alternative principles is distribution based on need. Because of economies of scale, adults in live-in relationships generally have an easier time financially than those who live alone.[57]

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[54] COUNCIL ON FAMILY LAW, *supra* note 9, at 21.

[55] *See* Linda McClain, *The Liberal Future of Relational Feminism: Robin West's Caring for Justice*, 24 LAW & SOC. INQUIRY 477, 510 (1999) (citing studies showing that generally lesbian couples do not organize their relationship on a provider-homemaker model).

[56] Frontiero v. Richardson, 411 U.S. 677, 685-87(1973).

[57] *See*, *e.g.*, ANN CRITTENDEN, THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE

Distributing resources to adults in relationships therefore is generally a regressive measure based on need. Further, insofar as two-parent families have particular advantages that make them more conducive to rearing healthy, stable children than single-parent families, distributing privileges to dual-parent families may also be regressive based on need.[58] As Judith Stacey argues, "The more eggs and raiments our society chooses to place in the family baskets of the married, the hungrier and shabbier will be the lives of the vast numbers of adults and dependents who, whether by fate, misfortune or volition will remain outside the gates."[59]

A clear recognition of the limits of both the state's and individuals' capacity to encourage marital relationships also cuts against distributing societal privileges based on marital status. Taking first limitations on the state's capacity, it must be recognized that the state has only limited ability to help citizens acquire and sustain healthy caretaking relationships. While it can establish certain institutional preconditions and incentives for couples to make relationships work,[60] ultimately whether or not healthy relationships will develop and be sustained has a great

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WORLD IS STILL THE LEAST VALUED 150 (2001)(demonstrating that "two households are much more expensive than one").

[58] The simple fact of distributing goods to families with children, however, is not regressive based on need. As Elizabeth Warren and Amelia Warren Tyagi demonstrate, having a child is now the best indicator of whether someone will end up in financial collapse. In their words, "married couples with children are twice as likely as childless couples to file for bankruptcy. They're seventy-five percent more likely to be late paying their bills. And they're also far more likely to face foreclosure on their homes." ELIZABETH WARREN AND AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING (2003).

[59] Judith Stacey, *Toward Equal Regard for Marriage and Other Imperfect Affiliations*, 32 HOFSTRA L. REV. 331, 344 (2003). Stacey adds: "In my view, this is an unacceptably steep and undemocratic social price for whatever marginal increases in marital stability might be achieved for those admitted to the charmed circle . . . " *Id.*.

[60] For example, poverty is significantly correlated with divorce, as are problems associated with poverty, such as homelessness and drug addiction. Social scientists who study the phenomenon believe that some of the correlation between poverty and divorce is actually a causal relationship – in other words, poverty leads to divorce. *See generally* Marsha Garrison, Reviving Marriage: Can We and Should We?, Address at the International Society of Family Law Conference (July 19-23, 2005)(on file with author). Given this, an effective way for the state to increase the stability of intimate relationships may be indirectly through antipoverty measures and other institutional supports for the poor rather than through direct measures to promote institutions such as marriage. Such indirect measures would also harmonize rather than conflict with the principle of distributing resources based on need.

deal to do with characteristics of the individuals involved that are beyond the state's reach to affect, and dumb luck – for example, who individuals happen to meet at what particular times. The state could, of course, still provide such sufficient financial incentives that people would enter into and remain in relationships in which they were miserable and in which little healthy caretaking occurred. Doing so, however, would not further the goods that the state should be seeking to further.

With respect to the issue of individuals' own capacity to enter into and maintain relationships, it must be recognized that although personal attributes and behavior have some part to play in the success of an individual's relationships, many factors that affect success are simply beyond the individual's control. For example, one partner may simply decide that he or she doesn't love the other partner any more and leave, with no fault on the part of the other partner, and no change in the partner's behavior. Accordingly, considerations of fairness militate against distributing privileges based on the success of a person's relationships, when this success has little relation to merit or effort and an inverse relation to need.

In sum, Fineman, Warner, Galston and the Council on Family Law all reach the relatively black-and-white conclusions about the state's position on marriage that each reaches because they ignore important goods and principles at stake with respect to this issue. Considering all these goods and principles together yields a more complicated—but ultimately a more satisfying—picture of what the state's role should be with respect to adults' relationships.

II. A Liberal Democratic Approach to Relationships Between Adults

In Part I, I explored several prominent theoretical positions with respect to the state's role in intimate relationships. None of these positions, I argued, considered the complex array of

goods and principles at stake in these relationships. In this Part, I lay out an approach that takes into account this array of important interests.

To begin sorting out these matters, let me point out that there are actually two separate but related issues that must be considered with respect to the state's approach to relationships. The first issue is whether the state should *recognize* relationships between adults for the purpose of assigning rights and responsibilities *between these adults*. The second is whether the state should *privilege* relationships between adults, in the sense that those who participate in these relationships should receive either *benefits from or rights against the state or third parties* that they would not otherwise receive. I argue that both of these issues should be answered in the affirmative, although the first issue is an easier one to answer than the second.

A. *State Recognition Of Adult-Adult Relationships*

When it comes to whether the state should recognize relationships between adults for the purpose of assigning rights and responsibilities between the parties, the answer seems to me to be clearly "yes." The interdependent nature of intimate relationships between adults, particularly when they are long-term, creates a series of issues regarding rights and responsibilities that are best addressed through laws that, at a minimum, establish a fair default position in the absence of an express agreement between parties to the relationship. Without such default rules, this interdependence can create large inequities and injustices both during and, particularly, at the end of these relationships. For the state to do otherwise, as Mary Shanley recognizes, would abandon the state's interest in securing justice and equality in these relationships.[61]

Martha Fineman, of course, argues that considerations of justice and equality dictate the opposite conclusion—state disengagement. According to Fineman:

[61] Shanley, *supra* note 16, at 16.

> If people want their relationships to have consequences, they should bargain for them, and this is as true with sexual affiliates as with others who interact in complex, ongoing interrelationships, such as employers and employees. This would mean that sexual affiliates (formerly labeled husband and wife) would be regulated by the terms of their individualized agreements, with no special rules governing fairness and no unique review or monitoring of the negotiation process.[62]

She asserts that the state's withdrawal from regulating adult-adult relationships "would mean that we are taking gender equality seriously."[63] In suggesting that a contractual regime will result in fair and equal agreements between parties involved in intimate relationships, however, Fineman glosses over serious difficulties. First she fails to take into account the ways in which those entering into a relationship based on affective ties may not be looking out after their own interests in opposition to the other person's (and that the state may not want to encourage them to be solely self-regarding). As a result, a "sexual affiliate" may agree to an unfair contract. Furthermore, the course of lives and relationships are often so difficult to predict that contracts entered into *ex ante* may not fairly and justly resolve what occurs *ex post*. In addition, in a regime of contract, those in a weaker bargaining position – traditionally women – will likely negotiate less favorable terms for themselves that will lead to inequality both in the course of the relationship and also when and if it ends.

And in this regime, even those who negotiate unfavorable contracts may be the lucky ones compared to those who negotiate no contracts. For some, this will be because they cannot afford a lawyer; for others, this will be because the motivation to express one's love publicly, which many would say is their motivation to enter marriage,[64] would not similarly impel them to

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[62] FINEMAN, *supra* note 10, at 134.

[63] *Id.*

[64] *See Goodridge v. Department of Public Health* 798 N.E.2d 941, 954-55 (Mass. 2003) (quoting *Griswold v. Connecticut* 381 U.S. 479, 486 (1965) ("Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. It is

enter into a contract to protect themselves against their partner. If and when these relationships end, the partners would have no contract claims against one another. Existing, albeit imperfect, status-based protections that are currently available to those divorcing, such as the right to equitable distribution of property and alimony, would be nonexistent in such a regime. This would particularly hurt those who devote more energy and care to the relationship than to financial pursuits – again, likely women – since they would have no automatic claim to income earned by their partners through the joint efforts of the family.[65]

A regime in which the state recognized relationships among adults for the purpose of apportioning rights and obligations among them therefore furthers the ends of fairness and justice. Of course, such rights and obligations could be assigned to couples based on the functional status of their relationship, without the state having to provide civil avenues to formalize these relationships *ex ante*. For example, the rights and responsibilities that the American Law Institute's *Principles of the Law of Family Dissolution*[66] now seek to apply to unmarried cohabitants could, in an era in which civil marriage and other formalized commitments between adults were eliminated, be applied to all couples. Under such an approach, what would matter in assigning such rights would be the couple's functional characteristics – how long they lived together, whether they had children together, etc. – rather than whether they had formalized their relationship. For example, more property sharing might

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an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.").

[65] It might be argued, however, that although some individuals who enter into conjugal relationships may fare worse in the event of a break-up, if status based marriages were eliminated, many other individuals would fare better because, in the absence of such recognition from the state, they would cease to enter into conjugal relationships. And certainly Fineman and other commentators have suggested that most women would fare better if they avoided entering into marriage or marriage-like relationships with men altogether. Whether or not this is the case, my strong hunch is that ending civil recognition will have little effect on the numbers of people who enter into conjugal relationships – they will simply do so without the imprimatur of the state, or its protections.

[66] AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (2001).

be required of couples who lived together for longer periods of time than couples who lived together for shorter periods, regardless of whether the couple had made some formal commitment to stay together.

In my view, however, eliminating a civil route for formalizing relationships would be a mistake for two reasons. First, this formalization helps to identify the intent of its members and their own understandings with respect to the intended primacy and permanency of the relationship. And surely such understandings should be relevant to determining the default rules that apply to the particular relationship. For example, a commitment to a permanent relationship, such as the entry into marriage serves today, should be pertinent to the state's determination of how long income should be redistributed between parties who have separated**.** Second, as the Council of Families recognizes, the state's making available a route through which citizens can formally commit to the permanency and depth of their relationship serves the state's goal of increasing the stability of adult caretaking relationships. Such commitments increase the likelihood that those participants who face tough times will try harder to weather the difficulty with their partners.[67]

B. *State Privileging Of (Some) Adult-Adult Relationships*

I have argued that the state should *recognize* relationships between adults and impose, at the least, default rights and responsibilities among participants in such relationships for the purpose of seeking to ensure equality and fairness. The issue of whether the state may and should seek to *privilege* such relationships over others is a much tougher issue for a liberal democracy. In my view, the answer should be "yes" because of the goods that these relationships further. These privileges, however, must be limited in particular ways since they

[67] *See* Bruce Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy – Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 476-84 (1983).

raise tensions among important liberal goods and values. Part of the challenge of a more robust liberalism that recognizes a richer diversity of goods must be to seek a course of action that ameliorates the tensions among these varied goods. In what follows, I set out four principles for the state's treatment of adults' relationships that, together, seek to accomplish this purpose.

1. *Freedom to enter into consensual relationships*

First, liberalism's great respect for individuals' forming and carrying out their own life plans requires that the state allow individuals the freedom to engage – or not engage – in consensual relationships with others. The right to determine one's own personal relationships is central to liberalism's respect for individual self-determination. The fact that liberalism was born out of fear of tyranny, as Judith Shklar points out,[68] strongly militates against the state decreeing that some consensual relationships are permissible and others are not. John Stuart Mill's counsel that society benefits from allowing different "experiments of living" to flourish also supports the state's ensuring that such freedom exists.[69] Under this principle, for example, a citizen whose vision of the good life is to have sexual relationships with as many other citizens as possible should be able to fulfill that vision without interference by the state (barring issues such as public health concerns), regardless of whether the majority's own private views of morality condemn such action.

2. *Encouragement of (a broad range of) long-term caretaking relationships*

Second, although the liberal state must tolerate all consensual relationships, it need not give all such relationships a level playing field. It is true, as Fineman and Warner argue, that the

[68] *See* Judith Shklar, *The Liberalism of Fear*, *in* LIBERALISM AND THE MORAL LIFE 37 (N.L. Rosenblum, ed. 1989).

[69] *See* JOHN STUART MILL, *On Liberty*, *in* ON LIBERTY AND OTHER (John Gray ed., 1991).

liberal democratic state should not favor some relationships over others based on citizens' private notions of morality. It can and should, however, seek to support relationships that further important public goods in which the liberal state has a legitimate interest. Among the most important of these is caretaking. Without minimizing the harm that can occur in relationships between adults, or ignoring the sex inequality that tends to mark heterosexual relationships, the crux of the matter is that dependency is an inevitable fact of life for adults as well as children, and a liberal state must contend with that fact. Because of its interest in the health, well-being, and dignity of its citizens, the liberal state has a vital interest in the success of long-term relationships, and should provide these relationships with the institutional support that will help them flourish.

Given that the state's interest is in caretaking, the category of relationships that the state has an interest in supporting is considerably broader than the set of couples who are now formally married. The state has an interest in supporting all long-term intimate relationships in which caretaking occurs, including relationships of couples who are not necessarily monogamous, or, at the opposite end of the spectrum, those whose relationships are not sexual. By the same token, the state also has an interest in supporting caretaking in family groupings that involve more than two adults.[70] Thus, the state has valid reasons to support all of the following horizontal relationships involving caretaking: a couple of elderly sisters who live together and take care of one another, a non-monogamous homosexual couple, a commune of five adults who live together with their children, and a heterosexual married couple.

[70] There may be administrative rather than theoretical reasons to limit the number of persons that the state should recognize. There is, however, no reason that two persons should necessarily be the limit.

3. *Limits on the privileges available to long-term caretaking relationships*

Third, with all that said, promoting the health and stability of horizontal relationships is only one goal that a flourishing liberal democracy should pursue, and only one of many principles that should affect the state's decision-making. State distribution of privileges in favor of these relationships therefore has to be weighed against alternative principles of distribution, including distribution based on need. As I pointed out before, considerations of need will often conflict with distributing privileges to adults in long-term relationships. Further, the recognition of the limits on the state's and individuals' abilities to ensure the existence and stability of relationships must also be factored into the state's family policy.

These considerations should cause the state to limit the privileges that support these relationships in two specific ways. First, the state's seeking to aid caretaking relationships between adults cannot undercut the state's responsibility to ensure that all its citizens have the means and opportunity to pursue dignified lives. This means, at a minimum, as Martha Fineman argues, that a just society should seek to deliver basic social goods such as health care to everyone in society, rather than based on family membership. Insofar as the state distributes these goods based on marital status, it neglects its most basic responsibilities.

Second, the state should limit privileges for relationships to those tied to the specific public good in which the state has a legitimate interest – for example, caretaking, or sex equality.[71] Singling out families for more generalized favorable treatment – while it might still further the goal of supporting families – stands in tension with principles of fairness among all citizens, both those within and those not in such families, particularly insofar as it redistributes

[71] *See also* FINAL REPORT: BEYOND CONJUGALITY, LAW COMM'N OF CANADA (2004), *available at* http://www.lcc.gc.ca/about/conjugality_toc-en.asp (last visited March 15, 2006).

economic resources to those who are, on average, better off. Under this principle, the state could allow caretaking leaves from work or special immigration privileges for the partners of citizens, but not general tax breaks for those in caretaking relationships that are unrelated to the extra expenses incurred in caretaking. Thus the state would have little justification for funnelling general economic support to those in adult-adult relationships, given that these adults, on average, do better financially due to the economies of scale of living together. In contrast, economic redistribution to caretaker-dependent relationships could be better justified by the consideration of the cost to caretakers of caring for dependents, including the interruption from working continuously in the paid work force.

One important way in which the state can legitimately foster relationships among adults that conform with this principle is to provide a civil route through which adults can formalize their commitment to others. As Bruce Hafen notes, formal commitments increase the likelihood that a relationship will last.[72] They also serve as an expressive vehicle for the state to announce its support for stable caretaking relationships without redistributing tangible privileges in favor of such relationships and, hence, away from those who might need them more. The state's endorsing such civil commitments is still not, of course, without cost to those who do not enter them: to the extent that the state endorses such commitments, those who do not enter into them may feel a lack of societal respect, or even societal disapprobation. In my view, however, the benefits that such formalization yields in terms of the stability of these relationships, given the importance of such relationships, still outweighs the costs of this potential stigmatization.

[72] *See* Bruce Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy – Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 476-84 (1983).

4. *Guarding against injury to other important goods*

Fourth, in privileging caretaking relationships between adults, the state must also seek to remedy the negative consequences to public goods associated with these relationships. Three of these possible consequences bear particular attention: 1) increased gender inequality, 2) increased economic inequality, and 3) the possibility that close caretaking relationships will cause their participants to turn away from civic life, instead of serving as a springboard to healthy civic engagement. I discuss each in turn.

a. *Sex inequality*

Any proposals that the state should promote intimate caretaking relationships must deal with the fact that heterosexual relationships, as well as the institution of marriage, have been deeply intertwined with women's continued gender inequality. Leaving current political realities aside, the state might, of course, deal with this troubling association by privileging only those long-term caretaking relationships that do not involve heterosexual relationships. Alternatively, and far more palatable politically, the state could privilege heterosexual relationships along with other relationships at the same time that it seeks to increase the equality within these relationships.

One way to pursue this latter goal would be for the state to adopt policies that encouraged the shared caretaking of children by their parents, since so much gender inequality is associated with women's assuming the greater portion of childrearing responsibilities.[73] To accomplish this goal, the state could adopt models of public support for caretaking that encourage men to take an equal role. For example, requiring that employers adopt family leave policies that can be taken

[73] *See* Katharine Bartlett, *Brigitte M. Bodenheimer Memorial Lecture On The Family: Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 844-45 (1998).

by parents sharing childcare between them, rather than policies that are limited to full-time caregivers, would encourage shared caretaking, as would flex-time, and allowing both parents of very young children to work somewhat fewer hours without sacrificing their jobs. Schools, too, should play a role in this endeavor, teaching children that both fathers and mothers can have equal roles in nurturing their children, and helping them to understand the importance of these caretaking tasks. In Anita Shreve's words, "the old home-economics courses that used to teach girls how to cook and sew might give way to the new home economics: teaching girls *and* boys how to combine work and parenting."[74]

b. *Economic inequality*

Second, with respect to economic equality, the state's encouraging tighter family ties runs an increased risk that wealth will be more tightly held within particular families' hands, and, therefore, that there will be more disparities of wealth and, consequently, opportunity across families. What this threat to equality calls for, however, is not state efforts to loosen family ties, but rather efforts to lessen the disparities of wealth and opportunity that result from these ties. Lessening these disparities requires that the state seek to ensure that all citizens have the financial means and education to ensure (at the very least) some basic threshold of opportunity, even when their families cannot provide this without aid. It also means, at the other end of the income spectrum, that the state should seek to reduce, although probably not eliminate, disparities in wealth continuing between generations. As Michael Walzer argues, there are significant reasons to allow family members to express their love through bequests to family members, as well as significant reasons to tax these bequests for reasons of equality and funding

[74] SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY 177 (1989) (*quoting* ANITA SHREVE, REMAKING MOTHERHOOD 237 (1987)).

legitimate state expenditures.[75] As Walzer concludes, the state should moderate between these goals by giving some weight to both when determining the extent of taxation of such gifts.

c. *Families as a respite, not an island*

The state should also seek to encourage familial relationships to serve as a source of support, but not be islands unto themselves. As Michelle Barrett and Mary McIntosh point out, the nuclear family, with its ideal of self-sufficiency, can cause family members to focus so exclusively on their families that it interferes with the vigorous public life that a healthy liberal democracy requires.[76] To counter the tendency for family members to treat their families as an island, the state should seek to support the caretaking relationships associated with the nuclear family at the same time that it seeks at least some deprivatization of this form. The pattern of childrearing in which parents have sole responsibility for childcare inside a private home isolates children and caretaking parents from the larger community. In privileging caretaking relationships, the state should seek to construct institutional arrangements that incorporate parents and dependents into the life of the community and share caretaking responsibilities within the community. Tax subsidies for co-housing developments, in which some cooking and childcare are performed cooperatively, and supports for childcare cooperatives, are two measures by which the state can pursue this end.

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[75] *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 128 (1990)("But surely the gift is one of the finer expressions of ownership as we know it. And so long as they act within their sphere, we have every reason to respect those men and women who give their money away to persons they love or to causes to which they are committed, even if they make distributive outcomes unpredictable and uneven.").

[76] MICHELE BARRETT AND MARY MCINTOSH, THE ANTI-SOCIAL FAMILY 51-52 (1991).

III. Civil Partnership or Proliferation of Families?

The most difficult issue with respect to how the state should treat adult's long-term caretaking relationships is not, in my view, whether or not the state should accord some civil status to these relationships, or even the issue of whether the state should provide subsidies to caretaking relationships. As I have said, in my view the answer to each of these questions is "yes," in large part because of the importance of caretaking to society. The most difficult issue is whether all such horizontal relationships should be categorized together for purposes of public support under a banner such as "domestic partnership," or whether they should be categorized separately according to the general type of relationship at issue. In the latter case, the state would presumably retain a civil status for conjugal relationships such as marriage (which, out of justice and fairness, as well as for the goods associated with them, would need to be expanded to same-sex couples), but also recognize other forms of adult-adult relationships, such as domestic partnerships between friends who cohabitate. This approach, however, runs the risk that marital relationships will continue to be perceived as superior to other relationships and disproportionately assigned privileges.

Grouping all adult-adult relationships into a single legal status has the advantage of guarding against the possibility that any particular subcategory of relationship, namely, marriage, would be unfairly privileged as against other horizontal relationships. In addition, clustering different types of horizontal relationships together into the same legal category would send a strong message that marriage occupies no paramount place in the hierarchy.

There are several downsides to this strategy, however. First, treating these relationships as a single category would keep the state from tailoring the particular obligations and benefits assigned to that status to the type of caretaking relationship at issue. For example, when a child

is born to or adopted by one of the parties within a conjugal relationship, it makes sense to accord a presumption of parenthood and right to adopt to the other partner. There is less reason to accord such a presumption in a non-conjugal caretaking relationship, however. The same is true for inheritance rights: as a default matter, it makes sense to assign a presumption that conjugal partners intend their partner to inherit (in the absence of agreements to the contrary), since most individuals in such relationships leave their estates to their partners. It may make less sense to apply this presumption to other types of long-term caretaking relationships. With that said, the state could choose to divide relationships into categories for the purpose of delineating rights between the partners, but to use a single category for purposes of assigning state support.

Second, although moving away from the category of marriage has the benefit of eliminating marriage as *the* privileged category, it has the related disadvantage that much of the positive cultural resonance associated with marriage – the notion that the institution is a serious, long-term bond of commitment based on love between two people who come together and take one another permanently as family – will also be lost.[77] To the extent that laws have an expressive force to which citizens respond, eliminating marriage would weaken the resolve of those in relationships to work through rough periods. It could also dissuade those who would otherwise have married from entering into domestic partnerships, since such partnerships do not have the same cultural resonance that swearing one's love through marriage does. This could leave many of those made vulnerable by relationships without legal protection.

[77] *See supra* note 62.

At the level of theory, in my view, there is no clear winner between these two alternatives – each has its own set of benefits and costs.[78] At the level of political reality, though, the popular ideology (not to mention the $50 billion a year wedding industry)[79] is so invested in the value of marriage that eliminating civil marriage is well nigh impossible. As a result, those who seek to topple marriage from its pedestal as the preferred form of family and to increase the equity among different forms of relationships would likely do better to focus their attention on decentering marriage by proliferating other categories of status relationships among adults, rather than seeking to eliminate marriage as a civil status and replacing it by a civil partnership category.[80] This strategy of broadening the categories of relationships that receive legal protections and support, and distributing a subset of the bundle of rights now received by marriage among these different relationships,[81] is not only the most pragmatic course to take given existing political realities, but a course that offers significant promise in furthering the goods that a liberal democracy needs to flourish. Disaggregating the privileges awarded based on the good at issue also helps deconstruct the monolithic notion of "The Family," and the orthodoxy surrounding it. This approach makes it clear that there are many kinds of relationships that contribute many different public goods, and that no one-size-fits-all family is the ideal.

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[78] As a result of the difficulty of this issue, Mary Shanley recently shifted positions, first arguing that the state should continue to support civil marriage, *see* SHANLEY, *supra* note 16, and more recently arguing that the state should discard civil marriage and treat all horizontal relationships as domestic partnerships. *See id.*

[79] Dina ElBoghdady, *For Love and Money; Amid Economic Sickness, Bridal Industry Radiates Health*, WASH. POST, May 25, 2003, at F1.

[80] *See* Judith Stacey, *The New Family Value Crusaders*, THE NATION, July 25, 1994; McClain, *supra* note 40, at 391, 401-02.

[81] *See* Iris Marion Young, *Reflections on the Family in the Age of Murphy Brown: On Gender, Justice, and Sexuality*, *in* REVISIONING THE POLITICAL: FEMINIST RECONSTRUCTIONS OF TRADITIONAL CONCEPTS IN WESTERN POLITICAL THEORY 258 (Nancy J. Hirschmann and Christine DiStefano eds., 1996); James DiFonzo, *Unbundling Marriage*, 32 HOFSTRA L. REV. 31, 65-66 (2003).

IV. Difficult Cases: Encouraging the Two-Parent Family and Encouraging Marriage

I have argued that the state has a legitimate interest in preferring two-parent (or more) families over single-parent families where children are involved. However, the thorny issue of *how* the state should seek to encourage two-parent families merits additional discussion. As I have argued elsewhere,[82] the state has a duty to ensure that children have the caretaking and other resources necessary to support their well-being and develop their capabilities. This duty exists, whether or not the state believes that parents have made a wise choice about their family form, and even if the state fears that ensuring that today's children have necessary resources will send the wrong signals about better and worse family forms and therefore hurt future children; the duty to support the existing children is paramount. For these reasons, it is illegitimate for the state to withhold welfare benefits to low-income families based on the mother's having additional children out if wedlock, if doing so would deprive the children in these families of necessary resources.

Above this required threshold of support, however, the state does have legitimate reasons to adopt measures that encourage two parent families. In doing so, however, the state should seek to harmonize the important liberal goods at stake. In other words, the state's goal should be to construct policies that avoid zero-sum situations in which furthering some goods operates to the detriment of others. Developing such policies will, however, require careful attention to the ways in which relevant goods may conflict. By this criterion, the state's seeking to further two-parent families by awarding them economic resources not awarded to single-parent families is a peculiarly bad tool to harmonize these goods. Not only would doing so keep resources from the

[82] Maxine Eichner, *Dependency and the Liberal Polity: On Martha Fineman's The Autonomy Myth*, 93 CAL. L. REV. 1285 (2005).

very families who need them most, it also risks stigmatizing the very children who are most vulnerable. Far better would be measures that do not pose such a stark tradeoff among goods. Thus the state would do better, for example, to achieve this end through job training programs and educational subsidies for youths who are at risk of becoming parents, since studies show that increasing the prospects for young adults' future makes it significantly less likely that they will bear children while they are young and single.[83] Such programs do not pit the important interests of current children against the important interests of future children.

The state should deal in a similar manner with proposals to shore up the institution of marriage (or whatever categories of adult-adult relationships that the state retains). Proponents of marriage have proposed a number of policies recently to strengthen marriage, including making divorce more difficult through returning to fault divorce laws, adopting covenant marriage provisions, premarital counseling, and even awarding bonuses for marriages where no pre-marital abortions occurred.[84] In choosing policies to strengthen the health and permanency of horizontal relationships, the state should here, too, seek to avoid policies that require large tradeoffs between important goods. In this light, tightening up divorce laws through a return to fault divorce, despite furthering the state's interest in promoting marriage, severely infringes on citizens' autonomy interests.[85] The state would therefore do better to adopt proposals such as

[83] MARION WRIGHT EDELMAN, FAMILIES IN PERIL: AN AGENDA FOR SOCIAL CHANGE 88 (1988).

[84] *See,* e.g., Ariz. Rev. Stat. §§ 25-901 to 25-906 (2000 & Supp. 2004); Ark. Code Ann. §§ 9-11-801 to 9-11-811 (2002 & Supp. 2003);La. Rev. Stat. Ann. §§ 9:272 to 9:276 (2000 & Supp. 2005) (covenant marriage provisions).*See also* Missouri House Bill 1917, LR # 3769-01 (1999)(proposing that couples who marry after attaining the age of 21, without having had any children or (in the woman's case) any premarital abortions, and having tested negative for STD's, be paid $1000 from a fund, which would be raised by assessing a $1000 fee against parties whose actions provided the grounds for a divorce).

[85] Covenant marriage laws, in which individuals getting married can choose whether or not heightened standards will apply at divorce, pose less of a conflict among important goods. *See* Ariz. Rev. Stat. §§25-901 to 25-906 (2000 & Supp. 2004); Ark. Code Ann. §§ 9-11-801 to 9-11-811 (2002 & Supp. 2003); La. Rev. Stat. Ann. §§ 9:272 to 9:276 (2000 & Supp. 2005)). Given the small number of couples who choose to enter into covenant marriage where it is available, though, as well as the problems with requiring parties to remain in a marriage that one party wants to

pre-marital counseling requirements that would avoid this stark tradeoff of goods. Further, given that women more often seek divorces than men, as Katharine Bartlett points out,[86] the state could usefully support such relationships by encouraging men to be better partners through assuming an equal share of housework and carework.[87] Such measures would infringe less on individual's autonomy than stricter divorce laws and, at the same time, increase sex equality.

In determining the measures that the state should take to further such relationships, it is important to keep in mind the limits of the state's institutional competence to deal with the complexities of these relationships. The state can make it more difficult for individuals to get out of marriage. It cannot, however, keep affection and caretaking alive within such relationships.[88] As I argued before, this recognition of the state's inherent lack of institutional capacity, as well as limits on citizens' own capacities in this area, should cause the state to limit benefits awarded to families out of concern for individual fairness. It should also cause the state to investigate means to encourage alternative caretaking networks for those who are not, either

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exit, the state would be wise to seek alternative policies. In Louisiana, two percent; in Arizona, 0.25 percent; and in Arkansas, only 71 out of approximately 38,000 marrying couples elected the covenant marriage. SCOTT DREWIANKA, CIVIL UNIONS AND COVENANT MARRIAGE: THE ECONOMICS OF REFORMING MARITAL INSTITUTIONS (2003).

[86] Bartlett cites figures from a 1986 study which indicate that women initiate divorce in 62 to 67 percent of cases. Bartlett, *supra* note 65, at 842 n.135. A more recent study gives approximately the same result, placing the figure at 70 percent. Margaret Brinig & Douglas W. Allen, *'These Boots Are Made for Walking': Why Most Divorce Filers Are Women*, 2 AM. L. & ECON. REV. 126, 127-28 (2000).

[87] *See* Bartlett, *supra* note 65, at 842**.** More recent data indicates that women still do an average of 17.5 hours of housework per week, while men do an average of 10. JAMES A. SWEET AND LARRY L. BUMPASS, CENTER FOR DEMOGRAPHY AND ECOLOGY, UNIVERSITY OF WISCONSIN-MADISON, THE NATIONAL SURVEY OF FAMILIES AND HOUSEHOLDS - WAVES 1 AND 2: DATA DESCRIPTION AND DOCUMENTATION, *available at* http://www.ssc.wisc.edu/nsfh/home.htm (last visited December 20, 2005).

[88] The difficulties associated with the state's promotion of marriage, for example, were made eminently clear in President G.W. Bush's recent plan to promote marriage for women on welfare. Despite the administrations $1.5 billion initiative, the administration had no clear plan for how states might successfully promote marriage once Wade Horn, the top official at Health and Human Services, withdrew his earlier proposal to award those who married with cash bonuses. *See* Barbara Ehrenreich, Editorial, *Let Them Eat Wedding Cake*, N.Y. TIMES, July 11, 2004, §4, at 13.

through chance or choice, members of intimate relationships, such as "mothers houses," where single parents can raise their children more communally, or the types of informal networks among friends that helped provide caretaking for men in the gay community stricken with AIDS in San Francisco at the height of the epidemic.

Conclusion

Given how contentious a legal and political issue marriage has become, it should not be surprising that the state's position with respect to marriage and other relationships among adults implicates so many, and such conflicting, goods and principles important to a liberal democracy. For this reason, determining the appropriate stance of the state to these relationships cannot be accomplished by looking to only one or two of the relevant factors at stake. To do so, as Indian folklore tells us, would be to take one part of the elephant for the whole.