7

GENDER

Introduction to the Moral Issues 275
Defining the Problem: Issues of Sexism 275
Overt and Institutional Sexism 275
Sexist Language 276
Sex Discrimination 277
Overt Job Discrimination and Unequal Pay 277
Comparable Worth 278
Legal Protection: Theory and Implementation 278
Sexual Harassment 278
Quid Pro Quo 278
The Hostile Work Environment 279
Models of the Place of Gender in Society 279
The Traditional Model 279
The Androgynous Model 280
The Maximal Choice Model 280
The Nature–Nurture Controversy 281
Gender Roles and the Family 281
The International Dimensions 281
Educational Opportunities for Women 282
Reproductive Freedom 282
Violence Against Women 282
Sexual Exploitation of Women 282
Human Trafficking 282
Amartya Sen and India's Mission Women 283
The Rise of Sex Selection 283
Conclusion 283
The Arguments 284
Kathy Miriam, "Stopping the Traffic in Women" 284

David Benatar, "The Second Sexism" 296
Susan Moller Okin, "Is Multiculturalism Bad for Women?" 311
Concluding Discussion Questions 319
For Further Reading 320

INTRODUCTION TO THE MORAL ISSUES

Gender matters. And it matters not just in the physical, mental, and emotional realms, but morally as well. As we turn to a consideration of the topic of gender, we discover that a wide array of moral issues come to the fore. Some have to do with equality and the various ways in which women have been denied equality in our society: sex discrimination, sexist language, sexual harassment, rape, pornography, hate speech, and reproductive rights. Others have to do with issues of diversity: not only diverse ideals of the place of gender in society but also the issue of whether women have a distinctive moral voice. In this introduction, we survey these issues, seeking to illuminate what is at stake in each of these areas and highlighting the questions each of us must answer in regard to this issue. Then we turn to a discussion of competing models of the place of gender in society and conclude with a discussion of the means of remedying some of the problems discussed here. First, however, let's take a quick look at the ways in which the issue of gender is similar to, and different from, ethnicity.

DEFINING THE PROBLEMS: ISSUES OF SEXISM

Sexism is a notoriously difficult term to define precisely, but its overall elements are clear. It refers to both *attitudes* and *behavior*. Sexist attitudes are attitudes that see individuals, solely because of their gender, as being less than their male or female counterparts. For example, if despite equal competence, Jane is seen by her employer as less competent than her coworker John, the employer is exhibiting a sexist attitude. If the employer then goes ahead and, on the basis of this distorted perception, promotes John but not Jane, then the employer is behaving in a sexist manner. Sexist *attitudes* refer to our perceptions and feelings; sexist *behavior* refers to our actions.

OVERT AND INSTITUTIONAL SEXISM

Just as we did with racism, we can distinguish between overt and institutional sexism. *Overt sexism* is the intentional discrimination against a person because of that person's gender. For example, if a person is denied a job because that person is a male or female, that is an act of overt sexism. In contrast to this, *institutional sexism* occurs when a person is (perhaps unintentionally) discriminated against because of factors that pertain to that person's gender. For example, in some college sports such as basketball and football, women would be underrepresented if teams were open to both male and female applicants; if athletic scholarship money was given only to those who made the team, the indirect result would be that far fewer women than men would receive athletic scholarships. Although there may be no *intent* to discriminate in athletic scholarships against women, the net *result* might be precisely such institutional sexism.

It is important to understand the ways in which gender-based expectations are woven into the fabric of everyday life, and it is also important to recognize the extent to which this has changed in little more than one generation in American life. Professional women in their fifties and sixties today remember many instances of a "first" for women: the first woman mayor, the first woman Supreme Court Justice, the first woman astronaut, the first woman general, the first woman to graduate first in her class in medical school, and such. Today those "firsts" are a matter of history—except, of course, no one yet remembers the first woman President of the United States, since that has not yet happened. Our character is often formed by the battles we have fought, and for the new generation it often seems as though the battles for gender equality were fought and won in the distant past. This calls for several comments.

First, in many places throughout the world, the battles have not been won. In some societies, women are still stoned to death for adultery, and in some cases they are stoned to death for *being raped*, as though it were a choice they had made. Women continue to be bought and sold around the world, as are children of both sexes. Women find their path to education blocked in many countries, not just those controlled by the Taliban. Women around the world continue to bear children against their will, trapped in a context of domination that negates the possibility of free choice. Women continue to be put on display around the world as objects of sexual fantasy, and in many instances such displays are woven into the fabric of a market economy that depends on the objectification of women for selling everything from cars to coats.

Second, the progress of women in countries such as the United States has come at a high cost. In contrast to many other countries, women in Western liberal democracies can choose to have a career. They can even choose to have a career and a family at the same time. However, in practice that often means that they have two full-time jobs—one at the office and the other at home—while their husbands have only one. This is progress, to be sure, but it is progress bought at a high price, a price that is paid primarily by women, not men, in our society.

Third, it is important to notice the small ways in which the position of women is often diminished in social interactions. Let me offer two examples from a university context, since this is the world I know best. Both examples come from women who were philosophy professors. One woman was talking about her years in graduate school and an experience that would recur all too often in graduate seminars. She would make a comment relating to that day's topic. Typically it would be a good comment, on point, illuminating, and opening up new ways of looking at the issue under discussion. Later in the seminar, the professor would make a reference to the comment, but often attribute it to one of the other students in the class, inevitability a male. It was a small thing, but was important in illustrating the way in which women were often made invisible a generation ago. It was not an outrageous case of harassment or a humiliating act of demeaning the student; it was simply a subtle and unconscious way in which a woman was made to disappear, her contributions assigned to one of her male classmates.

Another colleague of mine once explained why she always dressed well when at the university. If she was in the department office, she wanted to be sure that she would not be mistaken for the secretary. This is something that male faculty members never experience, but it is something that women recognize early in their careers. So, too, they learn early to say that they do not know how to type—so that they will not somehow be assigned typing jobs. Men who admitted that they knew how to type did not have to worry about that.

Of course, these are small things. I have never seen statistics on the number of women in graduate school a generation ago who were propositioned by senior male professors, but I suspect the numbers would be startling. The harassment that Catharine MacKinnon brought out into the open through her book, *Sexual Harassment of Working Women: A Case of Sex Discrimination*, was pervasive, whether in academia, the world of medicine, science, the corporate world, the world of sales. And prior to Title VII and the Supreme Court decisions relating to it, there was no protection for women in such situations. The world that this new generation is growing up in has changed, and changed for the better.

SEXIST LANGUAGE

One of the more contentious areas of discussion in regard to sexism is language. There are two distinct aspects to this issue: (a) the gendered structure of our language and (b) its specific vocabulary. In regard to linguistic structure, many have pointed out that English, like many other languages, is gendered; we often are forced by our language to identify a person as either male or female, even when we don't know the person's gender. Because the masculine gender is the default gender in cases where we don't know, we usually supply the masculine pronouns and adjectives. It is very awkward to say, "The pioneer rode on his or her wagon." Instead, we usually say "The pioneer rode on his wagon," thereby giving the false impression that the only pioneers were men. An even more revealing formulation is something such as, "The pioneers and their wives rode westward in their wagons," which implies that only the men were actual pioneers.

Advocates of a gender-neutral language have tried, with only partial success, to encourage us to use language in gender-neutral ways. This demands that we pay attention to our use of language, but that is usually something good. With some degree of care, it is usually possible to reformulate our language in gender-neutral ways

I have often used plural constructions in this book precisely for this reason, and tried in various ways to write in ways that do not involve gender stereotyping.

Sexist vocabulary abounds in our language. Sometimes it is rooted in differential perceptions: a man is seen as "assertive," a woman behaving in exactly the same way is perceived as "aggressive." The two words describe the same conduct, but give quite different value-laden spins to each on the basis of gender.

Sometimes specific words tell us a lot. One of the most striking analyses I have read occurred in an article by Robert Baker called, "Pricks and Chicks: A Plea for Persons." Baker points out that obscene, transitive verbs describing sexual intercourse (e.g., "screw") are usually used in such a way as to place women as the direct object *and* they are usually synonymous in English with "to harm or to hurt." This suggests a view of sexual intercourse that few of us would commend, equating sexual intercourse with men harming women. It is a disturbing correlation that suggests a disquieting societal understanding of sexual relationships.

Although it is easy to parody some attempts to eliminate sexist language, the point underlying such attempts is both clear and commendable. When we respect and care about someone, we speak both to them and about them in ways that manifest that respect and concern. In the final analysis, we try to avoid sexist language because we care about persons and respect them, and such language is incompatible with such caring and respect. If, on the other hand, we do not care for and respect others, our sexist language only solidifies and exacerbates that lack of caring and respect. The language is not the root problem, but the symptom of something deeper that has gone wrong. But just as it is valuable in medicine to reduce symptoms of disease, so too, there is a value in reducing sexist language, even though such reductions are far from a cure for the underlying ailment.

SEX DISCRIMINATION

Discrimination based on gender has certainly diminished over the years, but it still remains an important issue in American society. Although the Equal Rights Amendment (ERA) was never ratified by the required number of states, there are a number of legal guarantees available to individuals, especially women, who are the objects of sex discrimination. Moreover, numerous affirmative action programs have helped increase the representation of women in places where they had previously been discriminated against.

Overt Job Discrimination and Unequal Pay

Overt discrimination, where a woman is denied a job or promotion solely because she is a woman or is paid less than her male counterpart in the same job, has decreased significantly in recent years. In the 1960s, women made 59 cents for every dollar earned by men. In 1990, this figure was 72 cents, and, for younger women during that year, it was 80 cents. By 2010, it was about 82 cents. How much of this remaining discrepancy is due to discrimination and how much is due to other factors (women, on the average, work fewer hours per week than their male counterparts, many have fewer years of work experience than men of the same age, some leave the job force earlier when the family no longer needs the second income, etc.) is unclear, but it is clear that the relative position of women to men in the marketplace—although still subordinate—is definitely improving. Those who are discriminated against in these ways have legal recourse, even without the ERA, and there is an increasingly wide consensus in American society that we ought not to discriminate against people on the basis of gender. Although we may fail to live up to our ideals in this area, clearly equal pay for equal work has become one of our accepted ideals.

The factors that contribute to this wage differential are often subtle but significant, and they may not be related to explicit sexism or intentional gender bias. Again, consider an example from the academic world. A couple, both Ph.D. students, gets married and decides to make the decisions in their marriage in a gender-neutral way. They decide, for example, that if they get job offers in two different cities, they will accept whichever offer is higher, irrespective of whether it is to the man or the woman. Gender-neutral, right? Well, almost. If they are like the average couple, she is probably 3-5 years younger than he is, and consequently she will have proportionately less work experience. Her job offer will probably be less than his, even if there is no gender discrimination. As their careers progress, if they have children, they may both work, but it is her research that will probably suffer as she tries to juggle teaching, research, a home, and children. She may defer applications for promotion by a few years, just to keep the pressure manageable. Again, no overt discrimination, but gradually a pattern emerges in which equal is not *quite* equal

Comparable Worth

One of the more subtle ways in which sex discrimination occurs is when predominantly female occupations are less paying than comparable occupations with predominantly male employees. Examples come easily enough to mind: plumbers and truck drivers versus cleaning staff and secretaries. Although intuitively this seems true (at least to me), there are two significant problems in translating this intuition into something more concrete and effective. First, the notion of "comparable," although intuitively plausible, is very difficult to make precise. Second, many (especially market conservatives) are very wary of intervening in the market to regulate wages.

LEGAL PROTECTION: THEORY AND IMPLEMENTATION

Finally, it is important to note that it is often insufficient simply to pass legislation prohibiting something like sex discrimination unless there is a monitoring and enforcement structure to implement the legislation. Often, the impact of the legislation can be undermined if there is insufficient funding for its implementation. Again, opponents of big government may perceive regulation and monitoring as unwanted government intrusion. Rarely does it get perceived as government protection of those who are vulnerable. Rights in theory are of little significance if there is no enforcement mechanism in place to insure that these rights are actually observed.

SEXUAL HARASSMENT

Harassment in general consists of using undue and unwelcome *means*—usually short of outright violence—to pressure someone to some *end*, usually to do something that the harassed person does not want to do. Thus there are two crucial components of harassment: the means and the end. Workers might try to force a fellow worker to quit by pouring coffee in his locker, letting the air out of his car's tires, or calling him on the phone repeatedly in the middle of the night. Such actions would be the means of harassment, while the end would be forcing the other worker to quit.

Sexual harassment is usually sexual in two senses: (a) the *end* is usually to pressure someone (usually a woman) to have sexual intercourse (or some other kind of sexual activity) with the harasser and (b) the *means* to this end are usually things such as repeated sexual innuendoes, unwanted fondling, showing pictures, and so on. Sometimes, however, the means may be comparatively unrelated to sex: they may be threats about losing one's job, a promotion, a raise, or something else that the harasser controls. Sometimes, too, the end may not even really be sexual: it may simply be about power. Often, male harassers were primarily concerned with establishing their own dominance.

Several points need to be made about sexual harassment. First, most of us would agree that the less harassment in society, the better. This applies to all types of harassment, not just sexual harassment. Second, we are particularly wary of harassment of those who are most vulnerable to the intimidation of harassment: individuals of little power (usually women, often financially vulnerable) who have something (sex) that the harasser wants. Third, it is sometimes difficult to make judgments about incidents of harassment, especially when dealing with a single incident in isolation and without witnesses. However, in practice, harassment is often repeated and often done in front of other people. Fourth, sometimes appropriate expressions of sexual interest may cross the line into sexual harassment, due to either the insensitivity of the harasser or the oversensitivity of the harassed person.

In MacKinnon's original work, she noted two main types of sexual harassment, both of which—in significant measure because of MacKinnon's efforts—were acknowledged as prohibited by Title VII of the Civil Rights Act of 1964: the quid pro quo situation and the hostile work environment.

Quid Pro Quo

In Latin, this means "something for something," and this is the heart of quid pro quo: something is exchanged for something else. Someone in a position of power—a boss, supervisor, teacher, department head—tells someone over whom they have power—an employee, a student, a patient—that they can get something they want—a promotion, a job, a good grade perhaps just not getting fired or not being given a failing grade—by trading sexual favors for the desired thing. John (the boss) tells Mary (one of John's employees) that she can have a promotion if she has sex with him. The demand may be either explicit or implied. It may involve sexual intercourse or other sex-related activitie

The Hostile Work Environment

The second type of situation that came to count as sexual harassment was the hostile work environment. If employers or coworkers create an environment that interferes with the employee's ability to work or that the employee experiences as "intimidating, hostile, or offensive," then this counts as a violation of Title VII. So, for example, an employer who puts lewd photos of women all around the workplace and makes comments that have sexual undertones is creating what many women would experience as a hostile work environment, an environment in which they cannot be reasonably expected to do their job because of such interference. Whereas prior to 1964 and MacKinnon's arguments in *Meritor Savings Bank v. Vinson* in 1986, women exposed to such working environments had no recourse, after the Supreme Court's decision, there was at last something they could do. Male employers came to be held responsible for their conduct and for the working environment they established for their female employees.

Sexual harassment was viewed as treating women differently than men and as unfairly stereotyping them, confining them to positions of inferiority. This was a fairly narrow and specific model of harassment, confined to a relationship between a man (the harasser) and a woman (the person harassed) and oriented toward sexual activity. But what of cases in which all parties are male heterosexuals and the harassment is sexual in innuendo but not oriented toward procuring sexual favors? What happens when some third party—for example, a vendor who visits the company periodically—experiences the workplace as hostile, even though the employer was not directing anything toward that third party? Imagine a traditionally conservative male Christian or Muslim vendor who, calling on the company once a week for orders, experiences the environment as morally offensive and finds it difficult to do his job (selling his product) in that environment. Do he have any recourse? Is this sexual harassment? It certainly does not fit the standard model.

Given these general points about harassment, the central question facing us as a society in this regard is the extent to which we actively want to discourage sexual harassment, to provide special protection to those who may be victimized by it, and to punish those who harass. Sexual harassment can be discouraged through educational programs (beginning in schools, continuing on the job), the media, and the like. This is by no means limited to government initiatives; individuals can decide to provide appropriate models for dealing with harassment in their personal and public lives, in their business dealings, and so on. Potential victims can be afforded special protection through tough anti-harassment laws and through vigorous prosecution of those laws. Yet again, this is not simply a matter of legislation. Individuals can speak out against harassment when they witness it, even though it does not directly affect them. Companies can have strong internal policies against it, and it can be a serious factor in personnel decisions. Finally, we can pass strong legislation at various levels of government that discourages and punishes sexual harassment.

MODELS OF THE PLACE OF GENDER IN SOCIETY

Just as we saw that there was disagreement about the role of race in society, so too, we find that there is a significant degree of disagreement about precisely what the role of gender ought to be in society. The fundamental question that we face here is how we envision a future ideal society in regard to gender. Would it be one in which men and women occupy relatively traditional roles such as were common a generation ago? Is it one in which all references to gender have been banished, a unisex society? Is it one in which we still have some traditional roles but individuals—whether male or female—are free to choose whatever roles they want? Let's turn to a closer consideration of each of these three models of the place of gender in society.

THE TRADITIONAL MODEL

Advocates of the traditional model of gender roles see the place of women as primarily in the home and the place of men as primarily in the workplace. Even within the home, the husband is seen as head of the family and the wife is viewed as subservient to him. For a man, his home is his castle; for his wife, the home is all too often something to be cleaned and a place of unpaid work, including cooking and child rearing. In the workplace, traditionalists usually—either explicitly in earlier times, or now implicitly—advocate a gender-based division of

labor in which women occupy only low-paying (maids), menial (cleaning women), subservient (secretaries), and child-related (elementary school teachers) jobs that typically receive less pay than their male counterparts.

Critics of the traditional model argue that it places women in an inferior position in the home and in the workplace as well. Women's work in the home is unpaid and their labor in the workplace is underpaid. Moreover, women's options are most severely limited in this model, and they are especially limited from jobs that bring wealth and power. Moreover, in an age when men are freer to divorce their wives in midlife and marry younger women after their family is grown, and in an age when all too many fathers ignore child support, women are especially vulnerable to financial abandonment in middle age. In a society that is reluctant to hire middle-aged people, especially those without a strong employment history, such women face great challenges when they try to return to the workforce. Some critics of this model add that the model is also injurious to men, forcing them into an emotionally constricting gender-based stereotype that denies them the joys of close relationships and places the burdens of financial support squarely on their shoulders.

Defenders of the traditional model emphasize the necessity of this model for a strong family life and the importance of strong family life for society as a whole. Although talk about family values is often vague and misleading, there is clearly a sound point here: The most effective juncture for dealing with many widespread social problems is before they begin, and the best time to do this is when children are young and in the home. We return to a discussion of this topic later when we consider gender roles and the family.

The Androgynous Model

At the other extreme from the traditional model, some have advocated a model of society in which gender would be as irrelevant as, for example, eye color presently is. Just as eye color makes no difference in job selection, salary, voting, child care, or anything else remotely similar, so, too—according to the androgynous model—gender should make no difference in these things either. Defenders of androgyny differ about how extensive the domain of the androgynous ought to be. The most extreme position, *strong androgyny,* maintains that sex- and gender-based distinctions ought to be eliminated whenever possible in all areas of life. *Weak androgyny* maintains that gender-based discrimination ought to be eliminated in the public realm (i.e., the workplace and the political realm), but in the private realm of personal relationships it may be unobjectionable.

Among the objections raised to androgyny, three stand out. First, many argue that strong androgyny is impossible. There are simply too many differences between men and women for it to be possible to fit all into the same inevitably constricting mold. Indeed, recent research—which is quickly echoed in pop psychology and therapy—seems to suggest that there are many such differences, including areas such as communication styles. Trying to cram everyone into a single model would undo the progress we have made in understanding and appreciating our differences. The merit of this claim is discussed later in the section of the nature–nurture controversy. Second, many claim that, even if strong androgyny were possible, it is hardly desirable. Just as we seek to encourage diversity and difference in society as a whole, so too, such critics argue, we should try to encourage diversity and difference in the domain of gender. Finally, some have argued that strong androgyny is part of a larger view that sees men primarily as oppressors and women primarily as victims.

Some defenders of strong androgyny reply to such criticisms by defending a weaker version of their position, which simply seeks to abolish sex-based stereotyping and prohibit, at least within the realm of work and politics, discrimination based on gender. At the juncture, androgyny comes increasingly close to the next model, which emphasizes the importance of freedom of choice for all persons.

The Maximal Choice Model

Finally, many have argued in favor of a model that seeks to eliminate any gender-based restrictions on individual choice. In contrast to advocates of strict androgyny, supporters of the maximal choice model do not seek a unisex society. They are willing to accept that men and women may typically develop different personality traits and that there might even be typical differences in behavior. However, they stress the centrality of establishing a society that promotes *freedom of choice,* so that individuals can make whatever choices they want in both public and private life irrespective of their gender. Gender-based discrimination in the workplace and in the political

realm would be abolished, and equally qualified men and women would have equal accessibility to any job, profession, or office they desire. Similarly, within the family, men and women would be equally free to occupy any combination of roles traditionally associated with either men or women.

Criticisms of this model come from both sides. Traditionalists maintain that this model leads to great confusion in roles for everyone, and that social coherence is reduced as a result. Strong advocates of androgyny claim that, unless freedom of choice is reinforced with a strong restructuring of gender-based societal roles and expectations, the "freedom" is illusory: people will be subtly shifted into roles that correspond to the majority's expectations. Only a more radical form of androgyny will establish the social order necessary to ensure genuine freedom of choice.

THE NATURE–NURTURE CONTROVERSY

Obviously, the choice of models in this realm will depend in part on the extent to which a choice is possible. Some have argued that choice is limited by human nature, and that nature fixes (at least to some extent) our gender roles. Others have claimed that these roles are established primarily (perhaps even exclusively) through nurture and are thus open to change. Advocates of change support the nurture side of this controversy, whereas advocates of the status quo (or, in some cases, an idealized version of it) support the nature side of the debate.

Although this controversy obviously cannot be settled here, it is important to distinguish three questions when evaluating arguments in this area. First, to what extent do differences between the sexes actually exist? This is an empirical question best answered through careful research, especially in the natural and social sciences. Second, if differences do exist, what is their basis? Are they genetically based, "hard-wired" differences that remain unaffected by environmental changes or are they part of our "software" that can be reprogrammed through changes in child rearing, education, and the like? This is also an empirical question, but a more difficult one because it is asking about the *causes* of certain empirical conditions, not simply whether the empirical conditions exist. Third, whether there are differences or not, we must ask whether there *ought* to be differences and, if so, what those differences ought to be.

GENDER ROLES AND THE FAMILY

The place of gender in the family is one of the most difficult and controversial areas in which to seek common ground. As we indicated earlier in the discussion of the traditional model of gender roles, women pay a high price in their lives for their commitment to family—often a higher price than their male counterparts. As women have sought more equal access to the rewards of the workplace and more equal distribution of the responsibilities of home and family life, many men and women have been forced to rethink the ideal of the family and the way in which responsibilities have been apportioned by gender.

As Susan Moller Okin shows in her book, *Justice, Gender, and the Family*, we would have to restructure the family significantly if we were to make the family a just institution. In particular, responsibilities for the home and for children would have to be distributed evenly, and this entails a significant redefinition of roles. Such restructuring need not conflict with important social values, but it certainly involves a significant reordering of priorities and responsibilities for men.

THE INTERNATIONAL DIMENSION

In the United States, we have seen significant progress toward gender equality. Other countries, particular Europea liberal democracies, have made significantly greater strides in this direction, particularly in providing social, ec nomic, and political structures that are supportive of gender equality within the family. Men are much more likely receive significant paid paternity leave, and women are often entitled to two or more years of paid maternity leave European countries, with a guarantee that their job will be available to them when they decide to return to work is an interesting example of family values at work, family values that include a well-developed awareness of issue justice within the family. So, without a doubt, there are countries that far exceed the United States in their suppor gender equality within the family and that deeply respect the roles of women in society.

Yet there are many more places in the world in which the place of women is much worse than it is in the United States. Under many governments, women are second-class citizens, forbidden from fully participating in the political and social and economic life of the nation. Several mechanisms contribute to this.

Educational Opportunities for Women

The first and most effective barrier to such full participation is the denial of equal educational opportunity to women. In many societies, women are barred from universities, sometimes even from high school education. When they are allowed to participate, they are funneled into occupations specifically designated for women. They are encouraged to become nurses, not doctors; legal secretaries, not attorneys; cashiers and secretaries, not managers or directors.

Reproductive Freedom

The second most effective barrier is the denial of reproductive freedom. As long as women can become pregnant against their will, without their consent, while their husbands cannot, a woman's place will always be unequal, insecure in a world that, for their male counterparts, is secure. Birth control has become commonplace in many Western democracies, but there are countless countries around the world where women do not control their reproductive destinies, and this puts them at the mercy of their husbands.

Violence Against Women

Violence and intimidation, the threat of violence, constitute the third major impediment to full gender equality for women. Sexism, sexual harassment, and sexual intimidation are all violations of the law in the United States and in western liberal democracies, but there are still many countries in which this is not the case, countries where women have little recourse to protect themselves from abuse and intimidation. In a number of countries throughout the world, women are the victims of so-called honor killings, often murdered by male members of their own family to avenge some perceived disgrace in the family. In countries where the "honor code" reigns, the normal protections of law no longer apply to girls and women thought to have violated family honor. Much of this centers on perceived sexual "contamination." Women may be killed for an illicit kiss, a public declaration of affection—even for being the victim of rape. Their killers are almost never charged with a crime, and are often praised in male society as having upheld the family's honor. Without a legal and political structure that guarantees equal rights and provides the enforcement mechanisms to insure such equality, women will constantly be vulnerable in a way that their male counterparts are not.

Sexual Exploitation of Women

Women around the world—including in the United States—remain sexual objects to many of their male counterparts. In some cases, this sexual objectification is blatant, and the trafficking of women remains a major issue in our contemporary world. Women are bought and sold, used and discarded in the ways in which people use other disposable objects. In other cases, the objectification is just as pervasive, but more subtle. In the United States, pornography remains widespread, not because anyone is imposing it on our citizens, but because they choose it. Women are turned into objects in much of contemporary advertising, and this is not in any way confined to sleazy tabloids or the like. Look at the ads in the opening pages of the *Sunday New York Times Magazine* in virtually any issue, and the commodification of women will be display with amazing subtlety and refinement.

Human Trafficking

To describe what happens to some girls and women around the world as exploitation would be to understate the case. Particularly in Asia, girls as young as ten years old are sold into slavery as prostitutes, often becoming part of a massive sex industry that serves both local and foreign sex tourists. In some cases, young boys are also sold into such bondage, but three factors put girls at a much greater risk of enslavement. First, the demand for girls is greater. Second, many families willingly sell daughters into bondage, since girls are far less important to many families than are sons. Third, because in many of these countries the marriage of a daughter involves giving a dowry, female offspring are actually an economic liability. This prejudice against females has far-reaching implications for women in developing countries.

As Nicholas Kristof had documented so powerfully in his columns over the years in *The New York Times*, the harms against women have been massive. He estimates that, in the last five decades, more girls have been killed just because they were female than men were killed in all the wars of the twentieth century. He documents the ways in which, for example, girls sold into prostitution in Cambodia are shocked with cattle prods between customers to remind them to be pleasing to their customers.

AMARTYA SEN AND INDIA'S MISSING WOMEN

Amartya Sen, the Nobel-prize winning economist and political philosopher who has held endowed chairs at both Oxford and Harvard, wrote a powerful article, "Missing Women," in which he estimated that worldwide there were over one hundred *million* missing women, that is, women who would have been born and would have grown to maturity had they not be aborted, left to die after birth, malnourished to the point of death, neglected in terms of their health to the point where they died, and died in childbirth. In other words, if women were treated the same as men, there would have been one hundred million more of them than actually exist. We cannot even imagine a military attack that would leave one hundred million dead. It is all the more stunning to realize that such deaths have been largely invisible to us, at least until Sen's groundbreaking work.

The ratio of women to men in countries such as China, India, Pakistan, and Bangladesh shows clear evidence of this trend, especially among the younger age cohorts. In European countries and the United States, the ratio is about ninety-five girls per one hundred boys. (This appears to be the "natural" ratio which overall results in a gender balance in human populations.) In contrast, the ratio in Singapore is ninety-two girls per hundred boys; South Korea, eighty-eight; China, eighty-six.

Such numbers are troubling for two reasons. First, they indicate a massive harm against females. As I said earlier, these figures would be staggering if they reflected the casualties of a military battle. They should be no less alarming because they occur silently and largely in secret. Second, no one knows what the long-term effects of such severe gender imbalance will be in countries such as China. How will it handle the surplus of men as they reach adulthood and find that there are not enough women to marry? Will some women be forced into prostitution? Will they emigrate in search of wives? Or, most frightening of all, will the Chinese government feel that it can wage a war with heavy casualties on their own side? Typically, countries try to avoid wars in which their young men will be killed. However, with such a surplus in the male population, this natural inhibition against war may disappear, to the detriment of everyone.

THE RISE OF SEX SELECTION

Although infant health has improved in these Asian countries significantly, another factor has taken its pla sex-specific abortion of female fetuses. In the 2012 report of the World Bank on *Gender Equality and Devel ment*, we find a detailed portrait of the status of women around the globe and a careful analysis of the barrier gender equality that still exist in most countries throughout the globe.

For decades, sex selection was thought to be a problem confined to Asia and Africa, but recent evidence gests that that is changing. Until recently, in European countries and in the United States, couples have sho slight preference for girls over boys in sex selection. That trend is changing, at least in Eastern Eurc countries where the ratio in some countries is up to 111 boys per 100 girls. In Mara Hvistendahl's recent *Unnatural Selection: Choosing Boys Over Girls, and the Consequences of a World Full of Men*, she argues tl selection and gender imbalance threaten to become a serious problem for Western democracies as well coming decades.

CONCLUSION

When we think of the progress made by American women, we should pause to consider the situation around the world in order to realize that gender equality, and respect for women, is a distant ideal in m tries around the globe.

The Arguments

Kathy Miriam

Stopping the Traffic in Women: Power, Agency and Abolition in Feminist Debates over Sex-Trafficking

About the Author: Kathy Miriam is an independent scholar who writes widely in the area of feminism and related issues. Her blog, "Dialectical Spin: Radical Feminism in Other-Land," is available at http://kmiriam.wordpress.com/.

About the Article: Traditional liberal approaches to the issue of prostitution argue in favor of allowing prostitution in those instances in which it is an un-coerced exchange of "sexual services" for money. Miriam's article calls into question the underlying assumptions of this model of free exchange and maintains that a clear understanding of these relationships reveals the ways in which women do not just sell a service, but sell command over their bodies.

As You Read, Consider This:

1. Miriam refers to the "sex wars." What does she mean by this? In what way does Miriam's article raise some of the questions previously debated in the sex wars?
2. Miriam's work develops a radical feminist critique of the liberal political order. Explain what she means by the phrases "radical feminist critique" and "liberal political order."
3. The focal point of Miriam's argument is the notion of agency and, more specifically, her critique of the "contractual, liberal model of agency." Explain what Miriam means by that phrase and why she thinks this view of agency is misleading.
4. What does it mean to "theorize power and agency outside a liberal framework?"

Introduction

In the 1980s, U.S. feminism fractured along political fault-lines defined by conflicting views of prostitution and pornography and related conceptions of power, agency, and sexuality.[1] The "sex wars"—as they were unfortunately, popularly labeled—were apparently settled by the end of the decade, with "pro-sex" advocates declared the winners. The radical feminist anti-pornography and anti-prostitution position has been effectively marginalized—at least within the academy. Interestingly, the same cannot be said for debates around similar issues in a new transnational arena of feminist politics. Since the 1990s, numerous feminist nongovernmental agencies and grass-root groups across the hemispheres have been organizing to stop global trafficking in women and children.[2] In this context, old feminist debates about prostitution have reconfigured themselves along familiar theoretical lines. The contours of the debate are largely defined by, on one side, activists who align themselves with a radical feminist and abolitionist approach that defines prostitution as an institution of male domination. On the other side, activists who are "pro-sex-work" aim to distinguish prostitution as voluntary "work" from "forced prostitution," and to distinguish voluntary migration from (sex) trafficking.[3] The radical feminist camp has largely prevailed in terms of how international protocol is currently formulated. The "UN Optional Protocol of Trafficking in Human Beings," known widely as the "Palermo Protocol" was signed by 105 countries in 2002 and specifically does not construct a separate category for "forced" prostitution but rather, classifies prostitution (unmodified) as a major component of trafficking.[4] Pro-sex-work advocates, however, continue to press for the distinction between "free" and "forced" prostitution. The feminist debate over trafficking offers a timely opportunity for feminists to revisit central philosophical questions concerning agency and

"Stopping the Traffic in Women" by Kathy Miriam, *Journal of Social Philosophy*, Vol. 36 No. 1, Spring 2005, 1–17. Copyright © 2005. Used by permission.

power. Given the magnitude of the problem, namely, the vast numbers of women and children whose lives have been devastated by sex-trafficking under globalization, such questions reemerge with a new political urgency.

In this paper, I address these questions in a defense of the abolitionist position. One primary source for my approach is the breakthrough work of Carole Pateman's critique of "the sexual contract."[5] I argue that Pateman elaborates and advances radical feminism's main contribution to political philosophy, namely, its disclosure of male dominance as the latter is embedded within and presupposed by a *liberal* political order. Following Pateman, the root question of an abolitionist approach to prostitution is not whether women "choose" prostitution or not, but why men have the right to "demand that women's bodies are sold as commodities in the capitalist market."[6] The central premise of the abolitionist approach is that, "men create the demand; women are the supply."[7] In the sections that follow I first make explicit what I take to be the core elements of the radical feminist critique of liberalism, a critique that is central to the subsequent arguments of my paper. Secondly, I argue that the pro-sex-work approach depends on a contractual, liberal model of agency that both conceals and presupposes the demand side of the institution of prostitution. I will then directly address and clear up major points of intellectual confusion about the radical feminist conception of power at stake for the abolitionist argument. Finally, I conclude that if faced squarely, this theory of power does not, as is so often claimed, foreclose women's agency, but rather radically *challenges* feminism to theorize power and agency *outside a liberal framework*.

The Radical Feminist Critique of Liberalism

Briefly, liberalism continues to be the main philosophical and political philosophy in modern Western societies. For all the efforts to revise, contextualize, and update its classical statements, the result is still variations on certain central ontological themes. Most important for present purposes, liberalism still centrally values the "autonomy" of "individuals" and their rationality, and it continues to promote the idea of a universal equality in terms that conceive that equality as open to all individuals on the basis of this autonomy ("Just make the playing field level."). It follows, of course, that liberalism is centrally concerned with the idea of "choice," and construes "choice" as the exercise of the individual's autonomous will. Disagreements among liberal theorists typically revolve around the question of the extent to which the state can justifiably limit individual "choice," and the extent to which it must guarantee an individual's "right" to make choices without interference. A liberal state's concern with the distribution of rights is thus largely a function of the settlements made concerning these disagreements.

Self-defined "liberal feminists" generally take the core conceptions just mentioned as uncontested starting points of political philosophy and then go on to argue that women have so far not been accorded the full autonomy promised by the philosophy.[8] In contrast there has been a long tradition of critique, including (aspects of) radical feminism, Marxism and (at least in principle) poststructuralism that contests these very starting points. Most importantly for present purposes, this tradition contests liberalism's core idea of an unsituated freedom and autonomy, or, in other words a view of individuals as, in principle, free of historical and social conditions. To be sure, such a stark individualist view is not held by all liberal political philosophers. However, even those philosophers who develop theories of situated autonomy/freedom, often implicitly construe individuals as having the power to have and be affected only by those aspects of that determinateness that an individual "decides" to accept.[9] The radical critique of liberalism contests the definition of freedom as something in the head, in one's "thoughts," or as the physical/legal condition of "being let alone." Feminists like Carole Pateman, following in the path cleared by Catharine MacKinnon, have elucidated a specifically *gendered* aspect of this unsituated autonomy.

Pateman focuses particularly on the *contractarian* tradition of liberalism, a tradition in which the concept and practice of contracts is central. Pateman shows that contractarian liberalism has significant political and conceptual force in contemporary understandings of freedom, agency and power and how these understandings are presupposed and embedded in a range of institutions, including (post)modern forms of prostitution. For this reason, contractarian liberalism, and Pateman's critique of it, will be central to my own criticisms of the pro-sex-work position. For Pateman, the social/sexual contract is an organizing "principle of social association."[10] In other words, although we think of contract as an "exchange" of pieces of (material) property between two parties, the kinds of contracts that interest Pateman are those that "create *relationships* (such as that between worker and employer, or wife and husband)."[11] In these kinds of contracts (e.g., employment) what is exchanged is a special kind of property, namely,

"property in the person."[12] Pateman argues that the core liberal notion of freedom—the freedom to be left alone—is *derivative* of, rather than preceding, the proprietary concept of the individual.[13] In other words, freedom for the individual-as-owner-of-property-in-his-person includes the freedom to have this *property* left alone. As a principle of social association, contract structures those relations through which the property of one person/owner can be legitimately used by other individuals/owners without violating the individual's basic freedom, that is, his/her freedom to own property in his person. The individual, defined as an owner of property in his person, is constructed as "free" to trade/sell his capacities through the contract relation in exchange for some benefit. Note that this "exchange" presupposes that a person's capacities are separable, like pieces of (material) property, from the "self."[14] As Pateman notes, a powerful "political fiction" masks the fact that a person's capacities are not separable from her self like pieces of property.[15] In the context of the employment contract, for example, this political fiction is the fiction of "labor power" and allows for the story of employment as an "exchange": according to this story, the worker sells her "labor power" in exchange for some recompense. As Pateman shows, this story of the employment contract masks the real transaction at stake in the contract which is not in fact an *exchange* but a practice of *alienation*. In turn, since the worker's *capacities* cannot in fact be alienated from his person, what the worker is really offering (surrendering) to his/her employer, through the contract, is her/his (situated, embodied) *autonomy*.[16] That is to say, the real transaction in this contract is defined by the worker's *freedom to be subordinated* to an employer/boss.

With respect to prostitution, the central political fiction of prostitution-as-an-exchange is the story that through the prostitution contract, a woman sells "sexual services" for money, as if sexuality were not *actually* embodied, as if there existed a subject who, magically, was capable of separating her physical/sexual capacities from her "self." This "conjuring trick" (to use Pateman's phrase) called "sexual services" obscures the real meaning of prostitution as "an institution which allows certain powers of command over one person's body to be exercised by another."[17] Thus Julia O'Connell Davidson, closely following Pateman's analysis here, describes the transaction:

> The client parts with money and/or other material benefits in order to secure powers over the prostitute's person which he (or more rarely she) could not otherwise exercise. He pays in order that he may command the prostitute to make body orifices available to him, to smile, dance or dress up for him, to whip, spank, massage or masturbate him, to submit to being urinated upon, shackled or beaten by him, or otherwise submit to his wishes and desires.[18]

In sum, what is really sold in the prostitution or the employment contract is not some fictional "property," but a relation of command: *the prostitute/employee sells command over her body* to the john/pimp/employer in exchange for some recompense. It is this fundamental relation of domination and subordination that is mystified, if not denied, by the pro-sex-work position on "free prostitution."

THE "AGENCY" OF "SEX WORK"

The category of "free prostitution" depends on "the invention of sex work," that is to say, it depends on the crafting of "sex work" as a new descriptive and normative category for theorizing prostitution as a form of "labor."[19] The pro-sexwork position is not theoretically or politically homogenous and is defended by a range of arguments. At its most persuasive, the argument for defining prostitution as a form of labor importantly undercuts the fallacious and misogynist notion of prostitution as either "easy money" and/or as evidence of women's moral lassitude and "promiscuity." By legitimizing the "labor" of prostitution, pro-sex-work advocates aim to restore dignity to those decisions that enable women to survive within the constraints of the current global economy.[20] Given conditions of extreme poverty for women, pro-sex-work advocates claim that women choose prostitution to survive, and that recognition of this choice as a form of labor is essential to the goal of securing health and safety standards for women in an industry that otherwise remains unregulated and unprotected, leaving sex workers particularly vulnerable to such "work hazards" as violent assaults, rape, and sexually transmitted diseases. Following upon this goal, and against abolitionism, pro-sex-work activists advocate for political strategies of decriminalization, regulation, and/or unionization of sex-work-labor.

For abolitionists, a sanitized, regulated sex industry begs the moral question of whether regulating men's access to women is better than not regulating it. The strategy also begs the political question of whose interests are best or most served by such an approach.[21] Since the pro-sex-work position depends on a definition of prostitution as work, one key philosophical issue for my defense of abolitionism concerns the very intelligibility of

the category "sex work": What assumptions are required by the argument that prostitution is a form of work? What philosophically and politically has enabled the "invention of sex work"? While some philosophers have tackled the issue by comparing prostitution, unfavorably or favorably, to (other forms of) labor, my approach is somewhat different.[22] My aim is limited to arguing that the category of "sex work" depends on a contractual model of agency and its central notion of the proprietary self, and thus a model that both presupposes and conceals the social relations of domination that obtain for prostitution.

I see two variations of the contractual model of agency and of the proprietary notion of self that is assumed by the pro-sex-work argument although the same prostitutes' rights advocates often oscillate between both variations. I call these the "economist" and "expressivist" models of agency. The economist approach to "sex work" begins from the empirically sound claim that many women sell their bodies as a way to secure means of subsistence for themselves and their children. However, the argument then shifts from this descriptive claim to a normative claim that therefore selling sex is or ought to be a *legitimate* economic choice for women. This economist view is advanced by a major player in the trafficking debate, namely the pro-sex-work Global Alliance Against Trafficking in Women (GAATW).[23] In its description of the "causes and factors of trafficking," GAATW lists "the desire for a better life, poverty, gender and other forms of discrimination, family disintegration, negative cultural and religious practices, and the substantial profits that can be made from the trade."[24] Strangely, although GAATW opposes trafficking, in this passage it fails to differentiate here between conditions of the emergence of traffickers and the trafficked—as if both parties, for example, made "substantial profits . . . from the trade." The report also mutes the factor of gender, for example suggesting that "The low social value given to girls can contribute to trafficking as girls are often educated to [a] lower level than boys and have fewer work opportunities in skilled professions."[25] However, the gendered/sexual specificity of the "work opportunity" offered by trafficking is not given any more ethical or political weight than any other factors in the discourse. Most importantly and strangely, men's demand for commodified sex is not even listed as one of the conditions of trafficking.

GAATW's distinction between coerced and free prostitution depends on a blind spot to the relation of demand undergirding prostitution, and seems to make the liberal assumption that freedom is essentially a state of being "left alone"— or the state of not being forced to do something. From this perspective, "free" prostitutes are economic agents like Kafui, a single mother and low income clerk from Togo who, according to GAATW *voluntarily* migrates to Lagos, Nigeria, to increase her income through work as a prostitute: "Kafui could freely choose her clients and where and when she wanted to work. She sent money home to her family. After one year Kafui had saved US$1000. She returned to Togo and used this money to buy her own home there."[26] Replete with such American-dream icons as home-ownership, a very Western, individualist script is super-imposed upon the practice of prostitution in this account. This script, I suggest, assumes a notion of the proprietary individual, the sex worker as an agent who strategically and instrumentally uses property in her person (e.g., her sexuality) to further her economic self-interest.

The pro-sex-work camp, however, often ascribes a set of values to the economic choice of sex work that exceeds a purely economist view and aims at investing prostitution with new cultural—and feminist—meaning. One of the premises of this approach—advanced by writers such as Wendy Chapkis, Josephine Chuen-Juei HO and Kamala Kempadoo—is that the radical feminist view of prostitutes as victims is a distorting ideology rather than a social analysis, and as such, calls for new interpretations of the practice of prostitution. Thus Chapkis reinterprets prostitution as "erotic labor;" and claims that "like other forms of commodification and consumption practices of prostitution can be seen as sites of ingenious resistance and cultural subversion."[27] In this light, "the prostitute cannot be reduced to one of a passive object used in male sexual practice, but instead it can be understood as a place of agency where the sex worker makes active use of the existing sexual order."[28] An interpretation of sex work as "active use" of the existing order requires that feminists see "sex work not only as 'work' but maybe even as a 'profession' (both in appearance and spirit)," an attitude that "could prove to be most useful and beneficial for sex workers."[29] Thus argues HO, emphasizing that the selling of sex to male customers requires enormous creativity on the part of prostitutes who, she also claims, often feel "professional pride" in their "work."[30]

Theories of sex work advanced by writers like HO, Chapkis and Kempadoo presuppose an *expressiv[e]* (in contrast to economist) model of individual freedom. I use Charles Taylor's term "expressivist" to refer t[o]

specific heritage of Western Romanticist thought that defines individual freedom in terms of a "poeisis," an activity of self-creation.[31] For expressivist/Romanticist philosophers, individual self-definition is a process that unfolds from within the deep interior of self, a process of both creating and discovering one's authentic identity. Although essentially an idealist conception of freedom (freedom is in change of consciousness) inherited from Hegel, the expressivist model of the self-as-creative-activity did influence Marxist notions of work as (ideally) a form of self-actualization essential to human development.[32] Through work, the laborer externalizes her/his "species-being" as human; alienation refers to the way in which this process of self-externalization is appropriated by capitalists. A similar expressivist model of work is applied by Kempadoo to sex work, although she omits the part about alienation and appropriation. Kempadoo includes prostitution under the category of "reproductive labor": Like "reproductive labor," *sex work* is interpreted as "human activity," specifically "the way in which basic needs are met and human life produced and reproduced."[33] *Sex work* specifically involves "activities involving purely sexual elements of the body." If we take out the word "purely," this last point is uncontroversial. And I would not object to the point that "[S]exual energy should be considered vital to the fulfillment of basic human needs: for both procreation and bodily pleasure."[34] The leap in logic comes with the conclusion that because (1) sex work involves sex and (2) sex is or rather ought to be a vital activity then therefore (3) sex work itself is or ought to be considered vital to the fulfillment of human needs. But whose basic human needs are "fulfilled" by sex work? And is men's demand for commercial sex any more a "basic human need" than, say, Americans' "need" for SUVs? What is omitted is any critique of the power relations defining the practice of prostitution, in other words how women's "sexual energy" is *appropriated* by johns, pimps and traffickers for the latter's profit and pleasure, analogously (although not perfectly so) to the way in which (according to Marxist theory) the worker's "energy" is appropriated by the capitalists for the latter's profit. Without this critique of the actual material, power relations defining prostitution, it becomes possible to cast the "agency" of prostitution as no less than a form of self-actualization, a space for "ingenuity" and creativity. In this vein, HO can claim that sex workers "experiment with various cultural resources" that in turn "empowers" them as not only workers, but as *sexual agents*.[35] The "freedom" implied by this view of sex work is an idealist and "expressivist" notion of freedom as existing in an interior process of self-definition and value-creation—"freedom" pictured as "in the head."

A main political strategy that follows from this expressivist conception of sex work is one that casts sex workers' rights in terms of a politics of "recognition." A politics of recognition pivots on "identity" as its moral/political fulcrum and aims at redressing injuries to status, for example stigma and degradation, as a basic harm or injustice inflicted on certain identity-groups—Jews, Blacks, gays and lesbians, transgendered people, etc.[36] Applied to prostitution, then, the stigmatization of prostitutes—rather than the structure of the practice itself—becomes the basic injustice to be redressed by pro-sex-work advocates who now construe prostitutes as "sexual minorities" to use Gayle Rubin's now widely circulated term.[37] With the identity-concept of the prostitute as a "sex minority" (as Rubin specifically argued), we have traveled full circle from the argument that as "work" prostitution has nothing to do with the prostitute's own sexuality but is purely a means for a woman's economic gain, to arrive at the notion that selling commercial sex is fundamentally an expression of an individual's own style and desire.

The circle is logical despite an apparent dissonance between notions of embodiment underlying the two models of sex work. The economist model assumes a starkly instrumental notion of the body and agency. To use Pateman's description of the proprietary individual, this version pictures a disembodied, Cartesian subject who can stand in the same external relation to her body and capacities as she can to other (material) objects.[38] In contrast, the claim for sex work as "expression," namely as creative expression of identity and sexual agency, appears to affirm an embodied autonomy for the sex worker. But the contrast is deceptive. The expressivist model of sex work affirms a contract structure of sex work and its central fiction of exchangeable sexual services, a structure and fiction that precludes the conception it wants to affirm—of an expressive, situated, embodied subject. This expressivist model of sex work still presupposes the proprietary individual who can stand back, as an abstract self, from her "sexual energy" and from this abstract position alienate this "energy" as a "service" to circulate for customers in return for payment. Thus, the expressivist and economist models of the sex worker are two versions of the same contractual paradigm of *disembodied* agency.

The convergence of the expressivist and economist models of sex work is at once perfected and perfectly concealed by a postmodern theoretical approach to sex work that construes the latter as a purely discursive construction "produced" by modernity, and as such an "empty symbol." Thus Shannon Bell, taking this approach, argues that "the referent, the flesh-and-blood female body engaged in some form of sexual interaction in exchange for some kind of payment, has no inherent meaning and is signified differently in different discourses."[39] Seen as contingent in meaning, prostitution is illimitably open to re-interpretation, including feminist reinterpretations of prostitution as empowering for women. Thus Bell affirms the emergence, in the United States, of new prostitute performance artists who have reinvented "the prostitute" as a "new social identity": the "prostitute as sexual healer, goddess, teacher, political activist, and feminist."[40] From this vantage point, the body of the prostitute is infinitely "protean," a *text* that accommodates "endlessly shifting, seemingly inexhaustible vantage points" of interpretation, and thus exemplifying what Susan Bordo criticizes (referring to what she considers to be a postmodern notion of the protean body) as a traditional, Cartesian "fantasy of transcendence" in its "new, postmodern configuration."[41] Rather than owner of property, singular, in one's person, the protean postmodern self is owner of *properties*, plural, in one's (fragmented) person.[42] In this version, freedom is the ability to circulate among multiple "identifications," allowing then, for an interpretation of prostitution that abstracts the institution from any particular, historical situatedness in patriarchal capitalism. However, the proprietary concept of the (unified) self, remains the hidden precondition of this semiotic free play of interpretation. What is still presupposed is the (invisible) liberal Cartesian standpoint of a "self" free to stand back from its determinants and thus free to pick and choose those determinants it desires to be affected by and thus play with. But what is the real "identity" of this "double agent"? Is it coincidental that this is "a discourse about prostitution promoted by a handful of relatively privileged white American women as though it carries a weight equal to any other discourse" as O'Connell Davidson argues?[43] The sex worker as postmodern text issues from an elite vantage point, the abstract intellectual projecting its own version of abstract individuality onto prostitutes in general, the vast majority of whom lack a fraction of the mobility enjoyed by the privileged group who craft the theory.

I do not deny that women make real choices in some or many of the cases in which they enter prostitution for their economic survival. What I am contesting is a fantasy of "free" prostitution, insofar as this freedom is inscribed within expressivist and economist models of sex worker agency. For such "freedom" serves to mystify the actual conditions that determines *this* "economic" option, selling command over their bodies, as an option for women (and children) specifically, not for "any" (abstract and/or textual) body. The "sex work" model of agency occludes the reality that it is men's demand that makes prostitution intelligible and legitimate as a means of survival for women in the first place. In my next section I turn directly to the issues of "demand," the concept of *domination* at stake in the abolitionist critique of men's demand, and questions of women's agency and freedom raised by this conception of (male) power.

The Radical Feminist Critique of Domination

The radical feminist theory of domination which underlies a feminist abolitionist stance on prostitution has been misconstrued by critics of the theory. These critics show two main points of confusion in this regard, namely confusion about the relation between power and domination, and confusion about the relation between domination and coercion. For example, the pro-sex-work distinction between "coerced" and "free" prostitution depends on a conflation of domination and coercion. Thus, pro-sex-work advocate Niki Adams, of the English Collective of Prostitutes, objects to legal measures that criminalize pimping in and of itself when, she argues, harms against prostitutes are already covered by laws against "rape, sexual assault, kidnapping, false imprisonment, coercion . . . theft, extortion [etc.]."[44] The argument here, however, glosses over what both abolitionists and international protocol has defined as the inherent harms of pimping, prostitution, and trafficking—harms that are broader than coercive force. As Liz Kelly argues, the debate over whether prostitution is "forced" or "free" is the wrong debate. "The notion of 'force' being the definer of trafficking sits uneasily with the now widely accepted definition within the [Palermo Protocol]. Along with force, coercion and threat . . . the definition of trafficking include[s] deception and human rights abuses such as debt bondage, deprivation of liberty and lack of control over one's labour."[45] In my view, Kelly is describing an institution defined by relations of domination and subordination. These rela-

tions of domination and subordination enable a range of harmful and exploitative practices in trafficking and prostitution, practices that include but are not limited to use of coercive force.

The question remains of how radical feminists theorize domination and the relation of domination to power. Amy Allen, in her discussion of debates over pornography, criticizes the radical feminist position as *limiting* its concept of power to domination and subordination—"power-*over* others."[46] Allen makes the valid point that feminism needs a conception of power as "power to," or, in other words, the power to act with others for social change. While it is clear to me that the radical feminist position can and ought to be *expanded* to include this notion of collective agency, Allen draws a different conclusion. In her view, the radical feminist theory of power forecloses this new notion of agency, that is to say that its theory of *power-over* specifically "undercuts the very aim of feminism: the empowerment of women."[47] Yet, in my view, we cannot theorize "empowerment" without a radical critique—and demystification—of the meaning of "agency" in a liberal social culture. Therefore, contra Allen, the radical feminist critique of power-over is a *precondition* for conceiving "the empowerment of women" precisely because of its analysis of the inextricable relationship between female *agency* on the one hand, and male *domination*, on the other hand, in a liberal social order.

Pateman's work, for a striking example, affords us a unique insight into the contractual, liberal model of social relations as a structuring force of contemporary male dominance. In Pateman's view, sex difference is a structure of modern liberal social orders, and is necessarily also a "political difference, namely, the difference between freedom and subjection" or more specifically, *the difference between male mastery and female subjection*.[48] Male mastery and female subjection is a power relation structured into liberalism, and thus also into the organization of modern patriarchy. Pateman's critics consistently misrepresent Pateman's model of power in voluntarist and individualist terms, as if what Pateman was referring to was individual men's coercive control over individual women. In this vein, Nancy Fraser represents Pateman's model of male power as a "dyadic model" involving "the authoritative will of a superior," a man, over his female subordinate(s).[49] Allen applies the same argument to MacKinnon and suggests that a "dyadic" relation of power might have been applicable in earlier periods of patriarchy—when for example practices of *coverture* were pervasive, a legal doctrine that granted men control over his wife's property and person in a myriad of ways. Today, however, Allen argues, "domination and subordination have taken more diffuse social and cultural forms."[50] Allen argues that we need to "broaden" our notion of domination "such that the focus of analysis shifts from the master/subject dyad to the background social and cultural conditions that shape dyadic relations."[51] If by "master/subject dyad" Allen is referring to individual relations between men and women then I agree that feminism needs to understand the background conditions of these relationships. However, it appears that with the term "dyadic model" Allen is conflating "men's power over women" on the one hand, with individual men's command over individual women on the other hand. If there are background conditions that "shape" relations between women and men, men's power over women is itself a shaping element of these same conditions. Rather than shift our analysis away from men's *power over* women we need to sharpen our focus on this relation in order to understand both new and old forms that women's subordination takes today.

To begin with, radical feminism emphasizes that *men* as a social group continue to have *interests* in diffuse forms of women's subordination. R. W. Connell has theorized men's interests as "the patriarchal dividend," by which he means, the surplus that men as *men* continue to extract from women through a variety of modern practices of power.[52] This "dividend" is tacitly legitimized by what Adrienne Rich first called "the law of male sex right over women," meaning men's tacit right of access to women's emotional and physical capacities.[53] Analysis of "sex right" is not a theory of men's individual, coercive behaviors vis-à-vis women, nor is it a theory of men's juridical rights to dominate women. On the contrary, sex right is part of the *background understandings* of gendered, unequal social relations that make, say, an individual man's use of coercive force over a woman legitimate and intelligible even when explicit expressions of sex right (such as coverture) have been eliminated. "Sex right" is the invisible precondition of a liberalism that (still) works in men's interests, a claim which does not preclude an analysis of how class and race interests and "rights" are also presupposed by the same political order.

Radical feminist abolitionists conceptualize prostitution as an institution fundamentally based on men's sex right, that is, men's entitlement to demand sexual access to women. O'Connell Davidson (who is not pro-sex-work)

criticizes this conception of prostitution as patriarchal power. In other words, O'Connell Davidson thinks that this conception of prostitution reduces prostitution to one social/power relation: "Prostitute use becomes a straightforward expression of patriarchal domination (it is described as an act of aggression, of violence, and of rape)" and thus, for example, elides the difference between rape and prostitution.[54] O'Connell Davidson argues that we must distinguish prostitution as a practice dependent *on a contracted relation* from rape as the act of "being taken by force."[55] She does concede that the contract in prostitution is "fictional" insofar as it suggests a voluntary exchange; but, she claims, it is a "fiction" that is important to the specific social relations that obtain in a prostitute's relationship with a john, pimp, etc. Most importantly, the "fiction" is important to the degrees of agency that women exercise in this relationship, even if this agency means—to use O'Connell Davidson's own telling description—degrees of control over one's "unfreedom."[56]

Even if O'Connell Davidson is right to argue for differentiating between, say, rape and prostitution, her own grounds for this distinction are debatable. For example, she claims that "[i]f prostitution is rape, then it is logical to define prostitutes as women who are publicly available to be raped, and this is precisely the position taken by many police officers, judges and jurists around the world who refuse to accept that a woman who works as a prostitute can ever be raped."[57] But we can see that it *is* logical, although cruelly unjust, that police, judges, jurists, etc. would view prostitutes as "unrapeable." That is to say, if prostitution is an institution that entitles men to have sexual access to women, the view of prostitutes as unrapeable is an effect of the institution itself rather than a distorting view of the institution. From the epistemic and moral standpoint of the sexual contract, women who "willingly" sell themselves to men for sexual use are not intelligible "true as victims" of forced sex. (They are always asking for it.)

Contra O'Connell Davidson, an analysis of prostitution as a form of rape does not require a view of power as one-dimensional. Rather, it depends on a critique of the way male dominance and female sexual agency are structured into the epistemic and moral/political order of liberalism. We can thus understand the (un)rapeability of prostitutes as due to specific relations of male domination that are themselves *not* reducible to sheer coercive force. I suggest that these relations of domination obtain for *both* rape and prostitution insofar as both rape and prostitution are constructed through the sexual contract. From this perspective, an examination of how rape is like prostitution, more than the reverse, might afford us deeper insight into the complexity (rather than one-dimensionality) of male domination within a political liberal order, and correspondingly, insight into the structure of *female sexual agency* that a pro-sex-work discourse is invested in.

By "rape" I do not only refer to the discrete, isolated event—an event which is never truly discrete and isolated in terms of how it is interpreted and experienced (by both rapist and raped), or in terms of the power relations that contribute to the experience and its interpretations. I refer here also to how rape is currentl adjudicated (or not). The legal interpretation and treatment of rape—how rape becomes intelligible as such—i a contributing factor to how *sexual agency* as well as violation is experienced within women's contemporar social situation. First, consider the way that the definition of rape as "coerced" sex has been drawn in oppositic to a woman's "consent" to sex. To elaborate, as most feminists know, more times than not, a woman's "norma (hetero)sexual, gendered behavior is taken as presumptive evidence of her consent. A deeper point has not often been recognized, namely that this "consent test" has not only served to undermine the credibility of wor en's accounts of rape; it has also served to make women's credibility irrelevant to the conviction of rapists. Th legal theorist Katherine Baker argues that the "evidentiary problem of credibility" is not the main obstacle securing rape convictions as is popularly believed; rather, the main obstacle is the "normative problem of d ert."[58] In other words, juries and judges might believe the victim's account that a rape took place but still beli that the victim somehow "asked for it." From this epistemic and moral vantage point, even in cases where dence of a brutal stranger rape has been established during a trial, a proven rapist may be judged as *not* des ing conviction, not if the victim, say, wore a lace miniskirt and no underwear as was the case in an actual Florida trial.[59] From this same vantage point, the category of rape itself disappears, having subdivided bey recognition into "consensual" vs. "nonconsensual" rape.

In my view, the consent in the "consensual rape" presupposed by these kinds of legal practices, is conse structured by contract relations, namely, as (following Pateman) consent to be subordinated. Consider, in this

that the "consent" in this legal/common-sense paradigm of rape implies the proprietary concept of the individual. Now that a woman has been released from confinement within the private domain, she is hailed as an "abstract individual," and thus "autonomous," a sacrosanct "owner" of property in her own person—except, that is, if she wears a lace miniskirt and no underpants. No, rather, it is *because* she wears a lace miniskirt and no underpants: as an owner she is free to use property in her person as she chooses; this includes her choice of clothing and behavior in her intercourse with men. What do we have to assume about the very meaning of women's sexual agency within an epistemic and moral framework that takes for granted women's consent to sex/rape unless it can be proven that she physically resisted her assailant, was a virgin, wore plain, concealing clothing, or otherwise did not "provoke" her attacker? Following Pateman, I think we have to assume that within this framework, the meaning of a female sexual agent is the meaning of being a woman who has already contracted for men to have sexual access to her body. Women are told by a liberal political order that we too, like men, are abstract individuals within the public realm of civic society, indeed that we can shuck our gendered bodies as we enter into the social contract, only to have our very particular, sexualized "pound of flesh" returned to us by this same contract. Women are taught, precisely by rape and other forms of men's (tacitly) legitimized sexual access to women, that entry into the public for women is only as sexed/gendered. When, in cases of dire poverty, the only or "best" means for women's survival is to sell to men, command over their bodies, and when this selling of command is considered to exemplify these same women's *agency*, the sexed/gendered specificity of women's "individuality" in a liberal political order is at once thrown back at us and made to disappear before our very eyes. In sum, the *invisible* precondition of the (post)modern woman's *visible* (public) sexual "agency" is men's demand for sexual access to women.

Conclusion: Beyond a Contractual Model of Agency and Freedom

In defense of a radical feminist abolitionist position, I have argued that coercion, consent and agency are intricately bound together in a shared paradigm of *domination. Domination* can be best described, not as coercion or force, but as *a relation of access*, a relation that is embedded within a range of institutions that tacitly presuppose the *legitimacy* of this relation. I refer specifically to men's (and other dominant groups') politically and tacitly legitimized *demand* to have physical, sexual and emotional access to the capacities and bodies of other (e.g., gendered) groups of people. As I see it, this legitimized and entrenched relation defined by men's right to demand access to women is the central conception of male power at stake for the feminist movement to abolish prostitution. Moreover, this relation of power/access constitutes the hidden political conditions of women's "sexual agency" as the latter is affirmed by the pro-sex-work position. I conclude that this view of male power, rather than foreclose female sexual agency or empowerment challenges feminism to conceive of agency and empowerment beyond a contractual model. Briefly, this involves, at the least, recognizing that victimization and agency are not mutually exclusive conditions.

The pro-sex-work theory assumes that victimization and agency are mutually exclusive, and points to prostitutes' ability to negotiate over aspects of their work conditions as evidence that prostitutes have agency. The expressivist version of this theory interprets prostitutes' practice of negotiation as in and of itself constituting a *creative reworking* of the existing sexual order. But from this same theoretical vantage point, one aspect of the sexual order remains *non*negotiable and thus unworkable, namely, men's right to be sexually serviced. There is a blind spot in the pro-sex-work theory where this "right" remains invisible as such, partly because male power is invisible to it as *domination* and only intelligible as *coercive force*. Thus blinkered, the theory construes sex workers as "free" unless forcibly coerced into prostitution: the theory argues that if prostitutes have this "freedom," they cannot therefore be said to be "victims." The pro-sex-work position assumes a contractual model of freedom: it construes the consent to be subordinated as exemplifying freedom.

The abolitionist position that prostituted women are victims is not one that denies that these same women—any less than other victimized, oppressed, and/or enslaved peoples throughout history—have also employed numerous stratagems of resistance to their situation.[60] Even if these stratagems amount to negotiating the terms of their unfreedom, many victims can also be said to have "agency." Indeed, the question is not whether sex workers *have* agency. The question is, what is the *meaning* of an agency—and indeed "empowerment"—when these terms are defined as a capacity to negotiate within a situation that is itself taken for granted as inevitable?

It is only when we radically interrogate the meaning of "empowerment" in a social order structured through both liberalism and male dominance that we can conceive of power as *power to*, because it is only then that we can conceive of freedom—freedom beyond the sexual contract.[61]

To conceptualize freedom beyond the social/sexual contract requires that feminists first, demystify the expressivist model of sexual agency assumed by many proponents of the "sex work" model in order to expose its fundamentally contractarian liberal conception of the self and embodiment. Secondly, feminism should lay bare the ontological and political assumptions of contractarian liberalism that make the selling of sex legitimate and intelligible. Finally, and most importantly, radical feminism must be expanded to theorize freedom in terms of women's collective political agency (*power to*): this task requires an understanding that freedom is not negotiating within a situation taken as inevitable, but rather, a capacity to radically transform and/or determine the situation itself.

I am grateful to Barbara Houston for providing extensive, invaluable feedback on this manuscript. Maureen Sullivan, Robert Scharff and Charlotte Witt provided incisive comments on related incarnations of the manuscript that helped me to improve this version. I presented a closely related version of this paper as a talk for the Center for Humanities at the University of New Hampshire; I thank the Center and my spirited audience, which included my reliably provocative and stimulating colleagues in the Department of Philosophy. I also thank my anonymous reviewer for her or his constructive comments. Nancy J. Meyer's brilliant work, and our conversations, informs all of my work. Finally, I owe so much to the fiery, amazingly smart young women and men feminist activists who are my students; they have infused my philosophical work with new meaning.

Notes

1. The so-called "pro-sex" (AKA "sex radical") version of the debates is represented by *Pleasure and Danger: Exploring Female Sexuality*, 2nd ed., ed. Carole Vance (London: Pandora, 1992). The radical feminist anti-pornography version of the debates is well represented by *The Sexual Liberals and the Attack on Feminism*, ed. Dorchen Leidholdt and Janice G. Raymond (Tarrytown, NY: Pergamon Press, 1990).
2. For an overview see Andrea M. Bertone, "Transnational Activism to Combat Trafficking in Persons," *College Park Scholars International Studies* 10, no. 1 (2004): 9–22.
3. For a good representation of both positions see Niki Adams (English Collective of Prostitutes), "Antitrafficking Legislation: Protection or Deportation?" and Liz Kelly, "The Wrong Debate: Reflections on Why Force Is Not The Key Issue with Respect to Trafficking in Women for Sexual Exploitation" in "Dialogue," *Feminist Review* no. 73 (2003): 135–9.
4. For an overview and critique of the protocol see Barbara Sullivan, "Trafficking in Women: Feminism and New International Law," *International Feminist Journal of Politics* 5, no. 1 (2003): 67–91.
5. See Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988) and Pateman, "Self-Ownership and Property in the Person: Democraticization and a Tale of Two Concepts," *The Journal of Political Philosophy* 10, no. 1 (2002): 20–53.
6. Pateman, *The Sexual Contract*, 194.
7. Donna Hughes, "Men Create the Demand, Women Are the Supply," Lecture on Sexual Exploitation, <http://www.uri.edu/artsci/wms/hughes/demand.htm>.
8. I'm following Alison Jaggar's definition of "liberal feminism" in *Feminist Politics and Human Nature* (Totowa, NJ: Rowman and Allanheld, 1983).
9. I'm indebted to Robert Scharff for this point. Personal communication, Durham, New Hampshire, Spring 2004.
10. Pateman, *The Sexual Contract*, 5.
11. Pateman, "Self-Ownership," 27, author's emphasis.
12. Here Pateman follows C. B. MacPhereson's *Political Theory of Possessive Individualism from Hobbes to Locke* (Oxford and New York: Oxford University Press, 1962).
13. In "Self-Ownership," Pateman argues that contractarian liberals fail to see that the right to *not* be forced to do something is derivative of the "positive" right to voluntarily alienate one's person, 27.

14. Ibid., 33.
15. Ibid., 36.
16. Ibid., 27.
17. Julia O'Connell Davidson, *Prostitution, Power and Freedom* (Ann Arbor: University of Michigan Press, 1998), 9.
18. Ibid., 9–10.
19. Kamala Kempadoo attributes the "invention of sex work" as a category to Carol Leigh AKA Scarlet Harlot. Kempadoo, "Introduction: Globalizing Sex Workers' Rights," in *Global Sex Workers: Rights, Resistance, and Redefinition*, ed. Kempadoo and Jo Doezema (New York: Routledge, 1988), 8.
20. Like abolitionists, many pro-sex-work advocates criticize this global economy, arguing that women and children have been the worst victims of neo-liberal policies in their impact on the developing world. For example, the World Bank and IMF have induced debtor-nations to make "structural adjustments" in economies—adjustments that include eviscerating indigenous, subsistence agricultural economies and/or drastically cutting social spending. A consequence has been the increasing pauperization of vast numbers of women and children in the developing world and in the Eastern Bloc countries. A good source for this kind of analysis of the global economy is Cynthia Enloe, *Bananas, Beaches and Bases: Making Feminist Sense of International Politics*, updated edition with a new preface (Berkeley: University of California Press, 2000).
21. Laurie Shrage for example endorses regulation, an approach that entirely assumes the prostitution as "work" model: she argues specifically for a "progressive" system of regulation where prostitutes "would be licensed, much like other professionals," and in this system, the "standards for licensing sex providers should be established by public boards or commissions made up of service providers, community leaders, educators, and legal and public health experts." Moreover, "candidates for this license could be expected to complete some number of college-level courses on human sexuality from the perspectives of biology, psychology, history, medicine, and so on." Shrage, *Moral Dilemmas of Feminism* (New York: Routledge, 1994), 159. As Julia O'Connell Davidson comments, "In the real world, it is absurd to imagine that women like Catalina or Maria [two prostitutes who O'Connell Davidson discusses] are going to complete a number of college level courses before entering into prostitution (if they were in a position to attend college rather than work they would not be prostituting themselves in the first place)" and, she continues, "Except for a small minority of people, prostitution is not a positive career choice like deciding to become a brain surgeon, or even an aromatherapist" (198). I will discuss the notion of prostitutes as "professionals" in further detail later.
22. A trenchant argument for the distinction between prostitution and work, as well as an in-depth literature review of the issue, is provided by Scott A. Anderson, "Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution," *Ethics* 112, no. 4 (2002): 748–81. Anderson's argument contrasts interestingly with my own as he defends the radical feminist position on the basis of what he considers to be a liberal view of sexual autonomy.
23. See GAATW website <http://www.inet.co.th/org/gaatw> (June 2002) (Accessed June 10, 2004).
24. Ibid.
25. Ibid.
26. Ibid.
27. Quoted in Kempadoo, "Introduction: Globalizing Sex Workers' Rights," 9.
28. Ibid.
29. Josephine Chuen-Juei HO, "Self-Empowerment, and 'Professionalism': Conversations with Taiwanese Sex Workers," *Inter-Asia Cultural Studies* 1, no. 2 (2000): 283–99.
30. Ibid., 287.
31. Charles Taylor, "Aims of a New Epoch," in *Hegel* (Cambridge: Cambridge University Press, 1977).
32. This point is made by Seyla Benhabib, *Critique, Norm and Utopia: Foundations of Critical Theory* (New York: Columbia University Press, 1986).
33. Kempadoo, "Introduction: Globalizing Sex Workers' Rights," 4.
34. Ibid.

35. HO, "Self-Empowerment, and 'Professionalism': Conversations with Taiwanese Sex Workers," 284.
36. I'm following Nancy Fraser's formulation of a "politics of recognition." "From Redistribution to Recognition?" in *Justice Interruptus: Critical Reflections on the "PostSocialist" Condition* (New York: Routledge, 1997).
37. Gayle Rubin, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality," in *Pleasure and Danger: Exploring Female Sexuality*.
38. Pateman, *The Sexual Contract*, 55.
39. Bell quoted in O'Connell Davidson, *Prostitution, Power and Freedom*, 110.
40. Ibid., 111.
41. Susan Bordo, "Feminism, Postmodernism, Gender Skepticism," in *Unbearable Weight: Feminism, Western Culture and the Body* (Berkeley: University of California Press, 1993), 226.
42. I'm indebted to conversations with Bonnie J. Mann for this insight. Berkeley, CA, Spring, 1999.
43. O'Connell Davidson, *Prostitution, Power and Freedom*. 113.
44. Adams, "Anti-Trafficking Legislation: Protection or Deportation?" 141.
45. Kelly, "The Wrong Debate: Reflections on Why Force Is Not The Key Issue with Respect to Trafficking in Women for Sexual Exploitation," 141.
46. Amy Allen, "Pornography and Power," *Journal of Social Philosophy* 32 no. 1 (2001): 512–31.
47. Ibid., 515. Similar criticisms of MacKinnon have been made by Drucilla Cornell and Wendy Brown. See Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction and the Law* (New York: Routledge, 1991): 119–164 and Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995), chap. 4.
48. Pateman, *The Sexual Contract*, 6.
49. Fraser, "Beyond the Master Subject," *Justice Interruptus*, 227.
50. Allen, "Pornography and Power," 515.
51. Ibid., 523.
52. R. W. Connell, *Masculinities* (Berkeley and Los Angeles, California: University of California Press, 1995), 71.
53. Adrienne Rich, "Compulsory Heterosexuality and Lesbian Existence," in *Powers of Desire*, ed. A. Snitow, C. Stansell and S. Thompson (New York: Monthly Review Press, 1983): 177–205.
54. O'Connell Davidson, *Prostitution, Power and Freedom*, 120–1.
55. Ibid., 121–2.
56. Ibid., 102.
57. Ibid., 122.
58. Katherine K. Baker, "Once a Rapist? Motivational Evidence and Relevancy in Rape Law," *Harvard Law Review* 110: 563.
59. Baker refers to the following case: "Consider the remarks of a Florida jury foreman after acquitting a defendant who had been charged with knifing, beating with a rock, and twice raping a woman dressed in a lace miniskirt and wearing no underwear: 'We felt she . . . asked for it for the way she was dressed. . . . The way she was dressed with that skirt, you could see everything she had. She was advertising for sex.' The jury believed that the woman had been slashed with a knife, hit with a rock, and raped. They just did not care. Enhancing that woman's credibility would have done no good."
60. Kelly makes this argument in *Surviving Sexual Violence* (Cambridge: Polity Press, 1987).
61. Although she draws different conclusions than my own with respect to the radical feminist analysis of power, Allen proposes a reconceptualization of power that resonates with the notion of freedom I am arguing for. For example, she argues that feminists need to "modify our understandings of empowerment and resistance" (523) and she criticizes "sex radicals" who "conflate empowerment with resistance" (524). Especially important is her proposal that true resistance involves "power that we exercise *with* others in collective and social action" (527, author's emphasis). However, she also concludes that, given her criteria for a new conception of power, transforming (rather than abolishing) pornography is possible—transformation of pornography is possible if it is undertaken through feminists' collective action. In my view, however, she has not met the burden of showing why pornography is something that ought to be so redeemed in the first place.

Questions for Discussion

1. Describe the disagreement between liberal views about prostitution and Miriam's radical feminist view. If Miriam's view is accepted, how would this change our society?
2. Miriam discusses the claim that prostitutes are "unrapeable." What does she mean by this? What is her position on this issue? Do you agree or disagree? Why?
3. What is the connection between Miriam's analysis of rape and her understanding of sexual agency?
4. The subtitle of Miriam's article is "Power, Agency and Abolition in Feminist Debates over Sex-Trafficking." Explain the mean of her two key terms, "power" and "agency."

DAVID BENATAR

"The Second Sexism"

About the Author: David Benatar is an Associate Professor in the Department of Philosophy at the University of Cape Town, South Africa. He has published widely in the area of moral and political philosophy.

About the Article: In this article, Benatar challenges traditional beliefs about sexism, arguing that there is significant sex discrimination against men that is largely neglected, even by those who otherwise take sex discrimination seriously. This is an edited version; readers are referred to the original journal article for the full text, extensive footnotes, and several critical articles that respond to Benatar as well as a reply by the author

As You Read, Consider This:

1. Benatar describes three underlying prejudicial attitudes toward males. What are those three attitudes?
2. What does Benatar mean by the "no-discrimination argument"?
3. Explain what Benatar means by the "distraction argument."
4. Explain what Benatar means by the "inversion argument."
5. Explain what Benatar means by the "cost of dominance argument."

In societies in which sex discrimination has been recognized to be wrong, the assault on this form of discrimination has targeted those attitudes and practices that (directly) disadvantage women and girls. At the most, there has been only scant attention to those manifestations of sex discrimination of which the primary victims are men and boys. What little recognition there has been of discrimination against males has very rarely resulted in amelioration. For these reasons, we might refer to discrimination against males as the "second sexism," to adapt Simone de Beauvoir's famous phrase. The second sexism is the neglected sexism, the sexism that is not taken seriously even by most of those who oppose sex discrimination. This is regrettable not only because of its implications for ongoing unfair male disadvantage, but also, as I shall argue later, because discrimination against *women* cannot fully be addressed without attending to all forms of sexism.

So unrecognized is the second sexism that the mere mention of it will appear laughable to some. For this reason, some examples of male disadvantage need to be provided. Although I think that all the examples I shall provide happen to be, to a considerable extent, either instances or consequences of sex discrimination, there is a conceptual and moral distinction to be drawn between disadvantage and discrimination. I shall follow the convention of understanding discrimination as the *unfair* disadvantaging of somebody on the basis of some morally irrelevant feature such as a person's sex.

David Benatar, "The Second Sexism," © Copyright 2003 by *Social Theory and Practice*, Vol. 29, No. 2 (April 2003), pp. 177–210. Reprinted by permission of the author and publisher.

Discrimination need not be intentional. It is the *effect* rather than the intent of a law, policy, convention, or expectation that is relevant to determining whether somebody is unfairly disadvantaged. Discrimination also need not be direct, as it is when one sex is explicitly prohibited from occupying some position. There are powerful social forces that shape the expectations or preferences of men and women so that significantly disproportionate numbers of men and women aspire to particular positions. Here indirect or subtle discrimination is operative. I shall not defend the claims that discrimination can be indirect and need not be intentional. These are accepted by many. Given that many other claims I shall make will be widely disputed, I shall focus on defending those more contentious claims.

Given the distinction between discrimination and disadvantage, outlining the examples of male disadvantage below is, at least for some of the examples, only the first step in the argument. I shall later consider and reject the view that these examples are not instances of discrimination.

Male Disadvantage

Perhaps the most obvious example of male disadvantage is the long history of social and legal pressures on men, but not on women, to enter the military and to fight in war, thereby risking their lives and bodily and psychological health. Where the pressure to join the military has taken the form of conscription, the costs of avoidance have been either self-imposed exile, imprisonment, or, in the most extreme circumstances, execution. At other times and places, where the pressures have been social rather than legal, the costs of not enlisting have been either shame or ostracism, inflicted not infrequently by women. Even in those few societies where women have been conscripted, they have almost invariably been spared the worst of military life—combat.

Some have noted, quite correctly, that the definition of "combat" often changes, with the result that although women are often formally kept from combat conditions, they are sometimes effectively engaged in risky combat activity. Nevertheless, it remains true that in those relatively few situations in which women are permitted to take combat roles, it is a result of their choice rather than coercion and that even then women are kept as far as possible from the worst combat situations. Others have noted that the exclusion of women from combat roles has not resulted in universal protection for women in times of war. Where wars are fought on home territory, women are regularly amongst the casualties of the combat. It remains true, however, that such scenarios are viewed by societies as being a deviation from the "ideal" conflict in which (male) combatants fight at a distance from the women and children whom they are supposed to be protecting. A society attempts to protect its own women but not its men from the life-threatening risks of war.

If we shift our attention from combat itself to military training, we find that women are generally not treated in the same demeaning ways reserved for males. Why, for instance, should female recruits not be subject to the same de-individualizing crewcuts as male recruits? There is nothing outside of traditional gender roles that suggests such allowances. If it is too degrading for a woman, it must be judged also to be too degrading for a man. That the same judgment is not made is testimony to a double standard. Permitting women longer hair as an expression of their "femininity" assumes a particular relationship between hair length and both "femininity" and "masculinity." These special privileges simply reinforce traditional gender roles.

Men are much more likely to be the targets of aggression and violence. Both men and women have been shown, in a majority of experimental studies, to behave more aggressively against men than toward women. Outside the laboratory, men are also more often the victims of violence. Consider some examples. Data from the U.S.A. show that nearly double the number of men than women are the victims of aggravated assault and more than three times more men than women are murdered. In the Kosovo conflict of 1998–99, according to one study, 90% of the war-related deaths were of men, and men constituted 96% of people reported missing. In South Africa, the Truth and Reconciliation Commission found that the overwhelming majority of victims of gross violations of human rights—killing, torture, abduction, and severe ill-treatment—during the Apartheid years (at the hands of both the government and its opponents) were males. Testimony received by the Commission suggests that the number of men who died was six times that of women. Non-fatal gross violations of rights were inflicted on more than twice the number of men than women. Nor can the Commission be accused of having ignored women and their testimony. The majority of the Commission's deponents (55.3%) were female, and

so sensitive was the Commission to the relatively small proportion of women amongst the victims of the most severe violations that it held a special hearing on women.

The lives of men are more readily sacrificed in non-military and non-conflict contexts too. Where some lives must be endangered or lost, as a result of a disaster, men are the first to be sacrificed or put at risk. There is a long, but still thriving tradition (at least in Western societies) of "women and children first," whereby the preservation of adult female lives is given priority over the preservation of adult male lives.

Although corporal punishment has been inflicted on both males and females, it has been imposed, especially in recent times, on males much more readily than on females. Both mothers and fathers are more likely to hit sons than daughters. Where corporal punishment is permitted in schools, boys are hit much more often than girls are hit. Obvious sex role stereotypes explain at least some of the difference. These stereotypes also explain why, in some jurisdictions, physical punishment imposed by schools and courts has been restricted by law to male offenders.

Sexual assault on men is also often taken less seriously than such assault on women. For instance, the extent of sexual abuse of males is routinely underestimated. Sexual assaults upon boys are less likely to be reported than are those upon girls. Moreover, while rape by a male of a female is a crime everywhere, there are only a few jurisdictions in which forcing a male to have sex is regarded as rape. In these latter jurisdictions it is only recently that the definition of rape has been broadened to include the possibility of rape of a male. Before that, non-consensual sex with a man carried less severe penalties than non-consensual sex with a woman.

In a divorce, men are less likely to gain custody of their children than are women. Mothers gain custody of children in 90% of cases. Some have suggested that this is because very few men want child custody. The evidence does indeed suggest that a smaller percentage of fathers than mothers want custody and that even fewer fathers actually request custody. However, even taking this into account, fathers fare worse than mothers with regard to child custody. In one study, for instance, in 90% of cases where there was an uncontested request for maternal physical custody of the children, the mother was awarded this custody. However, in only 75% of cases in which there was an uncontested request for paternal physical custody was the father awarded such custody. In cases of conflicting requests for physical custody, mothers' requests were granted twice as often as fathers' requests. Similarly, when children were residing with the father at the time of the separation the father was more likely to gain custody than when the children were living with the mother at the time of separation, but his chances were not as high as a mother with whom children were living at the time of separation. This study was undertaken in California, which is noted for its progressive legislation and attitudes about both men and women and is thus a state in which men are less likely to be disadvantaged.

Fathers are not the only males to suffer disadvantage from post-divorce and other custodial arrangements. In one important study, divorced mothers showed their sons less affection than their daughters, "treated their sons more harshly and gave them more threatening commands—though they did not systematically enforce them . . ." "Even after two years . . . boys in . . . divorced families were. . . . more aggressive, more impulsive and more disobedient with their mothers than either girls in divorced families or children in intact families." In another study, "a significant proportion of boys who developed serious coping problems in adolescence, had lived in families in which their father was absent temporarily, either because of family discord or work." The same was not true of girls who grew up with an absent father. In short, boys tend to suffer more than girls as a result of divorce and of living with a single parent. This may be because children fare better when placed with the parent of their own sex, at least where that parent is amenable to having custody.

Homosexual men suffer more discrimination than do lesbians. For instance, male homosexual sex has been and continues to be criminalized or otherwise negatively targeted in more jurisdictions than is lesbian sex. Male homosexuals have a harder time adopting children than do lesbians, even in those places where same sex couples are permitted to adopt. Male homosexuals are much more frequently the victims of "gaybashing" assaults than are lesbians.

In addition to the above examples, for which the evidence is clear, there are also others for which there is only equivocal evidence. For instance, capital punishment is inflicted on men hundreds of times more often than it is inflicted on women. While it is true that men commit more capital crimes than women do, it is not

clear that this fully explains the vast disparity in the number of men and women executed. The sex of the criminal may itself influence whether a criminal is executed. Consider also the broader criminal justice system. There is at least some evidence that, controlling for the number and nature of offenses, men are convicted more often and punished more harshly than are women (or, at least, than those women who conform to gender stereotypes). Given that there is conflicting evidence about these latter examples, we cannot be sure that they really are examples of unfair male disadvantage. Nevertheless, they are worth mentioning at least as topics suitable for further investigation.

Underlying Attitudes

These are not negligible forms of disadvantage. In seeking to explain how they arise, one can point to at least three related prejudicial attitudes about males. First, male life is often, but not always, valued less than female life. I do not mean by this that every society unequivocally values male lives less than female lives. This cannot be true, because there are some societies in which female infants are killed precisely because they are female. However, even in such societies, the lives of adult males seem to be valued less than those of adult females. The situation is less ambiguous in liberal democracies. It is not my claim that every single person in these societies values male life less, but that these societies generally do. Although, of course, there are countless examples in liberal democracies of fatal violence against women, this tends to be viewed as worse than the killing of men. If violence or tragedy takes the lives of "women and children," that is thought to be worthy of special mention. We are told that X number of people died, including Y number of women and children. That betrays a special concern, the depravity of which would be more widely denounced if newsreaders, politicians, poets, and others commonly saw fit to note the number of "men and children" who had lost their lives in a tragedy.

Sometimes the special concern for female lives is less overt and more sophisticated. Consider, for example, an argument of Amartya Sen and Jean Dreze, who have drawn attention to the number of female lives that have been lost as a result of advantages accorded men. They have spoken about the world's 100 million "missing women." To reach this figure they first observe that everywhere in the world there are around 105 boys born for every 100 girls. However, more males die at every age. For this reason, in Europe, North America, and other places where females enjoy basic nutrition and health care, the proportion of males and females inverts—around 105 females for every 100 males. Thus, the overall female-male ratio in these societies is 1.05. Amartya Sen and Jean Dreze observe, however, that in many countries the ratio falls to 0.94 or even lower. On this basis, they calculate the number of "missing women"—the number of women who have died because they have received less food or less care than their male counterparts. This is indeed an alarming and unacceptable inequity.

It is interesting, however, that no mention is made of "missing men." The implication is that there are only women who are missing. There are, however, millions of missing men, as should be most obvious from the greater number of men than women who die violently. However, there are other less obvious ways in which men become "missing." To highlight these, consider how the figure of 100 million missing women is reached. Amartya Sen says that if we took an equal number of males and females as the baseline, then "the low ratio of 0.94 women to men in South Asia, West Asia and China would indicate a 6 percent deficit in women." However, he thinks it is inappropriate to set the baseline as an equal number of males and females. He says that "since, in countries where men and women receive similar care the ratio is about 1.05, the real shortfall is about 11 percent." This, he says, amounts to 100 million missing women.

Now, I think it is extremely enlightening that the baseline is set as a female to male ratio of 1.05. Why start from that point rather than from the ratio that obtains at birth? The assumption is that the female-male ratio of 1.05 is the one that obtains in societies in which men and women are treated equally in the ways relevant to mortality—and these are taken to be basic nutrition and health care. But clearly males are not faring as well as females in those societies, so why not think that there are relevant inequalities, disadvantageous to males, operative in those societies? One answer might be biology—males seem to be not as resilient as females. I cannot see, however, why that would warrant setting the baseline at the female-male ratio of 1.05. Some distributive theories—those that claim that natural inequalities are undeserved—recommend distributing social resources in a way that compensates for natural inequalities. If males are biologically prone to die earlier, perhaps the idea

distribution is the one whereby the mortality imbalance is equalized (by funding research and medical practice that lowers the male mortality level to the female level). This certainly seems to be what feminists would advocate if biology disadvantaged women in the way it does men. If, for instance, 105 girls were born for every 100 boys, but various factors, including parturition, caused more females to die, there would be strong arguments for diverting resources to preventing those deaths. At the very least, the baseline for determining "missing people" would certainly not be thought to be set after the parturition deaths were excluded.

If we accept the male-female sex ratio at birth—105 males for every 100 females—as a baseline, then at birth there is a female-male ratio of 0.95. From that baseline there are millions of missing men, at least in those societies in which the female-male ratio inverts to 1.05, who go unseen in the Sen-Dreze analysis. This analysis fails to take account of the connection between its baseline ratio and how our health resources are currently distributed. That the Sen-Dreze analysis highlights the missing women of the world, but notes nothing about the missing men, is extremely revealing. It is a sophisticated form of the view that lost female lives are more noteworthy than lost male lives.

It might be suggested that the stronger concern to avoid female deaths rather than male deaths is best explained not by a greater valuing of women's lives but by social and economic considerations. Since the reproduction of a population requires more women than it does men, a society can less afford to lose large numbers of women (in combat, for example). This explanation, however, is not at odds with the claim that female lives are valued more. In fact, it is a possible explanation of why female lives are valued more. Note, however, that this explanation does not excuse the differential treatment. If it did, then excluding women from work outside the home, where they might be tempted to delay or abandon procreative activities, could also be excused.

The second prejudicial attitude underlying the examples I have given of male disadvantage is the greater social acceptance of non-fatal violence against males. This is not to deny the obvious truth that women are frequently the victims of such violence. Nor is it to deny that there are *some* ways in which violence against women is accepted. I suggest only that violence against men is much more socially accepted.

At least one author has taken issue with the claim that violence against men is regarded as more acceptable. He has said that those who think it is so regarded "never offer a criterion for determining when a social practice is acceptable." He says that "sometimes they slide from the fact that violence with men as victims is very widespread to the conclusion that it is acceptable." He notes, quite correctly, that a practice can be widespread without its being deemed acceptable. He also thinks that the "penalties for violent acts, social instructions against violent acts, and moral codes prohibiting violent acts" constitute evidence that violence against men is not acceptable.

It is doubtful that a single criterion of the greater acceptability of violence can be provided. However, there can be various kinds of evidence for such a claim. For instance, although violent acts against men do usually carry penalties (as do violent acts against women), the law does reveal bias. When the law prohibits physical punishment of women but permits such punishment of men, it indicates a level of greater societal acceptance of violence against men. Similarly, when the law does not punish male homosexual rape with the same severity as it punishes heterosexual rape of women, it sends a similar message. But the law is not the only evidence of societal bias. There are penalties for wifebatterers and for rape, yet this (appropriately) has not stopped feminists from showing how both legal and extra-legal factors can indicate societal tolerance of such activities. If, for instance, police do not take charges of wife-battery or rape seriously or if there are social impediments to the reporting of such crimes, this can sometimes constitute evidence of a societal complacency and therefore some implicit acceptance of such violence. If that can be true when women are the victims, why can it not be true when men are? There *are* differences in the way people view violence against men and women. For example, a man who strikes a woman is subject to much more disapproval than a man who strikes another man (even if the female victim is bigger and the male victim smaller than he is, which suggests that it is sex not size that counts).

The third prejudicial attitude is the belief that the instances of male disadvantage to which I have pointed are fully explicable by men's being naturally more aggressive, more violent, less caring, and less nurturing than women are. Some—perhaps most—people will take this to be not so much a prejudice as a truism. I shall assess this view shortly and will show that even if there are such natural behavioral differences between the sexes, the magnitude and significance of these differences is exaggerated. At the very least, those exaggerations constitute prejudices.

RESPONDING TO OBJECTIONS

Some will recognize the value of attending to these prejudices and the forms of disadvantage to which they give rise. Among these people will be those feminists who acknowledge that opposition to instances of the second sexism, far from being incompatible with feminism, is an expression of feminism's best impulses. This, for reasons I shall make clear, is the view that I think all those opposed to sex discrimination ought to adopt. Regrettably, however, there will be others who will oppose combating what I have called the second sexism. These will include conservatives who endorse traditional gender roles, but also those feminists who will regard attention to the second sexism as threatening. I shall now consider and respond to four possible objections to concern about the second sexism.

The No-Discrimination Argument. What I call the no-discrimination argument suggests that the examples I have provided are not instances of discrimination (against men). The argument denies that there is a second sexism, by suggesting that it is not discrimination that accounts for these phenomena, but rather other factors. On this view, there may indeed be examples of male disadvantage, but these are not instances of *unfair* disadvantage.

I cannot offer a detailed application of this argument to all of the examples of male disadvantage. Therefore, although my discussion will have relevance to a number of them, I shall focus on the unequal pressures on men and women with regard to entering the military and engaging in combat. Many feminists do not question such inequalities. If pressed to explain their silence, some (but not others) might argue that these inequalities are an inevitable consequence of males' greater natural (rather than socially-produced) aggression. We might call this "the biological explanation." Insofar as they do not offer a similar explanation of the disproportionate number of men in the legislature, in specific professions, and in senior academic or management positions, and instead decry these inequalities, they selectively invoke the biological explanation to the advantage of females. Such selectivity is itself a kind of sexism. A similar charge could be laid against those feminists who would attribute both inequalities that disadvantage men and those that disadvantage women to natural differences between the sexes, but who call for an end only to those that adversely affect women.

The biological explanation does have a more consistent application in the hands of evolutionary psychologists and their followers. They argue that natural, evolutionarily explained differences between the sexes account, at least to a considerable extent, for social inequalities between men and women. They are careful to grant that environment also plays a role in psychological differences between the sexes and to acknowledge that no normative implications follow (directly) from the biological explanation. Notwithstanding such disclaimers, however, they regularly use the biological explanation to support conservative views that little if anything can or should be done to address sex inequalities, irrespective of which sex is disadvantaged. I shall now consider the common assumption that males are naturally more aggressive and then consider what implications this assumption, even if true, would really have for the sex inequalities I am considering.

The first point to note is that although males do account for more aggression and violence than females, the difference is not as great as it is usually thought to be. This is borne out by some laboratory studies. In real life, we find that there are at least some circumstances, most notably within the family, in which women behave as aggressively and violently as men and sometimes even more so than men. A number of studies have shown that wives use violence against their husbands at least as much as husbands use violence against their wives. Given the counter-intuitive and controversial nature of these findings, at least one well-known author (who shared the prevailing prejudices prior to his quantitative research) examined the data in multiple ways in order to determine whether these could be reconciled with common views. On almost every score, women were as violent as men. It was found that half the violence is mutual, and in the remaining half there were an equal number of female and male aggressors. When a distinction was drawn between "normal violence" (pushing, shoving, slapping, and throwing things) and "severe violence" (kicking, biting, punching, hitting with an object, "beating-up," and attacking the spouse with a knife or gun), the rate of mutual violence dropped to a third, the rate of violence by only the husband remained the same, but the rate of violence by only the wife increased. Wives have been shown to initiate violence as often as husbands do. At least some studies have suggested that there is a higher

rate of wives assaulting husbands than husbands assaulting wives and most studies of dating violence show higher rates of female-inflicted violence.

Most authors agree that the *effects* of spousal violence are not equivalent for husbands and wives. Husbands probably because they are generally bigger and stronger, cause more damage than wives. This is an important observation, of course, but in determining whether women are less violent than men are, it would be a mistake to point to the lesser effectiveness of their violence.

Recognizing that the sex differences in aggression and violence are less marked than commonly thought is important for the following reason. Any attempt to explain a phenomenon must be preceded by an accurate understanding of the phenomenon that is to be explained. To the extent that the sex differences in aggression are exaggerated, the posited explanations will be misdirected.

Because there are different possible explanations of the *actual* (that is, unexaggerated) sex differences in aggression, we need to consider next the evidence for the *biological* explanation of these differences. There are considerably divergent readings of the body of evidence on whether males are naturally more aggressive than females. The evolutionary psychologists understand the evidence clearly to support the biological explanation, while many feminists and others take the opposite view. Authoritatively assessing which of these interpretations is correct is too large a task to undertake here. Fortunately, for reasons I shall explain later, it is not necessary to do so. Nevertheless, for those who think that the evidence for the biological explanation is stronger than it really is, I shall first show that at the very least there is considerable room for doubt.

Consider first the alleged connections between aggression and circulating androgens, particularly testosterone. The administering of antiandrogens (and the resultant reduction of circulating testosterone levels) has been successful in curbing compulsive paraphilic sexual thoughts and impulsive and violent sexual behaviors. However, the drugs were not very effective in reducing non-sexual violence. Increasing testosterone levels in women or hypogonadal men to normal or supranormal levels has not been shown to increase aggression consistently. Lowering testosterone levels in men, by castration or antiandrogens, does not consistently decrease aggression.

Some of those reviewing the literature have concluded that the evidence does not support a link between circulating testosterone and human aggression. Some authors claim that the inability to establish this link stands in striking contrast to the ease with which relations have been shown between testosterone and other phenomena, including sexual activity. In those few studies that do suggest connections between circulating testosterone and human aggression, the links are correlational and there is some reason to think that it is the aggressive and dominant behaviors that cause testosterone levels to rise, rather than vice versa.

Now it might be argued that the evidence for androgenic causes of aggression is strongest not in the case of circulating androgens but in the case of prenatal androgen exposure. The suggestion is that exposure to androgens in utero causes the fetal brain to be organized in a way that causes increased aggression in the person that develops. On this view, since males are typically exposed to higher prenatal levels of androgens, they become naturally more aggressive.

There are clearly moral constraints on experimentally altering the androgen levels to which fetuses and infants are exposed. As a result, one of the few ways of testing the above hypothesis is by examining girls with congenital adrenal hyperplasia (CAH), a condition causing them to be exposed to unusually high levels of androgens in utero and until diagnosis soon after birth. Some studies have indeed found CAH girls to be more aggressive than control females, but some found "the difference was not significant." Other studies found no difference in aggression levels between CAH females and control females, even though affected females were, in other ways, found to be behaviorally similar to boys and unlike control females. The latter studies suggest that even if prenatal androgen exposure has other behavioral effects, an influence on aggression is not demonstrated.

There is, in any event, a significant problem that plagues the CAH studies. Given that the external genitalia of CAH girls tend to become virilized to some degree and parents know of their daughters' condition, one cannot discount social factors as a cause or partial cause of those behavioral differences that are found. One author has suggested that this objection can be rejected because normal children exposed prenatally to higher levels of testosterone have greater brain lateralization. However, unless cerebral lateralization can be shown to affect aggression, we cannot extrapolate from studies about the relationship between testosterone and lateralization to a relationship between testosterone and aggression.

None of this is to deny a biological basis for human aggression. It is possible, for example, that human aggression is rooted in some biological phenomenon other than androgens. There is some evidence that human aggression has many features in common with what is called "defensive aggression" (as distinct from "hormone-dependent aggression") in non-primate mammals and that this kind of aggression is rooted in the limbic system of the brain. One of the distinctive features of defensive aggression in non-primate mammals, however, is that it is quantitatively similar in males and females.

It is also possible that there is a connection between androgens and aggression even though none has yet been demonstrated. One possible explanation for this is that the posited connection is a complex one. One obvious feature of this complexity is the interaction with environmental factors. Even those who argue that there are (proven) hormone-related differences in aggression between the sexes agree that the environment, including the social environment, plays a significant role. Evolutionary psychologists often ignore the importance of this in drawing normative conclusions. Even if human aggression were shown to be influenced by androgens, current inequalities (in conscription and combat, for example) would still be cause for concern. One reason for this is that at least some of the inequality would be attributable to social factors rather than to natural hormonal differences between the sexes. Any natural differences in aggression that might exist could give rise to, but would also be greatly exaggerated by, sex-role expectations and conventions. This is one reason why conservatism is not a fitting response to current inequalities even if one thinks that natural differences account for some of the inequality. Another reason is that even if men are naturally more aggressive than women, it does not follow that women are not aggressive enough for military purposes or that they cannot be subject to environmental influences that would make them so.

Some feminists make much of how war is carried out by men, implying and sometimes even explicitly claiming that women are above this kind of behavior. But there are obvious social and gender role explanations that can account for why men become soldiers. Where women have had the opportunity to kill, torture, and perpetrate other cruel acts, they have proved very capable of doing so. There is a disingenuity in the arguments of those feminists who will discount the opportunity differentials between men and women for the violence of war, but who rush to explain the greater incidence of (non-sexual) child abuse by women as being a function of sexism. It is women, they correctly note, who have most contact with children and therefore have the greatest opportunity to abuse children. Moreover, we are told that female abusers of children "would probably not have become child abusers had the culture offered them viable alternatives to marriage and motherhood." If this line of argument (contrary to my own view) is acceptable, why can a similar explanation for participation in war not be given for young men "whose culture does not offer them viable alternatives" to machismo and the military?

Some feminists not only refuse to excuse men the violence of war (in the way they excuse women's violence) but, unlike other feminists, they also resist the very changes which would make it a less male affair—namely, parity in enlistment of the sexes. They oppose conscription of women. Feminist defenders of women's absence from combat assume that women are different and unsuited to war. They maintain that so long as there is (or must be) war, it is men who must wage it. There are a number of problems with this view. First, by seeking to preserve the status quo, they suppress the most effective test of whether men really are better suited to war. Notice how the real test of female competence to perform other tasks has been most unequivocally demonstrated by women actually performing those tasks. Whereas when there were almost no female lawyers people could have appealed to that fact to support claims of female unsuitability to the legal profession, that same line of argument is simply not available when there are vast numbers of successful female lawyers. Second, those who argue that women are ill-suited to war assume that men (unlike women) want to participate in war. Alternatively, male preferences on this score are a matter of indifference to them. The overwhelming majority of men do not wish to be part of the military. Were it otherwise, conscription would never be necessary. Why should these men be forced into the military, while women are not? It simply will not do, as I have explained, to justify this by saying that men are naturally more aggressive than women and thus more suitable to military activity.

Nor will it do, as some have tried, to justify the female exemption-exclusion from combat in other ways. I do not have space here to consider and respond to all the arguments for female exclusion from combat, but I shall examine two by way of illustration. Some have claimed that because women have less strength, stamina, and

muscle than men, they are less suited than men to the physical demands of ground combat. There are numerous problems with this argument. For instance, much combat activity, at least in our time, does not require strength. But even if it did, that would not be a reason for excluding all women. Some women are stronger than some men are. If strength were really what counted, that and not sex would be the appropriate criterion.

Others have defended the combat exemption-exclusion as a way of protecting women from the greater risk of being raped which they would bear if captured by the enemy. It might be noted in response to this that it is far from clear that sexual abuse is not experienced by many male prisoners of war. Second, males may well stand a greater chance of being tortured in non-sexual ways than women. Why should there be such rigid (often paternalistic) exclusions of women from combat allegedly to protect them from rape, while men are not only not protected, but often forced into combat situations where they can face harms (including maiming and torture) that are arguably as traumatizing as rape? Finally, the argument that women should be exempted from combat because they need to be protected from rape (or because they are less aggressive or less strong) is one that feminists can advance only at their peril. If some such reason for exempting women were (thought to be) true, it could equally support the exclusion of women from functions they do wish to fulfill. Indeed, such reasons have been used regularly by the conservative defenders of traditional gender roles, including those who have sought to exclude from combat those women who do want such roles.

The Distraction Argument. Not all those opposed to highlighting the second sexism will deny that men are sometimes the victims of sex discrimination. However, those who are willing to grant this may argue that attention to the second sexism will distract us from the much greater discrimination against women. On this view, until there is parity between the extent of disadvantage suffered by men and women, we must devote our attention and energies to opposing the greater discrimination—that experienced by females.

This argument presupposes that the position of women is worse than that of men. I do not deny this, if it is a global claim that is being made. In most places, women are generally worse off than men. This is because the traditional gender roles for women are much more restrictive than those for men, and most of the world's human population continues to live in societies that are characterized by traditional gender roles. But what about contemporary liberal democracies, from whose ranks most feminists are drawn and to which substantial (but not exclusive) feminist attention is devoted? In the light of the substantial inroads against sexism made in such societies, as well as the examples of the second sexism that I have outlined, are women worse off than men in such countries? Many people will confidently offer an affirmative answer. I cannot say that their answer is wrong. Nevertheless, the answer cannot be offered with confidence in a society that has viewed so lightly the serious forms of discrimination against men. The extent of discrimination against men is probably seriously underestimated and this makes fair comparison unlikely. Fortunately, I think that the question of which sex suffers the greater discrimination is simply irrelevant to the question of whether attention should be given to the second sexism. This brings me to my first response to the distraction argument.

Sex discrimination is wrong, irrespective of the victim's sex. It is not only the most severe manifestations of injustice that merit our attention. If it were wrong to focus on lesser forms of discrimination when greater forms were still being practiced, then we would have to attend to racial discrimination rather than sex discrimination, at least in those places in which racial discrimination is worse than sex discrimination. Moreover, where one opposed sex discrimination, one would have to ignore some forms of sex discrimination if one accepted the view that only the most serious injustices deserve our attention. Not all forms of sexism are equally severe. Using the word "man" to refer to people of both sexes, for example, is not as damaging as clitoridectomy or even as unfair as unequal pay. Feminists who think that we should devote our energies only to eliminating the worst forms of sex discrimination would be committed to a very restricted agenda. But if both major and minor forms of discrimination against women deserve attention, why should major forms of discrimination against men not be equally deserving of concern? How can it be acceptable to want an end to sexist speech while males die because of their sex? If one is opposed to injustice, then it is injustice that counts, not the sex of the victim. Even if it is the case that in general women are the greater victims of sex discrimination, it is still the case that some men suffer more from sex discrimination than some women. A young man on the Titanic who is denied a place

in a lifeboat because of his sex is worse off than the young woman whose life is saved because of her sex. A young man, conscripted and killed in battle, is worse off than his sister who is not. It does not matter here that had he survived, the man would have had greater access to higher education or could have earned more. If he is made to lose his life because of his sex and she has her life spared because of her sex, then this man is the greater victim of sex discrimination than this woman. Countering sex discrimination against men will remove some relative advantages that women enjoy, but that is fair in the same way that it is fair that countering sex discrimination against women removes relative advantages that men enjoy.

There is a second important response to the distraction argument. Far from distracting one from those discriminatory practices that disadvantage females, confronting the second sexism can help undo discrimination against women. This is because ending discrimination against one sex is inseparable from ending discrimination against the other sex. One reason for this is that the same sets of stereotypes underlie both kinds of discrimination. For example, the very attitudes that prevent women from being conscripted and from being sent into combat, thereby discriminating against those males and protecting those women who have no wish to be part of the military, also favor those males but disadvantage those females who desire a military career and who do not want to be excluded from combat. Similarly, the stereotypes of men as aggressive and violent and of women as caring and gentle lead to only males' being sent into battle but also entail assumptions that it is women who must bear primary responsibility for child-caring. Or consider the small proportion of women amongst the victims of gross human rights violations in South Africa. This is attributable to gender roles that discouraged women from engaging in political activity, especially dangerous political activity in which men were encouraged or expected to participate. Although these gender roles had beneficial effects for women in protecting them from the violence of adversaries, these same gender roles disadvantaged women in other regards. The "women and children first" mentality is another, related, example. It disadvantages men in life-and-death situations but has obvious disadvantages for women in other circumstances. Women are protected, to be sure, but in the same way and for relics of the same reasons that children are—they are assumed to be weak and to be unable to look after themselves. Similarly, the battered woman syndrome defense, under which the criminal law (at least in the United States) allows evidence of abuse of women, but not of men, to constitute an excuse from criminal responsibility, has the effect of reaffirming prejudices about women as lacking the capacity for rational self control.

The Inversion Argument. By the "inversion argument," I mean the argument that what I have suggested ar instances of discrimination against men are instead forms of discrimination against women. On this view, wha I have called the second sexism is instead just another form of discrimination against women. Rarely is such a argument explicitly presented. That is to say, those employing this sort of argument do not argue that matte ought to be inverted. Rather they simply invert them. They do not argue that what might be thought to constitu discrimination against men is rather discrimination against women. Instead, they simply present the data instances of anti-female bias. To this extent, my presentation of the inversion as an argument is a construction an argument out of a practice. The absence of an explicit argument for inversion is understandable. Were argument for inversion explicitly presented, its weakness would be much more apparent.

Consider, for example, those authors who present attempts at excluding women from the military as for of discrimination against women. They say, for instance, that the military, faced with an increase in the numb of women soldiers, "seems to have an exaggerated need to pursue more and more refined measures of sex difference in order to *keep women in their place,*" noting that Western armed forces "search for a differen which can justify women's continued exclusion from the military's ideological core—combat. If they can fi this difference, they can also exclude women from the senior command promotions that are open only to o cers who have seen combat." As I have argued, excluding women from combat does indeed disadvantage so women. That it is a minority of women whom this exclusion disadvantages—those who seek combat opportu ties and the career benefits that come with this in the military—does not alter the fact that *these* women indeed the victims of sex discrimination. But to present the exclusion exclusively in terms of the negative effe it has on women is to ignore the much greater disadvantage suffered by vast numbers of men who are forced i

combat against their wills. It is well and good to note, as I have done, how an instance of sex discrimination can cut both ways. It is quite another to present everything as disadvantaging only women.

Even those with a more balanced approach tend to make much more of the negative impact on women of those discriminatory practices whose primary victims are men. Thus, one author who notes that war is "often awful and meaningless," observes that there are advantages that combatants enjoy. She cites a prisoner of war graffito "freedom—a feeling the protected will never know" and "the feelings of unity, sacrifice and even ecstasy experienced by the combatant." Moreover, she notes that women "who remain civilians will not receive the post-war benefits of veterans, and those [women] who don uniforms will be a protected, exempt-from-combat subset of the military. Their accomplishments will likely be forgotten." Although true, the significance of these advantages is overdone—even to the point of depravity. Certainly, those who never experience its loss may not have the same acute appreciation of freedom, but that acute appreciation is, at most, a positive side effect of an immensely traumatic and damaging experience. Imagine how we would greet the observation that although paraplegia is "often awful and meaningless" it is only those who have lost the use of some limbs who can truly appreciate the value of having those limbs functional. Next, although veterans do have benefits denied to others, this is a form of compensation for sacrifice made. It is hardly unfair that compensation is not given to those to whom no compensation is due. People should be free, of course, to decide whether they want to accept the sacrifices of joining the military and the compensation that goes with it, but the absence of that choice is the disadvantage rather than the mere absence of the compensation. Finally, while the tasks of non-combatants are indeed less likely to be remembered, this observation grossly underplays the extent to which the tasks and sacrifices of most combatants are unremembered. Many of these who die in battle lie in unmarked graves or are memorialized in monuments to the "Unknown Soldier." In exceptional cases, as with the Vietnam War Memorial, a deceased combatant's memorial consists of an engraving of his name, along with thousands of others—hardly a remembrance proportionate to the sacrifice.

Consider another example of the inversion argument. Males, I noted earlier in my discussion of the Sen-Dreze argument, tend to die earlier than females. Although life expectancy has increased in developed countries over the last century, men have consistently lagged behind women. This suggests that the earlier death of males is (or, at least, was) not attributable to a biologically determined life-expectancy ceiling. As social conditions improved, men lived to be older, but never (on average) as old as women. If it were the case that men tended to live longer than women, we would be told that this inequality would need to be addressed by devoting more attention and resources to women's health. By means of the inversion argument, the call for more attention and resources to women's health is exactly what some people offer even though it is in fact men who die earlier. Such claims do not result from a belief that more is spent on the health care of men than women. A Canadian study on sex differences in the use of health care services showed that the "crude annual per capita use of health care resources (in Canadian dollars) was greater for female subjects ($1,164) than for male subjects ($918)" but that expenditures "for health care are similar for male and female subjects after differences in reproductive biology and higher age-specific mortality rates among men have been accounted for." Accepting that there is indeed an equal distribution of health-care dollars between men and women, one practitioner of the inversion argument suggested that such expenditure was not equitable. This, we are told, is because the greater longevity (of females) is "associated with a greater lifetime risk of functional disability and chronic illness, including cancer, cardiovascular disease, and dementia, and a greater need for long-term care." I shall assume that that is indeed so. Living longer does carry some costs, but on condition that those costs are not so great as to render the increased longevity a harm rather than a benefit, the infirmities that often accompany advanced age cannot be seen in isolation from the benefit of the longer life-span. An equitable distribution of health-care resources is not one that both favors a longer life-span for one sex and increases the quality of the additional years of that extra increment of life. Such a distribution would constitute a double favoring of one sex. A genuinely equitable distribution would be one that aimed at parity of life expectancy and the best quality of life for both sexes within that span of life. The proponents of the inversion argument, by contrast, are unsatisfied with any perceived trends that lessen the gap between men and the healthier sex. Thus we are told, disapprovingly, that at "a time when there have been improvements in the health status of men, the health status of women does not appear to be improving."

Another example of inversion is the common argument that the educational system disadvantages girls. It is widely thought that girls fare worse than boys in school and university. This is just the message proclaimed by a report from the Wellesley College Center for Research on Women. Sponsored by the American Association of University Women, the report, entitled "How Schools Shortchange Girls," has been widely cited. Indeed, there are some ways in which girls fare less well than boys in the educational system. For instance, boys tend to do better in mathematics and science tests and more doctoral degrees are awarded to men than to women. However, there are other ways in which boys are clearly at a disadvantage. In the U.S.A., girls outscore boys on reading and writing by a much greater margin than boys outscore girls in science and mathematics tests. And although boys do better on science and mathematics tests, girls get better class marks for these subjects. Some have suggested that this differential is to be explained by gender bias in the standardized tests. Christina Hoff Sommers suggests, however, that it could be better explained by a grading bias in schools against boys. Since Taiwanese and Korean girls score much higher than American boys on the same tests, it would seem that the gender-biased explanation of the standardized tests is not entirely satisfactory. Boys are educationally disadvantaged in other ways too. More boys miss classes, fail to do homework, have disciplinary problems, and drop out of school. The higher dropout rate for boys may partially explain the better average performance by boys on standardized tests. The academically weakest boys tend not to write. Boys are also "more likely to be robbed, threatened, and attacked in and out of school." Females now constitute a majority of college graduates and M.A.s in the U.S.A. Only in doctoral degrees are men still in the majority, but now by a much smaller margin than before. Females are worse off in some ways, but these disadvantages are diminishing. The inverters, ignoring the serious ways in which males are disadvantaged, present the educational institutions as disadvantaging only girls and women.

Sometimes the inversion argument or technique applies to a phenomenon that both discriminates against men and against women, but it presents the situation as discriminating only against women. We might call this a hemi-inversion argument. It inverts only that aspect that discriminates against men, thus presenting the phenomenon as disadvantaging only women. One example of this is the pair of authors who presented the exclusion of women in the sports media from male locker rooms after matches as an instance of blatant discrimination against those women. As they correctly observe, such sportswriters who "cannot get immediate access to athletes after a game . . . may miss deadlines and will likely be 'scooped' by the competition." They entirely ignore the other side of the issue, however, and quote with disapproval the coach who stated "I will not allow women to walk in on 50 naked men." Had it been a male sports writer seeking access to a locker room of 50 naked female athletes, we can be sure that a different tone would have been evident in feminist commentary on the matter. There are alternative solutions to such equity issues—such as denying all journalists, both male and female, from entering locker rooms. These authors ignore such options just as they ignore the invasion of privacy that would be experienced by the male athletes, who would surely be discriminated against if their female counterparts would not also be subject to such invasions. Instead, the authors view the matter entirely from the perspective of the female sports writers. I am fully aware that for other unfortunate reasons male sports draw more attention, and that female writers thus lose more in not having access to male locker rooms than male writers do in not having access to female locker rooms. However, if this is used to justify female access to male locker rooms but not male access to female locker rooms, then the intensity of the writer's interest rather than the athlete's privacy is taken to be the determining factor. And if that is so, then male journalists should be allowed to corner female politicians, actors, and other public personalities in female-only toilets and locker rooms if that is how they can scoop an important story. If this would not be acceptable, then neither is the intrusion by female sports writers on the privacy of male athletes, irrespective of the writers' interests in getting a story.

The inversion argument is a crass form of partiality. It presents *all* sex inequality as disadvantaging primarily or only women. This is unfair to those males who are the primary victims of some forms of sex discrimination. It also strategically compromises the case against those forms of discrimination that do in fact disadvantage women more than men. Unfairly presenting the relative disadvantages of different practices leads to one's legitimate claims being taken less seriously.

The Costs-of-Dominance Argument. A fourth kind of argument suggests that although there may indeed be costs to being a man, these are the costs of dominance—the costs that come with being the privileged sex. Unlike the inversion argument, the costs-of-dominance argument does not suggest that the costs of being a man are *themselves* actually advantages. Instead, this argument recognizes that they are indeed costs, but suggests that they should be seen merely as the by-products of a dominant position and thus not evidence of discrimination against males. In the words of one author, it "is a twist of logic to try to argue . . . that because there are costs in having power, one does not have power."

Clearly there are some situations in which the costs-of-dominance argument would be sound. Where a cost really is inseparable from one's position of power or (overall) advantage, then it is true that the cost is not a cause for complaint *on behalf of* the power-holder. However, it does not follow from this that all the costs experienced by males really are connected to their having power or privilege. For example, although the exemption-exclusion of women from the military is the result of females' perceived military incapacity, it is hardly obvious that male power would be impossible without this exemption-exclusion. For example, the rich have succeeded in preserving (even enhancing) their privilege while the poor, for various reasons, have endured a disproportionately heavy military burden. Thus, it need not be the case that those with the power in a society must be those who bear arms. Bearing arms is dirty work and there is no shortage of examples of underdogs being forced or enticed to do the dirty work. Similarly, it is far from clear that the higher rates of capital and corporal punishment of males is an inevitable by-product of male power.

It is sometimes alleged that the higher rates of male suicide, the tendency of males to die younger than women, the greater chance that men have of being killed, becoming alcoholic, and so forth, are side-effects of the stresses that come with privilege. It might be argued in response that alleged privileges that have these consequences are not real privileges for those who succumb. Although some men may benefit, many others experience only the costs. However, even if it were true that these were costs of genuine privilege, it would not follow that these costs were inevitable results. Those with power can divert resources in order to combat such side-effects of their power, thereby further improving their position.

Moreover, it is curious that as male power has surely (and appropriately) diminished in western democracies, the costs of being male have (inappropriately) increased, not decreased. For example, whereas a century or more ago men were almost guaranteed, following divorce, to gain custody of their children, today they are at a distinct disadvantage. As custody practices were better for men when they really did enjoy more power than they do now, it is clear that the current custody biases are not inevitable by-products of male power.

Thus, although it is true that the powerful cannot complain about having to bear the costs of that power, it does not follow that all disadvantages they suffer are such costs. Even if it is true that men in our society enjoy overall advantage—and I am not convinced that this is true any longer—it can still be true that they suffer genuine discrimination that is not an inevitable consequence of their privilege.

Now some will ask why those who hold most positions of power in a society could be the victims of pervasive discrimination. Why would those with power allow themselves to be treated in this way? Although there are a number of possible answers, the most important one is that insofar as discrimination is indirect and non-intentional, those who hold positions of power may not recognize it for what it is. They might take their disadvantage to be inevitable, perhaps because they share the very prejudices that contribute to their own disadvantage. A captain and officers clearly hold the powerful positions on a ship. Yet when it sinks and they adhere to and enforce a policy of saving "women and children," the social conventions lead them to use their power in a way that advantages women and disadvantages men (including themselves).

TAKING THE SECOND SEXISM SERIOUSLY

The fitting response to the second sexism is to oppose it in the same way that we oppose those sexist attitudes and practices of which women are the primary victims. To date, however, there has been an asymmetrical assault on sexism. Practices that disadvantage women have steadily been uprooted, while very few disadvantages of men have been confronted. Male disadvantage is thought hardly worthy of mention. When it is mentioned it is often excused even by those who purport to oppose sex discrimination. In academic research into gender issues,

the trend is to examine ways in which women are disadvantaged. Relatively little research examines the other side of the sexist coin. Because of this, we have every reason to think that the full extent of male disadvantage has not been revealed. If it has taken all the research it has to show the many facets of discrimination against women and girls, it surely will take as much to show the many ways in which men and boys suffer disadvantage.

Recognition of the second sexism sheds some light on the claim that all societies are structured to the exclusive benefit of men and are thus "patriarchal." So powerful is patriarchy, we are told, that women themselves internalize its values and serve its ends. Consider, for instance, female genital excision, which is widespread in some parts of the world. This ritual is almost always performed by women and many women are amongst the most vigorous defenders of the practice. Nevertheless, it is argued, entirely appropriately, that given how damaging the procedure is to the girls on whom it is performed, it cannot reasonably be claimed to serve the interests of women (except, perhaps, those few female performers of the ritual, as they may have a vested interest in it). What is curious, though, is that similar reasoning is not applied to the conscription of only males. Here some feminists are at pains to emphasize that it is men who make wars and men who conscript other men to fight them. This is true, but no less so than the claim that it is females who perform genital excision on little girls. Why is it not the case that the whole system of male-only conscription and combat serves women's interests? Why are the female agents of genital excision serving the interests of men, while the male—and now also female—agents of government, the bureaucracy and the military who send *men* to war, are serving *men's* interests? Why are women not complicit in and partly culpable for the perpetuation of gender role stereotypes that lead to male disadvantage? Once one recognizes the second sexism, claims about universal patriarchy become either absurd or unfalsifiable. The evidence suggests that not *everything* counts against women and in favor of men. Society often favors men, but it also sometimes (perhaps even often) favors women. To the extent that claims about the existence of patriarchy deny this and explain away any conceivable example of male disadvantage, they are unfalsifiable and accordingly unscientific.

Understanding the second sexism also has consequences for the debate about affirmative action for women (qua women, rather than qua some other class of beings). For instance, one objection to strong affirmative action policies is that rather than redressing past disadvantage by making restitution to an identifiably disadvantaged person, such policies make restitution to a person who belongs to a class that has been disadvantaged. This, it is said, sometimes leads to somebody who has not been disadvantaged receiving the benefit of affirmative action. In response to this argument, defenders of affirmative action sometimes argue that given how society works, *all* women have been disadvantaged and thus an affirmative action policy favoring women cannot in practice favor somebody who has not been disadvantaged. What the second sexism shows is that this response will not work. It will sometimes—even often—be the case that a man has been more disadvantaged than a woman. This woman may not have had her career interrupted by childbearing and rearing, but this man may have had his career interrupted by a period of military service. This woman may have had every educational advantage during childhood schooling, while this man may have been one of the many who suffered educational disadvantage.

Moreover, asymmetrical attention has been given to how sexist attitudes lead to lopsiding in social institutions. Feminists regularly tell us that anything less than proportionate representation of the sexes in government, the professions, and other socially desirable positions is an indication of discrimination (whether subtle or otherwise). Although there are relatively few female engineers, for example, despite formal equality of opportunity, we are told that this is due to subtle sexist influences that discourage young girls from aspiring to be engineers. Yet, this sort of reasoning is not used to explain why the vast majority of prisoners or soldiers are male. It is not said that sexist stereotypes dispose (or force) young males to enlist or to behave in ways that make them more susceptible to imprisonment. The proportion of male prisoners and soldiers, for example, is simply taken as natural in a way that the proportion of male engineers or legislators is not.

If the under-representation of women in the academy, for example, must be redressed by affirmative action policies that ensure proportionality, why should similar policies not be used for the purposes of conscription and combat? Affirmative action conscription policies that aimed at enlisting equal numbers of males and females and insisted on sending equal numbers of men and women into battle would not only enforce the

desired proportionality, it would also have an immense impact on the prejudicial views about gender roles. Similarly, notice that although women are now heavily represented in what were traditionally male jobs, men have not made comparable inroads into professions such as nursing, which (for about a century and a half) have traditionally been the preserve of women. Part of this is explicable by the lower status of traditionally female jobs, which makes them less attractive to men. But that, it seems to me, is just part of the sexist worldview that feminists are seeking to undo. If the aims of affirmative action include proportional representation of the sexes in each kind of work, and the overcoming of gender-linked jobs, then affirmative action has as much of a role to play in equalizing the nursing profession as it does in equalizing the sexes within the ranks of doctors. In fact there is reason—including the actual success rates—to think that sexist stereotypes make it easier for women to enter traditionally male professions than for men to enter traditionally female professions. Accordingly, affirmative action policies, if justified, may be more needed in nursing than in medicine. I want to emphasize that I am not recommending affirmative action in the military, the nursing profession, and other such areas. My claim is only that the very arguments used to defend affirmative action in other contexts would apply equally here. To apply them selectively is disingenuous.

CONCLUSION

When one considers how much has been written about discrimination against women, it is clear that no one paper can address all aspects of the second sexism. It has not been possible for me to search for and probe all instances of the second sexism, and it has not been possible to consider and respond to all objections to the claim that there is a second sexism. Such constraints on a single paper are innocuous in themselves. Unfortunately, however, the paucity of papers giving attention to discrimination against men leads to those few that there are being taken less seriously. The absence of an extensive academic literature about discrimination against men both results from and further entrenches the neglect of such discrimination. That is to say, it is at least partly because such discrimination is not taken seriously that so little research time and money is devoted to it. But because it is not the vogue to examine such discrimination, much less is known about it and this perpetuates the impression that is not worthy of detailed consideration. The lopsided information we have about sexism creates a climate in which the research bias is preserved and reinforced. This is dangerous. We have every reason to think that academic neglect of a problem is not an indication of its absence. For example, it was not long ago that sexual abuse of children was thought to be an extremely rare phenomenon. That issue has since become a popular academic and social cause, with the result that we now know much more about it and it is now widely recognized to be more common than was previously thought.

But do (most) men feel as though they are victims of sexism? It has been noted that "women bent on escape from the female sphere do not usually run into hordes of oppressed men swarming in the opposite direction, trying to change places with their wives and secretaries" and that this is evidence for "where the real advantage lies." Notice that one could embrace the conclusion that overall advantage lies with men, while still acknowledging that men do experience some significant sexist discrimination. In this paper I have sought only to highlight this discrimination and to argue that it should be opposed. I have not sought to claim that men are worse off than women. Nevertheless, the observation that men (generally) do not want to change places with women should not be invested with too much significance. If people's satisfaction or dissatisfaction with their socially mandated roles were determinative (or even suggestive) of whether such roles were advantageous to their bearers, then a few conclusions that are unfortunate for feminists would follow. First, many women forced into traditional female roles could not be viewed as being the victims of sexism, so long as those roles were internalized by those women and found by them to be satisfying. Just such an attitude characterized most women until the dawn of the women's movement, and it is an attitude that is still widespread among women in more traditional societies, if not with respect to every feature of their position then at least to many of its features. Second, the women most dissatisfied with their condition are to be found in disproportionately large numbers amongst women who are subject to the least sexist discrimination and restrictions. For instance, female feminist professors in Western societies are arguably the most liberated women in the world—the women least restricted or disadvantaged by sexism. Yet they are also more concerned about the disadvantages they do face than are many

less fortunate women. If the level of one's satisfaction with one's role is what determines the severity of the discrimination to which one is subjected, then the sexism experienced by contemporary Western feminists really is worse than that endured by those women in more traditional societies, past or present, who are satisfied with their position. Whether one takes that to be absurd will depend, at least in part, on what view one takes about such matters as adaptive preferences and false consciousness. It would be unwise to attempt to settle these issues here. All I wish to observe is that if men's apparent contentment with their position is taken to be evidence that they are not the victims of discrimination, then from that follow some conclusions that should be unsettling to most feminists. If, by contrast, it is thought that somebody might be the victim of discrimination without realizing it, then the way is opened to recognizing that even if most men are content with their position they might nonetheless be victims of a second sexism.

Journal/Discussion Questions

1. In your own experience, what have you seen that confirms Benatar's analysis of the second sexism? What have you seen that counts against his analysis? Overall, how would you assess the validity of his claims?
2. If Benatar is right, what conclusions follow for your own views about sexism in our society?

Susan Moller Okin

"Is Multiculturalism Bad for Women?"

About the Author: Susan Moller Okin (1946–2004) was the Marta Sutton Weeks Professor of Ethics in Society and Professor of Political Science at Stanford University. Her books include *Women in Western Political Thought* and *Justice, Gender, and the Family.*

About the Article: In this article, Okin explores some of the tensions that arise between acceptance of diversity (a key tenet of multiculturalism) and concern for the rights and well-being of women. The article was originally published in the *Boston Review,* October/November 1997 and reprinted in *Is Multiculturalism Bad for Women?* edited by Joshua Cohen, Matthew Howard, and Martha C. Nussbaum (Princeton: Princeton University Press, 1999).

As You Read, Consider This:

1. "Feminism" and "multiculturalism" are two key terms in Okin's article. How does she define each of these terms?
2. Why, according to Kymlicka, do certain minority groups deserve special group rights?
3. What is the liberal response to Okin's critique? What rejoinder does Okin offer to this response?

Until the past few decades, minority groups—immigrants as well as indigenous peoples—were typically expected to assimilate into majority cultures. This assimilationist expectation is now often considered oppressive, and many Western countries are seeking to devise new policies that are more responsive to persistent cultural differences. The appropriate policies vary with context: Countries such as England with established churches or state supported religious education find it hard to resist demands to extend state support to minority religious schools; countries such as France with traditions of strictly secular public education struggle over whether the clothing required by minority religions may be worn in the public schools. But one issue recurs across all contexts, though it has gone virtually unnoticed in current debate: What should be done when the claims of minority cultures or religions clash with the norm of gender equality that is at least formally endorsed by liberal states (however much they continue to violate it in their practice)?

Susan Moller Okin, *Is Multiculturalism Bad for Women?* Copyright © 1999 Princeton University Press. Reprinted by permission of Princeton University Press.

In the late 1980s, for example, a sharp public controversy erupted in France about whether Maghrebin girls could attend school wearing the traditional Muslim headscarves regarded as proper attire for postpubescent young women. Staunch defenders of secular education lined up with some feminists and far-right nationalists against the practice; much of the old left supported the multiculturalist demands for flexibility and respect for diversity, accusing opponents of racism or cultural imperialism. At the very same time, however, the public was virtually silent about a problem of vastly greater importance to many French Arab and African immigrant women: polygamy.

During the 1980s, the French government quietly permitted immigrant men to bring multiple wives into the country, to the point where an estimated 200,000 families in Paris are now polygamous. Any suspicion that official concern over headscarves was motivated by an impulse toward gender equality is belied by the easy adoption of a permissive policy on polygamy, despite the burdens this practice imposes on women and the warnings issued by women from the relevant cultures. On this issue, no politically effective opposition galvanized. But once reporters finally got around to interviewing the wives, they discovered what the government could have learned years earlier: that the women affected by polygamy regarded it as an inescapable and barely tolerable institution in their African countries of origin, and an unbearable imposition in the French context. Overcrowded apartments and the lack of each wife's private space lead to immense hostility, resentment, even violence both among the wives and against each other's children.

In part because of the strain on the welfare state caused by families with 20-30 members, the French government has recently decided to recognize only one wife and consider all the other marriages annulled. But what will happen to all the other wives and children? Having neglected women's view on polygamy for so long, the government now seems to be abdicating its responsibility for the vulnerability that women and children incurred because of its rash policy.

The French accommodation of polygamy illustrates a deep and growing tension between feminism and multiculturalist concerns to protect cultural diversity. I think we—especially those of us who consider ourselves politically progressive and opposed to all forms of oppression—have been too quick to assume that feminism and multiculturalism are both good things which are easily reconciled. I shall argue instead that there is considerable likelihood of tension between them—more precisely, between feminism and a multiculturalist commitment to group rights for minority cultures.

A few words to explain the terms and focus of my argument. By "feminism," I mean the belief that women should not be disadvantaged by their sex, that they should be recognized as having human dignity equally with men, and the opportunity to live as fulfilling and as freely chosen lives as men can. "Multiculturalism" is harder to pin down, but the particular aspect that concerns me here is the claim, made in the context of basically liberal democracies, that minority cultures or ways of life are not sufficiently protected by ensuring the individual rights of their members and as a consequence should also be protected with special *group* rights or privileges. In the French case, for example, the right to contract polygamous marriages clearly constituted a group right, not available to the rest of the population. In other cases, groups claim rights to govern themselves, have guaranteed political representation, or be exempt from generally applicable law.

Demands for such group rights are growing—from indigenous native populations, minority ethnic or religious groups, and formerly colonized peoples (at least, when the latter immigrate to the former colonial state). These groups, it is argued, have their own "societal cultures" which—as Will Kymlicka, the foremost contemporary defender of cultural group rights, says—provide "members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres."[1] Because societal cultures play so pervasive and fundamental a role in the lives of members, and because such cultures are threatened with extinction, minority cultures should be protected by special rights: That, in essence, is the case for group rights.

Some proponents of group rights argue that even cultures that "flout the rights of [their individual members] in a liberal society"[2] should be accorded group rights or privileges if their minority status endangers the culture's continued existence. Others do not claim that all minority cultural groups should have special rights, but rather that such groups—even illiberal ones, that violate their individual members' rights, requiring them to

conform to group beliefs or norms—have the right to be "let alone" in a liberal society.[3] Both claims seem clearly inconsistent with the basic liberal value of individual freedom, which entails that group rights should not trump the individual rights of their members; thus, I will not address the problems they present for feminists here.[4] But some defenders of multiculturalism largely confine their defense of group rights to groups that are internally liberal.[5] Even with these restrictions, feminists—anyone, that is, who endorses the moral equality of men and women—should remain skeptical. So I will argue.

Gender and Culture

Most cultures are suffused with practices and ideologies concerning gender. Suppose, then, that a culture endorses and facilitates the control of men over women in various ways (even if informally, in the private sphere of domestic life). Suppose, too, that there are fairly clear disparities of power between the sexes, such that the more powerful, male members are those who are generally in a position to determine and articulate the group's beliefs, practices, and interests. Under such conditions, group rights are potentially, and in many cases actually, antifeminist. They substantially limit the capacities of women and girls of that culture to live with human dignity equal to that of men and boys, and to live as freely chosen lives as they can.

Advocates of group rights for minorities within liberal states have not adequately addressed this simple critique of group rights, for at least two reasons. First, they tend to treat cultural groups as monoliths—to pay more attention to differences between and among groups than to differences within them. Specifically, they give little or no recognition to the fact that minority cultural groups, like the societies in which they exist (though to a greater or lesser extent), are themselves *gendered,* with substantial differences of power and advantage between men and women. Second, advocates of group rights pay no or little attention to the private sphere. Some of the best liberal defenses of group rights urge that individuals need "a culture of their own," and that only within such a culture can people develop a sense of self-esteem or self-respect, or the capacity to decide what kind of life is good for them. But such arguments typically neglect both the different roles that cultural groups require of their members and the context in which persons' senses of themselves and their capacities are first formed *and* in which culture is first transmitted—the realm of domestic or family life.

When we correct for these deficiencies by paying attention to internal differences and to the private arena, two particularly important connections between culture and gender come into sharp relief, both of which underscore the force of the simple critique. First, the sphere of personal, sexual, and reproductive life provides a centr[al] focus of most cultures, a dominant theme in cultural practices and rules. Religious or cultural groups are oft[en] particularly concerned with "personal law"—the laws of marriage, divorce, child custody, division and control [of] family property, and inheritance. As a rule, then, the defense of "cultural practices" is likely to have much great[er] impact on the lives of women and girls than those of men and boys, since far more of women's time and ener[gy] goes into preserving and maintaining the personal, familial, and reproductive side of life. Obviously culture is [not] only about domestic arrangements, but they do provide a major focus of most contemporary cultures. Home [is], after all, where much of culture is practiced, preserved, and transmitted to the young. In turn, the distributio[n of] responsibilities and power at home has a major impact on who can participate in and influence the more pu[blic] parts of the cultural life, where rules and regulations about both public and private life are made.

Second, most cultures have as one of their principal aims the control of women by men. Consider, for exa[m]ple, the founding myths of Greek and Roman antiquity, and of Judaism, Christianity, and Islam: they are [rife] with attempts to justify the control and subordination of women. These myths consist of a combination of d[eni]als of women's role in reproduction, appropriations by men of the power to reproduce themselves, character[iza]tions of women as overly emotional, untrustworthy, evil, or sexually dangerous, and refusals to acknowle[dge] mothers' rights over the disposition of their children. Think of Athena, sprung from the head of Zeus, an[d of] Romulus and Remus, reared without a human mother. Or Adam, made by a male God, who then (at l[east] according to one of the two biblical versions of the story) made Eve out of part of Adam. Consider Eve, wh[ose] weakness led Adam astray. Think of all those endless "begats" in Genesis, where women's primary role in re[pro]duction is completely ignored, or of the textual justifications for polygamy, once practiced in Judaism, still p[rac]ticed in many parts of the Islamic world and (though illegally) by Mormons in some parts of the United St[ates].

Consider, too, the story of Abraham, a pivotal turning point in the development of monotheism. God commands Abraham to sacrifice "his" greatly loved son. Abraham prepares to do exactly what God asks of him without even telling, much less asking, Isaac's mother, Sarah. Abraham's absolute obedience to God makes him the central, fundamental model of faith, for all three religions.

While the powerful drive to control women—and to blame and punish them for men's difficulty controlling their own sexual impulses—has been softened considerably in the more progressive, reformed versions of Judaism, Christianity, and Islam, it remains strong in their more orthodox or fundamentalist versions. Moreover, it is by no means confined to Western or monotheistic cultures. Many of the world's traditions and cultures, including those practiced within formerly conquered or colonized nation states—certainly including most of the peoples of Africa, the Middle East, Latin America and Asia—are quite distinctly patriarchal. They too have elaborate patterns of socialization, rituals, matrimonial customs, and other cultural practices (including systems of property ownership and control of resources) aimed at bringing women's sexuality and reproductive capabilities under men's control. Many such practices make it virtually impossible for women to choose to live independently of men, to be celibate or lesbian, or not to have children.

Those who practice some of the most controversial such customs—clitoridectomy, the marriage of children or marriages that are otherwise coerced, or polygamy—sometimes explicitly defend them as necessary for controlling women, and openly acknowledge that the customs persist at men's insistence. In an interview with *New York Times* reporter Celia Dugger, practitioners of clitoridectomy in Côte d'Ivoire and Togo explained that the practice "helps insure a girl's virginity before marriage and fidelity afterward by reducing sex to a marital obligation." As a female exciser said, "[a] woman's role in life is to care for her children, keep house and cook. If she has not been cut, [she] might think about her own sexual pleasure."[6] In Egypt, where a law banning female genital cutting was recently overturned by a court, supporters of the practice say it "curbs a girl's sexual appetite and makes her more marriageable."[7] Moreover, in such contexts, many women have no economically viable alternative to marriage. Men in polygamous cultures, too, readily acknowledge that the practice accords with their self-interest and is a means of controlling women. As a French immigrant from Mali said in a recent interview: "When my wife is sick and I don't have another, who will care for me? . . . [O]ne wife on her own is trouble. When there are several, they are forced to be polite and well behaved. If they misbehave, you threaten that you'll take another wife." Women apparently see polygamy very differently. French African immigrant women deny that they like polygamy, and say not only that they are given "no choice" in the matter, but that their female forebears in Africa did not like it either.[8] As for child or otherwise coerced marriage: this practice is clearly a way not only of controlling whom the girls or young women marry, but also of ensuring that they are virgins at the time of marriage and, often, enhancing the husband's power by creating a significant age difference between husbands and wives.

Consider, too, the practice—common in much of Latin America, rural South East Asia and parts of West Africa—of encouraging or even requiring a rape victim to marry the rapist. In many such cultures—including fourteen countries of Latin America—rapists are legally exonerated if they marry or (in some cases) even offer to marry their victims. Clearly, rape is not seen in these cultures primarily as a violent assault on the girl or woman herself, but rather as a serious injury to her family and its honor. By marrying his victim, the rapist can help restore the family's honor and relieve it of a daughter who, as "damaged goods," has become unmarriageable. In Peru, this barbaric law was amended for the worse in 1991: the co-defendants in a gang rape are now all exonerated if one of them offers to marry the victim (feminists are fighting to get the law repealed). As a Peruvian taxi driver explained: "Marriage is the right and proper thing to do after a rape. A raped woman is a used item. No one wants her. At least with this law the woman will get a husband."[9] It is hard to imagine a worse fate for a woman than being pressured into marrying the man who has raped her. But worse fates do exist in some cultures—notably in Pakistan and parts of the Arab Middle East, where women who bring rape charges are quite frequently charged with the serious Muslim offense of *zina*, or sex outside of marriage. Law allows for the whipping or imprisonment of such a woman, and culture condones the killing or pressuring into suicide of a raped woman by relatives concerned to restore the family's honor.[10]

Thus, many culturally-based customs aim to control women and render them, especially sexually and reproductively, servile to men's desires and interests. Sometimes, moreover, "culture"

linked with the control of women that they are virtually equated. In a recent news report about a small community of Orthodox Jews living in the mountains of Yemen—ironically, from a feminist point of view, the story was entitled "Yemen's small Jewish community thrives on mixed traditions"—the elderly leader of this small polygamous sect is quoted as saying: "We are Orthodox Jews, very keen on our traditions. If we go to Israel, we will lose hold over our daughters, our wives and our sisters." One of his sons added: "We are like Muslims, we do not allow our women to uncover their faces."[11] Thus the servitude of women is presented as virtually synonymous with "our traditions." (Only blindness to sexual servitude can explain the title; it is inconceivable that the article would have carried such a title if it were about a community that practiced any kind of slavery but sexual slavery.)

While virtually all of the world's cultures have distinctly patriarchal pasts, some—mostly, though by no means exclusively, Western liberal cultures—have departed far further from them than others. Western cultures, of course, still practice many forms of sex discrimination. They place far more stress on beauty, thinness, and youth in females and on intellectual accomplishment, skill, and strength in males; they expect women to perform for no economic reward far more than half of the unpaid work of their families, whether or not they also work for wages; partly as a consequence of this and partly because of workplace discrimination, women are far more likely than men to become poor; girls and women are also subjected by men to a great deal of (illegal) violence, including sexual violence. But women in more liberal cultures are, at the same time, legally guaranteed many of the same freedoms and opportunities as men. In addition, most families in such cultures, with the exception of some religious fundamentalists, do not communicate to their daughters that they are of less value than boys, that their lives are to be confined to domesticity and service to men and children, and that the only positive value of their sexuality is that it be strictly confined to marriage, the service of men, and reproductive ends. This, as we have seen, is quite different from women's situation in many of the world's other cultures, including many of those from which immigrants to Europe and Northern America come.

GROUP RIGHTS?

Most cultures are patriarchal, then, and many (though not all) of the cultural minorities that claim group rights are more patriarchal than the surrounding cultures. So it is no surprise that the cultural importance of maintaining control over women shouts out to us in the examples given in the literature on cultural diversity and group rights within liberal states. Yet, though it shouts out, it is seldom explicitly addressed.

A 1986 paper about the legal rights and culture-based claims of various immigrant groups and gypsies in contemporary Britain mentions the roles and status of women as "one very clear example" of the "clash of cultures."[12] In it, Sebastian Poulter discusses claims put forward by members of such groups for special legal treatment on account of their cultural differences. A few are non-gender-related claims: about a Muslim schoolteacher's being allowed to be absent part of Friday afternoons in order to pray, and gypsy children having less stringent schooling requirements than others on account of their itinerant lifestyle. But the vast majority of the examples concern gender inequalities: child marriages, forced marriages, divorce systems biased against women, polygamy, and clitoridectomy. Almost all of the legal cases discussed stemmed from women's or girls' claims that their individual rights were being truncated or violated by the practices of their cultural groups. In a recent article by political philosopher Amy Gutmann, "The Challenge of Multiculturalism in Political Ethics," fully half the examples have do with gender issues—polygamy, abortion, sexual harassment, clitoridectomy, and purdah.[13] This is quite typical in the literature on subnational multicultural issues. Moreover, the same phenomenon occurs in practice in the international arena, where women's human rights are often rejected by the leaders of countries or groups of countries as incompatible with their various cultures.

Similarly, the overwhelming majority of "cultural defenses" that are increasingly being invoked in US criminal cases concerning members of cultural minorities are connected with gender—in particular with male control over women and children. Occasionally, cultural defenses come into play in explaining expectable violence among men, or the ritual sacrifice of animals. Much more common, however, is the argument that, in the defendant's cultural group, women are not human beings of equal worth but subordinates whose primary (if not only) functions are to serve men sexually and domestically. Thus, the four types of case in which cultural defenses have been used most successfully are: kidnap and rape by Hmong men who claim

that their actions are part of their cultural practice of *zij poj niam* or "marriage by capture"; wife-murder by immigrants from Asian and Middle Eastern countries whose wives have either committed adultery or treated their husbands in a servile way; mothers who have killed their children but failed to kill themselves, and who claim that because of their Japanese or Chinese backgrounds the shame of their husbands' infidelity drove them to the culturally condoned practice of mother-child suicide; and—in France, though not yet in the United States, in part because the practice was criminalized only in 1996—clitoridectomy. In a number of such cases, expert testimony about the accused's or defendant's cultural background has resulted in dropped or reduced charges, culturally-based assessments of *mens rea*, or significantly reduced sentences. In a well-known recent case, an immigrant from rural Iraq married his two daughters, aged 13 and 14, to two of his friends, aged 28 and 34. Subsequently, when the older daughter ran away with her 20-year-old boyfriend, the father sought the help of the police in finding her. When they located her, they charged the father with child abuse, and the two husbands and boyfriend with statutory rape. The Iraqis' defense is based in part, at least, on their cultural marriage practices.

As these examples show, the defendants are not always male, nor the victims always female. Both a Chinese immigrant man in New York who battered his wife to death for committing adultery and a Japanese immigrant woman in California who drowned her children and tried to drown herself because her husband's adultery had shamed the family, relied on cultural defenses to win reduced charges (from murder to second degree or involuntary manslaughter). It might seem, then, that cultural defense was biased toward the male in the first case and the female in the second. But no such asymmetry exists. In both cases, the cultural message is similarly gender-biased: women (and children, in the second case) are ancillary to men, and should bear the blame and the shame for any departure from monogamy. Whoever is guilty of the infidelity, the wife suffers: in the first case, by being brutally killed on account of her husband's rage at her shameful infidelity; in the second, by being so shamed and branded a failure by his infidelity that she is driven to kill herself and her children. Again, the idea that girls and women are first and foremost sexual servants of men whose virginity before marriage and fidelity within it are their preeminent virtues emerges in many of the statements made in defense of cultural practices.

Western majority cultures, largely at the urging of feminists, have recently made substantial efforts to avoid or limit excuses for brutalizing women. Well within living memory, American men were routinely held less accountable for killing their wives if they explained their conduct as a crime of passion, driven by jealousy on account of the wife's infidelity. Also not long ago, women who did not have completely celibate pasts or who did not struggle—even so as to endanger themselves—were routinely blamed when raped. Things have now changed to some extent, and doubts about the turn toward cultural defenses undoubtedly come in part from a concern to preserve recent advances. Another concern is that such defenses can distort perceptions of minority cultures by drawing excessive attention to negative aspects of them. But perhaps the primary concern is that, by failing to protect women and sometimes children of minority cultures from male and sometimes maternal violence, cultural defenses violate their rights to the equal protection of the laws. When a woman from a more patriarchal culture comes to the United States (or some other Western, basically liberal, state), why should she be less protected from male violence than other women are? Many women from minority cultures have protested the double standard that is being applied to their aggressors.

Liberal Defense

Despite all this evidence of cultural practices that control and subordinate women, none of the prominent defenders of multicultural group rights has adequately or even directly addressed the troubling connections between gender and culture, or the conflicts that arise so commonly between multiculturalism and feminism. Will Kymlicka's discussion is, in this respect, representative.

Kymlicka's arguments for group rights are based on the rights of individuals, and confine such privileges and protection to cultural groups that are internally liberal. Following John Rawls, Kymlicka emphasizes the fundamental importance of self-respect in a person's life. He argues that membership in a "rich and secure cultural structure,"[14] with its language and history, is essential both for the development of self-respect and for giving

persons a context in which they can develop the capacity to make choices about how to lead their lives. Cultural minorities need special rights, then, because their culture may otherwise be threatened with extinction, and cultural extinction would likely undermine the self-respect and freedom of group members. Special rights, in short, put minorities on a footing of equality with the majority.

The value of freedom plays an important role in Kymlicka's argument. As a result, except in rare circumstances of cultural vulnerability, a group that claims special rights must govern itself by recognizably liberal principles, neither infringing on the basic liberties of its own members by placing internal restrictions on them, nor discriminating among them on grounds of sex, race, or sexual preference. This requirement is of great importance to a consistently liberal justification for group rights, since a "closed" or discriminatory culture cannot provide the context for individual development that liberalism requires and because collective rights might otherwise result in subcultures of oppression within and aided by liberal societies. As Kymlicka says: "To inhibit people from questioning their inherited social roles can condemn them to unsatisfying, even oppressive lives."[15]

As Kymlicka acknowledges, this requirement of internal liberalism rules out the justification of group rights for the "many fundamentalists of all political and religious stripes who think that the best community is one in which all but their preferred religious, sexual, or aesthetic practices are outlawed." For the promotion and support of *these* cultures "undermines the very reason we had for being concerned with cultural membership—that it allows for meaningful individual choice."[16] But the examples I cited earlier suggest that far fewer minority cultures than Kymlicka seems to think will be able to claim group rights under his liberal justification. Though they may not impose their beliefs or practices on others, and though they may appear to respect the basic civil and political liberties of women and girls, many cultures do not, especially in the private sphere, treat them with anything like the same concern and respect as men and boys, or allow them to enjoy the same freedoms. Discrimination against and control of the freedom of females is practiced, to a greater or lesser extent, by virtually all cultures, past and present, but especially religious ones and those that look to the past—to ancient texts or revered traditions—for guidelines or rules about how to live in the contemporary world. Sometimes more patriarchal minority cultures exist in the context of less patriarchal majority cultures; sometimes the reverse is true. In either case, the degree to which each culture is patriarchal and its willingness to become less so should be crucial factors in considering justifications for group rights—once we take women's equality seriously.

Clearly, Kymlicka regards cultures that discriminate overtly and formally against women—by denying them education, or the right to vote or to hold office—as not deserving special rights. But sex discrimination is often far less overt. In many cultures, strict control of women is enforced in the private sphere by the authority of either actual or symbolic fathers, often acting through, or with the complicity of, the older women of the culture. In many cultures in which women's basic civil rights and liberties are formally assured, discrimination practiced against women and girls within the household not only severely constrains their choices, but seriously threatens their well-being and even their lives. And such sex discrimination—whether severe or more mild—often has very powerful *cultural* roots.

Although Kymlicka rightly objects to the granting of group rights to minority cultures that practice overt sex discrimination, then, his arguments for multiculturalism fail to register what he acknowledges elsewhere: that the subordination of women is often informal and private, and that virtually no culture in the world today, minority or majority, could pass his "no sex discrimination" test if it were applied in the private sphere.[17] Those who defend group rights on liberal grounds need to address these very private, culturally reinforced kinds of discrimination. For surely self-respect and self-esteem require more than simple membership in a viable culture. Surely it is *not* enough, for one to be able to "question one's inherited social roles" and to have the capacity to make choices about the life one wants to lead, that one's culture be protected. At least as important to the development of self-respect and self-esteem is *our place within our culture.* And at least as important to our capacity to question our social roles is *whether our culture instills in and enforces particular social roles on us.* To the extent that their culture is patriarchal, in both these respects the healthy development of girls is endangered.

READING

PART OF THE SOLUTION?

It is by no means clear, then, from a feminist point of view, that minority group rights are "part of the solution." They may well exacerbate the problem. In the case of a more patriarchal minority culture in the context of a less patriarchal majority culture, no argument can be made on the basis of self-respect or freedom that the female members of the culture have a clear interest in its preservation. Indeed, they may be much better off if the culture into which they were born were either to become extinct (so that its members would become integrated into the less sexist surrounding culture) or, preferably, to be encouraged to alter itself so as to reinforce the equality of women—at least to the degree to which this is upheld in the majority culture. Other considerations would, of course, need to be taken into account, such as whether the minority group speaks a different language that requires protection, and whether the group suffers from prejudices such as racial discrimination. But it would take significant factors weighing in the other direction to counterbalance evidence that a culture severely constrained women's choices or otherwise undermined their well-being.

What some of the examples discussed above show us is how culturally endorsed practices that are oppressive to women can often remain hidden in the private or domestic sphere. In the Iraqi child marriage case mentioned above, if the father himself had not called in agents of the state, his daughters' plight might well not have become public. And in 1996 when Congress passed a law criminalizing clitoridectomy, a number of US doctors objected to the law as unjustified, since it concerned a private matter which, as one said, "should be decided by a physician, the family, and the child."[18] It can take more or less extraordinary circumstances for such abuses of girls or women to become public or for the state to be able to intervene protectively.

Thus it is clear that many instances of private sphere discrimination against women on cultural grounds are never likely to emerge in public, where courts can enforce their rights and political theorists can label such practices as illiberal and therefore unjustified violations of women's physical or mental integrity. Establishing group rights to enable some minority cultures to preserve themselves may not be in the best interests of the girls and women of the culture, even if it benefits the men.

When liberal arguments are made for the rights of groups, then, special care must be taken to look at within-group inequalities. It is especially important to consider inequalities between the sexes, since they are likely to be less public, and less easily discernible. Moreover, policies aiming to respond to the needs and claims of cultural minority groups must take seriously the need for adequate representation of less powerful members of such groups. Since attention to the rights of minority cultural groups, if it is to be consistent with the fundamentals of liberalism, must be ultimately aimed at furthering the well-being of the members of these groups, there can be no justification for assuming that the groups' self-proclaimed leaders—invariably mainly composed of their older and their male members—represent the interests of all of the groups' members. Unless women—and, more specifically, young women, since older women often become co-opted into reinforcing gender inequality—are fully represented in negotiations about group rights, their interests may be harmed rather than promoted by the granting of such rights.

Journal/Discussion Questions

1. In your own experience, how have you seen the tension between women's interests and multiculturalism play itself out (if at all)?
2. Critically evaluate Okin's criticisms of multiculturalism.

References

1. Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995), pp. 89, 76. See also Kymlicka, *Liberalism, Community, and Culture* (Oxford: The Clarendon Press, 1989). It should be noted that Kymlicka himself does not argue for extensive or permanent group rights for those who have voluntarily immigrated.

2. Avishai Margalit and Moshe Halbertal, "Liberalism and the Right to Culture," *Social Research* 61, 3 (Fall 1994): 491.
3. For example, Chandran Kukathas, "Are There any Cultural Rights?" *Political Theory* 20, 1 (1992): 105–39.
4. Okin, "Feminism and Multiculturalism: Some Tensions," *Ethics* 108, 4 (1998): 661–684.
5. For example, Kymlicka, *Liberalism, Community, and Culture and Multicultural Citizenship*, especially chap. 8. Kymlicka does not apply his requirement that groups be internally liberal to those he terms "national minorities," but I will not address this aspect of his theory here.
6. *New York Times*, 5 October 1996, A4. The role that older women in such cultures play in perpetuating them is important but complex, and cannot be addressed here.
7. *New York Times*, 26 June 1997, A9.
8. *International Herald Tribune*, 2 February 1997, News section.
9. *New York Times*, 12 March 1997, A8.
10. This practice is discussed in Henry S. Richardson, *Practical Reasoning About Final Ends* (Cambridge: Cambridge University Press, 1994), especially pp. 240–43, 262–63, 282–84.
11. *Agence France Presse*, 18 May 1997, International News section.
12. Sebastian Poulter, "Ethnic Minority Customs, English Law, and Human Rights," *International and Comparative Law Quarterly* 36, 3 (1987): 589–615.
13. Amy Gutmann, "The Challenge of Multiculturalism in Political Ethics," *Philosophy and Public Affairs* 22, 3 (Summer 1993): 171–204. . . .
14. Kymlicka, Liberalism, Community, and Culture, p. 165.
15. Kymlicka, Multicultural Citizenship, p. 92.
16. Kymlicka, Liberalism, Community, and Culture, pp. 171–72.
17. Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: The Clarendon Press, 1990), pp. 239–62.
18. *New York Times*, 12 October 1996, A6. Similar views were expressed on public radio.

Concluding Discussion Questions

Where Do You Stand Now?

Instructions

You have already answered the following questions in your moral problems self-quiz at the beginning of this boo You have studied the material in this section, take a moment to answer the same questions again. You can either enter your answers below or complete the survey on-line at http://ethics.sandiego.edu/surveys.

	Strongly Agree	*Agree*	*Undecided*	*Disagree*	*Strongly Disagree*	*Chapter 7: Gender*
31.	❑	❑	❑	❑	❑	Women's moral voices are different from men's.
32.	❑	❑	❑	❑	❑	Women are still discriminated against in the workplace.
33.	❑	❑	❑	❑	❑	Sexual harassment should be illegal.
34.	❑	❑	❑	❑	❑	Affirmative action helps women.
35.	❑	❑	❑	❑	❑	Genuine equality for women demands a restructuring of the traditional family.

8

SEXUAL ORIENTATION

The Narrative 324

Hillary Rodham Clinton, "Remarks in Recognition of Human Rights Day" 324

AN INTRODUCTION TO THE MORAL ISSUES 329

Introduction 330

Defining Sexual Orientation 330

Sexual Orientation and Dichotomous Thinking 330

Sex and Gender: Some Preliminary Distinctions about LGBT 330

Sex 330

Gender 331

Sexual Orientation 332

Determining Sexual Orientation 332

The Ethical Issues 332

What's Natural? Sexual Orientation and the Argument from Nature 332

Behavior and Identity 333

Guilt and Shame 333

Two Senses of "Unnatural" 333

Is Homosexuality Unnatural? 334

Is the Natural Always Good? 335

Discrimination Against Gays and Lesbians 335

Gays and Lesbians in the Military 336

Same-Sex Marriage 336

Models of the Place of Sexual Orientation in Society 338

The Conservative Model 338

The Liberal Model 339

Autonomy Arguments 339

Privacy Arguments 339

The Difference between Toleration, Acceptance, and Support 339

The Polymorphous Model 339

Diversity and Consensus 339
The Arguments 340
Martha Nussbaum, "A Right to Marry? Same-Sex Marriage and Constitutional Law" 340
James Q. Wilson, "Against Homosexual Marriage" 352
Concluding Discussion Questions 357
For Further Reading 358

THE NARRATIVE

HILLARY RODHAM CLINTON

Remarks in Recognition of International Human Rights Day

About the Author: The Secretary of State during President Obama's administration, Hillary Rodham Clinton is a graduate of Yale Law School. She served as the United States Senator from New York from 2001 to 2008.

About the Article: These remarks were delivered for International Human Rights Day before the Palais des Nations in Geneva, Switzerland on December 6, 2011. Clinton notes the historical significance of the U.N. Universal Declaration of Human Rights, the first worldwide attempt to articulate a consistent and uniform doctrine of human rights. In this speech, she concentrates on the issue of gay rights.

As You Read This Article, Ask Yourself:

1. What would it mean to live in a world without human rights? What would be lost?
2. Clinton addresses five main questions about gay rights in her talk. What are these? What are her replies to each of these objections?
3. Some people feel there is a tension between respect for the integrity of individual cultures and a commitment to human rights. How does Clinton address this issue?

Good evening, and let me express my deep honor and pleasure at being here. I want to thank Director General Tokayev and Ms. Wyden along with other ministers, ambassadors, excellencies, and UN partners. This weekend, we will celebrate Human Rights Day, the anniversary of one of the great accomplishments of the last century.

Beginning in 1947, delegates from six continents devoted themselves to drafting a declaration that would enshrine the fundamental rights and freedoms of people everywhere. In the aftermath of World War II, many nations pressed for a statement of this kind to help ensure that we would prevent future atrocities and protect the inherent humanity and dignity of all people. And so the delegates went to work. They discussed, they wrote, they revisited, revised, rewrote, for thousands of hours. And they incorporated suggestions and revisions from governments, organizations, and individuals around the world.

At three o'clock in the morning on December 10th, 1948, after nearly two years of drafting and one last long night of debate, the president of the UN General Assembly called for a vote on the final text. Forty-eight nations voted in favor; eight abstained; none dissented. And the Universal Declaration of Human Rights was adopted. It proclaims a simple, powerful idea: All human beings are born free and equal in dignity and rights.

Hillary Rodham Clinton, "Remarks in Recognition of Human Rights Day," remarks delivered at the Palais des Nations, Geneva, Switzerland, December 6, 2011; full remarks and video available at http://www.state.gov/secretary/rm/2011/12/178368.htm.

And with the declaration, it was made clear that rights are not conferred by government; they are the birthright of all people. It does not matter what country we live in, who our leaders are, or even who we are. Because we are human, we therefore have rights. And because we have rights, governments are bound to protect them.

In the 63 years since the declaration was adopted, many nations have made great progress in making human rights a human reality. Step by step, barriers that once prevented people from enjoying the full measure of liberty, the full experience of dignity, and the full benefits of humanity have fallen away. In many places, racist laws have been repealed, legal and social practices that relegated women to second-class status have been abolished, the ability of religious minorities to practice their faith freely has been secured.

In most cases, this progress was not easily won. People fought and organized and campaigned in public squares and private spaces to change not only laws, but hearts and minds. And thanks to that work of generations, for millions of individuals whose lives were once narrowed by injustice, they are now able to live more freely and to participate more fully in the political, economic, and social lives of their communities.

Now, there is still, as you all know, much more to be done to secure that commitment, that reality, and progress for all people. Today, I want to talk about the work we have left to do to protect one group of people whose human rights are still denied in too many parts of the world today. In many ways, they are an invisible minority. They are arrested, beaten, terrorized, even executed. Many are treated with contempt and violence by their fellow citizens while authorities empowered to protect them look the other way or, too often, even join in the abuse. They are denied opportunities to work and learn, driven from their homes and countries, and forced to suppress or deny who they are to protect themselves from harm.

I am talking about gay, lesbian, bisexual, and transgender people, human beings born free and given bestowed equality and dignity, who have a right to claim that, which is now one of the remaining human rights challenges of our time. I speak about this subject knowing that my own country's record on human rights for gay people is far from perfect. Until 2003, it was still a crime in parts of our country. Many LGBT Americans have endured violence and harassment in their own lives, and for some, including many young people, bullying and exclusion are daily experiences. So we, like all nations, have more work to do to protect human rights at home.

Now, raising this issue, I know, is sensitive for many people and that the obstacles standing in the way of protecting the human rights of LGBT people rest on deeply held personal, political, cultural, and religious beliefs. So I come here before you with respect, understanding, and humility. Even though progress on this front is not easy, we cannot delay acting. So in that spirit, I want to talk about the difficult and important issues we must address together to reach a global consensus that recognizes the human rights of LGBT citizens everywhere.

The first issue goes to the heart of the matter. Some have suggested that gay rights and human rights are separate and distinct; but, in fact, they are one and the same. Now, of course, 60 years ago, the governments that drafted and passed the Universal Declaration of Human Rights were not thinking about how it applied to the LGBT community. They also weren't thinking about how it applied to indigenous people or children or people with disabilities or other marginalized groups. Yet in the past 60 years, we have come to recognize that members of these groups are entitled to the full measure of dignity and rights, because, like all people, they share a common humanity.

This recognition did not occur all at once. It evolved over time. And as it did, we understood that we were honoring rights that people always had, rather than creating new or special rights for them. Like being a woman, like being a racial, religious, tribal, or ethnic minority, being LGBT does not make you less human. And that is why gay rights are human rights, and human rights are gay rights.

It is violation of human rights when people are beaten or killed because of their sexual orientation, or because they do not conform to cultural norms about how men and women should look or behave. It is a violation of human rights when governments declare it illegal to be gay, or allow those who harm gay people to go unpunished. It is a violation of human rights when lesbian or transgendered women are subjected to so-called corrective rape, or forcibly subjected to hormone treatments, or when people are murdered after public calls for violence toward gays, or when they are forced to flee their nations and seek asylum in other lands to save their lives. And it is a violation of human rights when life-saving care is withheld from people because they are gay, or equal access to justice is denied to people because they are gay, or public spaces are out of bounds to people because they are gay. No matter what we look like, where we come from, or who we are, we are all equally entitled to our human rights and dignity.

And with the declaration, it was made clear that rights are not conferred by government; they are the birthright of all people. It does not matter what country we live in, who our leaders are, or even who we are. Because we are human, we therefore have rights. And because we have rights, governments are bound to protect them.

In the 63 years since the declaration was adopted, many nations have made great progress in making human rights a human reality. Step by step, barriers that once prevented people from enjoying the full measure of liberty, the full experience of dignity, and the full benefits of humanity have fallen away. In many places, racist laws have been repealed, legal and social practices that relegated women to second-class status have been abolished, the ability of religious minorities to practice their faith freely has been secured.

In most cases, this progress was not easily won. People fought and organized and campaigned in public squares and private spaces to change not only laws, but hearts and minds. And thanks to that work of generations, for millions of individuals whose lives were once narrowed by injustice, they are now able to live more freely and to participate more fully in the political, economic, and social lives of their communities.

Now, there is still, as you all know, much more to be done to secure that commitment, that reality, and progress for all people. Today, I want to talk about the work we have left to do to protect one group of people whose human rights are still denied in too many parts of the world today. In many ways, they are an invisible minority. They are arrested, beaten, terrorized, even executed. Many are treated with contempt and violence by their fellow citizens while authorities empowered to protect them look the other way or, too often, even join in the abuse. They are denied opportunities to work and learn, driven from their homes and countries, and forced to suppress or deny who they are to protect themselves from harm.

I am talking about gay, lesbian, bisexual, and transgender people, human beings born free and given bestowed equality and dignity, who have a right to claim that, which is now one of the remaining human rights challenges of our time. I speak about this subject knowing that my own country's record on human rights for gay people is far from perfect. Until 2003, it was still a crime in parts of our country. Many LGBT Americans have endured violence and harassment in their own lives, and for some, including many young people, bullying and exclusion are daily experiences. So we, like all nations, have more work to do to protect human rights at home.

Now, raising this issue, I know, is sensitive for many people and that the obstacles standing in the way of protecting the human rights of LGBT people rest on deeply held personal, political, cultural, and religious beliefs. So I come here before you with respect, understanding, and humility. Even though progress on this front is not easy, we cannot delay acting. So in that spirit, I want to talk about the difficult and important issues we must address together to reach a global consensus that recognizes the human rights of LGBT citizens everywhere.

The first issue goes to the heart of the matter. Some have suggested that gay rights and human rights are separate and distinct; but, in fact, they are one and the same. Now, of course, 60 years ago, the governments that drafted and passed the Universal Declaration of Human Rights were not thinking about how it applied to the LGBT community. They also weren't thinking about how it applied to indigenous people or children or people with disabilities or other marginalized groups. Yet in the past 60 years, we have come to recognize that members of these groups are entitled to the full measure of dignity and rights, because, like all people, they share a common humanity.

This recognition did not occur all at once. It evolved over time. And as it did, we understood that we were honoring rights that people always had, rather than creating new or special rights for them. Like being a woman, like being a racial, religious, tribal, or ethnic minority, being LGBT does not make you less human. And that is why gay rights are human rights, and human rights are gay rights.

It is violation of human rights when people are beaten or killed because of their sexual orientation, or because they do not conform to cultural norms about how men and women should look or behave. It is a violation of human rights when governments declare it illegal to be gay, or allow those who harm gay people to go unpunished. It is a violation of human rights when lesbian or transgendered women are subjected to so-called corrective rape, or forcibly subjected to hormone treatments, or when people are murdered after public calls for violence toward gays, o when they are forced to flee their nations and seek asylum in other lands to save their lives. And it is a violation o human rights when life-saving care is withheld from people because they are gay, or equal access to justice is denie to people because they are gay, or public spaces are out of bounds to people because they are gay. No matter what w look like, where we come from, or who we are, we are all equally entitled to our human rights and dignity.

The second issue is a question of whether homosexuality arises from a particular part of the world. Some seem to believe it is a Western phenomenon, and therefore people outside the West have grounds to reject it. Well, in reality, gay people are born into and belong to every society in the world. They are all ages, all races, all faiths; they are doctors and teachers, farmers and bankers, soldiers and athletes; and whether we know it, or whether we acknowledge it, they are our family, our friends, and our neighbors.

Being gay is not a Western invention; it is a human reality. And protecting the human rights of all people, gay or straight, is not something that only Western governments do. South Africa's constitution, written in the aftermath of Apartheid, protects the equality of all citizens, including gay people. In Colombia and Argentina, the rights of gays are also legally protected. In Nepal, the supreme court has ruled that equal rights apply to LGBT citizens. The Government of Mongolia has committed to pursue new legislation that will tackle anti-gay discrimination.

Now, some worry that protecting the human rights of the LGBT community is a luxury that only wealthy nations can afford. But in fact, in all countries, there are costs to not protecting these rights, in both gay and straight lives lost to disease and violence, and the silencing of voices and views that would strengthen communities, in ideas never pursued by entrepreneurs who happen to be gay. Costs are incurred whenever any group is treated as lesser or the other, whether they are women, racial, or religious minorities, or the LGBT. Former President Mogae of Botswana pointed out recently that for as long as LGBT people are kept in the shadows, there cannot be an effective public health program to tackle HIV and AIDS. Well, that holds true for other challenges as well.

The third, and perhaps most challenging, issue arises when people cite religious or cultural values as a reason to violate or not to protect the human rights of LGBT citizens. This is not unlike the justification offered for violent practices towards women like honor killings, widow burning, or female genital mutilation. Some people still defend those practices as part of a cultural tradition. But violence toward women isn't cultural; it's criminal. Likewise with slavery, what was once justified as sanctioned by God is now properly reviled as an unconscionable violation of human rights.

In each of these cases, we came to learn that no practice or tradition trumps the human rights that belong to all of us. And this holds true for inflicting violence on LGBT people, criminalizing their status or behavior, expelling them from their families and communities, or tacitly or explicitly accepting their killing.

Of course, it bears noting that rarely are cultural and religious traditions and teachings actually in conflict with the protection of human rights. Indeed, our religion and our culture are sources of compassion and inspiration toward our fellow human beings. It was not only those who've justified slavery who leaned on religion, it was also those who sought to abolish it. And let us keep in mind that our commitments to protect the freedom of religion and to defend the dignity of LGBT people emanate from a common source. For many of us, religious belief and practice is a vital source of meaning and identity, and fundamental to who we are as people. And likewise, for most of us, the bonds of love and family that we forge are also vital sources of meaning and identity. And caring for others is an expression of what it means to be fully human. It is because the human experience is universal that human rights are universal and cut across all religions and cultures.

The fourth issue is what history teaches us about how we make progress towards rights for all. Progress starts with honest discussion. Now, there are some who say and believe that all gay people are pedophiles, that homosexuality is a disease that can be caught or cured, or that gays recruit others to become gay. Well, these notions are simply not true. They are also unlikely to disappear if those who promote or accept them are dismissed out of hand rather than invited to share their fears and concerns. No one has ever abandoned a belief because he was forced to do so.

Universal human rights include freedom of expression and freedom of belief, even if our words or beliefs denigrate the humanity of others. Yet, while we are each free to believe whatever we choose, we cannot do whatever we choose, not in a world where we protect the human rights of all.

Reaching understanding of these issues takes more than speech. It does take a conversation. In fact, it takes a constellation of conversations in places big and small. And it takes a willingness to see stark differences in belief as a reason to begin the conversation, not to avoid it.

But progress comes from changes in laws. In many places, including my own country, legal protections have preceded, not followed, broader recognition of rights. Laws have a teaching effect. Laws that discriminate vali-

date other kinds of discrimination. Laws that require equal protections reinforce the moral imperative of equality. And practically speaking, it is often the case that laws must change before fears about change dissipate.

Many in my country thought that President Truman was making a grave error when he ordered the racial desegregation of our military. They argued that it would undermine unit cohesion. And it wasn't until he went ahead and did it that we saw how it strengthened our social fabric in ways even the supporters of the policy could not foresee. Likewise, some worried in my country that the repeal of "Don't Ask, Don't Tell" would have a negative effect on our armed forces. Now, the Marine Corps Commandant, who was one of the strongest voices against the repeal, says that his concerns were unfounded and that the Marines have embraced the change.

Finally, progress comes from being willing to walk a mile in someone else's shoes. We need to ask ourselves, "How would it feel if it were a crime to love the person I love? How would it feel to be discriminated against for something about myself that I cannot change?" This challenge applies to all of us as we reflect upon deeply held beliefs, as we work to embrace tolerance and respect for the dignity of all persons, and as we engage humbly with those with whom we disagree in the hope of creating greater understanding.

A fifth and final question is how we do our part to bring the world to embrace human rights for all people including LGBT people. Yes, LGBT people must help lead this effort, as so many of you are. Their knowledge and experiences are invaluable and their courage inspirational. We know the names of brave LGBT activists who have literally given their lives for this cause, and there are many more whose names we will never know. But often those who are denied rights are least empowered to bring about the changes they seek. Acting alone, minorities can never achieve the majorities necessary for political change.

So when any part of humanity is sidelined, the rest of us cannot sit on the sidelines. Every time a barrier to progress has fallen, it has taken a cooperative effort from those on both sides of the barrier. In the fight for women's rights, the support of men remains crucial. The fight for racial equality has relied on contributions from people of all races. Combating Islamaphobia or anti-Semitism is a task for people of all faiths. And the same is true with this struggle for equality.

Conversely, when we see denials and abuses of human rights and fail to act, that sends the message to those deniers and abusers that they won't suffer any consequences for their actions, and so they carry on. But when we do act, we send a powerful moral message. Right here in Geneva, the international community acted this year to strengthen a global consensus around the human rights of LGBT people. At the Human Rights Council in March, 85 countries from all regions supported a statement calling for an end to criminalization and violence against people because of their sexual orientation and gender identity.

At the following session of the Council in June, South Africa took the lead on a resolution about violence against LGBT people. The delegation from South Africa spoke eloquently about their own experience and struggle for human equality and its indivisibility. When the measure passed, it became the first-ever UN resolution recognizing the human rights of gay people worldwide. In the Organization of American States this year, the Inter-American Commission on Human Rights created a unit on the rights of LGBT people, a step toward what we hope will be the creation of a special rapporteur.

Now, we must go further and work here and in every region of the world to galvanize more support for the human rights of the LGBT community. To the leaders of those countries where people are jailed, beaten, or executed for being gay, I ask you to consider this: Leadership, by definition, means being out in front of your people when it is called for. It means standing up for the dignity of all your citizens and persuading your people to do the same. It also means ensuring that all citizens are treated as equals under your laws, because let me be clear – I am not saying that gay people can't or don't commit crimes. They can and they do, just like straight people. And when they do, they should be held accountable, but it should never be a crime to be gay.

And to people of all nations, I say supporting human rights is your responsibility too. The lives of gay people are shaped not only by laws, but by the treatment they receive every day from their families, from their neighbors. Eleanor Roosevelt, who did so much to advance human rights worldwide, said that these rights begin in the small places close to home – the streets where people live, the schools they attend, the factories, farms, and offices where they work. These places are your domain. The actions you take, the ideals that you advocate, can determine whether human rights flourish where you are.

And finally, to LGBT men and women worldwide, let me say this: Wherever you live and whatever the circumstances of your life, whether you are connected to a network of support or feel isolated and vulnerable, please know that you are not alone. People around the globe are working hard to support you and to bring an end to the injustices and dangers you face. That is certainly true for my country. And you have an ally in the United States of America and you have millions of friends among the American people.

The Obama Administration defends the human rights of LGBT people as part of our comprehensive human rights policy and as a priority of our foreign policy. In our embassies, our diplomats are raising concerns about specific cases and laws, and working with a range of partners to strengthen human rights protections for all. In Washington, we have created a task force at the State Department to support and coordinate this work. And in the coming months, we will provide every embassy with a toolkit to help improve their efforts. And we have created a program that offers emergency support to defenders of human rights for LGBT people.

This morning, back in Washington, President Obama put into place the first U.S. Government strategy dedicated to combating human rights abuses against LGBT persons abroad. Building on efforts already underway at the State Department and across the government, the President has directed all U.S. Government agencies engaged overseas to combat the criminalization of LGBT status and conduct, to enhance efforts to protect vulnerable LGBT refugees and asylum seekers, to ensure that our foreign assistance promotes the protection of LGBT rights, to enlist international organizations in the fight against discrimination, and to respond swiftly to abuses against LGBT persons.

I am also pleased to announce that we are launching a new Global Equality Fund that will support the work of civil society organizations working on these issues around the world. This fund will help them record facts so they can target their advocacy, learn how to use the law as a tool, manage their budgets, train their staffs, and forge partnerships with women's organizations and other human rights groups. We have committed more than $3 million to start this fund, and we have hope that others will join us in supporting it.

The women and men who advocate for human rights for the LGBT community in hostile places, some of whom are here today with us, are brave and dedicated, and deserve all the help we can give them. We know the road ahead will not be easy. A great deal of work lies before us. But many of us have seen firsthand how quickly change can come. In our lifetimes, attitudes toward gay people in many places have been transformed. Many people, including myself, have experienced a deepening of our own convictions on this topic over the years, as we have devoted more thought to it, engaged in dialogues and debates, and established personal and professional relationships with people who are gay.

This evolution is evident in many places. To highlight one example, the Delhi High Court decriminalized homosexuality in India two years ago, writing, and I quote, "If there is one tenet that can be said to be an underlying theme of the Indian constitution, it is inclusiveness." There is little doubt in my mind that support for LGBT human rights will continue to climb. Because for many young people, this is simple: All people deserve to be treated with dignity and have their human rights respected, no matter who they are or whom they love.

There is a phrase that people in the United States invoke when urging others to support human rights: "Be on the right side of history." The story of the United States is the story of a nation that has repeatedly grappled with intolerance and inequality. We fought a brutal civil war over slavery. People from coast to coast joined in campaigns to recognize the rights of women, indigenous peoples, racial minorities, children, people with disabilities, immigrants, workers, and on and on. And the march toward equality and justice has continued. Those who advocate for expanding the circle of human rights were and are on the right side of history, and history honors them. Those who tried to constrict human rights were wrong, and history reflects that as well.

I know that the thoughts I've shared today involve questions on which opinions are still evolving. As it has happened so many times before, opinion will converge once again with the truth, the immutable truth, that all persons are created free and equal in dignity and rights. We are called once more to make real the words of the Universal Declaration. Let us answer that call. Let us be on the right side of history, for our people, our nations, and future generations, whose lives will be shaped by the work we do today. I come before you with great hope and confidence that no matter how long the road ahead, we will travel it successfully together. Thank you very much. (Applause.)

The Difference Between Toleration, Acceptance, and Support 339
The Polymorphous Model 339
Diversity and Consensus 339

INTRODUCTION

In the Bronx in 2009, a student went to what he thought was a party one Sunday night, and found instead a trap: he was whipped with a chain, burned, and sodomized with a baseball bat. In Oxnard, California in 2008, a fourteen-year-old boy shot a fifteen-year-old student twice in the back of the head in the middle school's computer lab. In 1998, Matthew Shepard, a student at the University of Wyoming, was brutally tortured and murdered near Laramie. They were all gay.

Violence against gays and lesbians continues to make headlines, at least in the most egregious cases, but violence is not the only issue. Citizens, school principals, legislators, jurists, political leaders, and even generals argue back and forth about a range of issues including gay marriage, violence and discrimination against gays and lesbians, and the military's stance toward its gay and lesbian members. Let's see if we can bring some order to this range of issues.

DEFINING SEXUAL ORIENTATION

The first step in this process is to ask exactly what we are talking about. This actually is more complex than one might originally think.

SEXUAL ORIENTATION AND DICHOTOMOUS THINKING

When we see a baby for the first time, our first question is usually, "Is it a boy or a girl?" Not only do social mores require this, even our language forces us to do so. The classic documentary, "The Pinks and the Blues," shows some of the ways in which this dichotomy is part of the very fabric of our social reality. We think of gender as dichotomous either male or female.

So, too, with sexual orientation. We typically tend to think about sexual orientation as binary: gay or straight. Thus we have two binaries: male/female and gay/straight. Combining the two dichotomies in everyday language, we get four possibilities: gay men, straight men, lesbian women, and straight women. Let's see why this falls short of the mark.

SEX AND GENDER: SOME PRELIMINARY DISTINCTIONS ABOUT LGBT

Typically we now distinguish between sex and gender, taking one to refer to the biological characteristics and the other (gender) to refer to the social roles typically associated with being male or female in a given society. Of course, "sex" also refers to sexual intercourse, but that meaning we can leave aside for the purposes of this discussion.

Sex

Sex, as the set of biological characteristics determining whether someone is male or female, would seem to be obvious and unproblematic. Often this is true, but certainly not always. Even in terms of biological characteristics, there may be several different types of characteristics upon which we can focus, most notably genitalia, hormones, and chromosomes. Even here we have matters of degree. It is probably more accurate to think of biological sexual identity as something stretched out along a continuum, with many clear-cut cases of females on one end and males on the other. But there is also an area in between: *intersexual persons* (previously called hermaphrodites)

that possess both male and female physical characteristics. Thus sex may be better understood on a continuum instead of as a dichotomy, in which male and female are at opposite ends of a continuum and intersexual people comprising a small percentage in the center. An even more accurate way of understanding of the biology would, I think, involve mapping male and female physical characteristics on two independent axes. Intersexual people would thus be high on both axes, most individuals would be high on one or the other axis, and a few would be low on both axes.

Not only is the question of who is male and who is female more complex, so too is the question of sexual orientation. Is sexual orientation a matter of *attraction* or *behavior*? How do we classify, for example, those who engage in same-sex sexual behavior as a matter of convenience when customary opposite sex partners are not available? Or those who are attracted to same-sex individuals but do not act on it? Or those who are attracted to both men and women? (Recent scientific studies seem to confirm that some individuals are genuinely bisexual not only in their behavior, but also in their both physiological arousal feelings and their subjective accounts of those feelings.) In other words, we get at least three categories of sexual orientation, with gradations of strength in each: gay, straight, and bisexual.

We have now covered three of the four letters at the beginning of this section: GLB. Let's turn to the final letter, T: transsexual/transgender. Transsexual individuals are typically persons who have undergone sex reassignment surgery and/or hormone replacement therapy in order to change their sex; transgender persons are individuals who have changed their gender role, which may or may not involve changing gender.

Sex reassignment surgery has been occurring for decades, and is one type of surgery that has become quite controversial. Some infants are born with both male and female external sex characteristics, and it was not uncommon for parents to choose gender-reassignment surgery in order to make the child definitively into either a male or a female. It's quite possible that in some cases, when these children reach adulthood, they might sometimes feel that they were wronged, that their identity had been tampered with in a profound and inappropriate way.

Some individuals change sex as adults after years of feeling that they are simply in the wrong body—or, more precisely, in a body that does not correspond to their subjective sense of their own sexuality. Such a change is a gradual process that involves hormone therapy as well as surgical procedures, and is usually accompanied by an extensive period of talk therapy.

So, "gay" and "straight" just doesn't suffice anymore. We live in a much richer, more complex world than we realized. With the exception of sex reassignment surgery, it's not that *the world* has changed. People presumably have always been this diverse. What has changed is our understanding of the world. Our increasingly nuanced vocabulary allows for two things. First, it allows us to see more clearly and in a more clearly defined way, to see people as they actually are rather than lumping everyone together into two categories. You might see this as analogous to referring to someone as "Thai" rather than "Asian." In those cases where categories are wrong, not just too general, it might be likened to the difference between calling someone "Guatemalan" instead of "South American." Second, this vocabulary gives individuals a public identity that they did not have before. It's as though you lived in a region that was not yet a country, that didn't have a name. Macedonia, for example, used to be part of Yugoslavia. It became independent in 1991 and was recognized by the United Nations in 1993 and by the United States a year later. Previously, a person from Macedonia had to say that he or she was a Yugoslavian; now that individual can say, "I am a Macedonian." Thus, the expansion of vocabulary allows a kind of self-identification that had previously been impossible.

Gender

If sex refers primarily to the biological characteristics of an individual, gender refers to the social construction of that identity as a male or female. In the chapter on gender (Chapter 7), we discussed some of the issues surrounding the construction of gender.

There appear to be interesting parallels between the sex/gender distinction and the race/ethnicity distinction, but this is a conceptually intricate issue. Race, if it refers to anything at all, purports to refer to a biological phenomenon, although we have seen numerous difficulties with that claim. Ethnicity refers to something that,

Sexual Orientation

Sexual orientation is also a mixture of the physical and the social, and it too presents its own set of complexities. What, exactly, do we mean by sexual orientation? Is it physical, psychological, or social—or all three? Is it fixed or can it be changed or chosen? Is it natural? Good or bad? Can individuals be attracted to members of both sexes or only to one sex? Let's now turn to look more closely at these issues.

DETERMINING SEXUAL ORIENTATION

What percentage of the population is gay or lesbian? Such a simple question proves to be very difficult for several reasons. Some of those reasons have to do with how we define sexual orientation, a topic we will consider in the following paragraphs of this section. An additional reason relates to potential distrust of researchers asking questions about sexual orientation. People often feel questions about sexual orientation invade a zone of privacy, and those who are gay or lesbian may have an additional concern that such information could be used for malicious purposes.

How can we decide what a person's sexual orientation is? Indeed, how can people decide what their own sexual orientation is? The straightforward answer is: look at the persons to whom an individual is sexually attracted. If they are the same sex, the person is gay or lesbian; if they are the opposite sex, they are straight or heterosexual. End of story. Almost.

Some people deceive others about their feelings of attraction. Some people even deceive themselves about their own feelings of attraction, especially when there is a social, familial, political, religious stigma attached to having such feelings. People "pass" as having a different, more acceptable sexual orientation.

Is it possible to cut through layers of deceit and self-deception? For over a decade, researchers have been working to find the so-called gay gene but most scientists believe that sexual orientation is not a matter of a single gene. It appears that it is very likely that it has a strong genetic component and is probably a combination of genes and an interaction with other factors as well. So we cannot currently determine sexual orientation through a genetic test. However, it is possible to measure an individual's state of sexual arousal, and this can provide very strong evidence about an individual's sexual orientation. Originally these studies in men involved physiological measures of penile arousal. Increasingly, researchers are using MRI, fMRI (functional MRI, which provide a view of brain activity over a period of time), and PET scans. These allow researchers to observe, among other things, brain activity while a person is being shown sexually explicit materials, etc.

But sexual orientation is not simply a matter of physiological arousal. It is also part of a social identity, and we can easily see ways in which sexual orientation can be constructed. As a society, we can sanction the construction of social identities that make LGBT persons "outsiders" in a variety of ways. For example, we can establish rules that prohibit LGBT persons from participating in certain professions (such as the military) or institutions (such as marriage). Doing so establishes them a priori (in advance) as outsiders, sometimes as outlaws. Their public identity becomes split between a public self and a private, hidden self. They cannot be publicly proud of who they are, of their hidden identity. One of the ethical questions is to ask whether it is morally acceptable to do this. Let's look at the arguments.

THE ETHICAL ISSUES

A number of arguments have been advanced over the decades relating to gay and lesbian issues. Let's begin with one of the issues most frequently raised: homosexuality is unnatural.

WHAT'S NATURAL? SEXUAL ORIENTATION AND THE ARGUMENT FROM NATURE

Although it is advanced in many variations, the argument from nature against homosexuality is clear enough in its general structure:

First premise:	Homosexuality is unnatural.
Second premise:	Whatever is unnatural is evil.
Conclusion	Homosexuality is evil.

Here "homosexuality" refers to both males and females. In its broad sense, it may include both homosexual feelings and tendencies as well as same-sex sexual activity; in its narrow sense, it is confined just to same-sex sexual activity. Thus some religious traditions, for example, have banned homosexual behavior, but not the orientation and feelings that usually accompany such behavior. Let's begin by addressing this issue.

Behavior and Identity

In grappling with the issue of gays and lesbians in their congregations, some churches have advanced what they see as a compromise position. Gays and lesbians are welcome to become part of the church, but they must not participate in same-sex sexual activity. A number of Christian churches have adopted this position in order to avoid completely pushing gays and lesbians out of their ranks. It harkens back to some traditional dictums such as, "Love the sinner, hate the sin," that draw a distinction between the person and the person's actions.

The distinction is sometimes drawn because of an underlying belief that sexual orientation is not a matter of choice and cannot be (completely) changed but that behavior can be regulated. Here the issue, as seen from the perspective of the churches, is how to provide a path to salvation (or church membership, which some take as the same thing) for everyone. If sexual orientation is not a matter of choice, and if a homosexual sexual orientation is not permitted, then those who are gay and lesbian are automatically barred from the church and from salvation. Same-sex sexual behavior, on the other hand, seems to be something that people can choose to engage in or not.

Those who condemn a homosexual sexual orientation (not just behavior) often hold as a corollary that sexual orientation can be changed. Those who advocate this position often see homosexuality as a pathology that can be reversed through intensive therapy.

Guilt and Shame

The distinction between behavior and identity is crucial in another respect. Psychologists often distinguish between guilt and shame. Guilt, they maintain, is centered on particular actions. For example, I might steal a book from a store and subsequently feel guilty about it. I don't, however, constitute my identity around this single act. I don't, in other words, say "I am a thief." Shame, in contrast, is a set of negative feelings about *who you are*, not just about some specific action. It is about identity rather than just behavior. While guilt—if appropriate—can play a very important formative role in the moral life, shame can often be toxic, leading to self-destructive behavior. Insofar as the condemnation of sexual orientation leads to shame, it may be particularly harmful.

There is another dimension to the distinction between guilt and shame that is relevant to the moral life. Typically, there are ways in which we can expiate or wipe away our guilt. For example, if I stole a book, I could return it and make restitution. I could, in other words, do specific things that would erase my guilt and put the whole thing behind me. On the other hand, if I am ashamed of who I am in some way, I can only get rid of that shame by changing who I am. However, if the element of my identity is central to who I am, then change may not be possible or desirable. Thus the guilt/shame distinction depends on the distinction between what is changeable and what is not.

Two Senses of "Unnatural"

The argument from nature needs further clarification. What does it mean to say that something is "unnatural?" There are at least two senses of this term, one of these a scientific concept and the other ultimately religious in its origins. Let's begin with the religious sense.

The Religious Sense of Nature and the Unnatural. In arguments relating to homosexuality, the terms "natural" and "unnatural" often have a theological underpinning, a foundation in a religious view of the world that holds that nature is something created by God, something that incorporates a divine plan, and something that has a final goal that is ordained by God. Thus what is natural is good precisely because it is part of God's plan for the universe and it has been structured by God. (I am leaving aside many important theological details for the sake of clarity here.) With this view of nature, it is to see how the "unnatural" becomes bad or evil. The unnatural is something that goes against God's plan for our lives.

There is an added dimension to this view: God's plan involves orienting sexual intercourse toward a final goal or purpose, the creation of offspring. Thus, within this worldview, human sexual intercourse has as its natural purpose the propagation of the species. Thus unnatural (and thus morally objectionable) acts are any sexual actions that are not oriented toward procreation. Not only is homosexuality condemned, but some forms of sexual behavior engaged in by heterosexual couples are condemned as well. Indeed, in some religions, this extends to a ban on virtually all forms of contraception as well.

Thus within this type of religious worldview, the terms "natural" and "unnatural" are not merely descriptive terms; they are imbued with value, saturated with value judgments about what is good and evil. The natural is good, and the unnatural is bad or evil—and the guarantee for those value judgments is God's creative will. To act unnaturally is to disobey God's will.

The Scientific Concept of Nature and the "Unnatural." In the language of modern science, the terms "natural" and "unnatural" have no value significance attached to them. To say that something is "natural," insofar as scientists would use this vocabulary at all, is simply to express a statistical probability, to say that it occurs frequently. If scientists were to say that something is unnatural, they would simply mean that it doesn't occur frequently. The scientific conception of nature, in other words, contains no implicit value judgments about good and evil. The natural world just is; it is neither good nor evil in itself.

The Fact-Value Distinction and the Naturalistic Fallacy. In the context of the modern scientific view of the world, which has been the framework within which scientific thought has operated for the last several centuries, it is seen as impossible to go from statements of facts (including facts about what is natural) to value judgments (such as concluding that it is wrong to act in a particular way). Attempts to do so, most philosophers claim, commit what is called the *naturalistic fallacy*, that is, drawing a value judgment from a set of purely factual premises.

Defenders of the argument from nature against homosexuality support a different concept of nature than we find in modern science, a value-laden concept in which the natural is seen as good.

Religion, Science, and the Debate about Sexual Orientation. We can see how arguments about homosexuality involve larger disagreements about the meaning of the term "nature," and how this in turn leads to a much wider debate about the relationship between religion and science. We have shown how this is true at the conceptual level, and one can simply turn to the world around us to see how it also plays itself out at the political level. All other things being equal, I suspect that those who are unmoved by the argument from nature tend to turn to science as their authority, while those who advocate this argument tend to turn to religion as their authority. The divide between religion and science is not the only factor in this debate, but it certainly is a highly significant one.

Is Homosexuality Unnatural?

Recognizing the two possible meanings of the term "unnatural," let's now turn to the question of whether homosexuality is unnatural in humans.

Clearly, in the statistical sense, homosexuality is unnatural in the sense that it does not occur nearly as frequently as heterosexuality. But notice two points here. First, this does not carry a value judgment. Second, it applies to the population as a whole, not to individuals.

If we look at each individual as an individual rather than the group as a whole, we may get a different answer. It may be the case that most individuals have a heterosexual orientation, and that some individuals have a homosexual orientation—and that this is what is "natural" for each. Typically, gay and straight individuals tend to describe the developing awareness of their own sexuality is roughly the same way with one exception to be discussed shortly. They become immediately aware of their attraction to one sex or the other. Typically, they do not think about it first, they do not choose it, or anything like that: it is simply there as a structure of their way

of perceiving the world. In other words, in this sense of "natural," it is just as natural for gay people to be attracted to people of the same sex as it is natural for straight people to be attracted to members of the opposite sex. In this sense, both heterosexuality and homosexuality are natural.

Now let me add the proviso to this description. If gays are in an environment that condemns homosexuality, their discovery of their own sexuality is more complicated. There is external pressure not to publicly avow one's gay sexual identity, and then the possibilities for both deception and self-deception emerge. Their sexual identity thus becomes more complicated.

Is the Natural Always Good?

There is another dimension to the argument from nature that is worth considering. It implies that the natural is good and that the unnatural is evil. If we grant the theological underpinning sketched out earlier, this is still a problematic claim.

Consider aggression, violence, rape, and war. Are they natural? When we look at human history, they seem to be disconcertingly constant and pervasive. Does that mean that they are good? Clearly not. We may indeed find that some things that are natural are not necessarily good.

So, too, we can imagine good actions that hardly appear to be natural in any significant sense. Individuals can altruistically sacrifice their lives to help total strangers, but we would hardly label such behavior "natural." So, too, martyrs may give up their lives to avoid betraying their religious convictions or dishonoring their god, but again we would hardly be inclined to call this "natural."

Thus there seems to be significant difficulties with equating the good and the natural and with equating the bad and the unnatural. Let's now turn to ethical issues about discrimination.

Discrimination Against Gays and Lesbians

Discrimination against gays and lesbians differs in several ways from the previous two types of discrimination we have considered: racism and sexism. One of the principal reasons for this is that sexual orientation is generally much less apparent than either race or sex. Because they are less easily identifiable, gays and lesbians are less likely to be subject to certain kinds of discrimination. Homosexuals have not formally been denied voting rights as women and African Americans have been, apparently do not suffer from a lower level of income than their heterosexual counterparts, and have not usually encountered restrictions on their individual right to hold property. In these ways, they are not in need of the same kinds of affirmative action programs that have been defended for racial minorities and women.

Despite these differences that favor gays and lesbians, they are discriminated against in ways that would not be tolerated today if such discrimination were directed against racial minorities or women. Their right to serve openly in the military has only been achieved recently and remains contentious; in many states, they are not permitted to marry one another, with both the emotional and financial costs that such prohibitions incur; they are often discriminated against in child-related matters such as child custody during divorces, adoption, foster parenting, Big Brothers, the Boy Scouts, and the like. Consider, for example, the financial costs of not being permitted to marry. When a husband dies, his estate may pass to his wife without taxes; when a gay person's lif partner dies, transferred assets are heavily taxed.

Moreover, gays and lesbians—and their families—usually experience a very painful process when they beg to let their sexual orientation become public. Again, there is nothing comparable for racial minorities or f women. Announcements of one's race or gender rarely come as surprises to one's family and loved ones in t way that revealing one's sexual orientation often does.

Finally, it is important to realize that some gays and lesbians experience discrimination because of radical character of their beliefs and "lifestyles." Here it is difficult to draw the line, but it would seem tha least part of the criticism and opposition they experience is directed primarily against their radicalness, their gayness.

Let's now turn to a consideration of two specific areas of discrimination—gays and lesbians in the military and homosexual marriage—and the more general issue raised by these particular problems, the issue of protection for gay rights.

Gays and Lesbians in the Military

After he was elected in 1992, President Bill Clinton attempted to lift the ban against homosexuals in the military, replacing it with a "Don't ask, don't tell" policy that many on varying sides of the issue found dissatisfying. He thereby ignited a heated debate about whether open homosexuals should be officially allowed to serve in the armed forces. Various arguments were advanced against lifting the ban, many of which centered around the effect on heterosexual military personnel "unit cohesion" and "combat effectiveness."

In 2011, in a combination of court, legislative and presidential decisions, the "Don't ask, don't tell" ban was lifted, and it became possible for gays and lesbians to serve openly in the United States military. It remains to be seen if this policy will remain in place in future years.

Same-Sex Marriage

Same-sex marriage is now a reality in a number of states. The constitutionality of some sections of DOMA, the Defense of Marriage Act of 1996, that defines marriage as a union between a man and a woman, remains a matter of contention before the courts. In other words, gay marriage is legal in some states, illegal in others, and the position of the federal government in this regard remains undecided.

At the time this book was going to press, the question of same-sex marriage was still an open issue in the courts. Some gay rights supporters have advocated the legalization of gay and lesbian marriages and same-sex marriage has been at least sporadically legally recognized in the United States. Opponents of the legalization of same-sex marriage often draw on religious sources. Many condemn gay and lesbian sexuality in general; others maintain that the traditionally religious meaning of marriage is incompatible with same-sex unions. Advocates of same-sex marriages see it as a matter of equal rights. They point to the many ways in which gays and lesbians have been disadvantaged because they have not been able to marry their partners. This has particularly been a source of anguish for gays since the onset of AIDS, when gays have cared for dying partners but have not been given the recognition of one who has lost a spouse. Some of the obstacles they face include denial of hospital visitation rights, challenges to durable power of attorney by blood-related family, the denial of rights to pass property without taxation, and challenges to the wills of the deceased by blood families. Other gay rights advocates have argued that marriage does not provide the path to liberation that some have claimed.

The question of gay marriage provides us with an opportunity to reflect on the purposes of marriage in general, and on the interests of the state in sanctioning such unions. Certainly one of the principal purposes of marriages is to provide a sustaining environment within which procreation and the raising of children can occur without involvement on the part of the state. In other words, the state clearly has an interest in procreation from generation to generation, and the institution of marriage historically has provided the context within which that happens. Although this has not yet occurred as an issue in the United States, we have seen in a number of Western European countries and in Japan as well a declining birthrate that has alarmed their respective governments. Without positive intervention on the part of the government, leaders worry that the future days of their country are numbered. Indeed, they worry that the final decades of their country may be excruciatingly painful in a country of elderly citizens with few to take care of them. What demographers call the replacement rate is 2.1 children per family. When the birth rate falls below this, the overall population of the country begins to shrink unless there is significant immigration to offset this. In Western Europe, in Denmark, Sweden, and Norway hovers around 1.7; Spain is less than 1.5, and Germany, Austria, and Greece are around 1.4. Japan is 1.2, and Hong Kong is even less than that. Many Western European democracies are now instituting increasingly strong reward

systems in order to encourage people to have children, and this includes much more generous parental leave programs than are found in the United States.

But the procreation and raising of children is neither a necessary nor sufficient condition of marriage. We certainly do not bar heterosexual couples who are unable to bear children from becoming married, nor do we require of heterosexual couples that they procreate. Moreover, in our contemporary world of new assistive reproductive technologies, there are possibilities for procreation that simply were not present in an earlier age. Many gay and lesbian couples want to have and raise children, whether their own biological children or adopted, and this is now increasingly possible in our world.

Historically, the state has had other interests in the institution of marriage as well. In the United States for almost two centuries, it was a principal mechanism for maintaining white supremacy. Most states had laws prohibiting marriage between its white citizens and people of color, although it seemed to show no concern about restricting marriage even more narrowly within the latter category. Interestingly, the justification for such restrictions was often the same one that we have seen in regard to barring gay marriages: they are unnatural. Beginning in the 1970s when California repealed its law restricting the marriage of whites to nonwhites, the United States gradually abolished this as a legitimate purpose of the institution of marriage. The purposes, even the "natural" purposes, of marriage are malleable, subject to historical revision and to moral improvement. In California, the controversy continues with Proposition 8, which restricted valid marriages to those between a man and a woman.

When we look at the history of marriage in the United States and Western Europe, we see that it had other functions as well. Until quite recently, marriage was a patriarchal structure in which the husband was by far the more powerful figure. After all, in the United States equal rights for women did not arrive until decades after equal rights–at least in theory—had been granted to black men. There was a political trade-off in the institution of marriage that can be traced back to the days of kings. Kings granted men a certain sovereignty over their own wives and households, and the political trade-off was that the men consequently became financially responsible for wife and children. Again we can see the way in which the state has an interest in perpetuating the institution of marriage in this kind of context because this removes from the king the burden of responsibility for carrying about the welfare of the wife and children and instead places this responsibility squarely on the shoulders of the "man" of the house.

At this juncture, we see the debate over gay marriage can go in two different directions. On the one hand, advocates of gay marriage have argued that there is nothing intrinsic about gay marriage that makes it unable to assume the same responsibilities and roles of its heterosexual counterpart. This line of argument is most clear in regard to those who defend the institution of marriage, whether gay or straight, as society's best arrangement for having and raising children. On the other hand, others have argued that we ought to look more closely at the functions of marriage and see whether they can be carried out more efficiently by social and economic relationships that are not necessarily tied to marriage at all.

Consider the issue of dependency. In the traditional model of marriage, the woman was dependent upon the man, as were the children. If the man died, then the family lost its "breadwinner." In other words, the family lost its source of financial autonomy. The state's recognition of this vulnerability eventually led to the development of survivor's benefits, that is, benefits paid to the family in recognition of the fact that they had lost their source of income. In the latter part of the twentieth century, when it became more common that a woman might be providing the principal source of income for a family, the legal and economic arrangement began to shift, allowing a survivor's benefits to either the husband or the wife. This was a step forward for gender equality. The next step, advocates of gay marriage argue in this context, should be to provide the same type of financial protection for gay couples that we provide for straight couples. That again would be an example of the first type of approach to this problem, one that extends the application of the traditional institution of marriage to gay couples. The second type of approach, however, would be simply to disentangle the question of economic dependence from marriage entirely and establish a system in which there can be a financial cushion for any people who lost their principal source of financial support. This could include not simply gay or straight couples, but also other [illegible] who live together, perhaps with no sexual dimension to the relationship at all. One could imagine several siste[rs]

for example, living together and taking care of one another, with one as the principal breadwinner. Perhaps another had been the principal caregiver for their mother while she was alive. In a situation such as this, if the principal income earner were to die, then it seems reasonable that the remaining partners would be eligible for some type of survivor's benefit. So, too, we could imagine a couple—whether straight or gay is irrelevant—in which both partners were equal income earners. In a situation such as this where there is no dependency, it may make little sense to have survivor benefits.

Thus the question of gay marriage expands to a question about the nature of marriage itself and the proper role that the government should play in the regulation of marriage.

Models of the Place of Sexual Orientation in Society

When we envision the ideal society as we would like to see it, what place does sexual orientation have in it? Is it a society composed solely of heterosexuals, or at least one in which homosexuals are not tolerated as members in good standing? Is it a society in which gays and lesbians are not discriminated against, but whose presence is also not stressed in any way? Or is it a society in which difference is celebrated and encouraged?

Our picture here is a complex one, because we actually have two separate—and sometimes conflicting—factors at work as individuals develop their own position on this issue. First, there is the issue of the morality of homosexuality, which is part of an individual's overall views on sexual morality. Second, there is the issue of societal rights and governmental protection of those rights. Here the issue is the extent to which government ought to be involved in legislating matters of sexual morality.

Let's consider how both of these factors intersect to form the major positions in this ongoing societal debate.

The Conservative Model

Many conservatives espouse an ideal of society that has no room for gays and lesbians. In some versions, simply being homosexual is enough to eliminate a person from the community. In other versions, gays and lesbians would be allowed to have their sexual orientation, but not to engage in homosexual acts. They would, in other words, be sentenced to a life of involuntary chastity. The stronger version would seek to change the sexual orientation of gays and lesbians to a heterosexual one so that there simply would be no homosexuals.

Defenders of conservative models offer two kinds of arguments. First, some maintain that homosexuality is intrinsically evil, and that therefore it should not be tolerated. Many defenders of this position cite religious sources as the foundation of their belief, whereas others appeal to some version of the "unnaturalness" argument discussed earlier. Second, some conservatives maintain that homosexuality contradicts important social and moral values—such as the value of family life—and should not be tolerated for that reason. Here the focus is not on homosexual *acts*, but on the *values* associated with homosexuals.

Critics of the conservative model offer several replies. First, many defenders of homosexuality argue that it is not unnatural, a point we have already discussed. Second, they point out that even if one believed something was unnatural and thus evil, it doesn't automatically follow that one is in favor of banning it. Many might think smoking cigarettes is bad, but that doesn't mean it should be completely banned. Third, they argue that it is consistent to support certain key social values, such as the value of family life, and yet not require that *everyone* live out that value in the same way. Many religious orders forbid their members from marrying, yet their presence is not seen in society as contradicting the value of family life. Fourth, many gays and lesbians support family life and in many cases would even like to have the option of marriage open to them.

Perhaps the most telling reply to supporters of the conservative model is one that does not address their specific arguments, but rather the plight of individuals who are ostracized from society simply on the basis of who they are. If the traditional model were to prevail, gays and lesbians would be excluded from presenting themselves honestly in society simply because of their sexual orientation, not because of any specific, nonsexual actions or values. Where can these people go? They can either pretend they are straight, and thus gain some acceptance, or stand by their sexual orientation and be excluded from society. They must choose, in other words, between

acceptance through denial of their own identity or exclusion as a result of affirming their sexual identity. A model of society that excludes a significant group in this way seems to be both a cruel and an unjust model.

The Liberal Model

There is no single "liberal" position on the issue of gay and lesbian rights. However, there are two principal currents in the liberal tradition that discourage discrimination against homosexuals: the emphasis on individual autonomy and the importance of the right to privacy.

Autonomy Arguments

Liberals characteristically believe that individual liberty is a very high priority and consequently many hold that individuals should be free to have and express whatever sexual orientation they wish. In some versions of liberalism, this right is virtually absolute, limited only in those instances when its exercise infringes on someone else's autonomy, whereas other versions of liberalism believe that such rights may be restricted for other reasons as well.

Privacy Arguments

Many liberals place a high value on the right to privacy and see a person's sexual orientation as protected from public scrutiny by that right to privacy. A person's sexual orientation, they argue, is no one else's business, especially not the government's business. Privacy arguments are particularly important in regard to the issue of whether the state may forbid certain kinds of sexual acts between consenting adults in private.

The Difference between Toleration, Acceptance, and Support

Liberal positions differ in the degree to which they are supportive of LGBT rights. We can distinguish three levels here.

- *Tolerance:* Gays and lesbians should not be discriminated against, but they also should not be encouraged. The "don't ask, don't tell" policy of the military may fall into this category, although many gays and lesbians see it as less than tolerant. Also in this category are people who believe homosexuality is bad but who also believe sexual morality shouldn't be legislated. Supporters of this position would be in favor of abolishing laws that forbid homosexual acts between consenting adults in private.
- *Acceptance:* Gays and lesbians should be allowed to express their sexual orientation openly to the same extent that heterosexuals are allowed to express their sexual orientation openly and should not be discriminated against because of it. This would include support for legal protection against discrimination based on sexual orientation.
- *Endorsement:* Gay and lesbian sexual orientation and lifestyles should be presented as an option that is as valid and valuable as heterosexual orientation and lifestyles. This may include presenting gay and lesbian families as models in public school curricula, legally sanctioning gay marriages, and so on.

Within the liberal tradition, there is a wide variation in the level of support for gay and lesbian rights.

The Polymorphous Model

Finally, some in our society—and this includes some heterosexuals and some homosexuals—see sexuality as centered purely around pleasure, and they see no necessary link between sexuality and either procreation or intimacy. Whatever brings pleasure is good and pleasure may come in many forms—that is, it may be polymorphus. Advocates of this view of sexuality hold that people should be allowed to engage in whatever kind of sexual activity they want and with whomever they want.

Diversity and Consensus

Although there is relatively little common ground between the most extreme positions on this issue, there is the possibility of some reasonable consensus in the following way.

It seems reasonable that we, as a society, may want to encourage certain fundamental moral values in society. Although such encouragement need not take the form of legislating morality (in the sense of attempting to force people to hold particular moral values through legislative fiat), and although it need not deny individual freedom or the right to privacy (we can discourage something without outlawing it), we may indeed decide to encourage certain values (such as honesty, long-lasting commitment, monogamy, etc.) in our society as a whole, including both heterosexuals and homosexuals. We may further want to discourage certain values and their associated behaviors (such as treating people merely as sexual objects, anonymous sex, etc.), again for everyone, regardless of sexual orientation. The focus, in other words, for finding common ground is not on sexual orientation, but on values.

We can see how this could be applied to issues such as homosexuals in the military and to gay and lesbian marriages. Traditionally, the military has stood for certain values—patriotism, loyalty to one's unit, discipline, and so on—that could be affirmed for both homosexuals and heterosexuals. Indeed, this is in fact almost exactly the situation we have seen for decades (if not centuries). The gays and lesbians in the military have been committed first and foremost to military values, and have often served with great distinction. The only difference would be to allow them to acknowledge their sexual orientation while still retaining their commitment to the values of the military.

A similar approach can be taken to the question of gay and lesbian marriages. It seems reasonable that society as a whole would want to encourage certain values such as commitment, individual caring, intimacy, and the like. Insofar as marriage is one of the institutions that helps support these values, extending this to include gays and lesbians would seem reasonable, for it gives them the opportunity to participate in a highly important societal institution.

THE ARGUMENTS

MARTHA NUSSBAUM

READING

"A Right to Marry? Same-sex Marriage and Constitutional Law"

About the Author: Martha Nussbaum is the Ernst Freund Professor of Law and Ethics at the University of Chicago, holding appointments in the Law School, Philosophy Department, Divinity School, and Classics. She is the author of numerous books and articles in philosophy, including *The Fragility of Goodness, The Therapy of Desire, For Love of Country, Cultivating Humanity,* and *Sex and Social Justice*.

About the Article: Nussbaum examines the issue of same-sex marriage, placing it within the wider context of the institution of marriage in general and in the context of the United States Constitution in particular and examining the historical transformations of marriage in various cultures.

This essay is adapted from herbook *From Disgust to Humanity: Sexual Orientation and the Constitution* (Oxford, 2010). It was written before the California ruling on Prop 8 and published in *Dissent Magazine* in the summer of 2009. For online replies by Martha Ackelsberg, Stephanie Coontz, and Katha Pollitt, see http://dissentmagazine.org/online.php?id=266.

As You Read, Consider This:

1. Nussbaum distinguishes three aspects of marriage. What are these three aspects? How do they play in the development of her argument?
2. What does Nussbaum mean by the "expressive dimension of marriage?" What role does this concept play in her analysis? (*Hint:* She returns to this concept at the end of the section on "What is the Right to Marry?'")

Martha Nussbaum, "A Right to Marry? Same-Sex Marriage and Constitutional Law." *Dissent Magazine*—Summer 2009 Issue, pp. 1-22. Copyright © 2009. Reprinted by permission of The University of Pennsylvania Press.

3. What does Nussbaum mean by her claim that monogamy "rested on the disenfranchisement of women?"
4. Nussbaum considers four arguments against same-sex marriage. What are these four arguments? What are Nussbaum's replies to each?
5. What reasons does Nussbaum give for maintaining that civil unions are "a kind of second-class status?"

Marriage is both ubiquitous and central. All across our country, in every region, every social class, every race and ethnicity, every religion or non-religion, people get married. For many if not most people, moreover, marriage is not a trivial matter. It is a key to the pursuit of happiness, something people aspire to—and keep aspiring to, again and again, even when their experience has been far from happy. To be told "You cannot get married" is thus to be excluded from one of the defining rituals of the American life cycle.

The keys to the kingdom of the married might have been held only by private citizens—religious bodies and their leaders, families, other parts of civil society. So it has been in many societies throughout history. In the United States, however, as in most modern nations, government holds those keys. Even if people have been married by their church or religious group, they are not married in the sense that really counts for social and political purposes unless they have been granted a marriage license by the state. Unlike private actors, however, the state doesn't have complete freedom to decide who may and may not marry. The state's involvement raises fundamental issues about equality of political and civic standing.

Same-sex marriage is currently one of the most divisive political issues in our nation. In November 2008, Californians passed Proposition 8, a referendum that removed the right to marry from same-sex couples who had been granted that right by the courts. This result has been seen by the same-sex community as deeply degrading. More recently, Iowa and Vermont have legalized same-sex marriage, the former through judicial interpretation of the state constitution, the latter through legislation. Analyzing this issue will help us understand what is happening in our country, and where we might go from here.

Before we approach the issue of same-sex marriage, we must define marriage. But marriage, it soon becomes evident, is no single thing. It is plural in both content and meaning. The institution of marriage houses and supports several distinct aspects of human life: sexual relations, friendship and companionship, love, conversation, procreation and child-rearing, mutual responsibility.

Marriages can exist without each of these. (We have always granted marriage licenses to sterile people, people too old to have children, irresponsible people, and people incapable of love and friendship. Impotence, lack of interest in sex, and refusal to allow intercourse may count as grounds for divorce, but they don't preclude marriage.) Marriages can exist even in cases where none of these is present, though such marriages are probably unhappy. Each of these important aspects of human life, in turn, can exist outside of marriage, and they can even exist all together outside of marriage, as is evident from the fact that many unmarried couples live lives of intimacy, friendship, and mutual responsibility, and have and raise children. Nonetheless, when people ask themselves what the content of marriage is, they typically think of this cluster of things.

Nor is the meaning of marriage single. Marriage has, first, a civil rights aspect. Married people get a lot of government benefits that the unmarried usually do not get: favorable treatment in tax, inheritance, and insurance status; immigration rights; rights in adoption and custody; decisional and visitation rights in health care and burial; the spousal privilege exemption when giving testimony in court; and yet others.

Marriage has, second, an expressive aspect. When people get married, they typically make a statement of love and commitment in front of witnesses. Most people who get married view that statement as a very important part of their lives. Being able to make it, and to make it freely (not under duress) is taken to be definitive of adult human freedom. The statement made by the marrying couple is usually seen as involving an answering statement on the part of society: we declare our love and commitment, and society, in response, recognizes and dignifies that commitment.

Marriage has, finally, a religious aspect. For many people, a marriage is not complete unless it has been solemnized by the relevant authorities in their religion, according to the rules of the religion.

Government plays a key role in all three aspects of marriage. It confers and administers benefits. It seems, at least, to operate as an agent of recognition or the granting of dignity. And it forms alliances with religious

bodies. Clergy are always among those entitled to perform legally binding marriages. Religions may refuse to marry people who are eligible for state marriage and they may also agree to marry people who are ineligible for state marriage. But much of the officially sanctioned marrying currently done in the United States is done on religious premises by religious personnel. What they are solemnizing (when there is a license granted by the state) is, however, not only a religious ritual, but also a public rite of passage, the entry into a privileged civic status.

To get this privileged treatment under law people do not have to show that they are good people. Convicted felons, divorced parents who fail to pay child support, people with a record of domestic violence or emotional abuse, delinquent taxpayers, drug abusers, rapists, murderers, racists, anti-Semites, other bigots, all can marry if they choose, and indeed are held to have a fundamental constitutional right to do so—so long as they want to marry someone of the opposite sex. Although some religions urge premarital counseling and refuse to marry people who seem ill-prepared for marriage, the state does not turn such people away. The most casual whim may become a marriage with no impediment but for the time it takes to get a license. Nor do people even have to lead a sexual lifestyle of the type the majority prefers in order to get married. Pedophiles, sadists, masochists, sodomites, transsexuals—all can get married by the state, so long as they marry someone of the opposite sex.

Given all this, it seems odd to suggest that in marrying people the state affirmatively expresses its approval or confers dignity. There is indeed something odd about the mixture of casualness and solemnity with which the state behaves as a marrying agent. Nonetheless, it seems to most people that the state, by giving a marriage license, expresses approval, and, by withholding it, disapproval.

WHAT IS the same-sex marriage debate about? It is not about whether same-sex relationships can involve the content of marriage: few would deny that gays and lesbians are capable of friendship, intimacy, "meet and happy conversation," and mutual responsibility, nor that they can have and raise children (whether their own from a previous marriage, children created within their relationship by surrogacy or artificial insemination, or adopted children). Certainly none would deny that gays and lesbians are capable of sexual intimacy.

Nor is the debate, at least currently, about the civil aspects of marriage: we are moving toward a consensus that same-sex couples and opposite-sex couples ought to enjoy equal civil rights. The leaders of both major political parties appeared to endorse this position during the 2008 presidential campaign, although only a handful of states have legalized civil unions with material privileges equivalent to those of marriage.

Finally, the debate is not about the religious aspects of marriage. Most of the major religions have their own internal debates, frequently heated, over the status of same-sex unions. Some denominations—Unitarian Universalism, the United Church of Christ, and Reform and Conservative Judaism—have endorsed marriage for same-sex couples. Others have taken a friendly position toward these unions. Mainline Protestant denominations are divided on the issue, although some have taken negative positions. American Roman Catholics, both lay and clergy, are divided, although the church hierarchy is strongly opposed. Still other denominations and religions (Southern Baptists, the Church of Jesus Christ of Latter-day Saints) seem to be strongly opposed collectively. There is no single "religious" position on these unions in America today, but the heat of those debates is, typically, denominational; heat does not spill over into the public realm. Under any state of the law, religions would be free to marry or not marry same-sex couples.

The public debate, instead, is primarily about the expressive aspects of marriage. It is here that the difference between civil unions and marriage resides, and it is this aspect that is at issue when same-sex couples see the compromise offer of civil unions as stigmatizing and degrading.

The expressive dimension of marriage raises several distinct questions. First, assuming that granting a marriage license expresses a type of public approval, should the state be in the business of expressing favor for, or dignifying, some unions rather than others? Are there any good public reasons for the state to be in the marriage business at all, rather than the civil union business? Second, if there are good reasons, what are the arguments for and against admitting same-sex couples to that status, and how should we think about them?

MYTH OF THE GOLDEN AGE

WHEN PEOPLE talk about the institution of marriage, they often wax nostalgic. They think, and often say, that until very recently marriage was a lifelong commitment by one man and one woman, sanctified by God and the

state, for the purposes of companionship and the rearing of children. People lived by those rules and were happy. Typical, if somewhat rhetorical, is this statement by Senator Robert Byrd of West Virginia during the debates over the "Defense of Marriage" Act:

> Mr. President, throughout the annals of human experience, in dozens of civilizations and cultures of varying value systems, humanity has discovered that the permanent relationship between men and women is a keystone to the stability, strength, and health of human society—a relationship worthy of legal recognition and judicial protection

We used to live in that golden age of marital purity. Now, the story goes, things are falling apart. Divorce is ubiquitous. Children are growing up without sufficient guidance, support, and love, as adults live for selfish pleasure alone. We need to come to our senses and return to the rules that used to make us all happy.

Like most Golden Age myths, this one contains a core of truth: commitment and responsibility are under strain in our culture, and too many children are indeed growing up without enough economic or emotional support. We can't think well about how to solve this problem, however, unless we first recognize the flaws in the mythic depiction of our own past. Like all fantasies of purity, this one masks a reality that is far more varied and complex.

To begin with, Byrd's idea that lifelong monogamous marriage has been the norm throughout human history is just mistaken. Many societies have embraced various forms of polygamy, informal or common-law marriage, and sequential monogamy. People who base their ethical norms on the Bible too rarely take note of the fact that the society depicted in the Old Testament is polygamous.

In many other ancient societies, and some modern ones, sex outside marriage was, or is, a routine matter: in ancient Greece, for example, married men routinely had socially approved sexual relationships with prostitutes (male and female) and, with numerous restrictions, younger male citizens. One reason for this custom was that women were secluded and uneducated, thus not able to share a man's political and intellectual aspirations. If we turn to republican Rome, a society more like our own in basing marriage on an ideal of love and companionship, we find that this very ideal gave rise to widespread divorce, as both women and men sought a partner with whom they could be happy and share a common life. We hardly find a major Roman figure, male or female, who did not marry at least twice. Moreover, Roman marriages were typically not monogamous, at least on the side of the male, who was expected to have sexual relations with both males and females of lower status (slaves, prostitutes). Even if wives at times protested, they understood the practice as typical and ubiquitous. These Romans are often admired (and rightly so, I think) as good citizens, people who believed in civic virtue and tried hard to run a government based on that commitment. Certainly for the founders of the United States the Roman Republic was a key source of both political norms and personal heroes. And yet these heroes did not live in a marital Eden.

In fact, there is no better antidote to the myth of marital purity than to read Cicero's account of the unhappy marriage of his brother Quintus to Pomponia Attica, the sister of his best friend, Atticus. Through his narrative (however biased in his brother's favor) we get a glimpse of something so familiar that it is difficult to believe it all happened around 50 B.C.E. Cicero is out in the country, on one of his estates, and his brother has (it seems) dragged his unwilling wife away from the city to spend a week on the farm—with a brother-in-law who doesn't like her and who, despite his undoubted greatness, is more than a little self-obsessed:

> When we arrived there Quintus said in the kindest way, "Pomponia, will you ask the women in . . .?" Both what he said and his intention and manner were perfectly pleasant, at least it seemed so to me. Pomponia however answered in our hearing, "I am a guest here myself." . . . Quintus said to me, "There! This is the sort of thing I have to put up with every day." . . . I myself was quite shocked. Her words and manner were so gratuitously rude. [They all go in to lunch, except for Pomponia, who goes straight to her room; Quintus has some food sent up to her, which she refuses.] In a word, I felt my brother could not have been more forbearing nor your sister ruder . . . [The following day, Quintus has a talk with his brother.] He told me that Pomponia had refused to sleep with him, and that her attitude when he left the house was just as I had seen it the day before. Well, you can tell her for me that her whole conduct was lacking in sympathy.

The marriage lasted six more unhappy years and then ended in divorce. The shock of seeing our own face in the mirror of Cicero's intimate narrative reminds us that human beings always have a hard time sustaining love and even friendship; that bad temper, incompatibility, and divergent desires are no invention of the sexual revolution. Certainly they are not caused by the recognition of same-sex marriage. We've always lived in a postlapsarian world.

The rise of divorce in the modern era, moreover, was spurred not by a hatred of marriage but, far more, by a high conception of what marriage ought to be. It's not just that people began to think that women had a right to divorce on grounds of bodily cruelty, and that divorce of that sort was a good thing. It's also that

Christians began insisting—just like those ancient Romans—that marriage was about much more than procreation and sexual relations. John Milton's famous defense of divorce on grounds of incompatibility emphasizes "meet and happy conversation" as the central goal of marriage and notes that marriage ought to fulfill not simply bodily drives but also the "intellectual and innocent desire" that leads people to want to talk a lot to each other. People are entitled to demand this from their marriages, he argues, and entitled to divorce if they do not find it. If we adopt Milton's view, we should not see divorce as expressing (necessarily) a falling away from high moral ideals but rather an unwillingness to put up with a relationship that does not fulfill, or at least seriously pursue, high ideals.

In our own nation, as historians of marriage emphasize, a social norm of monogamous marriage was salient, from colonial times onward. The norm, however, like most norms in all times and places, was not the same as the reality. Studying the reality of marital discord and separation is very difficult, because many if not most broken marriages were not formally terminated by divorce. Given that divorce, until rather recently, was hard to obtain, and given that America offered so much space for relocation and the reinvention of self, many individuals, both male and female, simply moved away and started life somewhere else. A man who showed up with a "wife" in tow was not likely to encounter a background check to find out whether he had ever been legally divorced from a former spouse. A woman who arrived calling herself "the Widow Jones" would not be asked to show her husband's death certificate before she could form a new relationship and marry. The cases of separation that did end up in court were the tip of a vast, uncharted iceberg. If, as historian Hendrik Hartog concludes about the nineteenth century, "Marital mobility marked American legal and constitutional life," it marked, far more, the daily lives of Americans who did not litigate their separations.

Insofar as monogamy was reality, we should never forget that it rested on the disenfranchisement of women. Indeed, the rise of divorce in recent years is probably connected to women's social and political empowerment more than to any other factor. When women had no rights, no marketable skills, and hence no exit options, they often had to put up with bad marriages, with adultery, neglect, even with domestic violence. When women are able to leave, they demand a better deal. This simple economic explanation for the rise of divorce—combined with Milton's emphasis on people's need for emotional attunement and conversation—is much more powerful than the idea of a fall from ethical purity in explaining how we've moved from where we were to where we are today. But if such factors are salient, denial of marriage to same-sex couples is hardly the way to address them.

Throughout the nineteenth and early twentieth centuries, a distinctive feature of American marriage was the strategic use of federalism. Marriage laws have always been state laws (despite recurrent attempts to legislate national law of marriage and divorce). But states in the United States have typically used that power to compete with one another, and marriage quickly became a scene of competition. Long before Nevada became mous as a divorce haven, with its short residency requirement, other states assumed that role. For quite a etch of time, Indiana (surprisingly) was the divorce haven for couples fleeing the strict requirements of states h as New York (one of the strictest until a few decades ago) and Wisconsin. The reasons why a state liberal- its laws were complex, but at least some of them were economic: while couples lived out the residenc irement, they would spend money in the state. In short, as Hartog points out, marriage laws "became publi ages of goods and services that competed against the public goods of other jurisdictions for the loyalty an x dollars of a mobile citizenry."

What we're seeing today, as five states (Massachusetts, Connecticut, Iowa, Vermont, and, briefly, California) have legalized same-sex marriage, as others (California, and Vermont and Connecticut before their legalization of same-sex marriage) have offered civil unions with marriage-like benefits, and yet others (New York) have announced that, although they will not perform same-sex marriages themselves, they will recognize those legally contracted in other jurisdictions, is the same sort of competitive process—with, however, one important difference. The federal Defense of Marriage Act has made it clear that states need not give legal recognition to marriages legally contracted elsewhere. That was not the case with competing divorce regimes: once legally divorced in any other U. S. state, the parties were considered divorced in their own.

But the non-recognition faced by same-sex couples does have a major historical precedent. States that had laws against miscegenation refused to recognize marriages between blacks and whites legally contracted elsewhere, and even criminalized those marriages. The Supreme Court case that overturned the anti-miscegenation laws, *Loving v. Virginia*, focused on this issue. Mildred Jeter (African American) and Richard Loving (white) got married in Washington, D. C., in 1958. Their marriage was not recognized as legal in their home state of Virginia. When they returned, there they were arrested in the middle of the night in their own bedroom. Their marriage certificate was hanging on the wall over their bed. The state prosecuted them, because interracial marriage was a felony in Virginia, and they were convicted. The judge then told them either to leave the state for twenty-five years or to spend one year in jail. They left, but began the litigation that led to the landmark 1967 decision.

In 2007, on the fortieth anniversary of that decision, Jeter Loving issued a rare public statement, saying that she saw the struggle she and her late husband waged as similar to the struggle of same-sex couples today:

> My generation was bitterly divided over something that should have been so clear and right. The majority believed . . . that it was God's plan to keep people apart, and that government should discriminate against people in love. But . . . [t]he older generation's fears and prejudices have given way, and today's young people realize that if someone loves someone they have a right to marry. Surrounded as I am now by wonderful children and grandchildren, not a day goes by that I don't think of Richard and our love, our right to marry, and how much it meant to me to have that freedom to marry the person precious to me, even if others thought he was the "wrong kind of person" for me to marry. I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry.

The politics of humanity seems to require us to agree with her. Let's consider, however, the arguments on the other side.

Panic over Same-Sex Marriage

AS WE do that, we need to keep two questions firmly in mind. First, does each argument really justify legal restriction of same-sex marriage or only some peoples' attitudes of moral and religious disapproval? We live in a country in which people have a wide range of different religious beliefs, and we agree in respecting the space within which people pursue those beliefs. We do not, however, agree that these beliefs, by themselves, are sufficient grounds for legal regulation. Typically, we understand that some beliefs (including some but not all mora commitments) can generate public arguments that bear on the lives of all citizens in a decent society, while oth ers generate only intra-religious arguments. Thus, observant Jews abhor the eating of pork, but few if any woul think that this religiously grounded abhorrence is a reason to make the eating of pork illegal. The prohibitio rests on religious texts that not all citizens embrace, and it cannot be translated into a public argument th people of all religions can accept. Similarly in this case, we must ask whether the arguments against same-s marriage are expressed in a neutral and sharable language or only in a sectarian doctrinal language. If the arg ments are moral rather than doctrinal, they fare better, but we still have to ask whether they are compatible wi core values of a society dedicated to giving all citizens the equal protection of the laws. Many legal aspects of o history of racial and gender-based discrimination were defended by secular moral arguments, but that did r insulate them from constitutional scrutiny.

Second, we must ask whether each argument justifies its conclusion or whether there is reason to see argument as a rationalization of some deeper sort of anxiety or aversion.

The first and most widespread objection to same-sex marriage is that it is immoral and unnatural. Such arguments were widespread in the anti-miscegenation debate, and, in both cases, these arguments are typically made in a sectarian and doctrinal way, referring to religious texts. (Anti-miscegenation judges, for example, referred to the will of God in arguing that racial mixing is unnatural.) It is difficult to cast such arguments in a form that could be accepted by citizens whose religion teaches something different. They look like Jewish arguments against the eating of pork: good reasons for members of some religions not to engage in same-sex marriage, but not sufficient reasons for making them illegal in a pluralistic society.

A second objection, and perhaps the one that is most often heard from thoughtful people, insists that the main purpose of state-sanctified marriage is procreation and the rearing of children. Protecting an institution that serves these purposes is a legitimate public interest, and so there is a legitimate public interest in supporting potentially procreative marriages. Does this mean there is also a public interest in restricting marriage to only those cases where there may be procreation? This is less clear. We should all agree that the procreation, protection, and safe rearing of children are important public purposes. It is not clear, however, that we have ever thought these important purposes best served by restricting marriage to the potentially procreative. If we ever did think like this, we certainly haven't done anything about it. We have never limited marriage to the fertile or even to those of an age to be fertile. It is very difficult, in terms of the state's interest in procreation, to explain why the marriage of two heterosexual seventy-year-olds should be permitted and the marriage of two men or two women should be forbidden—all the more because so many same-sex couples have and raise children.

As it stands, the procreation argument looks two-faced, approving in heterosexuals what it refuses to tolerate in same-sex couples. If the arguer should add that sterile heterosexual marriages somehow support the efforts of the procreative, we can reply that gay and lesbian couples who don't have or raise children may support, similarly, the work of procreative couples.

Sometimes this argument is put a little differently: marriage is about the protection of children, and we know that children do best in a home with one father and one mother, so there is a legitimate public interest in supporting an institution that fulfills this purpose. Put this way, the argument, again, offers a legitimate public reason to favor and support heterosexual marriage, though it is less clear why it gives a reason to restrict same-sex marriage (and marriages of those too old to have children or not desiring children). Its main problem, however, is with the facts. Again and again, psychological studies have shown that children do best when they have love and support, and it appears that two-parent households do better at that job than single-parent households. There is no evidence, however, that opposite-sex couples do better than same-sex couples. There is a widespread feeling that these results can't be right, that living in an "immoral" atmosphere must be bad for the child. But that feeling rests on the religious judgments of the first argument; when the well-being of children is assessed in a religiously neutral way, there is no difference

A third argument is that if same-sex marriage receives state approval, people who believe it to be evil will be forced to "bless" or approve of it, thus violating their conscience. This argument was recently made in an influential way by Charles Fried in *Modern Liberty and the Limits of Government*. Fried, who supports an end to sodomy laws and expresses considerable sympathy with same-sex couples, still thinks that marriage goes too far because of this idea of enforced approval.

What, precisely, is the argument here? Fried does not suggest that the recognition of same-sex marriage would violate the Free Exercise clause of the First Amendment—and that would be an implausible position to take. Presumably, the position is that the state has a legitimate interest in banning same-sex marriage on the grounds that it offends many religious believers.

This argument contains many difficulties. First, it raises an Establishment Clause problem: for, as we've seen, religions vary greatly in their attitude to same-sex marriage, and the state, following this argument, would be siding with one group of believers against another. More generally, there are a lot of things that a modern state does that people deeply dislike, often on religious grounds. Public education teaches things that many religious parents abhor (such as evolution and the equality of women); parents often choose home schooling for that reason. Public health regulations license butchers who cut up pigs for human consumption; Jews don't want to be associated with this practice. But nobody believes that Jews have a right to ask the state to impose their reli-

giously grounded preference on all citizens. The Old Order Amish don't want their children to attend public school past age fourteen, holding that such schooling is destructive of community. The state respects that choice—for Amish children; and the state even allows Amish children to be exempt from some generally applicable laws for reasons of religion. But nobody would think that the Amish have a right to expect the state to make public schooling past age fourteen off-limits for all children. Part of life within a pluralistic society that values the non-establishment of religion is an attitude of live and let live. Whenever we see a nation that does allow the imposition of religiously grounded preferences on all citizens—as with some Israeli laws limiting activity on the Sabbath, and as with laws in India banning cow slaughter—we see a nation with a religious establishment, de jure or de facto. We have chosen not to take that route, and for good reasons. To the extent that we choose workdays and holidays that coincide with the preferences of a religious majority, we bend over backward to be sensitive to the difficulties this may create for minorities.

A fourth argument, again appealing to a legitimate public purpose, focuses on the difficulties that traditional marriage seems to be facing in our society. Pointing to rising divorce rates and evidence that children are being damaged by lack of parental support, people say that we need to defend traditional marriage, not undermine it by opening the institution to those who don't have any concern for its traditional purposes. We could begin by contesting the characterization of same-sex couples. In large numbers, they do have and raise children. Marriage, for them as for others parents, provides a clear framework of entitlements and responsibilities, as well as security, legitimacy, and social standing for their children. In fact, the states that have legalized same-sex marriage, Massachusetts, Connecticut, Iowa, and Vermont, have among the lowest divorce rates in the nation, and the Massachusetts evidence shows that the rate has not risen as a result of the legalization. In the European countries that have legalized same-sex marriage, divorce rates appear to be roughly the same as among heterosexual couples.

We might also pause, for reasons I have already given, before granting that an increase in the divorce rate signals social degeneration. But let us concede, for the sake of argument, that there is a social problem. What, then, about the claim that legalizing same-sex marriage would undermine the effort to defend or protect traditional marriage? If society really wants to defend traditional marriage, as it surely is entitled to do and probably ought to do, many policies suggest themselves: family and medical leave; drug and alcohol counseling on demand; generous support for marital counseling and mental health treatment; strengthening laws against domestic violence and enforcing them better; employment counseling and financial support for those under stress during the present economic crisis; and, of course, tighter enforcement of child-support laws. Such measures have a clear relationship to the stresses and strains facing traditional marriage. The prohibition of same-sex marriage does not. If we were to study heterosexual divorce, we would be unlikely to find even a single case in which the parties felt that their divorce was caused by the availability of marriage to same-sex couples.

The objector at this point typically makes a further move. The very recognition of same-sex marriage on a par with traditional marriage demeans traditional marriage, makes it less valuable. What's being said, it seems, is something like this: if the Metropolitan Opera auditions started giving prizes to pop singers of the sort who sing on American Idol, this would contaminate the opera world. Similarly, including in the Hall of Fame baseball players who got their records by cheating on the drug rules would contaminate the Hall of Fame, cheapening the real achievements of others. In general, the promiscuous recognition of low-level or non-serious contenders for an honor sullies the honor. This, I believe, is the sort of argument people are making when they assert that recognition of same-sex marriage defiles traditional marriage, when they talk about a "defense of marriage," and so forth. How should we evaluate this argument?

First of all, we may challenge it on the facts. Same-sex couples are not like B-grade singers or cheating athletes—or at least no more so than heterosexual couples. They want to get married for reasons very similar to those of heterosexuals: to express love and commitment, to gain religious sanctification for their union, to obtain a package of civil benefits—and, often, to have or raise children. Traditional marriage has its share of creeps, and there are same-sex creeps as well. But the existence of creeps among the heterosexuals has never stopped the state from marrying heterosexuals. Nor do people talk or think that way. I've never heard anyone say that the state's willingness to marry Britney Spears or O. J. Simpson demeans or sullies their own marriage. But somehow, without even knowing anything about the character or intentions of the same-sex couple next door, they think their own marriages would be sullied by public recognition of that union.

If the proposal were to restrict marriage to worthy people who have passed a character test, it would at least be consistent, though few would support such an intrusive regime. What is clear is that those who make the argument don't fret about the way in which unworthy or immoral heterosexuals could sully the institution of marriage or lower its value. Given that they don't worry about this, and given that they don't want to allow marriage for gays and lesbians who have proven their good character, it is difficult to take this argument at face value. The idea that same-sex unions will sully traditional marriage cannot be understood without moving to the terrain of disgust and contamination. The only distinction between unworthy heterosexuals and the class of gays and lesbians that can possibly explain the difference in people's reaction is that the sex acts of the former do not disgust the majority, whereas the sex acts of the latter do. The thought must be that to associate traditional marriage with the sex acts of same-sex couples is to defile or contaminate it, in much the way that eating food served by a *dalit*, (formerly called "untouchable,") used to be taken by many people in India to contaminate the high-caste body. Nothing short of a primitive idea of stigma and taint can explain the widespread feeling that same-sex marriage defiles or contaminates straight marriage, while the marriages of "immoral" and "sinful" heterosexuals do not do so.

If the arguer should reply that marriage between two people of the same sex cannot result in the procreation of children, and so must be a kind of sham marriage, which insults or parodies, and thus demeans, the real sort of marriage, we are back to the second argument. Those who insist so strongly on procreation do not feel sullied or demeaned or tainted by the presence next door of two opposite-sex seventy-year-olds newly married, nor by the presence of opposite-sex couples who publicly announce their intention never to have children—or, indeed, by opposite-sex couples who have adopted children. They do not try to get lawmakers to make such marriages illegal, and they neither say nor feel that such marriages are immoral or undermine their own. So the feeling of undermining, or demeaning, cannot honestly be explained by the point about children and must be explained instead by other, more subterranean, ideas.

If we're looking for a historical parallel to the anxieties associated with same-sex marriage, we can find it in the history of views about miscegenation. At the time of *Loving v. Virginia*, in 1967, sixteen states both prohibited and punished marriages across racial lines. In Virginia, a typical example, such a marriage was a felony punishable by from one to five years in prison. Like same-sex marriages, cross-racial unions were opposed with a variety of arguments, both political and theological. In hindsight, however, we can see that disgust was at work. Indeed, it did not hide its hand: the idea of racial purity was proudly proclaimed (for example, in the Racial Integrity Act of 1924 in Virginia), and ideas of taint and contamination were ubiquitous. If white people felt disgusted and contaminated by the thought that a black person had drunk from the same public drinking fountain or swum in the same public swimming pool or used the same toilet or the same plates and glasses—all views widely held by southern whites—we can see that the thought of sex and marriage between black and white would have carried a powerful freight of revulsion. The Supreme Court concluded that such ideas of racial stigma were the only ideas that really supported those laws, whatever else was said: "There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification."

We should draw the same conclusion about the prohibition of same-sex marriage: irrational ideas of stigma and contamination, the sort of "animus" the Court recognized in *Romer v. Evans*, is a powerful force in its support. So thought the Supreme Court of Connecticut in October 2008, saying

> Beyond moral disapprobation, gay persons also face virulent homophobia that rests on nothing more than feelings of revulsion toward gay persons and the intimate sexual conduct with which they are associated . . . . Such visceral prejudice is reflected in the large number of hate crimes that are perpetrated against gay persons . . . .The irrational nature of the prejudice directed at gay persons, who "are ridiculed, ostracized, despised, demonized and condemned "merely for being who they are" . . . is entirely different in kind than the prejudice suffered by other groups that previously have been denied suspect or quasi-suspect class status. This fact provides further reason to doubt that such prejudice soon can be eliminated and underscores the reality that gay persons face unique challenges to their political and social integration.

We have now seen the arguments against same-sex marriage. They do not seem impressive. We have not seen any that would supply government with a "compelling" state interest, and it seems likely, given Romer, that these arguments, motivated by animus, fail even the rational basis test.

The argument in favor of same-sex marriage is straightforward: if two people want to make a commitment of the marital sort, they should be permitted to do so, and excluding one class of citizens from the benefits and dignity of that commitment demeans them and insults their dignity.

WHAT IS THE "RIGHT TO MARRY"?

IN OUR constitutional tradition, there is frequent talk of a "right to marry." In Loving, the Court calls marriage "one of the basic civil rights of man." A later case, *Zablocki v. Redhail*, recognizes the right to marry as a fundamental right for Fourteenth Amendment purposes, apparently under the Equal Protection clause; the Court states that "the right to marry is of fundamental importance for all individuals" and continues with the observation that "the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships." Before courts can sort out the issue of same-sex marriage, they have to figure out two things: (1) what is this "right to marry"? and (2) who has it?

What does the "right to marry" mean? On a minimal understanding, it just means that if the state chooses to offer a particular package of expressive and/or civil benefits under the name "marriage," it must make that package available to all who seek it without discrimination (though here "all" will require further interpretation). Loving concerned the exclusion of interracial couples from the institution; Zablocki concerned the attempt of the state of Wisconsin to exclude from marriage parents who could not show that they had met their child support obligations. Another pertinent early case, *Skinner v. Oklahoma*, invalidated a law mandating the compulsory sterilization of the "habitual criminal," saying that such a person, being cut off from "marriage and procreation," would be "forever deprived of a basic liberty." A more recent case, *Turner v. Safley*, invalidated a prohibition on marriages by prison inmates. All the major cases, then, turn on the denial to a particular group of people of an institutional package already available to others.

Is the right to marry, then, merely a non-discrimination right? If so, the state is not required to offer marriages at all. It's only that once it does so, it must do so with an even hand. The talk of marriage as a "fundamental right," together with the fact that most of these decisions mingle equal protection analysis with due process considerations, suggests, however, that something further is being said. What is it? Would it violate the Constitution if a state decided that it would offer only civil unions and drop the status of marriage, leaving that for religious and private bodies?

Put in terms of our three categories, then, does the "right to marry" obligate a state to offer a set of economic and civil benefits to married people? Does it obligate a state to confer dignity and status on certain unions by the use of the term "marriage"? And does it require the state to recognize or validate unions approved by religious bodies? Clearly, the answer to the third question is, and has always been, no. Many marriages that are approved by religious bodies are not approved by the state, as the case of same-sex marriage has long shown us, and nobody has thought it promising to contest these denials on constitutional grounds. The right to the free exercise of religion clearly does not require the state to approve all marriages a religious body approves. Nor does the "right to marry" obligate the state to offer any particular package of civil benefits to people who marry. This has been said repeatedly in cases dealing with the marriage right.

On the other side, however, it's clear that the right in question is not simply a right to be treated like others, barring group-based discrimination. The right to marry is frequently classified with fundamental personal liberties protected by the Due Process clause of the Fourteenth Amendment. In *Meyer v. Nebraska*, for example, the Court says that the liberty protected by that Clause "without doubt . . . denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." Loving, similarly, states that "the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the state," grounding this conclusion in the Due Process clause as well as the Equal Protection clause. Zablocki allows that "reasonable regulations that do not significantly

interfere with decisions to enter into the marital relationship may legitimately be imposed," but concludes that the Wisconsin law goes too far, violating rights guaranteed by the Due Process clause. *Turner v. Safley*, similarly, determines that the restriction of prisoner marriages violates the Due Process clause's privacy right.

What does due process liberty mean in this case? Most of the cases concern attempts by the state to forbid a class of marriages. That sort of state interference with marriage is, apparently, unconstitutional on due process as well as equal protection grounds. So, if a state forbade everyone to marry, that would presumably be unconstitutional.

Nowhere, however, has the Court held that a state must offer the expressive benefits of marriage. There would appear to be no constitutional barrier to the decision of a state to get out of the expressive game altogether, going over to a regime of civil unions or, even more extremely, to a regime of private contract for marriages, in which the state plays the same role it plays in any other contractual process.

Again, the issue turns on equality. What the cases consistently hold is that when the state does offer a status that has both civil benefits and expressive dignity, it must offer it with an even hand. This position, which I've called "minimal," is not so minimal when one looks into it. Laws against miscegenation were in force in sixteen states at the time of Loving.

In other words, marriage is a fundamental liberty right of individuals, and because it is that, it also involves an equality dimension: groups of people cannot be fenced out of that fundamental right without some overwhelming reason. It's like voting: there isn't a constitutional right to vote, as such: some jobs can be filled by appointment. But the minute voting is offered, it is unconstitutional to fence out a group of people from the exercise of the right. At this point, then, the questions become, Who has this liberty/equality right to marry? And what reasons are strong enough to override it?

Who has the right? At one extreme, it seems clear that, under existing law, the state that offers marriage is not required to allow it to polygamous unions. Whatever one thinks about the moral issues involved in polygamy, our constitutional tradition has upheld a law making polygamy criminal, so it is clear, at present, that polygamous unions do not have equal recognition. (The legal arguments against polygamy, however, are extremely weak. The primary state interest that is strong enough to justify legal restriction is an interest in the equality of the sexes, which would not tell against a regime of sex-equal polygamy.)

Regulations on incestuous unions have also typically been thought to be reasonable exercises of state power, although, here again, the state interests have been defined very vaguely. The interest in preventing child abuse would justify a ban on most cases of parent-child incest, but it's unclear that there is any strong state interest that should block adult brothers and sisters from marrying. (The health risk involved is no greater than in many cases where marriage is permitted.) Nonetheless, it's clear that if a brother-sister couple challenged such a restriction today on due process/equal protection grounds, they would lose, because the state's alleged (health) interest in forbidding such unions would prevail.

How should we think of these cases? Should we think that these individuals have a right to marry as they choose, but that the state has a countervailing interest that prevails? Or should we think that they don't have the right at all, given the nature of their choices? I incline to the former view. On this view, the state has to show that the law forbidding such unions really is supported by a strong public interest.

At the other extreme, it is also clear that the liberty and equality rights involved in the right to marry do not belong only to the potentially procreative. *Turner v. Safley* concerned marriages between inmates, most serving long terms, and non-incarcerated people, marriages that could not be consummated. The case rested on the emotional support provided by marriage and its religious and spiritual significance. At one point the Court mentions, as an additional factor, that the inmate may some day be released, so that the marriage might be consummated, but that is clearly not the basis of the holding. Nor does any other case suggest that the elderly or the sterile do not have the right.

The best way of summarizing the tradition seems to be this: all adults have a right to choose whom to marry. They have this right because of the emotional and personal significance of marriage, as well as its procreative potential. This right is fundamental for Due Process purposes, and it also has an equality dimension. No group of people may be fenced out of this right without an exceedingly strong state justification. It would seem that the best way to think about the cases of incest and polygamy is that in these cases the state can meet its burden, by showing that policy considerations outweigh the individual's right, although it is not impossible to imagine that these judgments might change over time.

LEGAL ISSUES

WHAT, THEN, of people who seek to marry someone of the same sex? This is the question with which courts are currently wrestling. Recent state court decisions had to answer four questions (using not only federal constitutional law but also the text and tradition of their own state constitutions): First, will civil unions suffice, or is the status of marriage constitutionally compelled? Second, is this issue one of due process or equal protection or a complex mixture of both? Third, in assessing the putative right against the countervailing claims of state interest, is sexual orientation a suspect classification for equal protection purposes? In other words, does the state forbidding such unions have to show a mere rational basis for the law or a "compelling" state interest? Fourth, what interests might so qualify?

Three states that have recently confronted this question—Massachusetts, California, and Connecticut—give different answers to these questions, but there is a large measure of agreement. All agree that, as currently practiced, marriage is a status with a strong component of public dignity. Because of that unique status, it is fundamental to individual self-definition, autonomy, and the pursuit of happiness. The right to marry does not belong only to the potentially procreative. (The Massachusetts court notes, for example, that people who cannot stir from their deathbed are still permitted to marry.)

For all these expressive reasons, it seems that civil unions are a kind of second-class status, lacking the affirmation and recognition characteristic of marriage. As the California court put it, the right is not a right to a particular word, it is the right "to have their family relationship accorded dignity and respect equal to that accorded other officially recognized families." All three courts draw on the miscegenation cases to make this point. The California court notes that if states opposed to miscegenation had created a separate category called "transracial union," while still denying interracial couples the status of "marriage," we would easily see that this was no solution.

All three courts invoke both due process and equal protection. The Massachusetts court notes that the two guarantees frequently "overlap, as they do here." They all agree that the right to marry is an individual liberty right that also involves an equality component: a group of people can't be fenced out of that right without a very strong governmental justification.

How strong? Here the states diverge. The Massachusetts court held that the denial of same-sex marriages fails to pass even the rational basis test. The California and Connecticut courts, by contrast, held that sexual orientation is a suspect classification, analogizing sexual orientation to gender.

What state interests lie on the other side? The California and Connecticut opinions examine carefully the main contenders, concluding that none rises to the level of a compelling interest. Preserving tradition all by itself cannot be such an interest: "the justification of 'tradition' does not explain the classification, it just repeats it." Nor can discrimination be justified simply on the grounds that legislators have strong convictions. None of the other preferred policy considerations (the familiar ones we have already identified) stands up as sufficiently strong.

These opinions will not convince everyone. Nor will all who like their conclusion, or even their reasoning, agree that it's good for courts to handle this issue, rather than democratic majorities. But the opinions, I believe, should convince a reasonable person that constitutional law, and therefore courts, have a legitimate role to play in this divisive area, at least sometimes, standing up for minorities who are at risk in the majoritarian political process.

FUTURE OF MARRIAGE

WHAT OUGHT we to hope and work for, as a just future for families in our society? Should government continue to marry people at all? Should it drop the expressive dimension and simply offer civil-union packages? Should it back away from package deals entirely, in favor of a regime of disaggregated benefits and private contract? Such questions, the penumbra of any constitutional debate, require us to identify the vital rights and interests that need state protection and to think how to protect them without impermissibly infringing either equality or individual liberty. Our analysis of the constitutional issues does not dictate specific answers to these questions, but it does constrain the options we ought to consider.

The future of marriage looks, in one way, a lot like its past. People will continue to unite, form families, have children, and, sometimes, split up. What the Constitution dictates, however, is that whatever the state decides to do in this area will be done on a basis of equality. Government cannot exclude any group of citizens from the

civil benefits or the expressive dignities of marriage without a compelling public interest. The full [illegible] same-sex couples is in one sense a large change, just as official recognition of interracial marriage [illegible] change, and just as the full inclusion of women and African Americans as voters and citizens was a large [illegible] On the other hand, those changes are best seen as a true realization of the promise contained in our [illegible] tional guarantees. We should view this change in the same way. The politics of humanity asks us to [illegible] same-sex marriage as a source of taint or defilement to traditional marriage but, instead, to understand [illegible] human purposes of those who seek marriage and the similarity of what they seek to that which straight [illegible] seek. When we think this way, the issue ought to look like the miscegenation issue: as an exclusion we [illegible] longer tolerate in a society pursuing equal respect and justice for all.

Works Consulted for this essay include the Following:

- Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Harvard University Press, 2000).
- Charles Fried, *Modern Liberty: and the Limits of Government* (New York: W.W. Norton, 2006).
- Hendrik Hartog, *Man and Wife in America: A History* (Harvard University Press, 2000).
- Andrew Koppelman, *Same Sex, Different States: When Same-Sex Marriages Cross State Lines* (Yale University Press, 2006).
- Cass R. Sunstein, "The Right to Marry," Cardozo Law Review 26 (2005), 2081- 2120.
- Susan Treggiari, *Roman Marriage* (Oxford University Press, 1991).
- Craig Williams, *Roman Homosexuality* (Oxford University Press, 1999). Updated edition forthcoming 20[illegible]

Journal/Discussion Questions

✍ *Nussbaum's essay discusses several arguments against same-sex marriage. Do you agree with Nussbaum's assessment of these arguments?*

1. The issue of same-sex marriage raises questions about the relation between religion and the state. How does Nussbaum view this relationship? In what ways do you agree or disagree with her?
2. Critically evaluate Nussbaum's claim that civil unions are a second-class status. What is your position o[illegible] this? Discuss.

JAMES Q. WILSON

"Against Homosexual Marriage"

About the Author: James Q. Wilson is Collins professor of management and public policy at UCLA. His books [illegible] *The Moral Sense, On Character, Moral Judgment: Does the Abuse Excuse Threaten Our Legal System?* and [illegible] *about Crime.*

About the Article: Using Andrew Sullivan's *Virtually Normal* as a counterpoint, Wilson develops his argument [illegible] homosexual marriage.

As You Read, Consider This:

1. What, according to Wilson, are the prohibitionist, conservative, and liberal positions on the issue of homose[illegible] riage? Which of these is closest to Wilson's position?

Our courts, which have mishandled abortion, may be on the verge of mishandling homosexuality. [illegible] sequence of two pending decisions, we may be about to accept homosexual marriage.

James Q. Wilson, "Against Homosexual Marriage," *Commentary*, March, 1996, Vol. 101, No. 3; pp. 34 – 39. Copyright © [illegible] Commentary, Inc. Reprinted by permission of the publisher.

In 1993 the supreme court of Hawaii ruled that, under the equal-protection clause of that state's constitution, any law based on distinctions of sex was suspect, and thus subject to strict judicial scrutiny. Accordingly, it reversed the denial of a marriage permit to a same-sex couple, unless the state could first demonstrate a "compelling state interest" that would justify limiting marriages to men and women. A new trial is set for early this summer. But in the meantime, the executive branch of Hawaii appointed a commission to examine the question of same-sex marriages; its report, by a vote of five to two, supports them. The legislature, for its part, holds a different view of the matter, having responded to the court's decision by passing a law unambiguously reaffirming the limitation of marriage to male-female couples.

No one knows what will happen in the coming trial, but the odds are that the Hawaiian version of the equal-rights amendment may control the outcome. If so, since the United States Constitution has a clause requiring that "full faith and credit shall be given to the public acts, records, and judicial proceedings of every other state," a homosexual couple in a state like Texas, where the population is overwhelmingly opposed to such unions, may soon be able to fly to Hawaii, get married, and then return to live in Texas as lawfully wedded. A few scholars believe that states may be able to impose public-policy objections to such out-of-state marriages—Utah has already voted one in, and other states may follow—but only at the price of endless litigation.

That litigation may be powerfully affected by the second case. It concerns a Colorado statute, already struck down by that state's supreme court, that would prohibit giving to homosexuals "any claim of minority status, quota preferences, protected status, or claim of discrimination." The U.S. Supreme Court is now reviewing the appeals. If its decision upholds the Colorado Supreme Court and thus allows homosexuals to acquire a constitutionally protected status, the chances will decline of successful objections to homosexual marriage based on considerations of public policy.

Contemporaneous with these events, an important book has appeared under the title *Virtually Normal*. In it, Andrew Sullivan, the editor of the *New Republic*, makes a strong case for a new policy toward homosexuals. He argues that "all public (as opposed to private) discrimination against homosexuals be ended. . . . And that is all." The two key areas where this change is necessary are the military and marriage law. Lifting bans in those areas, while also disallowing anti-sodomy laws and providing information about homosexuality in publicly supported schools, would put an end to the harm that gays have endured. Beyond these changes, Sullivan writes, American society would need no "cures of homophobia or reeducations, no wrenching private litigation, no political imposition of tolerance."

It is hard to imagine how Sullivan's proposals would, in fact, end efforts to change private behavior toward homosexuals, or why the next, inevitable, step would not involve attempts to accomplish just that purpose by using cures and reeducations, private litigation, and the political imposition of tolerance. But apart from this, Sullivan—an English Catholic, a homosexual, and someone who has on occasion referred to himself as a conservative—has given us the most sensible and coherent view of a program to put homosexuals and heterosexuals on the same public footing. His analysis is based on a careful reading of serious opinions and his book is written quietly, clearly, and thoughtfully. In her review of it in *First Things* (January 1996), Elizabeth Kristol asks us to try to answer the following question: What would life be like if we were not allowed to marry? To most of us, the thought is unimaginable; to Sullivan, it is the daily existence of declared homosexuals. His response is to let homosexual couples marry.

Sullivan recounts three main arguments concerning homosexual marriage, two against and one for. He labels them prohibitionist, conservative, and liberal. (A fourth camp, the liberationist, which advocates abolishing all distinctions between heterosexuals and homosexuals, is also described—and scorched for its "strang confluence of political abdication and psychological violence.") I think it easier to grasp the origins of the thr main arguments by referring to the principles on which they are based.

The prohibitionist argument is in fact a biblical one; the heart of it was stated by Dennis Prager in an ess in the *Public Interest* ("Homosexuality, the Bible, and Us," Summer 1993).

When the first books of the Bible were written, and for a long time thereafter, heterosexual love is w seemed at risk. In many cultures—not only in Egypt or among the Canaanite tribes surrounding ancient Is but later in Greece, Rome, and the Arab world, to say nothing of large parts of China, Japan, and elsewhe homosexual practices were common and widely tolerated or even exalted. The Torah reversed this, makin family the central unit of life, the obligation to marry one of the first responsibilities of man, and the linka

sex to procreation the highest standard by which to judge sexual relations. Leviticus puts the matter sharply and apparently beyond quibble:

> Thou shalt not live with mankind as with womankind; it is an abomination. . . . If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination; they shall surely be put to death; their blood shall be upon them.

Sullivan acknowledges the power of Leviticus but deals with it by placing it in a relative context. What is the nature of this "abomination" Is it like killing your mother or stealing a neighbor's bread, or is it more like refusing to eat shellfish or having sex during menstruation? Sullivan suggests that all of these injunctions were written on the same moral level and hence can be accepted or ignored as a whole. He does not fully sustain this view, and in fact a refutation of it can be found in Prager's essay. In Prager's opinion and mine, people at the time of Moses, and for centuries before him, understood that there was a fundamental difference between whom you killed and what you ate, and in all likelihood people then and for centuries earlier linked whom you could marry closer to the principles that defined life than they did to the rules that defined diets.

The New Testament contains an equally vigorous attack on homosexuality by St. Paul. Sullivan partially deflects it by noting Paul's conviction that the earth was about to end and the Second Coming was near; under these conditions, all forms of sex were suspect. But Sullivan cannot deny that Paul singled out homosexuality as deserving of special criticism. He seems to pass over this obstacle without effective retort.

Instead, he takes up a different theme, namely, that on grounds of consistency many heterosexual practices—adultery, sodomy, premarital sex, and divorce, among others—should be outlawed equally with homosexual acts of the same character. The difficulty with this is that it mistakes the distinction alive in most people's minds between marriage as an institution and marriage as a practice. As an institution, it deserves unqualified support; as a practice, we recognize that married people are as imperfect as anyone else. Sullivan's understanding of the prohibitionist argument suffers from his unwillingness to acknowledge this distinction.

The second argument against homosexual marriage—Sullivan's conservative category—is based on natural law as originally set forth by Aristotle and Thomas Aquinas and more recently restated by Hadley Arkes, John Finnis, Robert George, Harry V Jaffa, and others. How it is phrased varies a bit, but in general its advocates support a position like the following: man cannot live without the care and support of other people; natural law is the distillation of what thoughtful people have learned about the conditions of that care. The first thing they have learned is the supreme importance of marriage, for without it the newborn infant is unlikely to survive or, if he survives, to prosper. The necessary conditions of a decent family life are the acknowledgment by its members that a man will not sleep with his daughter or a woman with her son and that neither will openly choose sex outside marriage.

Now, some of these conditions are violated, but there is a penalty in each case that is supported by the moral convictions of almost all who witness the violation. On simple utilitarian grounds it may be hard to object to incest or adultery; if both parties to such an act welcome it and if it is secret, what differences does it make? But very few people, and then only ones among the overeducated, seem to care much about mounting a utilitarian assault on the family. To this assault, natural-law theorists respond much as would the average citizen—never mind "utility," what counts is what is right. In particular, homosexual uses of the reproductive organs violate the condition that sex serve solely as the basis of heterosexual marriage.

To Sullivan, what is defective about the natural-law thesis is that it assumes different purposes in heterosexual and homosexual love: moral consummation in the first case and pure utility or pleasure alone in the econd. But in fact, Sullivan suggests, homosexual love can be as consummatory as heterosexual. He notes that s the Roman Catholic Church has deepened its understanding of the involuntary—that is, in some sense netic—basis of homosexuality, it has attempted to keep homosexuals in the church as objects of affection and ture, while banning homosexual acts as perverse.

But this, though better than nothing, will not work, Sullivan writes. To show why, he adduces an analogy to ile person. Such a person is permitted to serve in the military or enter an unproductive marriage; why not exuals? If homosexuals marry without procreation, they are no different (he suggests) fr an who marries without hope of procreation. Yet peopl

practice varies; a sterile marriage, whether from choice or necessity, remains a marriage of a man and a woman. To this Sullivan offers essentially an aesthetic response, just as albinos remind us of the brilliance of color and genius teaches us about moderation, homosexuals are a "natural foil" to the heterosexual union, "a variation that does not eclipse the theme." Moreover, the threat posed by the foil to the theme is slight as compared to the threats posed by adultery, divorce, and prostitution. To be consistent, Sullivan once again reminds us, society would have to ban adulterers from the military as it now bans confessed homosexuals.

But again this misses the point. It would make more sense to ask why an alternative to marriage should be invented and praised when we are having enough trouble maintaining the institution at all. Suppose that gay or lesbian marriage were authorized; rather than producing a "natural foil" that would "not eclipse the theme," I suspect such a move would call even more seriously into question the role of marriage at a time when the threats to it, ranging from single-parent families to common divorces, have hit record highs. Kenneth Minogue recently wrote of Sullivan's book that support for homosexual marriage would strike most people as "mere parody," one that could farther weaken an already strained institution.

To me, the chief limitation of Sullivan's view is that it presupposes that marriage would have the same, domesticating, effect on homosexual members as it has on heterosexuals, while leaving the latter largely unaffected. Those are very large assumptions that no modern society has ever tested.

Nor does it seem plausible to me that a modern society resists homosexual marriages entirely out of irrational prejudice. Marriage is a union, sacred to most, that unites a man and woman together for life. It is a sacrament of the Catholic Church and central to every other faith. Is it out of misinformation that every modern society has embraced this view and rejected the alternative? Societies differ greatly in their attitude toward the income people may have, the relations among their various races, and the distribution of political power. But they differ scarcely at all over the distinctions between heterosexual and homosexual couples. The former are overwhelmingly preferred over the latter. The reason, I believe, is that these distinctions involve the nature of marriage and thus the very meaning—even more, the very possibility—of society.

The final argument over homosexual marriage is the liberal one, based on civil rights.

As we have seen, the Hawaiian Supreme Court ruled that any state-imposed sexual distinction would have to meet the test of strict scrutiny, a term used by the U.S. Supreme Court only for racial and similar classifications. In doing this, the Hawaiian court distanced itself from every other state court decision—there are several—in this area so far. A variant of the suspect-class argument, though, has been suggested by some scholars who contend that denying access to a marriage license by two people of the same sex is no different from denying access to two people of different sexes but also different races. The Hawaiian Supreme Court embraced this argument as well, explicitly comparing its decision to that of the U.S. Supreme Court when it overturned state laws banning marriages involving miscegenation.

But the comparison with black-white marriages is itself suspect. Beginning around 1964, and no doubt powerfully affected by the passage of the Civil Rights Act of that year, public attitudes toward race began to change dramatically. Even allowing for exaggerated statements to pollsters, there is little doubt that people in fact acquired a new view of blacks. Not so with homosexuals. Though the campaign to aid them has been going on vigorously for about a quarter of a century, it has produced few, if any, gains in public acceptance, and the greatest resistance, I think, has been with respect to homosexual marriages.

Consider the difference. What has been at issue in race relations is not marriage among blacks (for over a century, that right has been universally granted) or even miscegenation (long before the civil-rights movement, many Southern states had repealed such laws). Rather, it has been the routine contact between the races in schools, jobs, and neighborhoods. Our own history, in other words, has long made it clear that marriage is a dif-erent issue from the issue of social integration.

There is another way, too, in which the comparison with race is less than helpful, as Sullivan himself oints out. Thanks to the changes in public attitudes I mentioned a moment ago, gradually race was held to not central to decisions about hiring, firing, promoting, and schooling, and blacks began to make extraor-nary advances in society. But then, in an effort to enforce this new view, liberals came to embrace affirma-e action, a policy that said that race was central to just such issues, in order to ensure that real mixing

occurred. This move created a crisis, for liberalism had always been based on the proposition that a liberal political system should encourage, as John Stuart Mill put it, "experiments in living" free of religious or political direction. To contemporary liberals, however, being neutral about race was tantamount to being neutral about a set of human preferences that in such matters as neighborhood and schooling left groups largely (but not entirely) separate.

Sullivan, who wisely sees that hardly anybody is really prepared to ignore a political opportunity to change lives, is not disposed to have much of this either in the area of race or in that of sex. And he points out with great clarity that popular attitudes toward sexuality are anyway quite different from those about race, as is evident from the fact that wherever sexual orientation is subject to local regulations, such regulations are rarely invoked. Why? Because homosexuals can "pass" or not, as they wish; they can and do accumulate education and wealth; they exercise political power. The two things a homosexual cannot do are join the military as an avowed homosexual or marry another homosexual.

The result, Sullivan asserts, is a wrenching paradox. On the one hand, society has historically tolerated the brutalization inflicted on people because of the color of their skin, but freely allowed them to marry; on the other hand, it has given equal opportunity to homosexuals, while denying them the right to marry. This, indeed, is where Sullivan draws the line. A black or Hispanic child, if heterosexual, has many friends, he writes, but a gay child "generally has no one." And that is why the social stigma attached to homosexuality is different from that attached to race or ethnicity—"because it attacks the very heart of what makes a human being human: the ability to love and be loved." Here is the essence of Sullivan's case. It is a powerful one, even if (as I suspect) his pro-marriage sentiments are not shared by all homosexuals.

Let us assume for the moment that a chance to live openly and legally with another homosexual is desirable. To believe that, we must set aside biblical injunctions, a difficult matter in a profoundly religious nation. But suppose we manage the diversion, perhaps on the grounds that if most Americans skip church, they can as readily avoid other errors of (possibly) equal magnitude. Then we must ask on what terms the union shall be arranged. There are two alternatives—marriage or domestic partnership.

Sullivan acknowledges the choice, but disparages the domestic-partnership laws that have evolved in some foreign countries and in some American localities. His reasons, essentially conservative ones, are that domestic partnerships are too easily formed and too easily broken. Only real marriages matter. But—aside from the fact that marriage is in serious decline, and that only slightly more than half of all marriages performed in the United States this year will be between never-before-married heterosexuals—what is distinctive about marriage is that it is an institution created to sustain child-rearing. Whatever losses it has suffered in this respect, its function remains what it has always been.

The role of raising children is entrusted in principle to married heterosexual couples because after much experimentation—several thousand years, more or less—we have found nothing else that works as well. Neither a gay nor a lesbian couple can of its own resources produce a child; another party must be involved. What do we call this third party? A friend? A sperm or egg bank? An anonymous donor? There is no settled language for even describing, much less approving of, such persons.

Suppose we allowed homosexual couples to raise children who were created out of a prior heterosexual union or adopted from someone else's heterosexual contact. What would we think of this? There is very little research on the matter. Charlotte Patterson's famous essay, "Children of Gay and Lesbian Parents" (*Journal of Child Development*, 1992), begins by conceding that the existing studies focus on children born into a heterosexual union that ended in divorce or that was transformed when the mother or father "came out" as a homosexual. Hardly any research has been done on children acquired at the outset by a homosexual couple. We therefore have no way of knowing how they would behave. And even if we had such studies, they might tell us rather little unless they were conducted over a very long period of time.

But it is one thing to be born into an apparently heterosexual family and then many years later to learn that one of your parents is homosexual. It is quite another to be acquired as an infant from an adoption agency or a parent-for-hire and learn from the first years of life that you are, because of your family's position, radically different from almost all other children you will meet. No one can now say how grievous this would be. We know

that young children tease one another unmercifully; adding this dimension does not seem to be a step in the right direction.

Of course, homosexual "families," with or without children, might be rather few in number. Just how few, it is hard to say. Perhaps Sullivan himself would marry, but, given the great tendency of homosexual males to be promiscuous, many more like him would not, or if they did, would not marry with as much seriousness.

That is problematic in itself. At one point, Sullivan suggests that most homosexuals would enter a marriage "with as much (if not more) commitment as heterosexuals." Toward the end of his book, however, he seems to withdraw from so optimistic a view. He admits that the label "virtually" in the title of his book is deliberately ambiguous, because homosexuals as a group are not "normal." At another point, he writes that the "openness of the contract" between two homosexual males means that such a union will in fact be more durable than a heterosexual marriage because the contract contains an "understanding of the need for *extramarital outlets*" (emphasis added). But no such "understanding" exists in heterosexual marriage; to suggest that it might in homosexual ones is tantamount to saying that we are now referring to two different kinds of arrangements. To justify this difference, perhaps, Sullivan adds that the very "lack of children" will give "gay couples greater freedom." Freedom for what? Freedom, I think, to do more of those things that heterosexual couples do less of because they might hurt the children.

The courts in Hawaii and in the nation's capital must struggle with all these issues under the added encumbrance of a contemporary outlook that makes law the search for rights, and responsibility the recognition of rights. Indeed, thinking of laws about marriage as documents that confer or withhold rights is itself an error of fundamental importance—one that the highest court in Hawaii has already committed. "Marriage," it wrote, "is a state-conferred legal-partnership status, the existence of which gives rise to a multiplicity of rights and benefits . . . " A state-conferred legal partnership? To lawyers, perhaps; to mankind, I think not. The Hawaiian court has thus set itself on the same course of action as the misguided Supreme Court in 1973 when it thought that laws about abortion were merely an assertion of the rights of a living mother and an unborn fetus.

I have few favorable things to say about the political systems of other modern nations, but on these fundamental matters—abortion, marriage, military service—they often do better by allowing legislatures to operate than we do by deferring to courts. Our challenge is to find a way of formulating a policy with respect to homosexual unions that is not the result of a reflexive act of judicial rights-conferring, but is instead a considered xpression of the moral convictions of a people.

ournal/Discussion Questions

- *Wilson refers briefly to the experience of adolescents who are gay and the difficulties they encounter in coming of age in our society. Have your own experiences and observations confirmed Wilson's observations? What moral significance do those experiences have?*
- At several points in his essay, Wilson discusses the relationship between issues of race and ethnicity and issues of sexual orientation. In what ways are they similar? In what ways are they different?
- Some have offered "domestic partnership laws" as an alternative to legalizing homosexual marriages. What is Wilson's position on this alternative? Do you agree or disagree?

ONCLUDING DISCUSSION QUESTIONS

ERE DO YOU STAND NOW?