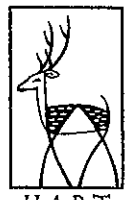
Legal Recognition of Same-Sex Partnerships

A Study of National, European and International Law

Edited by
ROBERT WINTEMUTE
School of Law, King's College,
University of London
and
MADS ANDENÆS
British Institute of International and Comparative Law,
London



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Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate

JANET HALLEY*

IN THIS CHAPTER, I examine some of the rhetorical forms in which pro-gay advocates in the United States justify lifting the current de facto, if not always de jure, ban on same-sex marriage. At the moment, by my count, we in the US have four basic modes of justification for same-sex marriage.[1] Two are explicit: Recognition and Rights. Each of these modes of justification is typically proposed as simple and internally coherent, but each is actually internally heterogeneous, and moreover each disguises while depending on a supplementary rhetoric of justification. That supplementary rhetoric is sometimes Regulation, and it is almost always Normalisation. I think this hidden complexity makes the project of seeking same-sex marriage normatively much more dubious than it might appear. At the very least, I hope to persuade those who seek this goal to do so with more frankness about their implicit endorsement of Regulation and Normalisation.

I will proceed by spelling out, first, some relationships between Recognition and Normalisation and, second, some relationships between Rights, Regulation, and Normalisation.

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[1] Typically, state marriage statutes in the US did not limit capacity to marry along the dimension of sex: they were silent on the very point that is crucial to this volume. Increasingly, however, as political pressure for same-sex marriage has emerged, state statutes and state constitutitional amendments, as well as the federal Defense of Marriage Act, explicitly limit access to marriage, or inter-sovereign recognition of foreign marriages, to cross-sex couples.

RECOGNITION AND NORMALISATION

In an essay entitled "From Redistribution to Recognition?", Nancy Fraser identifies the politics of sexuality as, classically, a politics of recognition. She distinguishes it sharply from the politics of the working class, which she describes as, classically, a politics of redistribution. I emphasise the terms she uses that are characteristic of recognition discourse:

> "Gays and lesbians suffer from heterosexism: the *authoritative* construction of norms that privilege heterosexuality. . . . The remedy for the injustice, consequently, is *recognition*, not redistribution. Overcoming homophobia and heterosexism requires changing the *cultural valuations* (as well as their legal and practical expressions) that privilege heterosexuality, deny *equal respect* to gays and lesbians, and refuse to recognize homosexuality as a *legitimate* way of being sexual".[2]

According to Fraser, economic harms suffered by sexual minorities are derivative of their primary harm, which is "quintessentially a matter of recognition".[3] Even when economic remedies are sought, they must be evaluated for their effectiveness in undoing the harm of disrespect.

Now I think it is true that the legal refusal of same-sex marriage, in a world in which cross-sex marriage is not only permitted but applauded, deprecates same-sex relationships—devalues them, delegitimates them. This derogation is the target of the Recognition justification of same-sex marriage, and it draws upon an etymology of the term "re-cognition": the law should *re*-cognise same-sex relationships, should *re*-think them. Not bad or indifferent, but good.

That seems very simple, but there are elements in same-sex marriage Recognition rhetoric that are problematic. This rhetoric derives much of its appeal from representing those who engage in same-sex relationships as the unequivocal agents of the normative projects of these relationships; and from appearing, when they turn to the public and the state, to ask for so little. I will consider each of these in turn.

First, these arguments posit that same-sex relationships already exist in the real world in a marriage-like form: extending recognition to them won't change the landscape of relationships or our ideas of their value very much. Thus, in his 1994 article "Crossing the Threshold," Evan Wolfson describes marriage as a private relationship which the state merely blesses. Marriage, Wolfson indicates, is:

> "not a mere dynastic or property arrangement; and it is not best understood as a tool or creature of the state or church. . . . [T]oday marriage is first and foremost about *a loving union between two people who enter into a relationship* of emotional and financial commitment and interdependence, two people who seek to make a public statement about their relationship, sanctioned by the state, the community at large, and, for some, their religious community".[4]

[2] N Fraser, "From Redistribution to Recognition?: Dilemmas of Justice in a 'Postsocialist' Age" in N Fraser, *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (London, Routledge, 1997), at 18–19.

[3] *Ibid.*, at 18.

The "loving union" comes "first"; the state's role is retrospective and grammatically passive. Similarly, Wolfson stipulates that the premier interest which people have in marriage is the "public affirmation of emotional and financial commitment and interdependence".[5] In this formulation, the couple's interdependence *precedes* and is metaphysically *independent of* its *affirmation*. The couple made itself what it is; and made itself good; all that the public and the state need to do is assent to this *fait accompli*.

But the bid for recognition is actually much more complex than that, inasmuch as the moment the bid is made, the agency of same-sex couples promptly becomes double bound. To seek recognition is to concede the authority of those whose regard is sought. Consider an analogy involving a teacher, a student, and an examination. We normally think of the teacher as having all the power: she can stipulate that the student cannot have something he wants very much without taking the examination and performing according to the teacher's scale of values on it. But at the same time, the student, by taking the examination, concedes the legitimacy and authority of the professor who grades it. The student bestows on the teacher the power to evaluate and rank her. Similarly, a movement that seeks public recognition of its personal relationships concedes that the power to bestow value on them lies in the public. And a movement that seeks *state* recognition of its personal relationships concedes that the power to evaluate and rank them lies in the *state*.

The "recognition gesture" thus places the state not only in second but also in first place. The state originates the terms on which the couple can be thought of as good. Seeking Recognition may begin as a project in which the couple is the subject, but it becomes a project in which it is an object. The couple mixes its subjectivity with subjection the moment it makes its bid for recognition.

Second, the implicit claim that recognition of same-sex marriage is a small change in norms, merely redesignating already-existing relationships now deemed "bad" as "good", is similarly unsimple. Recognition of same-sex marriage would reposition marriage quite substantially—would *normalise* it. The link between Recognition and Normalisation was suggested by Arnie Kantrowitz, who said in 1983 that: "The right to chose marriage is the ultimate normalisation of relations between gay and non-gay society".[6] "Normalisation" in this formulation appears to be nothing more than the recognition effect designated by Fraser and sought by Wolfson. But by framing his goal as the realignment not just of values but of two

[4] E Wolfson, "Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique" (1994) 21 *New York University Review of Law and Social Change* 567 at 579 (emphasis added).

[5] *Ibid.*, at 580.

[6] *Ibid.*, at 583 n.68 (Wolfson quoting Kantrowitz).

"societies," Kantrowitz also invoked another sense of the term normal, the one in play when your doctor says to you, expecting you to be relieved, "Your blood pressure is normal". She means not only "it's good", but also "it's average"— indeed "it's good *because* it's average". She declares a *relationship* between your blood pressure and everyone else's, a relationship that bestows value on your blood pressure by withholding it from that of other, imagined, patients.[7]

A similar ordering of *all* sexual relationships might be what we get out of legal recognition of same-sex marriage. As Claudia Card[8] and Michael Warner[9] argue, the achievement of same-sex marriage would erase the same-sex/cross-sex distinction currently drawn precisely at the borders of marriage, leaving in stark relief those borders themselves. Marriage itself would not merely continue to bestow positive recognition: it would become more *average*. And if same-sex couples respond to this change by marrying, the married/unmarried distinction would become simpler and more powerful as a mode of social ordering. Unmarried adults, and their sex lives, would become *weirder*. That would be a powerful effect of Normalisation in the sense of *ordering the population around a mean*, and it is an implicit goal of the apparently far less ambitious rhetorical project of "mere" Recognition.[10]

[7] In the essay he contributes to this volume, William N Eskridge, Jr uses the term "normalisation" in a way that entirely misses the conceptual novelty of the work of Michel Foucault and Georges Canguilhem that he cites and that I depend on here. (See Eskridge, chap. 6, n.10 and accompanying text.) "Normalisation" in this use is not the generation and imposition of some consolidated idea of good behavior or good values, the coercive herding of more and more people into the normalcy defined by that behavior or those values; it is the ever-shifting, provisional ordering of a social, conceptual, and ethical field around a distinction—say, married/unmarried; or a range of distinctions—say, wife/mistress/girlfriend; or a standard—say "room temperature" or "illness" or "reasonableness." It is the temporal negotiation all across the social field—within the domain of the "normal" and beyond it—of the determinative and ethical value of the relevant distinction, range of distinctions, or standard. In Eskridge's more conventional use of the term "normalisation," valuation precedes social ordering: someone or something decides that X conduct is good and uses power to coerce more people to do X for that reason. In Canguilhem's and Foucault's use of the term, ethical value may or may not emerge as an effect of the ordering of the field; may attach itself anywhere in it at different times; and may be entirely absent from the process. Modern medicine posits that the blood pressure that most seemingly healthy people have most of the time is "good": the average is deemed to be good. Some religions posit that ascetic or ecstatic experiences that can be undertaken only by an elite are "best": the average there is not necessarily bad, but it's not best. There is nothing "simple" about "normalisation" so understood. (See Eskridge, chap. 6, two sentences in text following n.29.). In the following paragraphs, Eskridge purports to take substantial hits on my argument (and Michael Warner's argument, which inspires mine) that marriage normalises, but he is really not talking about our arguments at all. See M Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (New York, NY, Free Press, 1999), ch. 2 ("What's Wrong with Normal?") at 41–80, and ch. 3 ("Beyond Gay Marriage") at 81–147.

[8] C Card, "Against Marriage and Divorce" (Summer 1996) 11(3) *Hypatia* 1.

[9] See Warner, *supra* n.7.

[10] DAJ Richards and W Eskridge, in essays included in this volume, attribute to me positive "consequentialist" arguments—that is, confident statements about *what will happen* if same-sex marriage is legally available. (See Richards, Introduction to Part I, pp. 27–9; Eskridge, chap. 6, text accompanying nn. 8, 23.) I don't think I have been read very carefully. "Might be" is not "will be"; "Of course things could go the other way" is not a statement of *what will happen*. Eskridge carries the error further, attributing to me a warning that the eventualities I draw up are to be avoided on some normative theory or other. (See Eskridge, chap. 6, p. 123.) I am assessing the contours of arguments here, not of realities yet unknown; and as I say in my last paragraph, I'm not sure how one would select among the myriad normative theories for assessing marriage. It remains an open question for me, for instance, whether same-sex couples with a queer project for their sexual or political lives—couples whose members might currently find it difficult to indicate their dissent from the valuation of marriage as a human and social good—might discover a crucial resource in their ability to *refuse* marriage. Producing oneself as weird can be precisely what one values.

Of course things could go the other way: recognition of same-sex marriage might lend new momentum to the long-running erosion of the specialness of marriage. No longer privileged by restriction to *some* unions and deprived of its power to send the message that those unions are particularly good, marriage might become less, not more, meaningful. Cross-sex couples could lose interest in marriage as a result, opting to cohabit rather than marry. Pro-marriage voting strength could erode; the social consensus that it is worthwhile to devote public and private resources to "support marriage" could break up. If this happens, rather than a convergence of same-sex with cross-sex couples in maintaining the centrality and thus the normalising power of marriage, "mere" Recognition will have contributed to the end of marriage's centrality as a mode of social ordering. In that sense, Normalisation is not necessarily implicit in Recognition. But the two can be detached in this way only by positing a "what if" scenario that denies one of the key premises of Recognition rhetoric: that it asks for so little. The end of marriage as social conservatives want to know it is not "so little".

I would note also that not all Recognition projects seek the same strong Normalisation. The recent legislative struggle that produced the French PaCS (*Pacte Civil de Solidarité*) provides several examples of Recognition projects that would not have normalised in the strong way that U.S. same-sex marriage efforts, if successful, would likely do. The original proposal, presented by Senator Mélenchon in 1990, would have been open to any two persons regardless of their sexes or of the nature of their relationship.[11] The next legislative proposal narrowed access one tick: ascending and descending relatives could not enter into the relation with one another.[12] Later still came in legislative proposals that required that the pair be *a couple*. The actual legislation promulgated in 1999 limits access to the PaCS to unrelated adults who are not married or bound by any other PaCS, who have a common legal residence (but not necessarily a single domicile) and who intend by their registry of a PaCS to formalise the economic interdependency of their "*vie commune*".[13]

This process of limiting access to the PaCS to relationships that are ever-increasingly marriage-like was culminated within days of passage of the legislation, in a decision of the *Conseil constitutionnel* which construed the new law to require *sexual* attachment as an essential element of the PaCS relation.[14]

[11] See Borrillo, chap. 25, at n. 11 and accompanying text. I am indebted to Daniel Borrillo for his careful legislative history of the PaCS.

[12] *Ibid.*, at n. 12 and accompanying text.

[13] Loi no. 99–944 du 15 novembre 1999 relative au pacte civil de solidarité, <http://www.legifrance.gouv.fr/html/frame_jo.html>.

[14] Decision No. 99-419 DC (9 Nov. 1999), <http://www.conseil-constitutionnel.fr/decision/1999/99419/index.htm>.

Indicating that "*la vie commune*" anticipated by the PaCS legislation did not extend to a mere commonality of interests or mere cohabitation of two people, the *Conseil* held that the PaCS is available only to those who intend to lead "*une vie de couple*". And what is "*une vie de couple*"? Apparently it is "*une vie sexuelle*". The *Conseil* insisted on this narrowing of the PaCS because the legislation, by barring blood relatives and those who are already married from obtaining PaCS status, "*a déterminé les composantes essentielles*" of the relation. The court apparently thought that nonincestuousness and nonpolygamy were "essentially" sexual limits. This interpretation is of course not the product of strictly logical thought. The danger that blood relatives might form PaCSs in order to formalise incestuous relations is not the only reason to bar them from the status: it is equally plausible that the evil to be avoided is that they would strip resources otherwise available to other family members by giving formal priority to a duty of support running only between the parties to the PaCS. And the danger that those who are already married would elevate an adulterous relationship to formal dignity by means of a PaCS is not the only reason to bar them from the status: it is equally plausible that the evil to be avoided is allowing married people to assume a duty to shift resources from their marital families to their PaCS, franc-for-franc to the detriment of the former. And even if the evil to be avoided was a sexual one, that does not make sexual attachment an essential element of the PaCS in general, but rather a risk foreseen for some particular PaCS relationships. The logic of the *Conseil constitutionnel* hangs together only if we add a premise not admitted to in its opinion: that marriage is not merely *a* but *the* paradigm of intimate adult commitment.

In parsing the successive accretion of marriage-like status rules limiting access to the PaCS, it may be helpful to distinguish marriage *substitutes* from marriage *alternatives*. The early proposals sponsored by the left were, I would suggest, marriage *alternatives*. They would have permitted individuals—whether in mere *pairs* or in *couples*, but above all, *not the state*, to determine the substantive content of particular PaCS relationships. These proposals would have bestowed recognition on same-sex couples and cross-sex couples without regard to the nature of their emotional bond and without any assumption that it was erotic: as long as the pair was ready to assume mutual responsibility for one another's daily needs and debts, the relationship would have been available. It could have been assumed by priest and housekeeper, two business partners, two roommates, two friends.

By contrast, the PaCS legislation as construed by the *Conseil constitutionnel* is a marriage *substitute*. With the sole exception that same-sex couples can avail themselves of it, it has the access rules of marriage. It accords a pared-down list of the substantive rules of marriage as well. In both respects, it resembles nothing on the U.S. scene so much as Domestic Partnership, which is consistently imagined as a marriage substitute, a way of bestowing a few sticks in the marriage bundle on couples the members of which are willing to attest that they live

in a marriage-like relationship: monogamous, sexual, domestic, economically interdependent, and long-term.[15]

Even though marriage alternatives *are* Recognition projects, they are much less likely to normalise marriage, and much more likely to denormalise it, than marriage substitutes. To be sure, marriage substitutes have some denormalising force. Even as construed by the *Conseil constitutionnel*, the PaCS, like American Domestic Partnership when it is equally available to cross-sex and same-sex couples, may render marriage a little bit less paradigmatic. Under both regimes, marriage no longer normalises all sexual relationships: the marriage substitute does too, and since marriage and the marriage substitute are different in other ways (the latter is easier to dissolve, less loaded with traditional expectations, free of religious jurisdiction, etc.), introduction of the latter significantly diminishes the hegemonic posture of marriage. But let us imagine that the PaCS had remained available without any stipulation that it accommodates only "*une vie de couple*" or, indeed, without any requirement that the two people engaging in the relation *be* "a couple." That would have denormalised marriage in another, perhaps more significant way. As pairs with different modes of mutual dependency adopted the PaCS form, they would have pluralised it. The PaCS itself would have resisted normalisation.[16] Unfortunately we won't have an opportunity to observe how this would have affected marriage, but here are two examples of what I think we'll be missing. Wouldn't it have occurred to more people than it does now to question whether friendship deserves the same level of commitment which is now captured for sexual relationships by marriage and its substitutes? Mightn't it have occurred to more people that the PaCS, with its individually tailored duty of support and easy exit rules, could sustain linked relationships and could therefore do without its current monogamy rules? In short, wouldn't marriage and the marriage paradigm have come in for some serious normative competition? Wouldn't the power of marriage to arrange the field of adult intimacy have wobbled from its center?

We in the U.S. will achieve none of this by seeking same-sex marriage. Indeed, the complex pattern of competing normalisations that emerges from the

[15] For example, Stanford University defines a Domestic Partner as

"the partner of an eligible employee or retiree who is of the same sex, sharing a long-term committed relationship of indefinite duration with the following characteristics:
—Living together for at least six months
—Having an exclusive mutual commitment similar to that of marriage.
—Financially responsible for each other's well being and debts to third parties. . . .
—Neither partner is married to anyone else nor has another domestic partner.
—Partners are not related by blood closer than would bar marriage in their state of residence".

Stanford University, "Enrollment Information for Same-Sex Domestic Partners."

[16] For an argument that denormalisation would be better furthered in the U.S. not by marriage substitutes like Domestic Partnership, but by marriage alternatives modeled on forms of association currently recognised in contract and corporate law, see Martha M. Ertman, "Marriage as a Trade: Bridging the Private/Private Distinction," (2001) 36 *Harvard Civil Rights—Civil Liberties Law Review* 79.

addition of the PaCS to French law, and that would have emerged from the formation of actual multiformed PaCSs within French society if the legislation had not been narrowed so dramatically, throws a sharp emphasis on the much more binary pattern that will prevail if US advocates of same-sex *marriage* achieve their goal.[17]

RIGHTS, REGULATION AND NORMALISATION

Rights are an exceedingly rich mode of justification for all kinds of things in the US—indeed, sometimes it appears to be the only language of justification in which we can speak to one another. The particular form that they take in US pro-same-sex-marriage argumentation is nicely exemplified by the second "interest" that Wolfson says people have in marriage: "*access* to legal and economic *benefits and protections*".[18]

When we say "rights of marriage," we frequently fold together, as Wolfson does here, the right *to* marry and the rights *of* marriage. This is a perfectly legitimate thing to do: from the perspective of candidates for marriage it makes sense, in that they want the former because it bestows the latter; and from the perspective of the US Supreme Court it made sense on a theory that, inasmuch as the latter are fundamental, the former must be as well.[19] But the very nature of the "right" in question is somewhat complex, in ways that will be clearer if we tease apart the right to marry and the rights of marriage, and some of their subsidiary elements.

There are, as far as I can tell, four basic forms of the argument that same-sex marriage is justified by a right to marry. The four asserted rights are:

1. The right to select one's marital partner without interference from the state;

[17] Morris Kaplan argues that the Recognition project avoids Normalisation and in fact may contribute to the multiplicity and accessibility of sexual intimacies and intensities that do not resemble marriage. He is not able to specify how this result would be delivered, however. His argument that "[a]t bottom the demand for recognition of same-sex partnerships is a demand to acknowledge the validity of lesbian and gay forms of life" (MB Kaplan, *Sexual Justice: Democratic Citizenship and the Politics of Desire* (London, Routledge, 1997) at 235, emphasis added) is simply incorrect. At least as it has been made in the U.S., it is a demand for acknowledgment of the validity of a *particular form* of lesbian and gay life: monogamous, sexual, domestic, economically interdependent, and long-term lesbian and gay life—that is, *marriagelike* lesbian and gay life. And second, his argument that seeking recognition of same-sex marriage is a form of civil disobedience (rather than an implicit concession that the state has legitimate power to bestow value on sexual relationships) is too ideal to have more than speculative importance. He is unable to define a single tactic, aside from violating sodomy statutes in the context of a public celebration of a same-sex couple's commitment to one another, that could meet the definition of civil disobedience, and he concedes (at 228–9) that the very people likely to seek marriage would be the last to undertake such a performance precisely because their monogamous, domestic, etc., sexual normativity would object strongly to it. Seeking recognition of same-sex marriage may be *dissent*, but it is dissent from the state's refusal to say it values lesbian and gay couples.

[18] Wolfson, *supra* n.4, at 580.

[19] See *Zablocki* v. *Redhail*, 434 US 374 at 386 (1978).

2. The right to choose marriage as the form for one's intimate relationships;
3. The right to be free from discrimination on the basis of some improper ground (gender, sexual orientation) in gaining access to marriage; and
4. The fundamental right *of* marriage.

These are not all the same thing, either in the law that they elaborate, or in the rhetoric of justification they invoke. I have ranked them in an order that emphasises a key discontinuity: the "right to select one's marital partner without interference from the state" and "the right to chose marriage as the form for one's intimate relationships" are deeply individualist and even libertarian in their framing (the former more so than the latter), while "the fundamental right *of* marriage" describes the marital relationship as a thoroughgoing engagement in a basic social form.

This discontinuity is endemic in invocations of marriage rights. Compare Kantrowitz's rights talk with that of the U.S. Supreme Court in its most-often-quoted definition of marriage. Kantrowitz asserted:

> "If it is *freely chosen*, a marriage license is as fine an *option* as sexual license. All *I* ask is the right to *choose for myself*".[20]

This speaker is a bold loner, the liberal individual *par excellence*—but it is also the speaker whom we have just heard asking for an "ultimate normalization". This tension between the individual and the social should come as no surprise: after all, the act of marrying cannot be done alone. On the sociability of marriage, consider the US Supreme Court's characterisation of marriage in *Griswold* v. *Connecticut*, a 1965 decision holding that married couples have the right to use contraceptives:

> "Marriage is a *coming together* for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an *association* that promotes *a way of life*, not causes; a *harmony* in living, not political faiths; a *bilateral loyalty*, not commercial or social projects. Yet it is an *association* for as noble a purpose as any involved in our prior decisions".[21]

Of course this is a rights-*of*-marriage decision, but this passage has been crucial in right-*to*-marry analyses, and for an obvious reason: if marriage is a fundamental form of human association, access to it is also fundamental; it is a fundamental right. But note that, in this formulation, marriage is not a *choice of mine*; it is an *association of us*. The couple replaces the individual as the subject of marital rights.

Here we have a shift that is buried in much US same-sex rights-claiming, when advocates assert the rights of "individuals *and couples*" to choose

[20] A Kantrowitz, "Till Death Do Us Part: Reflections on Community", *The Advocate* (Los Angeles), March 1983, at 27 (emphasis added).

[21] *Griswold* v. *Connecticut*, 381 U.S. 479 at 486 (1965) (emphasis added).

marriage.[22] The conflict elided in this formulation remains immanent at the moment a couple—or, the two individuals in it—decide to get married, but it is extremely salient when the couple—or, one of the two individuals in it—decides to divorce. We have in the US today, for example, a system of unilateral divorce by either spouse: a spouse who wishes to oppose a divorce in the hope of "saving the marriage" *will not prevail* against a spouse willing to testify that the marriage has irretrievably broken down. Alternatively, consider the succession of subjects in three important reproductive decision-making cases: we go from *Griswold*, which recognises the right of the marital *couple* to use contraceptives; to *Eisenstadt* v. *Baird*, which extends that right to unmarried individuals on the ground that the US Constitution regards married couples not as a unit but as *two rights-bearing individuals*;[23] to *Planned Parenthood of Central Missouri* v. *Danforth*, which holds that when a wife wants to elect an abortion which the husband opposes, the state may not require the wife to preserve the husband's potential child.[24] These gripping scenarios involving one spouse's unilateral control over matters central to the marriage are probably never imagined on wedding day, but they are implicit in it, and thus in any right of a couple—or the individuals in it?—to *have* a wedding day.

Over and above that rift, there is the further one between the rights of the individual and the couple on one hand, and the rights of the whole community with respect to their marriage on the other. The latter are eerily suggested in a passage from *Loving* v. *Virginia*, a 1967 US Supreme Court case holding that the states could not ban interracial marriage. One reason for that holding: marriage is a *fundamental right* in the sense that everyone has an interest in its nondiscriminatory availability:

> "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes . . . is surely to deprive *all* the State's citizens of liberty without due process of law".[25]

All citizens of the state are *actually* injured when *some* of them are punished for engaging in an interracial marriage. Here we see another hint, perhaps even stronger than the one sounded in *Griswold*, that "marriage rights" vastly overflow any individualist framing, placing individuals, couples and the broad totality of "the social" into a convergence that must bear within it the potential for

[22] Evan Wolfson provides the following "Marriage Resolution" promulgated by Lambda Legal Defense and Education Fund, Inc., and other pro-gay, pro-same-sex-marriage groups:

> "Because Marriage is a basic human right and an individual personal choice, RESOLVED, the State should not interfere with same-gender *couples who choose* to marry and share fully and equally in the rights, responsibilities, and commitment of civil marriage".

E Wolfson, "Why We Should Fight for the Freedom to Marry: The Challenges and Opportunities that Will Follow a Win in Hawaii" (1996) 1 *Journal of Gay, Lesbian, and Bisexual Identity* 79 at 82 (emphasis added).

[23] 405 US 438 (1972).

[24] 428 US 52 at 67–72 (1976).

[25] 388 US 1 at 12 (1967).

tension. And there is always a key conceptual tension. The interest of "all the State's citizens" in *your* marriage places almost excruciating pressure on the idea of marital *rights*. If rights are liberties, if they are classically the freedoms of individuals to act without state interference, entering into a relationship with every "citizen of the State" can only problematically be the content of a right.

The language of rights and freedom in U.S. same-sex marriage justification frequently runs up against this problematic, only to suppress it. Tropically, this occlusion takes the form of claims that marriage is a plastic social form always ready to receive the impressions of our wishes. In his book *The Case for Same-Sex Marriage*, William N Eskridge, Jr., insists that "marriage is a prepolitical form of interpersonal liberty", even as he acknowledges that it "is a creature of law and generates many legal ripple effects".[26] But ultimately he refutes the idea that the marital form has liberty-constraining functions: "Neither history nor the Bible nor the imperative of procreation establishes what marriage *must* be, as a matter of law. Marriage is an important legal construction, and it is what we *make* it to be".[27] Similarly, Evan Wolfson argues that marriage "is socially constructed, and thus transformable"[28]: "the fundamental issues in the [right-to-marry] cases are choice and equality, not the pro's and con's of a way of life, or even the 'right' choice".[29] But Wolfson has just told us that, according to the US Supreme Court in *Griswold*, marriage is fundamental precisely *because* it promotes *a* way of life.

More rarely (because the actual concrete incidents of marriage are so rarely important in same-sex marriage justifications),[30] the occlusion of Regulation by Rights occurs on the terrain of the couple's—or its individuals'?—control over the marital form. David Chambers, in his 1996 article entitled "What If?: The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Couples",[31] considers the possibility that same-sex marriage would constrain, not foster, the liberty of gay men and lesbians. It is rare to find anyone even asking the question. For Chambers, the danger to gay liberty is mitigated by the increasing availability of antenuptial agreements and other contractual inroads on marriage as a rigidly state-defined status. And so he ultimately concludes that the specific terms of marriage are increasingly subject to determination by

[26] WN Eskridge, Jr., *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* (New York, Free Press, 1996) at 132.

[27] *Ibid.*, at 160 (emphasis in original).

[28] Wolfson, *supra* n.4, at 589.

[29] *Ibid.*, at 580.

[30] In 1996, Chambers noted that "[i]n the vigorous public discussion [on same-sex marriage], few advocates address at any length the legal consequences of marriage. William Eskridge, for example, devotes only six of the 261 pages in his fine new book, *The Case for Same-Sex Marriage*, to the legal consequences, and his, with one exception, is the longest discussion I can find". D Chambers, "What If?: The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Couples" (1996) 95 *Michigan Law Review* 447 at 450. My research has not divulged anything that would allow me to amend this observation. The legal sequelae of marriage just don't matter much in this rhetorical field.

[31] *Ibid.*

particular couples: as long as that is true, the constraints are at once sporadic and, most likely, loosening. That being so, Chambers concludes, marriage represents a net gain in liberty for gay men and lesbians.

Chambers is utterly unique in the pro-same-sex-marriage literature, as far as I know, in acknowledging without cavil that marriage is a form of regulation.[32] But his cost/benefit analysis is a bit skewed to enhance his liberty-wins outcome. His own recitation of the specific legal consequences of marriage includes several terms that are *utterly unalterable* by the parties to particular US marriages: first, any criminal prohibition of either partner's engagement in sex with a third person (adultery laws); second, any employer rules against married couples working in the same workplace (anti-nepotism policies); third, the duty of support, at least to the extent of paying third parties out of one's own assets for a spouse's "necessary expenses"[33] and, in community property states, of depleting the marital "community" to pay *any* debts incurred by a spouse during the marriage; fourth and fifth, exit from the marriage only by death or divorce, with the state taking jurisdiction over each and often imposing substantive requirements when it gains this control. There are at least three more that are so widely taken for granted—so hidden in plain sight—that even Chambers doesn't isolate them. The first two are rigid, though silent, substantive bans: one, marriage to one-and-only-one person at a time (no polygamy or polyandry); and two, no "term" marriage contracts (no "5-year renewable" marriage; no "marriage for tonight"). The third arises from the state's plenary, but at any given moment perhaps unexercised, power to "construct" the marital form. The state can change the basic rules of marriages currently under way without providing a special exit for those who do not consent to the change. It has done so in my lifetime: the adoption of no-fault divorce drastically changed the terms of millions of ongoing marriages, pervasively, it appears, to the disadvantage of wives. States could reinstate a requirement of fault for divorce today without consulting the wishes of married individuals or couples beyond what is necessary to pass normal legislation and without "grandfathering in" their current access to no-fault divorce.[34]

[32] *Ibid.*

[33] Note that, because medical care above and beyond that covered by insurance or social welfare programs is deemed "necessary," this obligation can be catastrophic for unlucky spouses.

[34] Eskridge misreads this argument in the essay he contributes to this volume. He attributes to me a point I do not make: that "same-sex marriage will invite increased state attention to queer people or their relationships". (See Eskridge, chap. 6, p. 123.) For Eskridge, "same-sex marriage" and "gay marriage" are interchangeable, and would be the place where the state could find "queer people". (See Eskridge, pp. 117, 120, 124, 125, 127.) But for me, the term "gay" and the term "marriage" have such divergent referential objects that I could not sensibly use them in Eskridge's formulation. "Gay" (to me) designates an historical project of producing erotic subjects of a certain sort; marriage is a legally enforced relationship with access and exit rules and substantive legal and cultural content. To say that marriage, or marriages, or a marriage, could be gay, jumps a very complex conceptual divide separating and joining the *production of subjects* from and to the *institutional forms that law provides for human sociability*. I avoid the term "gay marriage" because I think crossing back and forth across that divide is hard, detailed work—hard work that is presumed away by the term. And I don't think that recognising "gay marriage" as Eskridge conceptualises it would have any necessary meaning for "queer sexuality." I say "queer" in order *not to say* "gay"; if possible, "queer" should float free of homosexual identity with all its particularities; I think some same-sex sex is not queer and some cross-sex sex is queer; the excitement of having the term queer available arises in part from the open edge it offers people, without reference to the same-sex-ness or cross-sex-ness of any particular element of erotic life, to know, think, act or feel something about oneself and others in sexual ways that seem now to be unknowable, unthinkable, unactable, unfeelable. On my use of the term "queer," "gay marriages" would not necessarily harbor more or less "queerness" than what Eskridge would call "straight marriages." It appears that, when Eskridge and I talk about sexuality, we have very different conceptual (not to mention political and erotic) projects going.

Eskridge also inaccurately attributes to me a claim that recognition of same-sex marriage "will instigate a state mobilisation around sex-negative regulations" (Eskridge, *supra*, p. 125): I make no such claim. Continuing the critique, he inaccurately attributes to Michel Foucault (and, it appears, to Michael Warner and me) the view that "nothing happens as a direct result of top-down stimuli (including laws); social change occurs from the bottom up" (Eskridge, *supra*, p.125). These are crude formulations which no one well trained in postmodern theory would avow, and that have no purchase in the work of Foucault, Warner, or me (hubristic catalogue). Taken together with misreadings noted above, these errors may seem small. But they rob Eskridge's refutation of my argument of the bite he wishes it to have.

Eskridge is right of course to identify me as a person who argues that he and other gay centrists who seek legal recognition of same-sex marriage fail to deal forthrightly with the regulatory dimensions of marriage. Eskridge's essay in this volume is a good example of what I am objecting to. He wishes to refute my assertion that same-sex marriage would offer to same-sex couples a regulatory form with intensities and invasiveness that are distinctive and that would be new to them; I am wrong on this point, he says, because the state also regulates nonmarital "households," producing a symmetry that renders an extension of the regulatory domain of marriage to include same-sex relationships no extension of regulation at all. (See Eskridge, *supra*, p. 123.) But the analogous regulatory regimes that he identifies as appearing on either side of the marriage/not-marriage distinction are not necessarily *the same* or *as regulatory*. Surely if avoiding state regulation is your goal, you will use different words in answering the question "Would you want exit from your relationship to be by divorce or by the terms of a cohabitation agreement?" You might also have very different answers on either side. Nor does Eskridge engage the many ways that marriage produces regulatory effects, not only on the married couple, but through one spouse on another, and ultimately through the couple on the entire social array—ways which I detail in this paragraph and in the following ones. Teaching family law has given me deep respect for the particularities of marriage and the complex ways in which *some* of its elements are mimicked (not copied) by regulatory practices applicable outside the marital relationship; but it has also borne in upon me again and again that marriage in the United States remains a unique legal form of human sociability. It *is* discrimination; no discrimination, no marriage. And I think ultimately Eskridge would not disagree; he seeks a marriage right precisely because marriage is unlike unmarriage.

Moreover, the rights of marriage are not always "of the couple" but rather, often, lie *against* one spouse. It is charming to call these elements of marriage "duties," "obligations", and "civilised commitment"—but let's face it: the rights of spouse against spouse are also what we must mean when we say "the rights of marriage". If I marry you, I can sue you for divorce (as no one else can); can make you divide the property that the state deems us to "share" under the order of a court; and can often (in the US) seek to introduce evidence of your marital fault to tilt the rules or the judge's discretion in my direction. As Chambers concludes, "at divorce and death, states impose on married couples a prescriptive view of the appropriate financial relationship between them".[35] And even though many of the specific terms of that prescription can be bargained away by the spouses in a prenuptial agreement or waived in a will (as Chambers is relieved to point out), that bargaining and giving away will happen in the

[35] Chambers, *supra* n.30, at 479.

shadow of the law (as Robert Mnookin and Lewis Kornhauser's classic article advises us).[36] Indeed, even the crudest application of economic modeling techniques to this process reveals the possibility that *any* important—or trivial!—decision in the marriage may be affected by these supposedly waivable endpoint rules.[37] The rights of spouse against spouse can be a source of diffuse, infinitesimal regulation of the marriage by a public that need not be visibly present.

Finally, even the most unequivocally beneficial of the marital rights recognised in the US—for instance, the spousal immigration and naturalisation preference, the federal command that employers must provide people with short leaves to care for their ill spouses, the eligibility to depend on a spouse's social security benefits, the exemption from federal and often state gift and estate taxes—depend on the state for their very meaning. They are not "rights" to be free from state interference à la the right of free speech: by contrast, they intrinsically involve a relationship with the state. Nor are they like other rights to enter legally enforceable relationships—for instance, the right to contract or to make a decision to procreate; by contrast, the state sets almost all the terms of these rights of marriage, while married people merely *receive* them. (The decision to exercise the right is, formally, distinct from design and receipt of the right itself.) It is far more apt to think of marriage in this aspect as a license. Here, as when the state stipulates that only X, Y, or Z type of entity can run a charter school or sell legal services, the state creates a warp in the distribution of some social good and then requires that only license holders can partake of it. But licenses aren't really about rights: they are instead a form of *regulation.*

Moreover, the regulatory effects of these marital "rights" extend way beyond the relationship of the licensed pair to the state. The four examples I just gave—the immigration and naturalisation preference, mandated availability of caretaking leave, social security dependency eligibility, and gift and estate tax exemption—allocate benefits to spouses on an assumption that each marriage is a mutual aid society. My family law professors at Yale, John Simon and Jay Katz, cannily described this aspect of US marriage as a private welfare system. The features I have just named transfer goods from some "public"—whether that is the pool of dispreferred potential immigrants, the employer, all participants in the social security system, or all those competing for state tax proceeds—to the marriage in order to subsidise the spouses' mutual duty of support. Other rules insist on specific transfers *within* the marriage: for example, social welfare programs, both public ones like Social Security and private ones like college scholarship programs, take both spouses' incomes into account in determining the eligibility of one of them for need-based subsidies. All of these rules posit that the *marriage* is primarily liable for its *members'* welfare.

[36] Robert Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 *Yale Law Journal* 954.

[37] For some not-so-crude, indeed quite arresting, examples, see GS Becker and KM Murphy, "The Family and the State" (1988) 31 *Journal of Law and Economics* 1; S Lundberg and RA Pollak, "Bargaining and Distribution in Marriage" (Fall 1996) 10 *Journal of Economic Perspectives* 139.

This liability survives the marriage, moreover, as we see in divorce and probate rules requiring that spouses who have passed out of the marriage, either by divorce or death, continue to bear a unique responsibility for the former spouse's support. Taken together, these private-welfare-system rules are deeply distributive in their function. They say to married people: *You*, not *we*, will support *you*. And thus they also say to *un*married people: We will not support you; *you are on your own*.[38]

Thus the social totality is implicated in the marital form. Rights have led to Regulation, and Regulation (like some aspects of the much more demure project of Recognition) has led to Normalisation. Is regulation of this kind a bad thing? Is normalisation of this kind a bad thing? These are hard questions. Every resource known to ethical philosophy, every theory of the state, every model of justice, offers a different way of approaching them. The purpose of this chapter is not to decide those questions or to argue that one or the other understanding of ethics, the state, or justice is the right one to use in answering them. My point instead is that we can't begin that work without an honest, beady-eyed understanding of *what marriage is*. And to that end, I would invoke two procedural norms which I think ought to guide us: "honesty is the best policy" and "be careful what you ask for." I rely on them to say: recognition and rights arguments depend on regulation and normalisation arguments; and it is bad to have a debate over the social value of lifting the ban on same-sex marriage that fails to acknowledge—indeed, that typically hides—these entailments.

[38] Thus Fraser's model of the relationship between Recognition and economic redistribution in gay rights claiming is, at least in the instance of marriage rights, mistaken. As I indicated above, see *supra*, text accompanying nn.3–4, Fraser regards Recognition as a distinct remedy that has merely consequential impacts on economic distribution. But claiming to have a right to marry (or to have one's same-sex relationship recognised through legal marriage) *is* claiming a certain place in the private welfare system managed through marriage; and it *is* claiming a right to avoid another place in it.