

QUEER RELATIONS: A READING OF MARTHA NUSSBAUM ON SAME-SEX MARRIAGE

JANET R. JAKOBSEN*

This symposium on the work of Martha Nussbaum as part of the inauguration of the program on Gender and Sexuality Law at Columbia Law School provides a chance to reflect on the reasons for a focus on gender and sexuality in the study of the law. After all, one might ask, are questions of gender and sexuality—at least those beyond a few matters like discrimination—not private concerns that should rightfully be beyond the realm of the state and its laws? If we look at public policy over the past half-century, however, gender and sexuality have been central to a range of crucial questions of social policy as they have been enacted in law—from welfare reform to immigration policy to health care—and so it is crucial that this area be taken seriously in the study of law as well.

As my way of phrasing this opening indicates, I am not a scholar of law, but rather of social policy and social movements, as these fields are understood within religious studies and through the lens of ethical analysis. I have used the tools of my training in social ethics and the study of religion to consider the role of gender and sexuality in contemporary U.S. policy. Martha Nussbaum's extensive body of scholarship includes a focus on a range of social policies in conjunction with her explorations of constitutional law. Having written widely on questions of gender, Professor Nussbaum has more recently turned to sexuality as well, and her interest in constitutional law has taken her to a question that continues to roil both public discourse and public policy in the U.S.—same-sex marriage.

Nussbaum takes up this issue at several points, most recently in her book, *From Disgust to Humanity*. Gay marriage also remains a crucial social issue of the day, although a difficult one to summarize given that the situation is remarkably fluid and the battles around the country over gay marriage shift on an almost daily basis. Same-sex marriage was, of course,

* Janet R. Jakobsen is Director of the Center for Research on Women, Professor of Women's Studies, and Dean for Faculty Diversity and Development at Barnard College, Columbia University. She holds the Ph.D. in Ethics and Society from the Graduate Division of Religion, Emory University and is the author of *Working Alliances and the Politics of Difference: Diversity and Feminist Ethics* (1998). With Ann Pellegrini, she is the author of *Love the Sin: Sexual Regulation and the Limits of Religious Tolerance* (2004) and co-editor of *Secularisms* (2008).

the confounding defeat for progressive forces in the November 2008 elections despite the overwhelming victory of Barack Obama in the presidential campaign. Obama was victorious in the state of California by a wide margin, but a majority of Californians also voted for Proposition 8, a referendum reversing the California Supreme Court's recognition of same-sex marriage. In the court battle that ensued, Prop. 8 was upheld by the California Supreme Court, but so were the gay marriages performed between the initial legalization and the passage of the referendum. This means that in California some same-sex couples are legally married, but at this time no other similarly-situated citizens of the state can join them. In the spring of 2009, however, there was a pronounced swing in momentum on the issue, with Iowa, Vermont, New Hampshire, and Maine joining Massachusetts and Connecticut in granting same-sex marriages, while New York and the District of Columbia chose to recognize these marriages but do not yet grant them. None of these decisions really settled the issue, even in these few states. Californians have begun litigation to overturn Proposition 8, while in Maine, a coalition called Stand for Marriage gathered signatures to put the bill on hold until a measure similar to Proposition 8 could be put to the voters. In November 2009, the repeal of Maine's gay marriage bill passed by a narrow margin, meaning that gay marriage was rescinded in Maine before it could take effect. Yet, these state-by-state battles are not the only site of conflict on this issue. In July 2009, these issues were brought to the federal level when the State of Massachusetts filed a suit in federal court challenging the federal Defense of Marriage Act (passed in 1996 and defining marriage as "between one man and one woman") as violating the exclusive prerogative of the states to define marriage.¹ So, despite the new spate of state recognition, the battles that may be faced in the remaining states—including the ongoing battles in states like California—and at the federal level mean that gay marriage will remain on the national agenda for some time to come.²

In the midst of all of this conflict, Nussbaum comes up with a means of addressing same-sex marriage that might be seen as surprising for a liberal theorist but that provides an alternative to the simplified "for" or

¹ Denise Lavoie, *Mass. is 1st State to Sue Feds over Marriage Issue*, ASSOCIATED PRESS, July 8, 2009, <http://abcnews.go.com/US/wireStory?id=8031916>.

² Nan Hunter has argued on her blog, *Hunter of Justice*, that despite this recent spate of activity, the battle beyond these states and a handful of others potentially receptive to same-sex marriage is likely to be anything but short, while the ground of debate may also shift to questions of religious freedom. Hunter for Justice, <http://hunterforjustice.typepad.com/> (May 15, 2009, 18:33 EST).

“against” dichotomy that has come to mark the dominant political debate on the subject. Unlike those who have promoted same-sex marriage as a crucial matter of lesbian and gay rights, or human rights more generally, Nussbaum supports gay marriage but also takes a different tack. She does think that if the state is going to marry heterosexual couples, equality requires that they also marry homosexual couples, but she is uncertain that the state should be in the business of marrying anyone at all. In this sense, rather than simply supporting gay marriage, Nussbaum is much more in line with the reading of marriage presented by queer theorists like Michael Warner, in *The Trouble with Normal*,³ and with a longstanding feminist tradition, represented by Martha Fineman’s *The Autonomy Myth*,⁴ that has variously criticized state-based marriage.

Queer theory is, itself, no singular thing; there is plenty of disagreement about issues ranging from the possibility of queer futurity to the status of central concepts like “heteronormativity” and “resistance to the norm.”⁵ Within sexuality studies, however, there is a relatively clear distinction between more traditional lesbian and gay studies, which presume some form of coherent gay and lesbian identity or community as their subjects, and the queer critique which takes as its object not only the normativity of heterosexuality in dominant cultures around the world (although as an Americanist, I will concentrate on the United States), but also the force of normativity within gay and lesbian communities (what scholars like Lisa Duggan and Jasbir Puar have termed “homonormativity”).⁶ In social movement terms, lesbian and gay studies tend to be associated more with gay rights organizations like the National Gay and Lesbian Taskforce and the Human Rights Campaign, both of which are strong proponents of same-sex marriage in the form of marriage equality or the freedom to marry (which are interesting conceptualizations

³ MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (2000).

⁴ MARTHA FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2005).

⁵ Laurent Berlant & Michael Warner, *Sex in Public*, 2 *CRITICAL INQUIRY* 24, 547–66 (1998); Janet R. Jakobsen, *Queer Is? Queer Does?: Normativity and the Problem of Resistance*, 4 *GLQ: A J. OF LESBIAN AND GAY STUD.* 511 (1998); LEE EDELMAN, *NO FUTURE: QUEER THEORY AND THE DEATH DRIVE* (2004); JOSÉ ESTABAN MUÑOZ, *CRUISING UTOPIA: THE THEN AND THERE OF QUEER FUTURITY* (2009).

⁶ Lisa Duggan, *Queering the State*, 39 *SOC. TEXT* 1 (1994); JASBIR PUAR, *TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES* (2007).

in themselves).⁷ Queer theory has tended to be more skeptical of marriage, an institution that is a central part of the very normativity that is of such concern to queer critique.⁸ As such, queer theorists have tended to support social policy proposals like those of the Beyond Marriage initiative and what Duggan, among others, has termed “sexual democracy.”⁹

Nussbaum’s position on this issue is striking for a scholar who is known for her commitment to a liberal paradigm that might put her more closely in line with the position held by proponents of “gay and lesbian” rights. At the symposium, a crucial question was raised by Tracy Higgins: at what point would we say that a position initially informed by a commitment to justice and rights, as Nussbaum’s work has long been, is no longer liberal? Extrapolating from Higgins’ question, is it possible that Nussbaum’s ethical and political commitments, which are admittedly formed by liberalism, might be best fulfilled by making a move beyond the limits of liberalism?

Take, for example, Nussbaum’s commitment to justice as articulated in her later work with books like *Hiding from Humanity*¹⁰ and *Frontiers of Justice*¹¹. In these books, she sets out to articulate a theory of justice that includes those who are not usually the subjects of such theories. She addresses this question across a broad spectrum of exclusion—gays and lesbians, people with disabilities, across national boundaries, as well as across species boundaries. In the case of gay and lesbian or queer people, we are not, or should not be, according to Nussbaum, the subjects only of compassion—of the “love” so often offered by the Christian Right, even as our “sin” is “hated.” Rather, as Ann Pellegrini and I argue in *Love the Sin: Sexual Regulation and the Limits of Religious Tolerance*, queers are not deviants to be tolerated but rather free and equal subjects along with those

⁷ National Gay and Lesbian Task Force, <http://www.thetaskforce.org> (last visited Feb. 1, 2010); Human Rights Campaign, <http://www.hrc.org/issues/marriage.asp> (last visited Feb. 1, 2010).

⁸ See WARNER, *supra* note 3.

⁹ Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families & Relationships (July 26, 2006), <http://beyondmarriage.org/BeyondMarriage.pdf>.

¹⁰ MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME AND THE LAW* (2006) [hereinafter NUSSBAUM, *HIDING FROM HUMANITY*].

¹¹ MARTHA NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY AND SPECIES MEMBERSHIP* (2007) [hereinafter NUSSBAUM, *FRONTIERS OF JUSTICE*].

who claim to love us even as they would deny us equal rights.¹² We are, or should be, the subjects of justice rather than the objects of tolerance. But the question is, what kind of subjects are we?

I ask this question because it has important consequences for policy and thus for law. Depending on how we answer, we might find gay marriage to be the single most important issue of gay rights, as commentators like Andrew Sullivan do.¹³ On this view, the right to freely choose whom to marry is definitive of the adult human being, who is the subject of justice, and so as a matter of equality it is actually crucial that gay people be afforded the right to make this choice. If they are not, they can never be equal citizens. Alternatively, if one understands the subject of justice differently, one might actually move to shift the argument away from gay marriage and toward other means of affirming equality. One might even be led to question the place that marriage holds in contemporary public life, where it is so often taken as an expression of the state's recognition of individual human dignity. Thus, the question of the status of liberalism is not an esoteric one, what is sometimes called "only academic," but rather has major implications for how one approaches a policy issue like same-sex marriage. If one accepts the autonomous individualism that is the mark of liberalism, then one will be more likely to take up the gay and lesbian rights approach, but if one begins with the queer critique of the individual, then an approach that de-centers or even disestablishes marriage, removing it from the realm of the state entirely, is the more likely choice.

While queer theory and politics do not embrace liberal individualism, they also stand in uneasy relation to the prominent alternatives to liberalism. For materialists like David Harvey, we are, in fact, too much on the side of liberalism, tied to a need for freedom and sexual (read: personal) expressivism that slides all too quickly into liberalism or neoliberalism.¹⁴ Queers do need and often advocate for freedom, even if queer critique does not base this advocacy on a claim to

¹² JANET R. JAKOBSEN & ANN PELLEGRINI, LOVE THE SIN: SEXUAL REGULATION AND THE LIMITS OF RELIGIOUS TOLERANCE (2003).

¹³ Andrew Sullivan, *My Big Fat Straight Marriage*, THE ATLANTIC, Sept. 2008, <http://www.theatlantic.com/doc/200809/gay-marriage> ("No other institution has an equivalent power to include people in their own familial narrative or civic history as deeply or as powerfully as civil marriage does."). See also SAME SEX MARRIAGE: PRO AND CON (Andrew Sullivan ed., 1997).

¹⁴ DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM, 5–38, 41 (2007) (explaining ties between concepts of freedom and liberalism and neoliberalism).

modern freedom.¹⁵ While queer theory does not satisfy the demands of historical materialism or promote liberalism, neither does it meet the norms of the communitarianism that provides another major alternative to modern freedom.¹⁶ Not only are queers often advocates for what is configured as sexual freedom, but they are associated with freedom because the queer critique of normativity is, by definition, a critique of the norms by which the boundaries of any community might be established. In other words, not only are queers outliers of communities that are defined by nation, gender, race, or class, but also of those defined by sexuality. The frequently invoked “gay and lesbian community” is created by normative operations as certainly as is any racial and ethnic community or any solid class. It is at this point that to be (or to do) “queer” parts company with any identity, including the homosexuality that David Halperin has argued tends to haunt queer theory.¹⁷ While the queer critique is often associated with homosexuality and cannot completely escape this association, neither can it comfortably provide a site for homosexual community.

Given that the queer approach fails to meet the standards of the autonomous individualism that is the hallmark of modern liberalism, while also failing to meet the standards of either the anti-individualism that grounds materialism or the communities that make for communitarianism, my work has focused on a relationality that is diagonal to liberalism, materialism, and communitarianism.¹⁸ Queer relationality explores the non-normative or alogical forms of affiliation on which social relations depend but which are rarely socially recognized or are considered only pathological.¹⁹ Amy Villarejo, for example, has recently read²⁰ Roderick

¹⁵ See, for example, Michael Warner’s extended argument for sexual autonomy in *The Trouble with Normal*. WARNER, *supra* note 3. For a reading of a queer basis for freedom, see Janet R. Jakobsen & Elizabeth Lapovsky Kennedy, *Sex and Freedom*, in *REGULATING SEX* 247–70 (Elizabeth Bernstein & Laurie Schaffner eds., 2004).

¹⁶ For a concise example of Nussbaum’s critique of communitarianism, see NUSSBAUM, *HIDING FROM HUMANITY*, *supra* note 10, at 271–77.

¹⁷ See DAVID M. HALPERIN, *SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY* 112–13 (1995); Jakobsen, *supra* note 5 (interpreting Halperin).

¹⁸ For an in-depth exploration of this type of diagonal relation to liberalism, see ELIZABETH POVINELLI, *THE EMPIRE OF LOVE: A THEORY OF INTIMACY, GENEALOGY AND CARNALITY* (2006).

¹⁹ I thank Jordana Rosenberg for the term “alogical” to describe part of what might be “queer” about different forms of relationality.

Ferguson's *Aberrations in Black: Toward a Queer of Color Critique* as using "non-heteronormative" as a site for intersectional analysis that, "on the one hand, can speak to the multiple forms that degradation takes in late capitalist America, where perversions and gender transgressions aplenty become inscribed in the mortar of racialized urban landscapes. On the other hand, he lends that same name to figures of defiance and critique."²¹ If social science reads non-normativity as pathology, queer relationality reads such "aberration" as offering possibilities for producing lives and social relations of value—albeit of different value.²² As such, a queer approach to relationality offers a different basis for discussions of value, ethics, and even social policy. As I will argue below, relationality is very much at stake in the debate over same-sex marriage, and a queer reading of Nussbaum's work on this issue can illuminate not only Nussbaum's position vis-à-vis the limits of liberalism but also what might be gained by thinking of relationality through other traditions that are not normatively liberal, materialist, nor communitarian.

I. SAME-SEX MARRIAGE: A QUESTION OF POLICY AND RELATIONALITY

Nussbaum raises a question that many queer theorists writing on the question of same-sex marriage have also raised: why do we bundle particular types of benefits with a sexual relationship in marriage? Why, if you marry someone, can you provide that person with crucial benefits like health care? Why do we not provide these benefits universally through the government? And, if we are going to provide them through these private means, why is a sexual partner the only viable adult designee for such benefits? My lover's brother has multiple sclerosis and now lives in a nursing home. The financial support for his health care is precarious to say the least. Why, if she and I were now to marry in Connecticut, where she lives and works, could she designate me as the recipient of benefits, but not him, despite the fact that he is more in need of her assistance than I?

²⁰ Amy Villarejo, *Tarrying with the Normative: Queer Theory and Black History*, 23 SOC. TEXT 69, 69–84 (2005).

²¹ RODERICK A. FERGUSON, *ABERRATIONS IN BLACK: TOWARD A QUEER OF COLOR CRITIQUE* 72 (2003).

²² On the question of valuing queer lives, see AMY VILLAREJO, *LESBIAN RULE: CULTURAL CRITICISM AND THE VALUE OF DESIRE* 28–35 (2003) (interpreting Marxian theory of value).

And what do these questions of benefits actually have to do with the relation of “marriage” as opposed to a civil union? What is it that distinguishes marriage from civil unions after all? For Nussbaum, the distinguishing characteristics are to be found in the expressive dimension of marriage. Nussbaum argues that there is movement toward a rough consensus in the U.S. about equality between heterosexuality and homosexuality in terms of the civil rights that would be conferred by domestic partnership or state-legitimated civil unions, but that public debate becomes heated when we turn to the expressive qualities attached to the word “marriage.” Nussbaum then questions not whether some citizens should have access to marriage and others to civil unions, but *the state’s* relation to marriage. For Nussbaum, it is not a mistake for the state to be involved in the basic social supports provided by civil unions, but it is a mistake for the state to be in the business of legislating the expressively laden union of marriage, given that this expressive meaning is widely divergent, hotly contested, and tightly held by different segments of the U.S. population. It is best, “as a matter of both political theory and public policy,” to leave this expressive domain to the realm of freedom and private association.²³ Private groups can decide for themselves the meaning of marriage, and they should be free to do so, untrammelled by the state. Moreover, there are no constitutional reasons why the state must sanction marriages that carry this expressive element:

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 simply the role it plays in the contractual process.²⁴

If, however, the state does offer marriage with its expressive benefits or, in other words, if the state sanctions marriages that carry both expressive weight and civil benefits, then the question of equality cannot rightfully be avoided, and the state must do so “with an even hand.”²⁵ Thus, whatever the state chooses, it must do within the framework of equality.

²³ MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 132 (2010) [hereinafter NUSSBAUM, FROM DISGUST TO HUMANITY].

²⁴ *Id.* at 154.

²⁵ *Id.*

Nussbaum does go on to briefly consider the social policy (rather than constitutional) issues of marriage or civil unions. She sees a state interest in the support of family units, particularly in terms of support for the raising of children, but she points out, as both feminists and queers often do, that raising children is not always part of marriage and that marriage is not necessarily the best means for providing social support for the partners or their children. If social support were the true basis of the state's interest, then instead of focusing on marriage the state should be involved in a wide range of policy options, such as paid medical leave for designated caretakers (which may or may not be defined in familial terms), that could provide important building blocks of support but that are often not discussed as serious policy options. Given the distance between the current public discussion that focuses almost exclusively on marriage and a possible conversation in which a broad range of social arrangements would be publicly recognized as viable, Nussbaum concludes that the U.S. is probably best off supporting the "package deal" of civil unions for all citizens, which would produce equality in state benefits without unduly disrupting American cultural expectations.²⁶ While Nussbaum is willing to consider means of arranging social support other than civil unions, for now she supports the idea that by replacing state-based marriage with civil unions, the state could increase equality while taking a step away from involvement in the expressive domain of marriage.

Nussbaum does not argue, as some queer theorists do (Ann Pellegrini and myself included), that the government should support the freedom to form relationships more broadly than the couple-centric forms of civil unions and gay marriage, although she does not close the door on this possibility. Returning to the constitutional issue, Nussbaum argues that the U.S. government has every right to pick and choose among the types of relationships it supports.²⁷ But, as a matter of ethics and social policy, Ann Pellegrini and I argue that we should ask why the government chooses to support some types of relationships and not others. We ask this question particularly with regard to the central American value of freedom. If freedom is a crucial value of U.S. public life (and who would argue that it is not?), why is the government unwilling to embrace it vis-à-vis sexuality?

Unlike those who presume that sexual freedom and social support are mutually contradictory, Pellegrini and I argue that under conditions of

²⁶ *Id.* at 163–65.

²⁷ MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 339 (2008) [hereinafter NUSSBAUM, LIBERTY OF CONSCIENCE].

sexual freedom, sexual relations can create a wide variety of life-supporting relationships.²⁸ From the networks that provided crucial support in the midst of the AIDS crisis, to those that provide mutual support as we age, to gay parents who are willing to adopt and give loving homes to children who would otherwise be in institutionalized care, sexual relations of various kinds—public sex and private, multiple and monogamous—allow for relational connections that make both cultures and lives possible. Given that forty-one percent of marriages now end in divorce, it is clear that heterosexuals mostly make their lives in these kinds of networks as well.²⁹ Moreover, as both historians and sociologists have shown these types of relational networks—whether created through extended kin networks, neighborhoods, or religious bodies—have been crucial to sustaining, and in fact constitutive of, the American “family” and its raising of children (except, perhaps, for the short period of “nuclear family” dominance after World War II).³⁰ In other words, if the main concern of the government in supporting particular types of sexual relationships is that those relationships provide for the well-being of persons, then support for sexual democracy instead of the institution of marriage would be the rational choice.

The question that Pellegrini and I find to be perhaps the most interesting in this entire debate is why it is that when it comes to sex, the central American values—freedom and democracy—are nowhere to be found. To connect these values to sex is not to find oneself at the center of American public life but at some far extreme, beyond the realm of nearly all political analysis. We find this strange gap in the application of dominant U.S. values to be the result of the particular obsessions and resulting panic or hysteria that are associated with sexuality in the American context. These panics are often attributed to religion—to the Puritan heritage of U.S. public culture—and, while religion is undoubtedly part of U.S. public discourse about sexuality, we argue that religion alone cannot explain the particular U.S. obsession with sex.³¹ For that we need to think about secularism in relation to religion.

²⁸ JAKOBSEN & PELLEGRINI, *supra* note 12, at 137–48.

²⁹ Dan Hurley, *Divorce Rate: It's Not As High As You Think*, N.Y. TIMES, Apr. 19, 2005, at F7 (noting that social scientists have calculated the divorce rate to be forty-one percent at its peak).

³⁰ STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* (2000).

³¹ As Estelle Freedman and John D'Emilio point out, this view of the Puritan heritage seriously misreads the Puritans as dedicated simply to sexual repression. ESTELLE B. FREEDMAN & JOHN D'EMILIO, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA*

II. CHRISTIAN SECULARISM

Nussbaum is also deeply interested in the question of why the United States is so obsessed with gay sexuality and so dedicated to opposing gay marriage, and she too has questions about the ways in which religion is so often invoked in U.S. debates over sexuality in general and gay marriage in particular. Nussbaum recognizes that gay marriage is, in fact, a relatively conservative policy vis-à-vis sexuality.³² Queer theorists across a range of positions argue that same-sex marriage simply inducts same-sex partners into the structures of normativity. In other words, gay marriage is a straightforward (pardon the pun) policy of assimilation. This is not to say that gay marriage would not provide important social recognition and also crucial material benefits to a number of people who currently need them. In immigration, housing, and health care marriage can be a lifeline that is not otherwise available, although one can raise questions about whether this is so in all cases and why it should be. This brute material fact has led to new movements, like Beyond Marriage, that take marriage seriously while also arguing that it should not be conceptualized as the leading issue, and in some cases the only issue, for either gay liberation or the support of households.

If this is so—if gay marriage is a relatively conservative policy, and not even all gay people agree that gay marriage is nirvana—Nussbaum wonders why it raises the type of hysteria that it does. Why, for example, do people argue that “gay marriage” is a threat to heterosexual marriage? Why do the ways that some people might get married threaten the ways that other people do get married? After all, we let people get married by Elvis impersonators in Las Vegas. If this does not undermine western civilization as we know it, why would two men in tuxedos?³³ And yet, much of the

(1988, xi). Mary Anne Case also argues that, unlike the Anglican colonists, the Puritans were resistant to the conflation of civil marriage and religious marriage. For Case, both the Puritan heritage of understanding marriage as a civil contract and the Catholic recognition of the distinction between civil and religious marriage have been factors in allowing the New England states of Massachusetts, Connecticut, and Vermont to be in the forefront of allowing same-sex civil unions and marriages. Mary Anne Case, *Why Evangelical Protestants are Right when They Say that State Recognition of Same-Sex Marriages Threatens Their Marriages and What the Law Should Do About It* (Oct. 1, 2008) (unpublished manuscript, on file with author). Thus, Case helpfully reverses the usual presumptions about religious sexual conservatism to show that on the issue of marriage at least a Puritan or Catholic heritage does not necessarily lead to a conservative legal stance.

³² See NUSSBAUM, FROM DISGUST TO HUMANITY, *supra* note 23, ch. 5.

³³ For a reading of how homosexuality itself is taken to undermine “western civilization,” see Janet R. Jakobsen, *Can Homosexuals Undermine Western Civilization As*

campaign for Proposition 8 in the 2008 election in California was in precisely these defensive terms. In a moment of political brilliance, yet logical uncertainty, the campaign positioned itself as in support of heterosexual marriage as much as it was in opposition to the homosexual variety. In so doing, the campaign positioned itself as less about taking away the civil rights of gay and lesbian people and more about protecting the civil rights of heterosexuals. Despite its logical shakiness, this tactic is not new. Nussbaum wants to know why, in 1996, before there was any state that allowed same-sex marriage, the U.S. Congress felt the need to pass a federal law defending heterosexual marriage against this somewhat unclear assault. At the time, not only was the logic of “defending marriage” somewhat cloudy, so was the need. And yet, the American public apparently saw it as such a crucial issue that the Congress took it up in an election year as a surefire electoral winner, and Bill Clinton, supposed friend of the gays (a supposition made by both those who hoped he was and those who vilified him for so being), signed the bill as if he had no other choice.

As evidence for her claim that the argument over same-sex marriage is driven by hysteria, Nussbaum provides a reading of Senator Robert Byrd’s statement on the floor of the Senate in support of the bill (a point to which I will return). In that speech, Byrd proclaims horrific consequences for any nation that moves away from the definition of marriage as between “one man and one woman.” Nussbaum proposes that Byrd’s speech is best understood as driven by disgust for homosexual sex acts. As indicated by the title of her recent book on constitutional issues related to sexuality, *From Disgust to Humanity*, Nussbaum wants to obviate the impulse to make public policy or court decisions on the basis of disgust.³⁴

Most interestingly for my purposes, Nussbaum argues that it is this disgust, not religion, that drives both public hysteria and public policy vis-à-vis same-sex issues in general and same-sex marriage in particular.³⁵ This is an interesting claim because virtually everyone in popular discourse—from the mainstream media to gay activists who blame religious groups to

We Know It?, in QUEER GLOBALIZATIONS/LOCAL HOMOSEXUALITIES 49–70 (Arnaldo Cruz-Malavé & Martin F. Manalansan IV eds., 2002). For a reading of why conservative evangelicals believe heterosexual marriage to be threatened by same-sex marriage, see Case, *supra* note 31.

³⁴ NUSSBAUM, FROM DISGUST TO HUMANITY, *supra* note 23, intro.

³⁵ *Id.*, ch. 1.

religious activists who take credit for victories like Proposition 8—thinks that the reasons for anti-gay activism are largely religious.³⁶ In the aftermath of Proposition 8, the big question debated in both the print media and on the Internet was not whether religion was to blame, but which religion was to blame. Was it the Church of Jesus Christ of the Latter Day Saints, or the Catholic Church, or the Black Church voters brought out by Barack Obama's candidacy, or all of the above? Ultimately, analyses of both exit polling and records of fundraising for the Prop. 8 campaign showed that the Mormons and the Catholics were large funders of support for the measure.³⁷ While race was not the most statistically significant indicator of how people voted (meaning that the focus on increased African American participation due to Obama's candidacy was misleading), church attendance was a relevant variable.³⁸ So if these are the numbers, what does

³⁶ The mainstream media was almost universally willing to accept the idea that voters drawn to the polls by anti-gay referenda—the so-called “values voters”—were responsible for George Bush's victory in Ohio (and hence his victory in the electoral college) in 2004. Frank Rich, *The Great Indecency Hoax*, N.Y. TIMES, Nov. 28, 2004, § 2 at 1. This occurred despite the fact that the data on “values” voters supported no such conclusion, given that there were not an unusually high number of such voters in 2004 (the percentage was higher in 1996 when Clinton was reelected) and the question about values did not name specifically conservative or religious values. *Id.*

³⁷ Mary Anne Case draws an important distinction between the Catholic hierarchy and Catholic populations with regard to same-sex marriage. *See* Case, *supra* note 31, *id.* at 3. The Catholic hierarchy resolutely opposes any legalization of same-sex marriage, as indicated by their funding of the campaign for Proposition 8, but Catholic populations tend to display more openness to same-sex marriage than do Protestants. *Id.* at 3. Case points out that, for example, polls show Latino Catholics are much more open to same-sex marriage than Latino Protestants, and a significant proportion of the population is Catholic in the states that have been early adopters of civil unions and same-sex marriage, particularly Massachusetts and Connecticut. *Id.* Case theorizes that this openness on the part of Catholic populations is due to a recognition of a distinction between religiously-based marriage and state-based marriage that exists for Catholics but does not for Protestants (particularly for Anglicans); the Catholic regulation of marriage is obviously different from that of the state, while for Protestants state and religious regulation tend to be conflated. *Id.* at 5.

³⁸ PATRICK J. EGAN & KENNETH SHERRILL, NATIONAL GAY AND LESBIAN TASK FORCE POLICY INSTITUTE, CALIFORNIA'S PROPOSITION 8: WHAT HAPPENED, AND WHAT DOES THE FUTURE HOLD? 3 (2009), *available at* http://www.thetaskforce.org/downloads/reports/reports/pi_prop8_1_6_09.pdf (chart showing the percentage of “yes” votes for Proposition 8 based on frequency of religious service attendance); MARK BALDASSARE ET AL., PUBLIC POLICY INSTITUTE OF CALIFORNIA, PPIC STATEWIDE SURVEY: CALIFORNIANS & THEIR GOVERNMENT 12 (2008), *available at* http://www.ppic.org/content/pubs/survey/S_1208MBS.pdf (analyzing voter characteristics for Proposition 8 and voting percentages in relation to evangelical affiliation).

Nussbaum mean when she argues that religion does not drive the politics of sexuality in the United States?

Her claims are very specific and based on some points that are often not part of the discussion but that are important for anyone who wishes to think about the role of religion in American politics. First to the specifics: in *Liberty of Conscience*, Nussbaum presents an argument about the role that religion might play in constitutional claims for gay rights.³⁹ Is there a First Amendment claim, either against religious establishment or for free exercise, to be made on behalf of same-sex marriage rights?⁴⁰ There is a wide-ranging literature in both legal and interdisciplinary scholarship and much disagreement on this point, but Nussbaum argues that there is not an establishment claim to be made vis-à-vis same-sex marriage.⁴¹ She points to a set of facts that are either unknown or overlooked in most public discourse about gay marriage. When advocates claim that “all religions agree” in their moral opposition to same-sex marriage, these advocates are simply wrong. Not only is it the case that not “all religions” agree on this matter, but neither does “the Judeo-Christian tradition,” nor even all Jews or all Christians. As Nussbaum says, there are major religious bodies that directly support and perform same-sex marriages, and within other religious bodies there is wide disagreement on the topic.⁴² Thus, the claim that respect for religion or religious practice forces public policy to oppose same-sex marriage seems to overlook, well, religion.

On this argument, opposition to same-sex marriage cannot be a matter of religious establishment because current marriage law does not establish any particular religion. Moving from the question of whether “all religions” oppose same-sex marriage to those religions that might be established in the United States—Christianity or Christianity in conjunction with Judaism (the often referenced but rarely specified “Judeo-Christian

³⁹ NUSSBAUM, *LIBERTY OF CONSCIENCE*, *supra* note 27.

⁴⁰ The specifically legal question—whether a court decision can be effectively based on either the disestablishment or free exercise clauses—should be carefully distinguished from the idea of religious freedom that a number of advocates have proposed as an important public claim for social policies that support gay rights. In other words, this is one point at which the constitutional and the social policy questions diverge. The idea of religious freedom in the U.S. is a powerful public idea that exceeds the limited claims of the constitution, even as the constitution gives rise to and provides a touchstone for the idea.

⁴¹ *SEXUAL ORIENTATION AND HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE* (Martha C. Nussbaum & Saul M. Olyan eds., 1998).

⁴² NUSSBAUM, *LIBERTY OF CONSCIENCE*, *supra* note 27, at 337.

tradition”)—there is serious internal disagreement on the matter of same-sex marriage. As Nussbaum points out, Reformed Jews represent a large and mainstream religious body that not only supports and consecrates same-sex marriages but also actively lobbied against amending the U.S. Constitution to enforce a definition of marriage as between one man and one woman.⁴³ In 2005, also in response to the right-wing push for a Constitutional amendment, the United Church of Christ, a mainline Protestant denomination, passed a resolution affirming “equal marriage rights for couples regardless of gender.”⁴⁴ Nor should this diversity within and among traditions be a surprise, because contrary to the claims of most political advocates who blithely invoke the Bible as presenting clear condemnation of homosexuality and same-sex marriage, Nussbaum points out that both the Hebrew Bible and the Christian New Testament are quite complicated when it comes to their views of sexuality and marriage.⁴⁵

If opposition to same-sex marriage does not establish a particular “religion,” the next question for Nussbaum is whether the practice of same-sex marriage should be granted protection under the Free Exercise Clause. Does the refusal of the state to recognize same-sex marriages unfairly abrogate the freedom to practice religion by picking and choosing among which religious practices the state supports? For Nussbaum, the question is not whether the state picks and chooses among religious forms of marriage to support but rather whether this is a unique problem vis-à-vis homosexuality. In looking at the history of religion cases in *Liberty of Conscience*, Nussbaum points out that the U.S. has always picked amongst types of relationships to support, most famously in the *Reynolds* case over Mormon polygamy. Nussbaum argues that “even if one holds, as I do, that *Reynolds* was badly argued and very likely wrongly decided, it does not establish a right, on religious grounds to the state’s *recognition* of one’s religious marriage.”⁴⁶

Nussbaum argues that instead of religion being the driving force in arguments over gay marriage, those who so strenuously oppose such an extension of civil rights are driven by a disgust grounded in an unwillingness to acknowledge human embodiment and frailty, realities that

⁴³ *Id.* at 338.

⁴⁴ Shaila Dewan, *United Church of Christ Supports Same-Sex Marriage*, N.Y. TIMES, July 5, 2005, at A10.

⁴⁵ NUSSBAUM, FROM DISGUST TO HUMANITY, *supra* note 23, at 137.

⁴⁶ NUSSBAUM, LIBERTY OF CONSCIENCE, *supra* note 27.

are projected onto sexuality and specifically onto gay sex. The problem of denying one's human vulnerability, of literally hiding from one's humanity, is a more general and secular human condition. However, two questions remain. Why does this disgust take the form that it does—why is it projected onto sexuality in the United States in a way that it is not everywhere in the world nor has it been everywhere even in Western history? And how is it legitimated in American public life as a matter of public policy?

This is the point at which the debate over same-sex marriage starts to get interesting, because virtually every politician says that the reason for his or her opposition to same-sex marriage is religious. For example, every serious candidate for President, regardless of party affiliation, has thus far officially opposed same-sex marriage and every one, again no matter the party, gives religion as the reason for this opposition. This ubiquitous claim is made by Barack Obama, Hillary Clinton, John Kerry, and even by Howard Dean, who had supported civil unions as Governor of Vermont, as well as all of the Republican candidates in recent memory.⁴⁷ Most importantly for Nussbaum's point, Barack Obama claims that his opposition to same-sex marriage is religious and yet his longtime church, Trinity Church in Chicago, is part of the United Church of Christ, a denomination which supports same-sex marriage. What could Obama mean in claiming religious conviction without even mentioning the position of his own religious denomination?

There are different ways to go in relation to this set of facts. One way is to argue that if we maintain institutionalized religion as our definition of "religion" our view of how religion works in American public life will be limited. We will tend to see only those religions that look most like the dominant religious institutions in this country. So, for example, the persistent references to the Jewish "faith" in public discourse presume a Christian model of religion based on "faith," and apply it to religious sites where practice might be much more definitional than is faith. In religious studies, there is a huge debate on the topic of how we understand religion in

⁴⁷ For example, Hillary Clinton has been quoted as saying, "Marriage has got historic, religious and moral content that goes back to the beginning of time, and I think a marriage is as a marriage always has been, between a man and a woman." Joel Siegel, *Hil Nixes Same-Sex Marriage*, THE N.Y. DAILY NEWS, available at http://www.nydailynews.com/archives/news/2000/01/11/2000-01-11_hil_nixes_same-sex_marriage.html.

public life, with leading scholars like Robert Orsi, Tomoko Masuzawa, and Russell McCutcheon weighing in.⁴⁸

Legal scholar Winnifred Fallers Sullivan has taken up this debate as a means of thinking about the question of religious freedom in the United States. Sullivan's argument is not, like Nussbaum's, that the Courts often fail to recognize diversity among institutionalized religions, but that the Courts (also) fail to recognize non-institutionalized religious practices as "religion." So, one approach that we could take in considering the contradiction between the uniformity of politicians' claims to oppose same-sex marriage for reasons of religion and the diversity among institutionalized religious bodies on this point would be to broaden our definition of religion beyond that which is institutionalized. At the legal level, a number of court cases have been fought over this question, particularly free exercise claims around Native American practices that are not institutionalized through religious bodies *per se*, at least not bodies that look like churches. The courts have mostly decided these practices do not count as "religious," which Sullivan argues makes the promise of religious freedom extremely narrow. If the courts only recognize religions that look like (Christian) churches, then most of those practices that need the protection of free exercise are automatically placed outside its realm. In other words, keeping to the narrow vision of "religion" which is institutionalized in church-like organizations narrows the Free Exercise Clause, as it relates to issues beyond same-sex marriage, and essentially creates what Sullivan calls the "impossibility of religious freedom" in the United States.⁴⁹

Mary Anne Case provides an alternative reading of establishment claims by looking not to the establishment of positions held by contemporary religious institutions but to the point in English legal history when religious marriage became established in the state.⁵⁰ She points out

⁴⁸ RUSSELL T. MCCUTCHEON, *MANUFACTURING RELIGION: THE DISCOURSE ON SUI GENERIS RELIGION AND THE POLITICS OF NOSTALGIA* (1997); TOMOKO MASUZAWA, *THE INVENTION OF WORLD RELIGIONS, OR HOW EUROPEAN UNIVERSALISM WAS PRESERVED IN THE LANGUAGE OF PLURALISM* (2005); ROBERT A. ORSI, *BETWEEN HEAVEN AND EARTH: THE RELIGIOUS WORLDS PEOPLE MAKE AND THE SCHOLARS WHO STUDY THEM* (2006).

⁴⁹ Winnifred Fallers Sullivan, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* (2007) (basing argument around her experience as an expert witness in precisely such a case of non-institutionalized practice). For a useful summary of the Native American cases and an alternative approach, see Michael McNally, *Native American Religious Freedom Beyond the First Amendment*, in *AFTER PLURALISM* (Courtney Bender & Pamela Klassen eds., forthcoming 2010).

⁵⁰ Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758 (2005).

that for much of the history of Anglo-American law, marriage was based on contract law (an approach to which some advocates argue we should return) and had the status of a private transaction with no public licensing.⁵¹ With the passage of the Act for the Better Preventing of Clandestine Marriages (popularly known as Hardwicke's Act) in 1753, however, the state asserted control over marriage and did so through the Church of England.⁵² After the passage of this law, marriages were only legal if they included an official ecclesiastical license and the publication of banns in the Anglican Church.⁵³ As Case makes clear in a footnote, "Thus the state's monopoly power was put, not in secular hands, but in the hands of its Established Church. Special provisions were made for the marriage of Quakers and Jews, but none for those of Catholics, Dissenters, or non-Christians."⁵⁴ This conflation of religious officiating and state power carries over into Anglo-American law so that a clergy member who performs a marriage acts on behalf of both religious institution and the state, a situation that, Case argues, "should be pretty antithetical to our view of the separation of church and state."⁵⁵

Case goes on to argue that this conflation between religion and the state also explains some of the opposition to same-sex marriage by conservative evangelical Protestants.⁵⁶ For these Protestants, not only does the church perform a task for the state in officiating at marriages, but the state also performs a task for the Church in regulating the terms of those marriages.⁵⁷ Unlike Catholicism and Judaism, where religious law regulates both the formation of marriages and their dissolution (or the bar to their dissolution), there is no direct control over marriages by religious institutions for Protestants.⁵⁸ As Case notes, "Catholic priests can wave a finger at their faithful and say don't get divorced and make it stick legally through canon law. Protestant pastors may also wag their fingers and say don't get divorced, but there's nothing legally either in church law or in

⁵¹ *Id.* at 1766.

⁵² *Id.* at 1767.

⁵³ *Id.*

⁵⁴ *Id.* at 1767 n.35.

⁵⁵ Case, *supra* note 31, at 7.

⁵⁶ Case, *supra* note 50, at 1795.

⁵⁷ *Id.*

⁵⁸ *Id.*

civil law that gives them enforcement power.”⁵⁹ This fact gives Protestants a strong political interest in keeping the state regulation of marriage in accordance with their beliefs.⁶⁰ In addition, making an analogy to Protestant control of the public schools, Case argues that we cannot understand the politics of same-sex marriage if we do not take into account the fact that Protestants are used to seeing their specific approach to social issues as coextensive with the general “American” approach.⁶¹

A. Christian Secularism and the Establishment of “Religion”

Regardless of where one comes down on the question of establishment and free exercise, there are also political issues to consider with regard to the role of religion in the development of policy regarding same-sex marriage. As we have learned from the issue of reproductive rights, even if the courts were to resolve the issue in favor of same-sex marriage, the political debate would remain. Thus, regardless of how one resolves the constitutional issues, these political questions are absolutely central.

At the political level, a debate about ethical values, including the value of religious freedom, is wholly appropriate. Even if the current enmeshment of religious marriage in the state does not violate the letter of the law, does it violate the ethical value of religious freedom? At the legislative level, we can ask not just “is it unconstitutional?” but “is it basically unfair as a matter of policy to impose a prohibition on the entire country that is based on interpretations of a religious tradition and personal religious convictions, particularly when this prohibition seriously disadvantages the life pursuits of a significant minority of the population?” Moreover, Case is making the point that for conservative Protestants, a change in state law really does threaten the way that Protestant marriages are conducted, and this type of threat to religious practice is one of the things the disestablishment is supposed to prevent.⁶² In the current popular imagination, the “separation of church and state” is mainly taken to provide a protection for the non-religious or the differently religious from the state’s imposition of religion. But, in fact, the separation provided by

⁵⁹ Case, *supra* note 31, at 6.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 6–7.

disestablishment can also protect religious practice. If the state is conflated with one's religious practice, then a change in state policy can negatively affect that practice: religion is actually threatened by the state. One way to prevent this threat is to separate religion from the state, so that state policy cannot have such direct religious effect.

Another approach to religion in public life is to claim that politicians' references to religion as the basis for opposing same-sex marriage are not necessarily references to institutionalized religion(s) but are, rather, references to American civil religion. So, for example, Robert Bellah outlines his view of American civil religion by explicating references to God in Presidential Inaugural addresses.⁶³ He argues that these references are not to a specific religion but to a broad set of ritualized invocations and practices that contribute to the development and maintenance of the civil society that sustains the American nation.⁶⁴ Once again, at the legal level, scholars have argued that the practice of civil religion by the government should not run afoul of the Establishment Clause. It does not establish any single (institutionalized) religion, and most advocates of civil religion argue that it does provide for what Michael Maddigan calls "values that are essential to the identity of American democracy."⁶⁵

When it comes to sexuality, however, the concept of civil religion does not have a great deal of explanatory power. Most analysts of civil religion see it in Durkheimian terms, so they focus on ritualized activities and invocations that unify "civil society" or "the nation."⁶⁶ This type of ritual activity functions so effectively because it is free of specific content beyond the broad and supposedly unifying "values" to which Maddigan refers. Therefore, it is unclear how we would take a civil religion approach

⁶³ Robert Bellah, *Civil Religion in America*, in *BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONAL WORLD* 168–86 (1970).

⁶⁴ *Id.*

⁶⁵ Michael M. Maddigan, *The Establishment Clause, Civil Religion, and the Public Church*, 81 CAL. L. REV. 293, 298 (1993).

⁶⁶ This Durkheimian tradition follows Bellah's original articulation and was significantly extended by Bellah and his colleagues in *BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN PUBLIC LIFE* (1986). For a documentary background on early American sources for the tradition of civil religion, see *CONRAD CHERRY, GOD'S NEW ISRAEL: RELIGIOUS INTERPRETATIONS OF AMERICAN DESTINY* (revised ed., 1998). For an argument against this dominant Durkheimian strand, see *MICHAEL HUGHEY, CIVIL RELIGION AND MORAL ORDER: THEORETICAL AND HISTORICAL DIMENSIONS* (1983).

to politicians' claims about sexuality. First, it is clear that these claims are not "unifying," but are, in fact, part of what has been, in the 1980s and 1990s, called "culture wars." Second, why would an opposition to gay marriage be "essential to the identity of American democracy"?⁶⁷ In other words, why would civil religion have such a specific sexual content, one that does not accord with the practice of a significant minority of the population in the United States? Do we have a national sexuality? Does it need to be ritually invoked to keep the nation together and afloat? I would suggest that the answer to these last two questions is actually "yes," but the concept of civil religion can tell us very little about the relationship between a national sexuality and religion. It cannot tell us why the civil religion would have a specifically sexual content at all, much less one that is widely and hotly debated within and among mainstream religious institutions. These debates are precisely what civil religion is supposed to avoid.

As a result, Ann Pellegrini and I have taken a different approach in our joint work—in *Love the Sin: Sexual Regulation and the Limits of Religious Tolerance*⁶⁸ and particularly in the new collection that we have edited, called simply *Secularisms*.⁶⁹ I have extended this position in my own work on sex and freedom, where I argue that the sexual content of politicians' religious claims is as much the product of secular modernity as it is of particular religious views.⁷⁰ But we also must, nonetheless, explain why this secular sexuality looks so much like and works so well in alliance with a politicized evangelical Christianity. In order to develop such an explanation, I draw upon the concept of Christian secularism that Pellegrini and I developed in the *Secularisms* project.⁷¹

We agree with Nussbaum that the political discourse around sexuality completely ignores the diversity within and among religious traditions.⁷² And this ignorance (as it might be called) does sometimes include the U.S. judiciary. In *Love the Sin* we do a close reading of the majority and concurring opinions in the 1986 *Bowers v. Hardwick* decision,

⁶⁷ Maddigan, *supra* note 66, at.

⁶⁸ JAKOBSEN & PELLEGRINI, *supra* note 12.

⁶⁹ SECULARISMS (Janet R. Jakobsen & Ann Pellegrini Durham eds., 2008).

⁷⁰ Janet R. Jakobsen, *Sex + Freedom = Regulation: Why?*, 23 SOC. TEXT 285 (2005).

⁷¹ Special Issue, *World Secularisms at the Millennium*, 18 Soc. Text 1 (2000).

⁷² See JAKOBSEN & PELLEGRINI, *supra* note 12, at 31–32 (noting the differences between and within Judaism and Christianity concerning attitudes towards homosexuality).

which upheld the constitutionality of sodomy laws (and was overturned by the *Lawrence* decision).⁷³ The *Bowers* opinions obliterate not just diversity among contemporary religious institutions on the issue of homosexuality but all historical diversity within what Chief Justice Warren Burger calls “Judeo-Christian moral and ethical standards.”⁷⁴ Burger provides a brief history of these standards which proceeds rapidly from ancient Rome to 1986 and which Burger conflates with a “millennia of moral teaching” that is presumably secular as well as religious.⁷⁵ But, here is the interesting point: in this conflation of Christian culture with secular civilization, mistaken as it is in the specifics of what both Christian and secular culture have actually had to say about sexuality, we see a fundamental absorption of the “Judeo-Christian tradition” into secular culture and law. As a result, Pellegrini and I came to think that Burger was not so much drawing on religion as upon what we call “Christian secularism.”⁷⁶

We argue that secularism is neither utterly free from religion nor is this freedom a universally invariant social formation based on reason alone. Rather, *Secularisms* traces multiple secularisms that are inflected by the religions against which they are defined, and in the United States that inflection is specifically Christian.⁷⁷ Christian secularism is a dominant mainstream cultural formation in the United States through which the values of Christianity are articulated as the secular values of the dominant society.⁷⁸ Christian secularism is not Christianity in disguise; it is a separate social formation (as Talal Asad has made clear in his work on secularism).⁷⁹

⁷³ JAKOBSEN & PELLEGRINI, *supra* note 12, at 23–34.

⁷⁴ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, J., concurring).

⁷⁵ *Id.* at 197.

⁷⁶ *SECULARISMS*, *supra* note 69, at 3.

⁷⁷ *See generally id.*

⁷⁸ It is important to note that this dominant formation is hegemonic, not just in the sense that it provides common-sensical assumptions for public life in the U.S. that are so deep as to be virtually invisible, but also in the sense that it is built by the knitting together of a shifting set of strands that make up the social fabric. Thus, on some issues and at some points in history, the “Christian” element of Christian secularism reflects mainline Protestantism. At other times and on other issues, it can bring together non-mainline Protestants and Catholics. For a description of this type of shifting and dynamic hegemony see ERNESTO LACLAU & CHANTAL MOUFFE, *HEGEMONY AND SOCIALIST STRATEGY: TOWARDS A RADICAL DEMOCRATIC POLITICS* (1985).

⁷⁹ *See* TALAL ASAD, *FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY (CULTURAL MEMORY IN THE PRESENT)* (2003).

But it is also a secularism that is specifically Christian. It is different than, for example, the Hindu secularism of Hindu nationalist politics in India or the Sunni secularism of Kemalist Turkey.⁸⁰

Similarly, in some of the Supreme Court cases that have adjudicated the question of holiday displays on public property at Christmas time, the display of symbols associated with Christianity has been taken to be either “indirect, remote, and incidental,” in religious effect (*Lynch v. Donnelly*)⁸¹ or effectively secular (*County of Allegheny v. ACLU*).⁸² In these cases, the Court declares that the display does not violate the Establishment Clause not for the types of reasons that Nussbaum brings to bear in her argument about same-sex marriage, but because Christmas is effectively a secular American holiday, defined as much by commercialism as by religion.⁸³ Now, not being legal scholars, Ann’s and my point in looking at these cases was about how court decisions influence our ideas of what the ethical value of freedom might mean. We were (and still are) concerned that the idea that Christianity is a secular holiday leaves little space for any vision of American public life that is not Christian or otherwise religious.⁸⁴ We argue instead for a vision of public discourse in which there is more space and indeed freedom from this dominant Christian secularism, including more space for directly religious expression as well as more space for secular expression that is not a reiteration of Christian secularism.

Although we are concerned about the type of court decision that could make a specifically religious holiday into a secular one, in another way, we think that the Court is right—Christmas is effectively a secular holiday. Christmas has become a ubiquitous part of secular American culture, so dominant that it is inescapable even for those who do not

⁸⁰ For an analysis of Hindu secularism and its relation to Hindu nationalism and for the relation between Muslim secularism and Turkish communism, see Geeta Patel, *Ghostly Appearances: Time Tales Tallied Up*, 18 SOC. TEXT 47, 64 (2000) and Andrew Davison & Taha Parla, *Secularism and Laicism in Turkey*, in SECULARISMS, *supra* note 69, at 58.

⁸¹ 465 U.S. 668 (1984).

⁸² 492 U.S. 573 (1989).

⁸³ *Id.* at 616.

⁸⁴ The conflation of the supposedly more open “holidays” with Christianity was on display once again in 2008 when President Bush’s Chanukah card depicted a Christmas tree on the cover.

identify as Christian.⁸⁵ The implications of this fact are far-reaching. Not only are all kinds of references to religion in public discourse effectively secular—at least insofar as they are not in reference to specific religious institutions (where Nussbaum locates the religion)—but also all kinds of apparently secular references have a Christian cast to them. I have explored this concept in more depth with regard to the workings of the term “freedom” in the speeches of now-former President George W. Bush.⁸⁶ While Bellah locates civil religion in the invocation of God in the inaugural addresses of U.S. Presidents, if one turns to the second inaugural address of President Bush, himself an avowed Christian, what is most notable is not his invocation of God, but his invocation of “freedom.”⁸⁷ He used the word freedom over twenty-five times in a speech that lasted twenty-one minutes.⁸⁸ Freedom is, in certain ways, definitive of secularism, specifically in the secular claim to freedom from the bonds of religious dogma. Yet, in invoking it, Mr. Bush was also able to connect the two crucial parts of his “base”: religious conservatives, who hear in the claim to freedom a form of religious freedom that secures Protestant values in the government, and fiscal conservatives, who hear in the word freedom the echoes of the free market (and who may or may not be Protestant). In other words, the civil religious aspects of Mr. Bush’s inaugural address—including the fact that both a religious invocation and a benediction were offered at the ceremony—are crucially connected to the invocation of secular freedom that, if Max Weber is to be believed,⁸⁹ has a specifically Christian (in this case Protestant) hue to it.

These connections—which form a “working alliance” between conservative Christianity and secular government—have been particularly important for at least the last three decades with regard to sex. The invocation of Christian secularism in addition to open religiosity brings together a focus on monogamous marriage with Protestant ideas of

⁸⁵ STEPHEN M. FELDMAN, *PLEASE DON’T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE* 284–86 (1998) (recounting multiple instances of encountering Christmas references in everyday life and culture).

⁸⁶ Jakobsen, *supra* note 70.

⁸⁷ George W. Bush, Second Inaugural Address (Jan. 20, 2005), *transcript available at* <http://www.npr.org/templates/story/story.php?storyId=4460172>.

⁸⁸ In this same speech, President Bush also used the term “liberty” fifteen times. *Id.*

⁸⁹ MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Talcott Parsons trans., 1958).

freedom.⁹⁰ Although politicians, like Senator Robert Byrd in Nussbaum's example, may claim a Biblical basis for their views on marriage, they are actually projecting a more modern understanding onto the Biblical text. The place in the Bible that comes closest to specifying marriage as between one man and one woman is in the writings attributed to the Apostle Paul; this is the reference point for many evangelical leaders when asked directly about the Biblical basis for the definition of marriage as between one man and one woman.⁹¹ The Pauline epistles are also the primary background for the version of freedom that is adopted by the Protestant Reformers in the sixteenth century. It is this Protestant freedom that influences both Enlightenment ideas of freedom, particularly Kantian autonomy, and American ones.⁹²

⁹⁰ On the concept of "working alliance," see JANET R. JAKOBSEN, *WORKING ALLIANCES AND THE POLITICS OF DIFFERENCE: DIVERSITY AND FEMINIST ETHICS* (1998).

⁹¹ Elizabeth Bernstein's forthcoming study on religious influence in both the Bush and Obama Administration's includes interviews with many evangelical leaders who cite Paul as the Biblical basis for their understanding of marriage as between one man and one woman. For background, see UN Research Institute for Social Development, [http://www.unrisd.org/80256B3C005BCCF9/\(search\)/DA28E37EB9DA9259C12576580028C998?Opendocument&highlight=2,jakobsen&fromsearch=yes&query=Jakobsen](http://www.unrisd.org/80256B3C005BCCF9/(search)/DA28E37EB9DA9259C12576580028C998?Opendocument&highlight=2,jakobsen&fromsearch=yes&query=Jakobsen) (last visited Feb. 1, 2010).

⁹² On Kant, see J.B. SCHNEEWIND, *THE INVENTION OF AUTONOMY: A HISTORY OF MODERN MORAL PHILOSOPHY* (1998). With regard to Calvin, the foundational role of the Puritans in American culture establishes the place of the Calvinist heritage in mainstream American cultural and political life, although more recent histories, like JON BUTLER, *AWASH IN A SEA OF FAITH: CHRISTIANIZING THE AMERICAN PEOPLE 1* (1990), have contested the focus on Calvinism as an overemphasis on the role of the "familiar" theme of "New England Calvinism." Similarly, Edwin Gaustad and Leigh Schmidt begin their book, *The Religious History of America*, with:

Throughout the nineteenth century and into the twentieth century, much of the magical power of [Plymouth] rock came from the desire for many Americans to identify themselves closely with these Pilgrims and Puritans, to cherish them in all their piety and courage as the forefathers of the nation. . . . But, what happens when now in the twenty-first century when so many have grown weary of Pilgrims and Puritans, when so many find Anglo-American relations with Indians to be thievish and worse, when so few in this polyglot and multiracial nation identify with them as fathers, let alone as mothers? Where should a religious history of America begin when the old New England stories of origin now seem so contrived, so narrow, so political?

EDWIN S. GAUSTAD & LEIGH E. SCHMIDT, *THE RELIGIOUS HISTORY OF AMERICA* 3 (2002). While the historical inaccuracy of the singular Puritan origin story is now well established thanks to scholars like Butler, Gaustad, and Schmidt, this historical inaccuracy or even the

This kind of Christian secularism is rampant in the production of American public policy, particularly with regard to sexuality. On this argument we can say that Nussbaum is right in her claim that religion really is not behind anti-gay sentiment, and that instead the issue is more secular. Perhaps more accurately, what drives anti-gay sentiment is an alliance between religious and secular elements—a conservative Protestant investment in the state's regulation of marriage, and a Christian secular understanding, like that used by Burger in the *Hardwick* decision, that sees the modern understanding based in Protestant freedom as the self-evident basis of “millennia of moral teaching” about sexuality. Thus, in thinking about Nussbaum's focus on a secular disgust and attendant moral panic about sexuality, it may be helpful to think about the ways in which this disgust and its obsessive focus on sexuality is simultaneously Christian and secular, located not in “millennia” of moral teaching but in a post-Reformation framework. As scholars like Caroline Walker Bynum and Rudolf Bell have pointed out, food, rather than sex, was the prime focus of Christian moral concern and the enactment of embodiment, including disgust at human frailty, in the medieval period.⁹³ Disgust may be secular, but it is materialized in culturally specific ways.

B. Christian Secularist Marriage and the Autonomous Individual

To see this disgust enacted through Christian secularism, let us think again about Senator Robert Byrd's statement on the floor of the U.S. Senate in the 1996 debate over the Defense of Marriage Act. Byrd opens his

increasing demographics of those who do not directly identify with the Puritans does not mean that this narrative of “America” and its Puritan origins is not still culturally powerful. It remains a matter of extensive cultural contest. There is, for example, a lively Internet debate on whether the “founding fathers” were Christian, including entries from a state Supreme Court judge in Missouri and significant proof texts of famous quotations. See Hon. Judge Robert Ulrich, Chief Justice, Missouri Court Of Appeals, Western District Were the Founding Fathers Christian?, *available at* <http://www.shalomjerusalem.com/heritage/heritage19.html>; Jonathan Rowe, One of the Worst Christian Nation Articles Yet, <http://jonrowe.blogspot.com/2006/05/one-of-worst-christian-nation-articles.html> (May 15, 2006, 19:52 EST). For a synthesis of the extensive sources on this legacy, as well as an introduction to some of the complexities of religion in America, see JON BUTLER, GRANT WACKER, & RANDALL BALMER, *RELIGION IN AMERICAN LIFE: A SHORT HISTORY* (2008); *NEW DIRECTIONS IN AMERICAN RELIGIOUS HISTORY* (Harry S. Stout & D. G. Hart eds., 1997); *THE CALVINIST ROOTS OF THE MODERN ERA* (Alik Barnstone et al. eds., 1997).

⁹³ See RUDOLPH M. BELL, *HOLY ANOREXIA* (1985); CAROLINE WALKER BYNUM, *HOLY FEAST, HOLY FAST: THE RELIGIOUS SIGNIFICANCE OF FOOD TO MEDIEVAL WOMEN* (1987).

statement by pointing out that he has brought his family Bible to the Senate floor with him for the debate. Ann Pellegrini and I were particularly interested in this moment of Congressional speech-making when we were writing an op-ed piece thinking through the cultural and political implications of the *Lawrence v. Texas* decision.⁹⁴ We used Byrd's speech to show the ubiquity of the invocation of religion as the source of the morality that opposes gay marriage.⁹⁵ As a senior legislator in the Democratic Party, Byrd is hardly a member of the frequently-invoked "religious right," and he was, in fact, first elected to the Senate long before the rise of the "new right" as a powerful movement. And yet, he also felt it appropriate to bring his family Bible to a policy debate and to read from it on the Senate floor. Byrd's speech is not an example of the influence of the religious right. It is an example of the Christian presumption in American (secular) public policy, particularly when that policy is regarding sexuality.

Later, I returned to Byrd's speech as exemplary of another point Nussbaum also makes.⁹⁶ Byrd is basically projecting a modern view of sexuality back onto the Biblical text and onto what he calls the "Old Testament" in particular. As Nussbaum points out, while Byrd provides examples of Biblical passages that mention marriage, he hardly provides a full reading of marriage in the Biblical text.⁹⁷ This point is crucial because the Bible presents complicated and even contradictory positions on marriage and can hardly be said to provide an unerring norm of marriage as between one man and one woman. The "Old Testament" patriarchs are polygamous and this is not depicted in the text as in any way abnormal or indicative of a moral problem in and of itself. Although the patriarchs have problems, some of which are produced by polygamous arrangements, polygamy is not seen as the moral source of these problems.

How one understands the sexual and familial norms presented in the Biblical text depends on which parts of the Bible and even which particular stories one reads and how one reads those stories. For example, one can find narratives that support various forms of sexual activity or familial formation if the forms also support other major norms, including patriarchal procreation, protection of the Hebrew people, and loyalty across

⁹⁴ Janet R. Jakobsen & Ann Pellegrini, *Sex and Freedom*, *Newsday*, July 13, 2003, at A2.

⁹⁵ *Id.*

⁹⁶ Janet R. Jakobsen, *Ethics After Pluralism*, in *AFTER PLURALISM*, *supra* note 49, at 1.

⁹⁷ NUSSBAUM, *FROM DISGUST TO HUMANITY*, *supra* note 23, at 133–34.

family ties (although even these norms may come into conflict). The text appears to look approvingly on irregular sexual acts if, for example, they maintain patriarchal procreation. For example, Tamar is named as righteous in the text after pretending to be a prostitute and engaging in sex with her father-in-law, Judah, after each of his two eldest sons failed to provide her with a child before being struck dead by the Lord and Judah hesitated to marry her to a third son. While nearly all of the Biblical sexual arrangements are patriarchal, needless to say, they are not all about the formation of a modern middle-class marriage between “one man and one woman.”

Many Christian interpreters argue that the Christian Testament challenges and changes many of the norms of the Hebrew Bible. We should note that there are often appeals to the “Judeo-Christian tradition,” which carry within them this type of Christian supersessionism: if there are conflicts between Biblical texts, the Christian tradition carries the day. But even within the Christian text, the views presented about marriage are hardly those that are promoted by Byrd and countless others as representing “five thousand years” of unchanging history. Jesus was not a family man: he advocated discipleship specifically over the claims of family, befriended prostitutes, and did not at any point directly endorse marriage. The Pauline author, as noted above, comes closest to naming marriage as between one man and one woman, but it must be noted that the text specifically encourages marriage because of the likelihood that most Christians will be unable to sustain the morally preferable option of celibacy. Given this probable failing, it is better to be married. Thus, if we were to take the Christian Biblical text as our only guide, we would likely be writing to our Senators so that they would stand on the Senate floor and provide new programs to promote lifelong celibacy as opposed to abstinence until marriage.

It is the Reformation that makes marriage the moral ideal over celibacy⁹⁸ and, as Charles Taylor has recently argued, it is the response of

⁹⁸ For an exhaustive documentation of Calvin’s views on marriage and sexuality, see JOHN WITTE, JR. & ROBERT M. KINGDON, *SEX, MARRIAGE, AND FAMILY LIFE IN JOHN CALVIN’S GENEVA: COURTSHIP, ENGAGEMENT, AND MARRIAGE* (2005) (volumes two and three forthcoming). As Witte and Kingdon state in their Introduction,

Building on a generation of Protestant reforms, Calvin constructed a comprehensive new theology and jurisprudence that made marital formation and dissolution, children’s nurture and welfare, family cohesion and support, and sexual sin and crimes essential concerns for both church and state. . . . [I]t stands today as one of the most enduring models of marriage and family life in the Protestant world and well beyond.

the Counter-Reformation that makes sex, rather than say, murder, such a central and rigid focus of Catholic morality.⁹⁹ In other words, it is the immediately pre-modern period and not five thousand years of religious history that lays the groundwork for the focus on marriage between one man and one woman that is so important to Byrd. And it is also this period that lays the groundwork for the autonomous individualism of modernity. As I have argued elsewhere, the two foci are actually interrelated.¹⁰⁰ As exemplified in Luther's and Calvin's writings on marriage, the autonomous individual who stands alone before God in the classic formulation of the Reformers can do so because his relational needs are secured in marriage.¹⁰¹ In other words, as many feminist critics made clear long before the queer

Id. at 1–2 (emphasis added). For my reading of both Luther and Calvin, see Jakobsen, *supra* note 70.

⁹⁹ For Taylor's reading of the Counter-Reformation, see Charles Taylor, *Sex and Christianity: How Has the Moral Landscape Changed?*, COMMONWEAL: A REVIEW OF RELIGION, POLITICS AND CULTURE, Nov. 16, 2007, http://www.commonwealmagazine.org/article.php3?id_article=2016. Particularly in the past few decades, the Catholic concern with sexuality has been both politically and culturally connected to conservative Protestantism in both U.S. and global contexts to make sexual regulation appear to be an overarching Christian (and American) concern. Although the Protestant activist group the Christian Coalition had difficulty forming an alliance with Catholics in the early 1990s, more recent alliances between Protestants and Catholics on specific issues of sexual conservatism have been more successful. For a discussion of the influence of this alliance on the Bush Administration, see Peter J. Boyer, *Party Faithful: Can the Democrats get a Foothold on the Religious Vote?*, NEW YORKER, Sept. 8, 2008, at 27. For a discussion of the even more recent effort by the Catholic Church and the Church of Jesus Christ of the Latter Day Saints in the Proposition 8 Campaign, see Michael Rothfeld & Tony Barboza, *Governor Backs Gay Marriage; Schwarzenegger Voices Hope that Proposition 8 Will Be Overturned by Courts as Crowds Continue to Protest*, L.A. TIMES, Nov. 10, 2008, at B1. For a discussion of international alliances on conservative sexuality among Catholics, Protestant, Mormons, and some Muslims, see Kathryn Joyce, *Missing: The "Right" Babies*, THE NATION, Mar. 3, 2008, at 11.

¹⁰⁰ See Jakobsen, *supra* note 70 and Janet R. Jakobsen & Elizabeth Lapovsky Kennedy, *Sex and Freedom*, in REGULATING SEX: THE POLITICS OF INTIMACY AND IDENTITY (Elizabeth Bernstein & Laurie Schaffner eds., 2004).

¹⁰¹ See, e.g., JOHN CALVIN, THE INSTITUTES OF THE CHRISTIAN RELIGION 1258 (John T. McNeill ed., Ford Lewis Battles trans., Westminster 1960) (1536) (promoting marriage in critique of the traditional monastic vows, particularly the vow of celibacy); MARTIN LUTHER, MARTIN LUTHER: SELECTIONS FROM HIS WRITINGS (John Dillenberger ed., 1961) (interpreting Biblical passages on marriage).

critique of normativity, autonomous individuals do not exist autonomously.¹⁰²

Just as Christmas has effectively become a secular holiday, so also have the ideas of the autonomous individual and the locating of the individual in a family organized by heterosexual marriage become effectively parts of secular modernity. These ideas are made all the more effective by the fact that they can be at once secular and Christian—both part of the agenda of specifically Christian political movements, like the “Christian right,” and part of the secular invocation of politicians, like Howard Dean, from the liberal end of the (relatively narrow) political spectrum in the United States.¹⁰³ Moreover, as Foucault points out about the ways in which the modern discourse of sexuality informs both ideas of sexual regulation and sexual freedom,¹⁰⁴ the influence of this modern secular vision of marriage can be seen in the desperate push of the gay rights movement to promote marriage, even in cases like in California where the shift from domestic partnership to marriage does not confer additional material benefits.¹⁰⁵

¹⁰² The critique of liberal autonomy has been pursued in a number of other traditions as well, including feminist and womanist critiques. See, e.g., NANCY ARMSTRONG, *DESIRE AND DOMESTIC FICTION: A POLITICAL HISTORY OF THE NOVEL* (1990) (feminist literary history critique of eighteenth century domestic fiction); KATIE G. CANNON, *BLACK WOMANIST ETHICS* (1988); REY CHOW, *THE PROTESTANT ETHNIC AND THE SPIRIT OF CAPITALISM* (2002); CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988). Nonetheless, the presumption that moral agency depends on autonomy—that agency can only be moral if acts are undertaken without coercion—remains at the center of many fields of study. See, for example, Walter Johnson’s critique of social history and its efforts to “give slaves back their humanity” by attributing to slaves some form of autonomous agency. Walter Johnson, *On Agency*, 37 J. OF SOC. HIST. 113 (2003).

¹⁰³ Ann Pellegrini and I have written elsewhere about the ways in which these ideas about sexuality in particular can suture conservative Christians to the U.S. government from which they are often alienated. See *World Secularisms at the Millennium*, *supra* note 72.

¹⁰⁴ The argument of the first volume of *The History of Sexuality* is that the idea of sexual regulation does not induce sexual repression but is itself part of the incitement to produce oneself as a free subject of modernity. See MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY*, VOL. 1: AN INTRODUCTION 1–50 (1978).

¹⁰⁵ As Case notes, the shift from domestic partnership to marriage might shift who is able and willing to access these benefits. Some people who do not qualify as domestic partners could get married and thus gain access to benefits, while some of those who have registered as domestic partners may not be willing to marry to maintain their benefits. See Case, *supra* note 51, at 1772.

The usefulness of this type of analysis for social movements, particularly for those interested in promoting the ethical values of equality and freedom, is to shift our understanding of the political configuration that makes sexuality a cultural and political battlefield. A focus on the “Christian right” alone will not explain why sex can be so politically important in a country where, according to Pew Research Center reports, only about eleven percent of the population identifies as conservative evangelical Christian.¹⁰⁶ In other words, we must explain why a political argument that is supposedly driven by a minority of the population about the sexuality of a different minority of the population should rivet an entire nation that is not particularly known for attending to or enfranchising minorities. If we think through the secular importance of the issue we can move beyond an unhelpful opposition between “religious” and “secular” actors that does a disservice to religious gays and lesbians and to religious progressives of all sexualities—for example, all those Jews and Christians whom Nussbaum notes support gay marriage and who are rarely heard in public debates. More than this shift, however, an analysis of the formation of U.S. sexual politics in Christian secularism can give us an alternative vision of possible frameworks and policies for building sexual freedom and equality—sexual democracy—in the United States.

If the problem is not a Biblical injunction that restricts marriage to relations between one man and one woman but rather a modern conception of marriage organized (as feminists have argued) to provide material support for the autonomous individual, then the question for public policy is not whether marriage should be expanded to include two men or two women, but how best to provide social support. This question becomes particularly pressing because, as we now know, marriage is not necessarily an effective means of providing social support. Marriage does provide support for some people and it undoubtedly provides emotional satisfaction and other benefits for many. After all, if over forty percent of marriages end in divorce that leaves over fifty percent that last. But the ubiquitous “pressures” on “families” that are so often the stuff of political rhetoric also indicate how difficult it is for any single family to provide for the needs of its members. The difficulties of what we ask of marriages as sole sources of social support are made manifest at a number of points, but we as a society often treat these difficulties as individual problems rather than a failure of social support. Thus, the difficulties that fund the entire academic literature on “work-family balance” are not necessarily created by a lack of balance

¹⁰⁶Laurie Goodstein, *For a Trusty Voting Bloc, a Faith Shaken*, N.Y. TIMES, Oct. 7, 2007, §4 at 1.

but rather by a lack of social support for the necessary labor of caring for children or elders within the singular structure of “the family,” difficulties that are acutely intensified if any member of the family is ill, disabled, or in need of support beyond that imagined to be required by the “normal” family (i.e. virtually everyone).¹⁰⁷ Moreover, even in lifelong, happy, and monogamous marriages, the surviving partner may be left impoverished by the care of his or her loved one or, in the case of many women, simply by the fact that they dedicated themselves to marriage and family rather than to the labor market. In other words, marriage does not provide needed support for many people, and even for those people who find marriage to satisfy many of their needs, additional social support could probably improve their lives.

At a deeper level, these issues raise questions not just about family structure and whether, by sanctioning and supporting only marriages, the state is failing to enable social support. The issues raised by an analysis of the Christian secular basis of marriage in the United States also raise questions about the autonomous individual who is supposed to be the subject of marriage rights and familial formation. Again, feminists have long considered these questions: if women are at risk for poverty in their old age because they have not acted as autonomous individuals in the market but rather have dedicated themselves to unremunerated familial labor (or taken less remunerative jobs in order to provide familial labor), then should we simply advocate that they act more like autonomous individuals? Or does encouraging some women to act as autonomous individuals simply push the problem of labor off onto paid domestic workers who have trouble supporting their own families? And if those who look most like autonomous individuals actually depend on the domestic labor of others—whether the unremunerated labor of family members or a paid domestic labor force—then are they really so autonomous? In short, if we are born alone and die alone, then who the heck is that woman in the room when one is born and why do so many families have to actually “decide” when their family members will die?

These questions, among others, have led feminists across a range of disciplines—from political theorists like Carole Pateman to literary and cultural critics like Nancy Armstrong and Rey Chow—to question whether

¹⁰⁷ The feminist literature on this question is voluminous. For examinations of the moral dimensions of these issues, see, for example, LISA DODSON, *MORAL UNDERGROUND: HOW ORDINARY AMERICANS SUBVERT AN UNFAIR ECONOMY* (2009); EVA FEDER KITTAY, *LOVE’S LABORS: ESSAYS ON WOMEN, EQUALITY AND DEPENDENCY* (1998); NANCY FOLBRE, *INVISIBLE HEART: ECONOMICS AND FAMILY VALUES* (2001); NANCY FOLBRE, *VALUING CHILDREN: RETHINKING THE ECONOMICS OF THE FAMILY* (2008).

the autonomous individual should be the basis of either political theory or public policy. In other words, these critics question the very basis of liberalism as political theory or framework for the law. Perhaps most interesting, I read Nussbaum as not thinking that the autonomous individual should be the basis of ethical, political, or legal liberalism. Hence, the salience of the question: at what point do we move outside the bounds of liberalism?

III. QUEER RELATIONS

In *Hiding from Humanity* Nussbaum argues positively for “mature interdependence,” which indicates an open recognition of any human being’s incompleteness and vulnerability, one’s animality and mortality, as well as an acceptance of uncertainty in one’s own knowledge of the world and in what others might offer or provide to sustain one. These acknowledgements allow us to develop public policy that does not presume individuals who are autonomous and independent, without needs other than the opportunity of an even playing field on which to participate in economic exchanges to meet those needs. Nussbaum points out that needs are met not just by equal exchanges among independent actors, but by inter-relations among persons who have different needs and capabilities, including persons who may never be “productive” in the economic sense. To have needs, including needs for social support and provision that might be met outside of the world of economic exchange, is not to fail at the project of being a person but is rather a condition of being a person.

She connects the critique in *Hiding from Humanity*, along with the specific legal and policy questions of *From Disgust to Humanity*, to her critique of social contract theories in *Frontiers of Justice*.¹⁰⁸ Her wide-ranging exploration of social contract theories and support for the capabilities approach in that book is more extensive than can be addressed in this single essay. Moreover, her specific question about political theory is related to but distinct from the concerns of my own work with queer ethical subjectivity in relation to public policy.¹⁰⁹ Her basic question, however,

¹⁰⁸ NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 11.

¹⁰⁹ As Nussbaum notes, for example, in her reading of Thomas Scanlon, ethical theory does not ask the same questions vis-à-vis the subject of justice, as does Rawlsian political theory. The social contract approach makes certain assumptions about the “normal” human being that allow for the design of basic political institutions, and thus, must have “a certain degree of comprehensiveness, attempting to cover the major entitlements of citizens.” *Id.* at 139.

which is whether a Rawlsian theory of justice or some variant thereof can adequately address those who are at the “frontiers of justice,” raises an important set of issues related to the possibility of moral personhood and agency.¹¹⁰ She develops a picture of the subject of justice by exploring three cases that challenge the assumptions and boundaries of liberal justice: disability, nationality, and species membership.¹¹¹ As Nussbaum lays out in great detail, the presumptions about personhood that are invoked in the forming of the social contract have serious implications for the moral possibilities that will follow.¹¹² She shows, for example, how Rawls hopes to be able to address disability in the later legislative phase of social relations, the time when policy is formulated after the basic rules of justice have been established. But despite these hopes, by placing people with disabilities in the position of the objects of legislative action rather than that of the subjects of justice-formation, people with disabilities become the subjects of aid rather than of justice, a very different moral relation.¹¹³ In each of her cases, Nussbaum shows that justice requires the recognition of an interdependence that is grounded in both material and moral relations. This interdependence can best be incorporated into a theory of justice, she argues, through the capabilities approach.¹¹⁴

While the relation between a queer theoretical approach and the capabilities approach is beyond the scope of this essay, Nussbaum’s concern for interdependence and material need connects with certain strands of feminist and queer materialism, particularly with those strands of materialism that are interested in maintaining some concept of freedom, even as they emphasize the relational basis through which needs might be met. A number of different theorists (Jean-Luc Nancy and J.K. Gibson-Graham, among others) have recently taken up the possibility that struggles for justice might produce subjectivities that are neither the autonomous individual nor the coherent community.¹¹⁵ For instance, heterodox economist David Ruccio argues for the possibility of “decentered

¹¹⁰ *Id.* at 3.

¹¹¹ *Id.*, chs. 2, 3, 4, 5, 6.

¹¹² *Id.* at 107.

¹¹³ *Id.* at 108.

¹¹⁴ *Id.* at 156, 284, 350.

¹¹⁵ J.K. GIBSON-GRAHAM, *A POSTCAPITALIST POLITICS* (2006); JEAN-LUC NANCY, *BEING SINGULAR PLURAL* (Robert D. Richardson & Anne E. O’Byrne trans., 2000); JEAN-LUC NANCY, *THE INOPERATIVE COMMUNITY* (Peter Connor trans., 1991).

communities,' a form of social agency radically different from the individuality that is constituted in a society characterized by commodity exchange."¹¹⁶ The contribution that queer theory can make to this body of work has to do with the way in which decentered communities are actually *produced through* complex social relations, including sexual relations.

A. Networks of Relation: Kin and Queer

In an effort to describe what is distinctive about these relational formations, I begin not with queer relations but with the work done by anthropologist Carol Stack on African American families, originally published in 1974.¹¹⁷ Stack is writing in response to the "myth of the Black matriarchy" and the "culture of poverty"—ongoing discourses about the supposed dysfunction of African American families, which was supposedly evidenced by the lack of a nuclear family structure ("self-sufficient" households with a mother, father, and children).¹¹⁸ Stack conducted an ethnography of a poor black urban community in the Midwest and argues that nuclear family structures, especially if in poverty and particularly with their idea of self-sufficiency, would hardly be functional.¹¹⁹ Instead, she demonstrates that within the context of impoverishment (and I will argue that impoverishment is not the only condition that makes this so), survival is enabled much more effectively with extended kinship networks that

¹¹⁶ David F. Ruccio, *Failure of Socialism, Future of Socialists?*, 5 RETHINKING MARXISM 6, 16 (1992). For Ruccio's extensive arguments advocating a non deterministic reading of Marx, see, for example, DAVID F. RUCCIO & JACK AMARIGLIO, POSTMODERN MOMENTS IN MODERN ECONOMICS 216–51 (2003) (discussing and comparing modernist Marxism with past Marxist theory); POSTMODERNISM, ECONOMICS, AND KNOWLEDGE (Stephen Cullenberg, Jack Amariglio, & David F. Ruccio eds., 2001). See also the work of the journal *Rethinking Marxism: A Journal of Economics, Culture, and Society*, of which Ruccio is currently the editor. The idea that a coherent community is not the natural opposite to the capitalist individual is particularly important because, as Miranda Joseph has so convincingly shown, community is not the romantic antidote to capitalism but its effective supplement. Fortunately, the "romance of community" criticized by Joseph is not the only possible alternative to autonomous individualism. MIRANDA JOSEPH, AGAINST THE ROMANCE OF COMMUNITY (2002).

¹¹⁷ CAROL STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY (1974).

¹¹⁸ *Id.* at 22.

¹¹⁹ *Id.* at xiii.

provide childcare, economic support, and refuge in the face of violence that is both social and intimate.¹²⁰

Not only do these extended kinship networks help what are called “single mothers” survive and raise their children, but they protect and support women who are in marriages, particularly when both spouses must work to earn a living wage. Such networks also support the elderly, once again providing needed care that would not necessarily be available even if an older person had dedicated her or his life to a mutually monogamous lifelong marriage. In other words, Stack argues that while government officials may claim that the way through poverty is to develop a nuclear family structure, such a structure is actually highly precarious and in need of additional support. Moreover, the extended networks that Stack documents provide needed support no matter the age or situation of any individual. They support the necessary care and education of children. They support working persons who spend most of their time at work and, thus, even if they make “enough” money (which, as the term “working poor” makes all too clear, they may not), do not have the time for the many tasks required to maintain their own lives, much less their families. These networks support those who are not working and need financial and in-kind assistance. These networks also support those who have retired, who have lost spouses, or who face disease and disability.

Stack writes in the terms of family, kinship, and community (not surprising in 1974—particularly for an anthropologist—perhaps only a little less surprising today), but not all of the persons in any of these networks are connected by the traditional kinship roles. Rather, through the actions of caring, someone might become a sister/brother, aunt/uncle, or grandmother/grandfather even if he or she were not born into that role. Moving somewhat beyond Stack’s text, these networks are sometimes defined by a neighborhood, but not always. For example, given migratory patterns both within the United States and beyond it, the networks may include grandparents, aunts and uncles in the southern U.S. or in places like the Dominican Republic. Peggy Levitt has much more recently documented the maintenance of these connections between the U.S. and the Dominican Republic amongst migrants to the U.S. in ways that show that our traditional ideas of immigration and of community may be inadequate.¹²¹ In other words, if these networks are kinship or neighborhood networks, the kin and neighbors are often virtual—they are the families we choose (so

¹²⁰ *Id.* at 28.

¹²¹ PEGGY LEVITT, *THE TRANSNATIONAL VILLAGERS* (2001).

named by Kath Weston to describe gay kinship) intertwined with the families in which we are born.¹²²

As Stack points out, these networks cannot solve all of the problems of poverty in the United States: they help people to survive, but they cannot launch them out of poverty. When you are in a network that is made up mostly of poor people, even shared resources go only so far. Nor can a kinship network undo poor housing conditions, provide jobs where there are none, or fix the public school system. These networks exist in a larger social context that is determined by social forces that include the actions (or inaction) of government, the workings (or nonworking) of the economy, and the effects of racism. But policies addressing these larger issues might be much more effective if, rather than trying to induce and enforce individuals into the nuclear family structure imagined as that of the middle class, they recognize how it is that people actually survive in poverty: through social networks that are an incredibly effective resource rather than a problem. In other words, local, state, and federal governments could build on the basis of this resource and create policies that are directed toward the larger scale problems.

Stack's ethnography is helpful in delineating the ways in which social relations may work in the context of networks of relation that do not precisely fit our normal set of categories nested in ever widening circles, from individual to family to community to nation/state to world. I would like to suggest that self-consciously queer relations often take place in these types of networks but that they are unlikely to be recognized as such, in part because they do not fit the usual categories of individual and family that mark personal relationships. Until very recently, queers (and here we must note the overlap but also failure of complete consonance between the categories "queer" and "gay and lesbian") were literally barred from conducting their personal lives, especially their sexual lives, in the realm of the family. They were often kicked out of their families of origin, sometimes at very young ages, and they were legally barred from forming families of their own. In other words, queers did not, until perhaps the *Lawrence* decision in 2003,¹²³ live within the bounds of the legitimated private sphere. Yet it is in many ways even harder to conduct queer lives in public. Queer lives seem to be conducted in that no man's land between family and state—sometimes called civil society—and yet their very presence, or at least the insistence that their presence be recognized in

¹²² KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* (1991).

¹²³ *Lawrence v. Texas*, 539 U.S. 558 (2003).

public space, can be seen as uncivil. Despite the removal of certain legal prohibitions post-*Lawrence*, public queerness is still met with physical violence on an all too regular basis. Queers are also often excluded from the “voluntary associations,” whether churches or the Boy Scouts, of which sociologists make so much as the basis of American civil society.¹²⁴

Yet, as Stack shows, without social networks that are neither wholly private nor fully supported by public institutions, social and physical survival might be much more difficult. This is true for queers as well as for the impoverished African Americans whom Stack studies. We saw this during the AIDS crisis when networks of care sprung up to help people live with the disease. AIDS organizations developed buddy systems where people who may never have met each other, in being named “buddies” (unlike “families,” a word not seen in many policy studies about addressing social problems), became a first line of defense for people with AIDS, who were also often without appropriate medical care, any familial support, or the concern of the broader world. They were certainly without the government support of public policy that addressed the epidemic in terms of either prevention or treatment. What these examples suggest is that alternative narratives of relation that rely on neither autonomous individualism, nor coupled familial life, nor holistic communities provide crucial resources for understanding the parameters of the “mature interdependence” that Nussbaum advocates.

In my own life, my utter dependence on such a narrative became apparent when my lover was injured in a bicycle accident that produced a spinal cord injury and resulted in paralysis. To take just one example from that experience, over the five months that Christina was in the hospital, I was literally fed and, perhaps more importantly, our dog was regularly walked and fed by a network of people who were certainly not my kin and who, as a group, met none of the usual definitions of a community. Many of these people I had never met, and some of them I still have not met. Because I was at the hospital all day through the fall and winter, they would simply drop food off on the back porch of the house, and I would eat it when I came home that night. Some of them were Christina’s friends and colleagues, a work community and network with which we are all familiar with in the academy. Some of them might be said to be members of the oft-invoked “gay and lesbian community”—the local lesbian ob-gyn, whom I

¹²⁴ In *From Disgust to Humanity*, Nussbaum makes a similar point about the inadequacy of the public-private split vis-à-vis sexuality. She is concerned with the question of whether public sex should be legally protected and she shows that the public-private distinction that forms the basis for most legal regulation of public sex is utterly incoherent. See NUSSBAUM, *FROM DISGUST TO HUMANITY*, *supra* note 23, ch. 6.

had once met, and the local crew coach, whom I did not meet until much later—who in the course of lesbian life in a relatively small city heard of our plight and pitched in. Some were members of Christian and Jewish congregations to which Christina’s friends and colleagues belonged, but who did not know us personally. Some were simply friends of friends, people who had faced similar crises and knew what was needed, or people with particular skills or a particular love of dogs. In other words, Babe the dog and I were sustained not by a community of people—our religious congregation or community defined by institutions of employment—but a network of people who came to their contributions and connections through various means. Since that moment of initial hospitalization, the network has expanded to include paid caregivers, my friends and colleagues here in New York (some fifteen of whom recently helped us move into my newly accessible apartment), and a range of disability support services and social movements.

And while these relational networks may become most visible in extreme contexts, they may also form a crucial part of how people sustain themselves in various circumstances. Just before Christina got hurt, I had been doing a lot of work with the American Academy of Religion’s Committee on the Status of Women in the Profession (SWIP) on the issues surrounding what is frequently called “work-family balance.” We set up childcare at the annual meeting and looked at other policies that might make it easier to participate fully in the profession and maintain a family life. I had always found it a little odd that these tasks had become part of my portfolio, since I have long participated in the queer critique of “family” as a category of social policy. However, I also began to see that this queer critique and the needs of those who saw themselves as fundamentally about family—married heterosexual people with children and/or aging parents to care for—were much more in line than one might have first guessed. As I noted in a short essay for SWIP on my experience with Christina, social supports for relations of caring and friendship are crucial whether or not one is married.¹²⁵ For those who are married, such supports could relieve critical and sometimes crushing burdens on families and individuals within families, particularly women. Such supports could enable people to actually exercise the much vaunted but much less existent “choice” about whether or how to have children, enter a marriage, or remain married. For those who do not wish to marry or who wish to exercise other “choices,” such

¹²⁵ Janet R. Jakobsen, Discussion, *Work is not the only Problem: How the Concept of Family Contributes to the Work-Family Dilemma*, 23 J. OF FEMINIST STUD. IN RELIGION 127 (2007).

networks provide a similarly crucial support structure, as well as protection in times of crisis. As became all too clear in my own experience, these protections are vital when one lives in a formation that can be made to look like a family, and they are even more important when one does not. Without the primary care that U.S. policy presumes to be provided by families, many people with spinal cord injuries who could potentially live outside of institutionalized care do not.

B. Policy Implications of Thinking Beyond Marriage

Yet, the failure to recognize these networks of relation has important consequences for social policy. For example, one of the now well-documented failures of the campaign in opposition to Proposition 8 was to make alliances with communities of color and poor communities in California. Instead, supporters of Proposition 8 posed gay and lesbian rights as threats to these communities and particularly to marriages as a last line of defense for individuals in these communities during increasingly uncertain economic times. As Richard Kim described in his reports from California in *The Nation*, support for Proposition 8 became a way of stating one's support for marriages that seem fragile and under threat.¹²⁶ In ways with which we are now all familiar and yet which we seemed unable to address politically, this positioning of the Proposition made it seem as if gay and lesbian people were not part of the African American or Latino community—much less the Mormon and Roman Catholic churches—and as if the gay and lesbian community were simply secular, white, and affluent. The pro-Prop. 8 campaign also made it seem as if gay marriages, rather than economic circumstances and a lack of extensive social supports, threatened heterosexual marriages. Most importantly, there was little discussion of the policies that might actually support both marriages (whether gay or straight) and the possibility of queer lives. There was virtually no discussion of the alignment of interests, between not just gays and lesbians who hope to marry but also queers and married people, concerning social policies that might help care for all members of our society and do so while seeking employment.

There are two ways to approach policies that might support families. One is the traditional approach. Both Democrats and Republicans subscribe to aspects of this method: support for “families,” defined as marriages, through policies that can be both patronizing and punitive—from

¹²⁶ Richard Kim, *Marital Discord: Why Prop 8 Won*, THE NATION, Nov. 5, 2008, <http://www.thenation.com/doc/20081124/kim>.

the long history of policing mothers who received welfare, to more recent efforts to imprison fathers who fail to pay child support, to education focused on abstinence until marriage. The other approach is that of sexual democracy: social supports for the various types of relationships that help people to survive and thrive. Connecting policies in support of sexual democracy to those that support families like the ones documented by Stack provides a grounding for an alternative set of alliances that might in turn provide a different outcome for political battles like the one over Proposition 8. Undoubtedly some Proposition 8 voters, including some in African American and Latino communities, were committed to the denial of rights to gays and lesbians and/or to a singular definition of marriage. But, given the focus of the campaign, some were trying to defend the family from various assaults that the campaign crystallized as coming from the prospect of gay and lesbian marriage. What is disheartening about what actually happened in 2008 is the utter failure to take up the issue posed by Proposition 8 as a chance to form what Obama called during the primary campaign “a new majority.” This failure was one that also occurred on the part of the Obama campaign, which entered the debate late and allowed Obama’s statements to be used by those who opposed gay marriage, even though he finally made a direct statement in opposition to the referendum (but the Obama campaign’s and now the administration’s inability to deal with queer politics is another paper).¹²⁷ The deeper failure was that those who ran the campaign in opposition to Proposition 8 did not make these connections.

The other major point at which Stack’s analysis can connect to the type of queer relationality that I have been sketching here is in its implications for the level at which public policy is focused. The question is whether “families” are best supported by family-focused policy or whether we need to look much more seriously at the level termed “civil society” than at the family. Given Stack’s analysis, the question of fighting poverty is not so much one of whether individuals stay married or not, but of whether the support networks on which they depend on can provide for something more than basic survival. In the end, the question is not whether to marry, so much as under what conditions marriages take place and whether those conditions support only those who are married or whether they equally support everyone in society. The greatest difficulty with gay marriage is not whether it should or should not be favored as opposed to civil unions, but the level of focus that it receives in relation to other policies that might actually make marriages, unions, or partnerships more

¹²⁷ Janet R. Jakobsen & Ann Pellegrini, *Living with Neoliberalism: Political Debates, Now*, 76 SOC. RES. 1227–54 (2009).

likely to succeed, and that might also make survival more likely regardless of how people organize their relationships. This analysis provides a vision of the networks that support queer lives, but not just queer lives. In fact, this shift in focus would support lives across a relatively broad spectrum of persons, perhaps throughout a “new majority.”

C. Universal Access for Nonnormative Lives

A focus on how life is sustained under nonnormative conditions can illuminate social relations and policies that are useful across the spectrum of normativity. This perspective, in which considering the nonnormative alternatives illuminates possibilities for those who see themselves as normative, is one of the things that disability rights movements mean by “universal access.” Universal access presents quite a different claim than does the traditional approach to universalism. Instead of beginning from the normative individual to determine that upon which “everyone” can supposedly agree, universal access presumes that, by looking to those who are excluded by this traditional approach, we can find ways to change social spaces, not just so as to include those who have been excluded but so as to improve life possibilities more generally.¹²⁸

The difference between these two methods of approaching broader inclusion can be seen by comparing curb cuts in New York City and those in downtown New Haven, Connecticut. As all New Yorkers know, the curb cuts in the city are special areas cut into the center of each side of any given corner to make it possible to wheel across the street and back up onto the sidewalk (although the actual effectiveness and accessibility of the cuts varies widely). While absolutely crucial for getting around the city in a wheelchair, they are also a royal pain. First of all, most of the walking people also walk through the curb cuts. Why? Because it is actually easier than stepping down off the curb and back up. This ease is one of the main points that disability activists make—our built environment is not particularly easy or healthful for those who understand themselves as able-bodied, which means they often use the special spaces and mechanisms created for people with disabilities, like curb cuts and ramps. The New York City curb cuts also tend to pool water, and ice in the winter, right

¹²⁸ Much of Nussbaum’s critique of Rawls and of social contract theories more generally in *Frontiers of Justice* is focused on the normative assumptions on which Rawls depends in determining the type of persons who can come together to form the social contract and participate in the original position. See, NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 11, at 107.

below the special cut outs. In parts of New Haven, by contrast, the entire curb is gently sloped around the corner, so that a wheelchair user and a walking person can both traverse the entire corner. There is no specially marked zone of inclusion and no specially produced pool of water to curse during times of rain and snow. Rather than thinking of disability as the exception for which special provisions are made, universal access suggests that a universally inclusive built environment is better for all, or at least for more, people.

Universal access is a powerful metaphor for organizing, and it is methodologically suggestive. Taking the approach of universal access, the idea of the universal would have to be built up from multiple, and necessarily different, starting points rather than built out from a singular normative point. In particular, universal access suggests that taking nonnormative lives seriously as an already central part of social relations would open possibilities for making the lives of those who live closer to the mythical norm better as well.

D. Interdependencies as a Basis for Sexual Democracy

But, as Nussbaum points out, justice requires more than that when we attend to and fulfill needs, we also improve the lives of others. Universal access often makes the lives of everyone better, and it is certainly more socially productive than simply creating special accommodations for those who are marginalized by current arrangements. Even with the best access, however, there are cases where attention to nonnormative lives will require measures that use significant resources. Nussbaum makes the case for why this provision of resources, along with changes for universal accessibility, is part of the work of justice. Nussbaum asks us to rethink the social contract with different ends in view for the project of social cooperation than those offered by traditional liberal contract theories. Social cooperation is not the coming together of normal individuals to agree to principles of justice for the sake of mutual benefit, and who might, once the principles are agreed upon, offer charity to those whose presence would not necessarily serve the definition of mutual benefit. Nussbaum instead suggests that:

Social cooperation . . . is seen as having a more capacious and diffuse set of ends, including the pursuit of justice and just interdependency for its own sake, for all sorts of different people, some of them free and some less free or differently free, some of them relatively independent and all in at least some ways dependent, some equal in capacity and other quite unequal in

capacity (though this does not mean that they are not morally equal).¹²⁹

Given that we are all dependent in at least some ways, and I would suggest queer in at least some ways (since none of us actually meet the mythical norm in all respects), perhaps we should look to social cooperation as not just pointing to the ends of justice but as the very condition of our existence.

It is these wide-ranging interdependencies that gay marriage cannot effectively accommodate. Although marriage is often equated with maturity—those who cannot commit to marriage, whether single men, the women of “Sex and the City,” or queer people, are “immature”—Nussbaum suggests alternatively that “maturity” means an ability to recognize the interdependencies that hold us in the world. And if this is the meaning of “mature,” then marriage does not set this standard. Marriage is one means of creating a commitment between two people, and sometimes also an extended kinship network. But it does not necessarily acknowledge the various ways in which we are interdependent, the ways in which we need help beyond our immediate families to make it through the world. Nor does it acknowledge the cost to those who support the dependencies of others.

The pressing question raised by the debate over “gay marriage”—a question that is rarely asked in the context of that debate—is why marriage has become seemingly our only means as a society of effectively recognizing interdependence and relation. Why, if the United States, as a nation, is so interested in supporting families, do we not support the way that people actually live in relation, whether the extended kinship networks described by Stack, or gay and lesbian “families we choose,” or even the range of relations that are not necessarily familial but nonetheless sustaining? Why is so much focused on the family? My analysis has suggested that the cultural force of Christian secularism is at least in part responsible for narrowing the normative circle of relational possibility. In particular, I have argued that it is not religion *per se* that drives the focus on marriage, but a particular understanding of Christianity, rooted in the Reformation and crystallized in modernity, that emphasizes the autonomous individual and sees marriage as a means of supporting that individual.

In other words, in our highly individualist nation, marriage is the normative site where one can be both an individual and in relation. And yet, because Christian secularism provides the normative power for negotiating one of the major contradictions of modernity—the individualism of human

¹²⁹ NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 11, at 350.

beings who are in many ways dependent—U.S. public discourse has not attended to the contradiction between the focus on marriage—the refusal to admit of families beyond those formed by heterosexual marriage and the way in which marriage is seen as the only means to normatively provide for relational needs—and other basic values, including those of freedom and democracy. As Ann Pellegrini and I argue in *Love the Sin*, the United States is supposed to value freedom above all else, but U.S. public discourse has not been able to sustain any meaningful discussion of connections between freedom and sexuality. We suggest that dislodging the hegemonic force of Christian secularism in the United States could further both sexual freedom and religious freedom.¹³⁰

Connecting this view of the multiplicitous possibilities for freedom in the U.S. to the “frontiers of justice” outlined by Nussbaum might also provide a means of rethinking the relation between sexuality and a range of social values and social movements. In the end, the argument for sexual democracy is not about sexuality alone. It is about the possibility of developing a world in which the rich and varied dependencies that make life possible can be recognized, including the interdependency between freedom and justice.

¹³⁰ JAKOBSEN & PELLEGRINI, *LOVE THE SIN*, *supra* note 12.

