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# ENRON, DOMA, AND SPOUSAL PRIVILEGES: RETHINKING THE MARRIAGE PLOT

I. Bennett Capers\*

## INTRODUCTION

The story of the collapse of Enron, at one time the world's seventh largest company, is familiar to many.<sup>1</sup> Formed in Texas in 1985, Enron boasted returns to investors of 600 percent by mid-1999,<sup>2</sup> and 1,000 percent by early 2000.<sup>3</sup> What investors did not know was that Enron was engaging in creative accounting to conceal its mounting debt from failed projects.<sup>4</sup> Only later, near the end of 2001, did it become obvious that Enron's reported profits were largely the result of smoke and mirrors.<sup>5</sup> Its stock price, which hit a high of ninety dollars per share in mid-2000, fell to sixty-one cents on November 28, 2001.<sup>6</sup> Less than a week later, Enron filed for bankruptcy.<sup>7</sup> At the time, it was the largest corporate bankruptcy in U.S. history.<sup>8</sup> By the end, the chain of events that resulted from Enron's collapse included congressional hearings;<sup>9</sup> new insights into Enron's role in the California energy crisis of the 1990s;<sup>10</sup> the criminal prosecution and dissolution of its accounting firm Arthur Andersen;<sup>11</sup> the criminal

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\* Professor of Law, Brooklyn Law School; J.D., Columbia Law School; B.A., Princeton University. I am indebted to Melissa Murray and Darren Rosenblum for their insightful comments, and to Toni Aillo, my librarian at my former institution, Hofstra Law School, for her excellent research. Lastly, I owe a special thanks to Joe Landau for encouraging me to participate in this Symposium, and for not taking "no" for an answer.

1. There are two excellent books on the Enron collapse. See KURT EICHENWALD, *CONSPIRACY OF FOOLS: A TRUE STORY* (2005); BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND FALL OF ENRON* (2003).

2. MCLEAN & ELKIND, *supra* note 1, at 10–14, 229.

3. *Id.* at 229.

4. *Id.* at 150–70.

5. The first serious scrutiny of Enron is traceable to a March 2001 article in *Fortune* magazine. See Bethany McLean, *Is Enron Overpriced?*, *FORTUNE*, Mar. 5, 2001, at 123 (noting that Enron was trading at 55 times its earnings, notwithstanding the fact that the source of its income was unclear).

6. Richard A. Oppel, Jr. & Andrew Ross Sorkin, *Enron Collapses as Suitor Cancels Plans for Merger*, *N.Y. TIMES*, Nov. 29, 2001, at A1.

7. Richard A. Oppel, Jr. & Andrew Ross Sorkin, *Enron Corp. Files Largest U.S. Claim for Bankruptcy*, *N.Y. TIMES*, Dec. 3, 2001, at A1.

8. *Id.*

9. Richard A. Oppel, Jr. & Joseph Kahn, *Enron's Ex-Chief Harshly Criticized by Senate Panel*, *N.Y. TIMES*, Feb. 13, 2002, at A1.

10. MCLEAN & ELKIND, *supra* note 1, at 264–83.

11. Arthur Andersen was found guilty of obstructing justice in connection with its shredding of thousands of documents relating to its audit of Enron. See Cathy Booth

prosecution of several Enron insiders, including Chairman and Chief Executive Officer Kenneth Lay, President and Chief Executive Officer Jeffrey Skilling, and Chief Financial Officer Andrew Fastow;<sup>12</sup> and the passage of new securities regulations in the form of the Sarbanes-Oxley Act.<sup>13</sup>

That much is well known. What is less well known is the issue Enron almost raised about the Defense of Marriage Act<sup>14</sup> (DOMA) and spousal privileges. This “almost raised” issue is the subject of Part I of this Essay. Part I recounts the story of the first executive to be arrested as part of the Enron debacle, Michael Kopper, who happens to be gay. On the surface, the story of Kopper and his partner, William Dodson, may seem insignificant: unlikely to repeat itself, inconsequential, and illustrative of just one of the hundreds of disadvantages facing same-sex couples under DOMA. After all, how important is an “almost raised” story about the interplay of evidentiary rules and DOMA? But dig deeper, and the Kopper and Dodson story raises questions that go well beyond Enron, DOMA, and spousal privileges. Indeed, it raises issues that go beyond the solution advocated by many of the contributors to this symposium, and by every mainstream LGBT advocacy group: the solution of marriage equality. Or at least this is what I argue in Part II. To my mind, the Kopper and Dodson story ultimately raises questions about the prioritization by LGBT groups of marriage equality as a goal, and about the belief, shared by many, that marriage equality will be the catalyst that ends other inequalities.

In a way, the goal of this Essay is straightforward. It asks, at a time when President Obama has announced his support for marriage equality,<sup>15</sup> when public support is growing,<sup>16</sup> and when so much seems aligned (the stars and the wedding bells) in our favor, that we take a breather. It adds another voice to the small group of legal scholars who question the relentless push for marriage equality and ask, “But?” (It speaks volumes that the small group is comprised mostly of women.)<sup>17</sup> It asks, before we commit

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Thomas, *Called to Account*, TIME, June 24, 2002, at 52. Though the Supreme Court later reversed the conviction, *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), by then the firm had dissolved, resulting in the termination of approximately 85,000 employees. Editorial, *Andersen Died in Vain*, CHI. TRIB., Mar. 14, 2012, at A22.

12. Alexei Barrionuevo, *2 Enron Chiefs Are Convicted in Fraud and Conspiracy Trial*, N.Y. TIMES, May 26, 2006, at A1; Alexei Barrionuevo, *Skilling Sentenced to 24 Years*, N.Y. TIMES, Oct. 24, 2006, at C1.

13. See Michael W. Peregrine, *Another View: Sarbanes-Oxley and the Legacy of Enron*, N.Y. TIMES DEALBOOK (Nov. 25, 2011, 10:30 AM), <http://dealbook.nytimes.com/2011/11/25/another-view-sarbanes-oxley-and-the-legacy-of-enron/>.

14. 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

15. Jackie Calmes & Peter Baker, *Obama Endorses Same-Sex Marriage, Taking Stand on Charged Social Issue*, N.Y. TIMES, May 10, 2012, at A1.

16. See *infra* notes 61–64.

17. The women I am thinking of are Katherine Franke, Paula Ettelbrick, and Nancy Polikoff.

everything, “Can we just talk some more?”<sup>18</sup> In short, this Essay begins again—before it is too late—another “uncomfortable conversation.”<sup>19</sup>

But all of that comes later. For now, I begin with Enron and the “almost raised” issue of spousal privileges.

### I. ENRON AND SPOUSAL PRIVILEGES

One of the first targets of the criminal investigation into Enron’s collapse, and the first Enron executive to plead guilty and enter into a cooperation agreement with the Government, was Michael Kopper.<sup>20</sup> With his boss Andrew Fastow, Kopper manufactured a series of arcane, off-balance special purpose entities that, together with mark-to-market accounting, allowed Enron to bypass reporting requirements, stash its growing debt and underperforming assets, and report speculative future earnings on a cash basis when in fact Enron was losing money.<sup>21</sup> These special purpose entities also allowed Enron insiders to skim millions of dollars from the company for their personal use.<sup>22</sup> For example, in one transaction, Kopper and Fastow each invested \$25,000 in a special purpose entity, from which they gained a profit of \$4.5 million in a matter of months.<sup>23</sup> By the time of Enron’s collapse, Kopper had pocketed more than \$16 million through his use of special purpose entities; Fastow had taken more than \$40 million.<sup>24</sup>

It was the concealment of debt, rather than the self-dealing of its employees, that caused Enron’s collapse. And it was here that Kopper’s partner, Dodson, became useful. In order to conceal some of Enron’s debt, a special purpose entity was placed in Dodson’s name.<sup>25</sup> According to some observers, Jeffrey Skilling believed that the lack of legal recognition of Kopper’s relationship with Dodson would make investigators less likely

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18. Perhaps no legal scholar has been more eloquent than Katherine Franke in urging restraint, or at least that we resist “the normative and epistemic frame that values nonmarital forms of life in direct proportion to their similarity to marriage, [and] unseat marriage as the measure of all things.” Katherine M. Franke, *Longing for Loving*, 76 *FORDHAM L. REV.* 2685, 2686 (2008).

19. I am thinking here of Martha Fineman’s wonderful collection of essays. See *FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS* (Martha Albertson Fineman et al. eds., 2009).

20. Landon Thomas, Jr., *Call It the Deal of a Lifetime*, *N.Y. TIMES*, Jan. 8, 2006, at C1.

21. *Id.* For example, in 2000, Enron used mark-to-market accounting to claim more than \$110 million in estimated profits from a twenty-year agreement it entered into with Blockbuster Video. In fact, the deal fell apart, resulting in a loss. *MCLEAN & ELKIND, supra* note 1, at 291–99.

22. Mary Flood & Tom Fowler, *Enron from the Inside*, *HOUS. CHRON.*, Sept. 28, 2004, at A1.

23. *Id.*

24. Thomas, *supra* note 20.

25. Chris Bull, *Enron’s Domestic-Partner Scam*, *ADVOCATE*, Mar. 19, 2002, at 21; Jeremy Quittner, *Odd Man Out at Enron: Did Michael Kopper’s Sexual Orientation Play a Role in his Becoming the First Man to Fall in the Country’s Biggest Corporate Scandal?*, *ADVOCATE*, Oct. 15, 2002, at 28.

“to connect Dodson’s work at [the special purpose entity] to Kopper’s work at Enron.”<sup>26</sup>

Although it is impossible to say with certainty, it is likely that investigators and federal prosecutors picked Kopper as an initial target because they hoped he would cooperate and assist them in their investigation of Fastow, who in turn could lead them to Kenneth Lay and Jeff Skilling.<sup>27</sup> In addition, Kopper’s sexuality likely made him an easy target for negotiating a plea.<sup>28</sup> But there was something else that gave prosecutors the upper hand vis-à-vis Kopper, something that Kopper’s defense lawyer likely brought to his attention early on: the unavailability of any spousal privilege.

In brief, federal law recognizes two spousal privileges in criminal cases: the spousal immunity privilege and the marital communications privilege.<sup>29</sup> Under the spousal immunity privilege, spouses cannot be compelled to testify against one another.<sup>30</sup> One rationale for this privilege is that there is a “natural repugnance” to forcing one spouse to testify adversely against “his intimate life partner.”<sup>31</sup> Under the second spousal privilege, the marital communications privilege, either spouse can prevent the other from disclosing any confidential communication made during the course of the marriage. The presumption is that all communications between spouses are confidential.<sup>32</sup>

Both privileges would have been available had Kopper been married to a woman rather than partnered with Dodson. Had Kopper been married to a woman, she could have asserted both privileges to avoid testifying before a grand jury or at trial, even in the face of a subpoena.<sup>33</sup> Even if his wife had

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26. Quittner, *supra* note 25, at 28.

27. *See id.* In fact, the government did eventually secure the cooperation of Fastow to testify against Skilling and Lay. Alexei Barrionuevo, *Who Will Steal the Enron Show?*, N.Y. TIMES, Jan. 29, 2006, at C1. For a discussion of the practice of prosecuting lower-level offenders in order to convict higher-level offenders, see Miriam Hechler Baer, *Cooperation’s Cost*, 88 WASH. U. L. REV. 903 (2011); Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135, 1152–53 (2004).

28. There were likely a couple of dynamics at play here. One, the government could have traded on the common perception that gay men are targeted for abuse, including rape, in prison. *See* Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1267 (2011). Two, the government could have traded on the assumption that Kopper would not want his sexuality widely known. Either dynamic might induce Kopper to cooperate against Fastow in return for keeping his sexuality secret or avoiding abuse in prison. For an exploration of some of these prosecutorial tactics, *see id.* at 1284–88.

29. I am bracketing the complicated choice of law issues that come up in federal cases in which state law supplies the rule of decision, as in diversity actions.

30. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2228, 2333 (1961).

31. *Id.*

32. *Blau v. United States*, 340 U.S. 332, 333 (1951).

33. Of course, evidentiary privileges have little effect on what is discoverable during other parts of the investigation. Such privileges, for example, play little if any role in the police interrogation of witness-spouses during the course of an investigation. *See, e.g., Crawford v. Washington*, 541 U.S. 36 (2004) (both the husband and wife were interrogated; the wife later invoked spousal privilege at trial to refuse to testify against her husband);

been willing to testify, Kopper could have unilaterally barred her from repeating anything he told her in confidence.

Neither privilege was available to Kopper or Dodson. If we imagine justice as scales, then the interplay between privilege law and DOMA tipped the scales of justice against Kopper. In part, this is because the first prerequisite to either spousal privilege is a validly recognized marriage. But this is also because of section 3 of DOMA, which, for purposes of federal law, expressly defines “marriage” and “spouse” as excluding same-sex couples.<sup>34</sup> Put differently, even if Kopper and his partner had been legally married,<sup>35</sup> and even if Texas recognized their marriage,<sup>36</sup> section 3 of DOMA would arguably still have prohibited a federal court from recognizing their marriage.<sup>37</sup>

This is not to suggest that a creative lawyer could not find a way to argue around DOMA. The Federal Rules of Evidence, until very recently, contained only one rule addressing privileges.<sup>38</sup> Instead of delineating the parameters of an attorney-client privilege or a clergy-penitent privilege, Congress adopted a single catch-all rule:

Except as otherwise required by the Constitution of the United States or provided by an Act of Congress or in rules prescribed by the Supreme

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Trammel v. United States, 445 U.S. 40 (1980) (the wife was interrogated and agreed to cooperate against her husband; her trial testimony was limited by the marital communication privilege). It should also be noted that some courts have ruled that the privileges are not available in situations where both spouses have engaged in joint criminal activity. *See, e.g.,* United States v. Clark, 712 F.2d 299, 301 (7th Cir. 1983). I am setting aside whether this joint-crime exception could have been applied to compel the testimony of spouses in the Enron case.

34. Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2006)).

35. All of this is theoretical, of course. In fact, the first state to permit same-sex marriages, Massachusetts, did not do so until 2003. *See* Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

36. Again, this is theoretical. In fact, Texas is one of many states that have enacted their own mini-DOMAs. These are state laws or state constitutional amendments that define marriage in heterosexual terms for purposes of state law and often specifically decline legal recognition of same-sex pairings. Texas has also gone a step further by amending its constitution to bar recognition of “any legal status identical or similar to marriage.” TEX. CONST., art. I, § 32. For a brief discussion of whether this amendment also bars Texas from recognizing heterosexual marriages, see ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES 147–48 (2006).

37. This would be true even if Enron were headquartered in Massachusetts (a marriage equality state), and Kopper and his partner were legally married residents of Massachusetts, where a Massachusetts state court would recognize their marriage and grant them the evidentiary privileges that come with it. Under DOMA, a federal court in Massachusetts would arguably still be prohibited from recognizing their marriage.

38. The Advisory Committee originally proposed to Congress thirteen separate rules to establish general principles of privilege law, which would have codified nine specific evidentiary privileges. PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE § 37.02, at 575 (3d ed. 2009). After much controversy over the rules—including objections that the proposed rules failed to include any privilege for marital confidences, physician-patient communications, or journalists and their sources—Congress rejected the proposed rules and passed a single rule, Rule 501, instead. *Id.* § 37.02, at 576. In 2008, Congress added Rule 502, which concerns the attorney-client privilege and work product. FED. R. EVID. 502.

Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of common law as they may be interpreted by the courts of the United States in light of reason and experience.<sup>39</sup> However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.<sup>40</sup>

On its face, the rule looks both forward and backward. It looks backward in time by mandating that privileges “shall be governed by the principles of common law.”<sup>41</sup> At the same time, it looks forward through its inclusion of the phrase, “as [such principles] may be interpreted by the courts of the United States in the light of reason and experience.”<sup>42</sup> Thus, by its terms, Rule 501 allows federal courts to develop new privileges. Indeed, the Supreme Court has recognized Congress’s “affirmative intention not to freeze the law of privilege,”<sup>43</sup> but instead to “leave the door open to change”<sup>44</sup> and “provide the courts with the flexibility to develop rules of privilege on a case-by-case basis”<sup>45</sup> in order to “continue the evolutionary development of testimonial privileges.”<sup>46</sup> Hence, in *Trammel v. United States*,<sup>47</sup> the Supreme Court invoked Rule 501’s flexibility to modify the spousal immunity privilege. Prior to *Trammel*, either spouse could assert the spousal immunity privilege; post-*Trammel*, and consistent with changing views about equality in marriage,<sup>48</sup> the right to assert the privilege now vests solely in the witness-spouse.<sup>49</sup> And in *Jaffee v. Redmond*,<sup>50</sup> the Supreme Court invoked Rule 501’s flexibility to create an entirely new federal privilege for psychotherapists and their patients.<sup>51</sup> Lower courts have used Rule 501’s permissive language to recognize still other privileges.<sup>52</sup>

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39. FED. R. EVID. 501 (restyled 2011).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Trammel v. United States*, 445 U.S. 40, 47 (1980).

44. *Id.* The Senate Report reflected this sentiment, explaining that Rule 501 “should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis.” S. REP. NO. 93-1277, at 13 (1974).

45. *Trammel*, 445 U.S. at 47 (quoting 120 CONG. REC. 40891 (1974) (statement of Rep. Hungate)).

46. *Id.*

47. *Id.*

48. *Id.* at 52 (“The ancient foundations for so sweeping a privilege have long since disappeared. Nowhere in the common-law world—indeed in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being.”).

49. *Id.* at 53.

50. 518 U.S. 1 (1996).

51. *Id.* at 18.

52. For example, two district courts have invoked Rule 501’s expansive language to recognize a parent-child confidential communications privilege. See *In re Grand Jury*

In theory, a federal court could get around DOMA by recognizing a separate privilege for same-sex couples.<sup>53</sup> Although DOMA would arguably prevent the court from treating a same-sex couple as married and thus entitled to marital privileges,<sup>54</sup> DOMA would not prevent a court from creating new privileges, say, a “cohabiting couples” privilege, that would be available for same-sex couples. In other words, the court could, in theory at least, play a name game to avoid running afoul of DOMA and simply not call the relationship marriage.

Such a court could even find ample justification for the creation of a new privilege that would, implicitly or explicitly, benefit same-sex married couples. Although “there is a general duty to give what testimony one is capable of giving,”<sup>55</sup> the Supreme Court has allowed exceptions in the form of privileges where there is a “public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.”<sup>56</sup> Here, the public good that would attend the recognition of privileges for married same-sex couples (or married-like couples in jurisdictions where marriage is unavailable) is identical to the public good that attends the recognition of privileges for married heterosexual couples. Consider the public good articulated in *Hawkins v. United States*<sup>57</sup>:

The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well. Such a belief has never been unreasonable and is not now.<sup>58</sup>

Certainly, the benefit of fostering family peace exists whether the couple is heterosexual or not. Assuming the relationship is one the community believes should be fostered, extending such a privilege also satisfies John

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Proceedings, Unemancipated Minor Child, 949 F. Supp. 1487 (E.D. Wash. 1996) (recognizing a parent-child communications privilege); *In re Agosto*, 553 F. Supp. 1298 (D. Nev. 1983) (same). Federal circuit courts have generally declined to follow suit. *See, e.g., In re Grand Jury*, 103 F.3d 1140 (3d Cir. 1997) (declining to recognize a parent-child privilege); *United States v. Erato (In re Erato)*, 2 F.3d 11 (2d Cir. 1993) (same); *In re Grand Jury Proceedings of John Doe v. United States*, 842 F.2d 244 (10th Cir. 1988) (same); *Port v. Heard*, 764 F.2d 423 (5th Cir. 1985) (same); *United States v. Ismail*, 756 F.2d 1253 (6th Cir. 1985) (same); *In re Grand Jury Subpoena (Santarelli)*, 740 F.2d 816 (11th Cir. 1984) (same); *United States v. Jones*, 683 F.2d 817 (4th Cir. 1982) (same); *United States v. Penn*, 647 F.2d 876 (9th Cir. 1980) (same).

53. “[Rule 501] . . . did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to ‘continue the evolutionary development of testimonial privileges.’” *Jaffee*, 518 U.S. at 8–9 (quoting *Trammel*, 445 U.S. at 47).

54. A court could also read DOMA as not applying to the recognition of privileges.

55. *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting 8 JOHN HENRY WIGMORE, EVIDENCE § 2192 (3d ed. 1940)).

56. *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)); *see also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

57. 358 U.S. 74 (1958).

58. *Id.* at 77.



Henry Wigmore's proposed test for recognizing new privileges.<sup>59</sup> Since Rule 501 would allow a court to factor in societal changes—as the Court did in *Trammel*<sup>60</sup>—the court could also consider the trend toward marriage equality in the states,<sup>61</sup> as well as public support for marriage equality,<sup>62</sup> and even greater support for equalizing the benefits and obligations of marriage.<sup>63</sup> Relying on recent census data, the court could consider the sizeable number of same-sex couples who would benefit from the allowance of spousal privileges.<sup>64</sup> Of course, a more aggressive court could simply declare DOMA unconstitutional. A few courts have done so already,<sup>65</sup> and others are sure to do so in the near future given the Obama Administration's determination that DOMA is unconstitutional<sup>66</sup> and its decision no longer to defend section 3 of DOMA.<sup>67</sup>

My point, though, is not to draft a blueprint for circumventing DOMA. Nor is my point to complain about yet another benefit denied to same-sex couples by virtue of DOMA. A 2004 report from the U.S. Government Accountability Office identified 1,138 provisions of federal law that distinguish between people who are married and those who are not.<sup>68</sup> Of these, spousal privileges are likely minor ones, unless one is in a same-sex relationship and facing federal criminal prosecution. My point is decidedly different. Specifically, my point is to call into question the “marriage plot.”

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59. See WIGMORE, *supra* note 30, § 2285.

60. *Trammel*, 445 U.S. at 52.

61. Six states and the District of Columbia permit same-sex couples to marry. In total, twenty states and the District of Columbia provide legal recognition for same-sex couples and their dependents. See *Same-Sex Relationship Recognition Laws: State by State*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/same-sex-relationship-recognition-laws-state-by-state> (last visited Oct. 20, 2012).

62. See Peter Baker, *Same-Sex Marriage Support Shows Pace of Social Change Accelerating*, N.Y. TIMES, May 11, 2012, at A20 (citing a Pew research poll showing increased American support for same-sex marriage, including a 26-point swing in the last decade); Nate Silver, *Support for Gay Marriage Outweighs Opposition in Polls*, N.Y. TIMES FIFTYTHREE (May 9, 2012, 4:52 PM), <http://fivethirtyeight.blogs.nytimes.com/2012/05/09/support-for-gay-marriage-outweighs-opposition-in-polls/>.

63. See Cindy Ok, *Majority of Americans Back Same-Sex Civil Unions*, SLATE, (May, 14, 2012, 11:35 AM), [http://slatest.slate.com/posts/2012/05/14/gay\\_civil\\_union\\_support\\_6\\_in\\_10\\_americans\\_back\\_civil\\_unions\\_but\\_less\\_than\\_half\\_support\\_gay\\_marriage\\_.html](http://slatest.slate.com/posts/2012/05/14/gay_civil_union_support_6_in_10_americans_back_civil_unions_but_less_than_half_support_gay_marriage_.html) (reporting that approximately 62 percent of Americans polled supported some form of legal recognition for same-sex couples).

64. The 2010 census data reported 131,729 same-sex married couple households and 514,735 same-sex unmarried partner households in the United States. *Census Bureau Releases Estimates of Same-Sex Married Couples*, U.S. CENSUS BUREAU (Sept. 27, 2011), [http://www.census.gov/newsroom/releases/archives/2010\\_census/cb11-cn181.html](http://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn181.html).

65. See, e.g., *Dragovich v. U.S. Dep't of Treasury*, No. C 10-01564 CW, 2012 WL 1909603 (N.D. Cal. May 24, 2012); *Golinski v. U. S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012); *Gill v. U. S. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010).

66. Letter from Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

67. *Id.*

68. U.S. GOV'T ACCOUNTABILITY OFFICE, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (2004), *available at* <http://www.gao.gov/assets/100/92441.pdf>.

## II. THE MARRIAGE PLOT

Recently, I have been thinking about Jeffrey Eugenides's novel *The Marriage Plot*,<sup>69</sup> which references through its title a recurring trope in nineteenth century fiction. Think of almost any novel by Jane Austen, many of which end with either a marriage proposal or a marriage ceremony.<sup>70</sup> Or think of Charlotte Brontë's *Jane Eyre*, the last chapter of which famously opens with the line, "Reader, I married him."<sup>71</sup> Marriage as climax<sup>72</sup> was a popular narrative device in nineteenth century fiction<sup>73</sup>—indeed, remnants can be found in popular entertainment today<sup>74</sup>—because back then at least, it told the reader everything the reader needed to know. A suitable marriage, especially at a time when property passed to male heirs, meant that a woman would have a home over her head, would be financially provided for, could serve her function of producing children, and would satisfy the basic requirements for being well-regarded in society. There were no lingering questions. Marriage settled everything—at least in nineteenth-century fiction. Indeed, it is precisely the passing from prominence of this plot device that prompts a character's complaint in *The Marriage Plot*. The character, a professor of English literature, laments to his students that the novel, as a form, "reached its apogee with the marriage plot and had never recovered from its disappearance. In the days when success in life had depended on marriage, and marriage had depended on

69. JEFFREY EUGENIDES, *THE MARRIAGE PLOT* (2011).

70. Securing a suitable marriage, of course, is what motivates the plots in Austen's *Pride and Prejudice*, *Sense and Sensibility*, and *Emma*. This goal is made explicit by the narrator of *Pride and Prejudice*, which opens with the line: "It is a truth universally acknowledged, that a single man in possession of a good fortune, must be in want of a wife." JANE AUSTEN, *PRIDE AND PREJUDICE* 27 (Dell Publ'g Co. 1959) (1813).

71. CHARLOTTE BRONTË, *JANE EYRE* 489 (Random House, Inc. 1950) (1847). It is telling that in her most recent novel, Lorrie Moore subverts this expectation. At the end of *A Gate at the Stairs*, the narrator is propositioned by the handsome, older man she once worked for as a babysitter. The novel concludes with the lines: "Reader, I did not even have coffee with him. That much I learned in college." LORRIE MOORE, *A GATE AT THE STAIRS* 322 (2009).

72. The reference to climax is not meant to be prurient, but to recall Roland Barthes analysis of codes that inform literary texts. One such code, the hermeneutic, sets up delayed gratification, which Barthes compares to the unveiling of robes. See ROLAND BARTHES, *S/Z* 18–20 (1970); see also ROLAND BARTHES, *THE PLEASURE OF THE TEXT* (Richard Miller trans., Hill & Wang 1975) (1973).

73. See, e.g., RACHEL ABLow, *THE MARRIAGE OF MINDS: READING SYMPATHY IN THE VICTORIAN MARRIAGE PLOT* (2007); JENNI CALDER, *WOMEN AND MARRIAGE IN VICTORIAN FICTION* (1976); Kathy Alexis Psomiades, *The Marriage Plot in Theory*, in 43 *NOVEL: A FORUM ON FICTION* 53 (2010); Tamara S. Wagner, *Marriage Plots and "Matters of More Importance": Sensationalising Self-Sacrifice in Victorian Domestic Fiction*, in *ANTIFEMINISM AND THE VICTORIAN NOVEL: REREADING NINETEENTH-CENTURY WOMEN WRITERS* 137 (Tamara S. Wagner ed., 2009).

74. Contemporary examples of the marriage plot can be found in romance novels, such as those of Nora Roberts, and even in the popular television show *Downton Abbey*, the second season of which ends, quite literally, with a marriage proposal. *Downton Abbey: Christmas Special* (ITV television broadcast Dec. 25, 2011). Arguably, even the television show *Sex and the City* is indebted to the marriage plot.

money, novelists had had a subject to write about. The great epics sang of war, the novel of marriage.”<sup>75</sup>

I am thinking of the marriage plot in nineteenth-century fiction because it seems as if, like starry-eyed readers, we are expecting a similar “marriage plot” in our push for marriage equality. Never mind that lesbians and gays continue to be discriminated against in employment<sup>76</sup> and housing<sup>77</sup> and are disproportionately targeted for hate crimes;<sup>78</sup> those problems, like the lack of security facing unmarried English women in the nineteenth century, will recede once we can marry, since marriage is the real barrier that keeps us from being welcomed into the fold. We expect this notwithstanding the waning of the marriage plot in fact and fiction,<sup>79</sup> and notwithstanding that even in nineteenth-century fiction, the plot device of “happy ever after” was, just below the surface, a questionable one. *Jane Eyre* marries Rochester at the end, but let us not forget she is his second wife. He kept the first locked in the attic, prompting a cottage industry of feminist literary criticism,<sup>80</sup> as well as several prominent law and literature analyses.<sup>81</sup> There is even the feminist reimagining of *Jane Eyre* in the form of Jean Rhys’s novel *Wide Sargasso Sea*.<sup>82</sup>

This reliance on the “marriage plot” is one response to the issue Enron “almost raised” about DOMA and spousal privileges. As many of my students respond when I raise this issue in class, the “real” answer is to repeal DOMA or have it ruled unconstitutional, and thus allow Kopper and

75. EUGENIDES, *supra* note 69, at 22.

76. See Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 722–28 (2012).

77. See Equal Access to Housing in HUD Programs—Regardless of Sexual Orientation or Gender Identity, 76 Fed. Reg. 4194, 4194 (Jan. 24, 2011) (noting evidence that lesbian and gay individuals and families lack equal access to housing).

78. See Mark Potok, *Anti-Gay Hate Crimes: Doing the Math*, S. POVERTY L. CENTER, <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2010/winter/anti-gay-hate-crimes-doing-the-math> (last visited Oct. 20, 2012).

79. As the professor of English literature observes in *The Marriage Plot*: “Sexual equality, good for women, had been bad for the novel. And divorce had undone it completely. What would it matter whom Emma married if she could file for separation later? How would Isabel Archer’s marriage to Gilbert Osmond have been affected by the existence of a prenup?” EUGENIDES, *supra* note 69, at 22.

80. See, e.g., NINA AUERBACH, ROMANTIC IMPRISONMENT: WOMEN AND OTHER GLORIFIED OUTCASTS 70, 197–204 (Carolyn G. Heilbrun & Nancy K. Miller eds., 1986); SANDRA M. GILBERT & SUSAN GUBAR, THE MADWOMAN IN THE ATTIC: THE WOMAN WRITER AND THE NINETEENTH-CENTURY LITERARY IMAGINATION 339 (1979); ELAINE SHOWALTER, A LITERATURE OF THEIR OWN: BRITISH WOMEN NOVELISTS FROM BRONTË TO LESSING 118–22 (1977).

81. See, e.g., Anita L. Allen, *The Jurisprudence of Jane Eyre*, 15 HARV. WOMEN’S L.J. 173 (1992); Michele Cammers Goodwin, *The Black Woman in the Attic: Law, Metaphor and Madness in Jane Eyre*, 30 RUTGERS L.J. 597 (1999); Linda R. Hirshman, *Brontë, Bloom, and Bork: An Essay on the Moral Education of Judges*, 137 U. PA. L. REV. 177 (1988); Debora L. Thredy, *The Madness of a Seduced Woman: Gender, Law, and Literature*, 6 TEX. J. WOMEN & L. 1 (1996).

82. JEAN RHY, *WIDE SARGASSO SEA* (1966).

Dodson, as well as innumerable other same-sex couples in the country, to enjoy the same privileges as heterosexual married couples. Other students focus on more practical and immediate answers. For example, an attorney representing Kopper might argue that same-sex couples are entitled to the same evidentiary privileges as different-sex married couples, and that Kopper's communications with his partner Dodson should similarly be protected. The attorney would argue that the court has the authority, in light of "reason and experience," to extend marital privileges notwithstanding DOMA.<sup>83</sup> Or, making a slightly broader claim, the attorney might argue that any couple in a marriage-like relationship, including unmarried heterosexual couples, should be able to secure the benefits of these evidentiary privileges. Of course, even these arguments are still variations on the marriage plot.

But one can imagine other plots that do not use marriage as the measuring stick for determining what relationships are deserving of protection. For example, one might argue that familial groupings should be entitled to privileges. There could be an evidentiary privilege for siblings,<sup>84</sup> or for the parent-child relationship. Consider *In re Grand Jury*,<sup>85</sup> in which the Third Circuit considered three appeals presenting the same critical issue: whether the court should recognize a parent-child privilege. In one appeal, a father had been subpoenaed to testify against his teenage son.<sup>86</sup> In another, a sixteen-year old was subpoenaed to testify against her father.<sup>87</sup> Though the Third Circuit declined to create a parent-child privilege,<sup>88</sup> it acknowledged its ability to do so<sup>89</sup> and that there were strong arguments in support of such a privilege.<sup>90</sup> Building on those arguments, one could argue that the better result would be to extend privileges to familial relationships in order to further society's interest in protecting the family unit.

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83. This need not necessarily involve a challenge to the constitutionality of DOMA. Rather, given Rule 501's permissive language, a federal court could extend evidentiary privileges to same-sex married couples either by side-stepping the term marriage, or by ruling that such an extension does not implicate DOMA insofar as the court is not "determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States." 1 U.S.C. § 7 (2006).

84. As Jill Elaine Hasday has recently discussed, the law's focus on preserving marital relationships coexists with indifference to safeguarding sibling relationships. See Jill Elaine Hasday, *Siblings in Law*, 65 VAND. L. REV. 897 (2012).

85. 103 F.3d 1140 (3d Cir. 1997).

86. *Id.* at 1142-43.

87. *Id.* at 1143.

88. *Id.* at 1157.

89. *Id.* at 1149.

90. *Id.* at 1146 n.12 (citing law review articles). For additional arguments in favor of such a privilege, see, for example, Gregory W. Franklin, Note, *The Judicial Development of the Parent-Child Testimonial Privilege: Too Big for Its Britches?*, 26 WM. & MARY L. REV. 145 (1984); Susan Levine, Comment, *The Child-Parent Privilege: A Proposal*, 47 FORDHAM L. REV. 771 (1979); Catherine Chiantella Stern, Note, *Don't Tell Mom the Babysitter's Dead: Arguments for a Federal Parent-Child Privilege and a Proposal to Amend Article V*, 99 GEO. L.J. 605 (2011).

Going even further, one can imagine an argument that seeks to protect individuals without regard to whether they are in a marital or marriage-like relationship and without regard to their family status. For example, one could seek to protect those individuals (the majority of us?) who are more likely to confide in a friend than a family member. In other words, there could be an evidentiary privilege for confidential communications between friends, as Sanford Levinson has suggested.<sup>91</sup> Society has an interest in fostering and preserving friendships.<sup>92</sup> Indeed, society should have an interest in ensuring that everyone has someone they can confide in. After all, “the mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.”<sup>93</sup> That citizens have confidantes, whether that person is a spouse, family member, friend, clergy member, psychotherapist, or, say, bartender, would appear to benefit us all. It is this last argument that moves furthest away from the “marriage plot” and the partiality toward marriage and that seems the most progressive to me.

This brings me back to Enron and the absence of evidentiary protections for Kopper and Dodson. To simply pursue a “marriage plot” and argue that Kopper and Dodson should receive the same evidentiary protections as heterosexual married couples may seem like equality to some members of the LGBT community, but that equality ignores the inequality that exists when we favor those who are married over those who are not. Some years ago, the theorist Michael Warner observed that “[m]arriage sanctifies some couples at the expense of others. It is selective legitimacy . . . . Marriage, in short, discriminates.”<sup>94</sup> Nancy Polikoff makes a similar point: “When law makes marriage the dividing line, it harms all unmarried people, including those with children. The harm is the dividing line.”<sup>95</sup> And they are right.

All of this goes back to the 1989 debate between Paula Ettelbrick and Tom Stoddard,<sup>96</sup> which Ed Stein revisited in the *Rutgers Law Review* a few years ago.<sup>97</sup> Should the goal of the LGBT movement be to demand the privileges (here, quite literally, an evidentiary privilege) of marriage, in which case the goal is necessarily the invalidation of DOMA and the

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91. Sanford Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631; see also Dalton Conley, *Spread the Wealth of Spousal Rights*, N.Y. TIMES, May 20, 2007, at A13.

92. For an argument that the law should do more to recognize and foster friendships, see Ethan J. Leib, *Friendship and the Law*, 54 UCLA L. REV. 631 (2007).

93. *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996).

94. MICHAEL WARNER, *THE TROUBLE WITH NORMAL* 82 (1999).

95. NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 123 (2008).

96. Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, OUT/LOOK, Autumn 1989, at 8–12, reprinted in WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 1098–99 (2d ed. 2004); Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, Autumn 1989, at 8–12, reprinted in ESKRIDGE & HUNTER, *supra* note 96, at 1099–1101.

97. Edward Stein, *Marriage or Liberation?: Reflections on Two Strategies in the Struggle for Lesbian and Gay Rights and Relationship Recognition*, 61 RUTGERS L. REV. 567 (2009).

securing of marriage equality? Or should the goal of the LGBT movement be to challenge the institution of marriage itself? Are we fighting to be admitted to the exclusive country (marriage) club? Or are we calling into question the very notion of exclusive country (marriage) clubs to begin with? If marriage is a necessary precursor to what Martha Fineman designated the “appropriately constituted family”—defining “the normal and designat[ing] the deviant”<sup>98</sup>—and we are saying we want to be normal, doesn’t that necessarily mean we are accepting, to a certain extent, the categorization of deviancy? In her seminal essay “Thinking Sex,” Gayle Rubin argues that the state has never been nonpartisan when it comes to intimacy and has always privileged some types of intimacy at the expense of others. Her series of hierarchies bears repeating:

<b>Good, Normal, Natural</b>	<b>Bad, Abnormal, Unnatural</b>
Heterosexual	Homosexual
Married	Unmarried
Monogamous	Promiscuous
Procreative	Nonprocreative
In pairs	Alone or in groups
In a relationship	Casual
Same generation	Cross-generational
In private	In public
No pornography	Pornography
Bodies only	With manufactured objects
Vanilla	Sadomasochistic <sup>99</sup>

This is not a fixed list, of course; the benefits that attach to engaging in approved intimacy and the stigma that attaches to engaging in suspect intimacy vary over time and by geography.<sup>100</sup> But the point remains the same: to the extent that being married is seen as being better than unmarried,<sup>101</sup> marriage equality advocates want to be able to check the box

98. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 144 (1995); see also Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1267–68 (2009) (observing that family and criminal laws operate to construct a boundary between legitimate sexual behavior (within marriage) from illegitimate sexual behavior (outside of marriage)).

99. See Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *THE LESBIAN AND GAY STUDIES READER* 3, 28–30 (Henry Abelove et al. eds., 1993).

100. See Bennett Capers, *The Crime of Loving: Loving, Lawrence, and Beyond*, in *LOVING V. VIRGINIA IN A POST-RACIAL WORLD: RETHINKING RACE, SEX, AND MARRIAGE* 114 (Kevin Noble Maillard & Rose Cuison Villazor eds., 2012); Murray, *supra* note 98.

101. See Melissa Murray, *What’s So New about the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL’Y & L. 387, 436 (2012). It is telling that heterosexuals who opt out of marriage are often pathologized “as immature, uncommitted, unfaithful, disloyal, undevoted, and overly sexual.” Ruthann Robson, *Compulsory Matrimony*, in *FEMINIST AND QUEER*

that says married. But this is buying into the system, not subverting it. In doing so, far from upsetting the marriage cart, we are tightening its wheels.<sup>102</sup>

There is also the issue of “our” inconsistent messaging. To traditionalists, we argue that allowing same-sex couples to marry will have no effect on heterosexual, paradigmatic marriage.<sup>103</sup> We even argue that, if anything, allowing same-sex couples to marry will make LGBT individuals better citizens—less promiscuous, more stable.<sup>104</sup> But behind closed doors, or rather among friends and allies, we argue that same-sex marriage has the potential to disrupt traditional gender roles and female subordination in marriage.<sup>105</sup> My concern is not that this is the equivalent of speaking out of both sides of one’s mouth, a practice I have no quarrel with when the ends justify the means. My concern is that what we’re telling the traditionalists—that same-sex marriage will change nothing—will turn out to be the truth.

A further concern is that the full-court press for marriage equality, so all-encompassing that anyone who questions this priority may come to think of herself as a traitor to the cause, seems to discourage “uncomfortable conversations” about marriage itself. The way marriage is used as a substitute for a public safety net for citizens is just one example.<sup>106</sup> Instead

LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS 313, 324 (Martha Fineman et al. eds. 2009).

102. The words of David Blankenhorn, a former opponent of marriage equality who now supports marriage equality, are in this sense both welcome and cause for concern.

I’d like to help build new coalitions bringing together gays who want to strengthen marriage with straight people who want to do the same. For example, once we accept gay marriage, might we also agree that marrying before having children is a vital cultural value that all of us should do more to embrace? Can we agree that, for all lovers who want their love to last, marriage is preferable to cohabitation?

David Blankenhorn, *How My View on Gay Marriage Changed*, N.Y. TIMES (June 22, 2012), <http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html>.

103. See, e.g., WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 173 (2002). For a discussion of the harm debate, see Robert Justin Lipkin, *The Harm of Same-Sex Marriage: Real or Imagined?*, 11 WIDENER L. REV. 277 (2005). For a discussion of the harm in terms of standing to intervene in DOMA litigation, see Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539 (2012).

104. This is also the argument made by Ted Olson, one of the lawyers behind the court challenge to California’s Proposition 8. See Theodore B. Olson, *The Conservative Case for Gay Marriage*, NEWSWEEK, Jan. 18, 2010, at 48.

105. See, e.g., CARLOS A. BALL, THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY (2003); WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 61 (1996); Kathryn Abrams, *Elusive Coalitions: Reconsidering the Politics of Gender and Sexuality*, 57 UCLA L. REV. 1135, 1136 (2010); Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199, 1201 (2010); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 L. & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 9, 17 (1991) (arguing that same-sex marriage has the potential to “destabilize the cultural meaning of marriage”).

106. As Melissa Murray has observed:

[I]t is not just that marriage has become a substitute for government-provided economic assistance to needy families. It is that marriage has become the de facto

of questioning the myriad ways in which marriage is incentivized, so much so that it has come to seem natural and normal to want to marry, and so much so that it can be said that there is something akin to “compulsory matrimony” in our society,<sup>107</sup> marriage equality proponents often seem unquestioningly to “carry a brief”<sup>108</sup> for marriage. Instead of devoting critical attention to how marriage manifests itself as another form of state regulation, interrogating its disciplining function as Melissa Murray has recently done,<sup>109</sup> or addressing the prospect that marriage will make us “good gays,”<sup>110</sup> we simply accept its normativity and with it, its hegemony.

This embrace of a “marriage plot” seems all the more odd when one views, as a marker of progress, the line from *Bowers v. Hardwick*,<sup>111</sup> in which the Supreme Court ruled that state laws criminalizing same-sex sex did not violate the Constitution, to its decision in *Lawrence v. Texas*<sup>112</sup> some seventeen years later, ruling that it did. Laurence Tribe famously quipped that the issue in *Bowers* should have been “not what Michael Hardwick was doing in the privacy of his own bedroom, but what the State of Georgia was doing there.”<sup>113</sup> Indeed, to a large extent, the victory in

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social safety net for *all* families. . . . Expanding marriage to include same-sex couples would improve health care coverage . . . . Expanding marriage would legitimize the children of same-sex couples . . . . Likewise, expanding marriage would provide certain immigration benefits to the same-sex spouses of American citizens.

With this frame in mind, the LGBT rights movement’s prioritization of marriage equality is sensible—marriage is a crucial conduit to a wide array of public and private benefits. But importantly, all of these ends might be achieved—for same-sex couples and everyone else—without marriage.

Melissa Murray, *Black Marriage, White People, Red Herrings*, 116 MICH. L. REV. (forthcoming 2013) (manuscript at 35–36) (on file with author).

107. See Robson, *supra* note 101, at 313. This phrasing borrows from Adrienne Rich. See Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631, 632 (1980).

108. JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006); see also Franke, *supra* note 18, at 2698.

109. Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 40 (2012) (arguing that marriage “continues to be a *disciplining* institution of critical importance to the state’s project of constructing a disciplined citizenry”). One can even see the disciplining function in *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006), in which the New York Court of Appeals rejected an equal protection challenge to New York’s ban on same-sex marriage. The court found that the ban satisfied the rational basis requirement in that it could be justified by a determination that “an important function of marriage is to create more stability and permanence in the relationships that cause children to be born.” *Id.* at 7. “It thus could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other.” *Id.* As Ruthann Robson has observed in her critique of the decision, from such reasoning, “it would seem that the benefits of marriage are meant to induce—coerce?—unwilling heterosexuals into marriage.” Robson, *supra* note 101, at 327.

110. WARNER, *supra* note 94, at 113.

111. 478 U.S. 186 (1986).

112. 539 U.S. 558, 578 (2003).

113. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-21, at 1428 (2d ed. 1988).



*Lawrence* was getting the state out of the bedroom.<sup>114</sup> But if that was the victory, it was a pyrrhic one. Having gotten the state out of the bedroom, we now seem to want the state back in.<sup>115</sup> Some years ago, Nan Hunter observed, “*Lawrence v. Texas* marked a dramatic milestone in efforts to limit state power to control homosexuality, but the product is likely to be a different regulatory regime rather than a libertarian utopia.”<sup>116</sup> Her words may prove prescient. Indeed, the Massachusetts Supreme Court’s decision in *Goodridge v. Department of Public Health*<sup>117</sup> hints at as much. When the *Goodridge* court ruled that the state could not deny marriage to same-sex couples, many in the LGBT community viewed the decision as a cause for celebration. But the court’s language should also occasion pause and reflection. The court, after all, described marriage as a relationship between “three partners,” not two: “two willing spouses and an approving State.”<sup>118</sup> Of course, that marriage involves the state as a third partner has long been true of heterosexual marriage. The issue is, do we too want the state as a third partner? Is the contemporary battle for gay rights really a battle to enjoy this particular ménage à trois?

To be clear, none of this is intended as an argument against the strategy of pursuing the right to marry. But I do question the prioritization of this strategy as a means for achieving anything approaching equality and what has amounted to the pursuit of this strategy to the exclusion of all others. If we were ever at a point where marriage could solve everything—providing security, a home, financial stability, and the proverbial “happy ever after”—we are certainly at that point no longer. The marriage plot, after all, was a fictional device. And I question whether pursuing marriage equality comes with unintended consequences: reifying distinctions based on marital status, reifying a hierarchy between those who are married and those who are not, and validating a system in which privileges follow accordingly. My concern is that with domesticity comes domestication. My concern is that marriage equality, beneath the surface, requires and entrenches marital status inequality.

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114. Of course, another way to read *Lawrence* is as granting a right that is decidedly domesticated. See Murray, *supra* note 109, at 56 (*Lawrence* “paints Tyron Garner and John Geddes Lawrence with the brush of marital domesticity, suggesting that the pair were a long-term couple.”); Laura Rosenbury & Jennifer E. Rothman, *Sex in and out of Intimacy*, 59 EMORY L.J. 809, 814 (2010) (arguing that the language of *Lawrence* reveals the Court’s concern for protecting sex that is connected to an emotional bond); Jeannie Suk, *Is Privacy a Woman?*, 97 GEO. L.J. 485, 512 (2009) (observing that “within *Lawrence*’s famously heteronormative home discourse of domesticity and relationships, it was as if a front-region performance of marriage-like intimacy were intruding on the back-region conduct of private gay sex”); see also Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004).

115. I am reminded here of the framed needlepoint message, “Bless this Home,” still found in many houses. Marriage equality advocates seem to want something similar, in effect a government seal of approval.

116. Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1554 (2004).

117. 798 N.E.2d 941 (Mass. 2003).

118. *Id.* at 954.

All of which brings me, one last time, to the issue Enron almost raised about DOMA and spousal privileges; or rather, to the story of Michael Kopper and William Dodson. As a former federal prosecutor who prosecuted securities crimes, I can imagine the thinking that likely went into selecting Kopper as a target. Kopper can lead us to his boss Fastow. And Kopper, as a gay man, will likely have an incentive to cooperate rather than go to prison where gay men are targeted for abuse. And unlike the situation with his married colleagues at Enron, we will be able to go after his partner Dodson, subpoena Dodson to testify before the grand jury, and compel Dodson to tell us every incriminating thing Kopper confided to him.

The response to this thinking could be to invoke the marriage plot. Let's allow same-sex couples to marry, thus allowing them the privileges (including the evidentiary privileges) that come with marriage. Let's treat Kopper and Dodson as if they were a heterosexual married couple. Let's give them that privilege. That is one response. But hopefully this Essay has prompted thoughts about other responses and other questions. After all, allowing Kopper to marry or otherwise secure the benefit of spousal privileges does little to alter the equation that made him, as a gay man, a soft target for prosecutors in the first place. Beyond Kopper, how does marriage equality, or securing spousal evidentiary privileges, benefit the Enron employee who isn't married? How does it benefit those individuals, gay and straight and bisexual and transsexual, who are single, whether by choice or happenstance? How does benefiting "just us" further justice?

#### CONCLUSION

My partner and I married in Massachusetts several years ago, and he and I still disagree about the LGBT marriage agenda. His argument is that, with marriage equality, other issues facing the LGBT community will resolve themselves. I'm not so sure, especially when I think of the suicide rates among LGBT youth,<sup>119</sup> or the hate crimes committed against those perceived to be gay or transgender (consider Massachusetts, which has seen an increase in antigay bias crimes since it became a marriage equality state),<sup>120</sup> or the employment discrimination still faced by members of the

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119. Lucia Graves, *Gay Teen Suicides Pervasive, A 'Hidden Problem': Expert*, HUFFINGTON POST, (Oct. 22, 2010, 9:06 PM), [http://www.huffingtonpost.com/2010/10/22/gay-teen-suicides-a-hidden-problem\\_n\\_772707.html](http://www.huffingtonpost.com/2010/10/22/gay-teen-suicides-a-hidden-problem_n_772707.html).

120. See COMMONWEALTH FUSION CTR., MASSACHUSETTS HATE CRIMES, 2008, available at <http://www.mass.gov/eopss/docs/eops/hatecrimes2008.pdf> (noting sixty-two incidents of reported antigay bias); COMMONWEALTH FUSION CTR., MASSACHUSETTS HATE CRIMES, 2007, available at <http://www.mass.gov/eopss/docs/eops/hatecrimes2007.pdf> (noting seventy-six incidents of reported antigay bias); COMMONWEALTH FUSION CTR., MASSACHUSETTS HATE CRIMES, 2006, available at <http://www.mass.gov/eopss/docs/eops/hatecrimes2006.pdf> (noting seventy-one incidents of reported antigay bias); COMMONWEALTH FUSION CTR., MASSACHUSETTS HATE CRIMES, 2005, available at <http://www.mass.gov/eopss/docs/eops/hatecrimes2005.pdf> (noting sixty-three incidents of reported antigay bias); COMMONWEALTH FUSION CTR., MASSACHUSETTS HATE CRIME, 2004, available at <http://www.mass.gov/eopss/docs/eops/hatecrimes2004.pdf> (noting forty-three incidents of reported antigay male bias).

LGBT community. I find myself thinking of Robin Shahar, who, after graduating from the top of her class at Emory Law School, lost her job offer with the Georgia Attorney General's Office when the Attorney General learned that she was about to have a commitment ceremony with her same-sex partner.<sup>121</sup> Even if we secured marriage equality tomorrow, people like Robin Shahar still wouldn't have job security.

I think, too, about the reliance marriage equality advocates have placed on *Loving v. Virginia*,<sup>122</sup> the 1967 Supreme Court decision that declared anti-miscegenation laws unconstitutional and declared the existence of a fundamental right to marry. As I have observed elsewhere, though a watershed decision, *Loving* in fact changed very little.<sup>123</sup> More than ten years after *Loving*, only 36 percent of Americans believed interracial couples should be able to marry.<sup>124</sup> Even now, interracial couples face horrible discrimination.<sup>125</sup> So if *Loving* and *Lawrence* are the signposts that get us to marriage equality, will marriage equality change that much? Will it lessen the pressure to cover that Kenji Yoshino has so eloquently explored,<sup>126</sup> or weaken the hold of the gay closet?<sup>127</sup> Will it make our intimacy any less obscene in the eyes of society?<sup>128</sup> Will marriage equality mean that my partner and I will be able to hold hands in public without fear of being targeted for verbal or physical harassment?

Anyway, my partner and I used to argue about the wisdom of the LGBT movement's prioritization of marriage equality. Now, we've simply agreed to disagree. My hope is that readers who disagree with me will likewise agree to disagree.

One final word. Note that I use the word partner, not husband. The word husband still sounds awkward to me, only partially because, as a society, we still think husband and wife, not husband and husband. Primarily, it sounds awkward because of the connotations of what a husband is: man of the house, bread-winner, all of those heteronormative, patriarchal associations I'd rather avoid. It also reminds me of Audre Lorde's question: Is it really possible to disassemble the master's house using the master's tools?<sup>129</sup> Can we really change marriage—I'm talking real change, not just changes at the margins—by seeking the invalidation of

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121. *Shahar v. Bowers*, 70 F.3d 1218 (11th Cir. 1995).

122. 388 U.S. 1 (1967).

123. See Capers, *supra* note 100, at 118–19.

124. Margaret Talbot, *Wedding Bells*, NEW YORKER, May 21, 2012, at 19.

125. See, e.g., Susan Saulny, *In Strangers' Glances at Family, Tensions Linger*, N.Y. TIMES, Oct. 13, 2011, at A1; David Moyer, *White Grandfather Detained While Walking with Black Granddaughter: Scott Henson Cuffed by Texas Police*, HUFFINGTON POST, (Feb. 14, 2012, 9:13 AM), [http://www.huffingtonpost.com/2012/02/14/white-grandfather-detained\\_n\\_1275383.html](http://www.huffingtonpost.com/2012/02/14/white-grandfather-detained_n_1275383.html).

126. See KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006).

127. See EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* (1990).

128. See Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379 (2008) (exploring how rules against obscenity disproportionately censor same-sex intimacy).

129. Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 110 (2007).

DOMA and marrying our same-sex partners? I'm not so sure. What I am sure of is that it is critical that we really have a long talk, however uncomfortable it may be, before saying "I do."

*Notes & Observations*