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> For the first time in living memory, we can realistically hope to see lesbian and gay couples happily joined on an equal footing with our non-gay brothers and sisters—if those who favor equality can put aside their divisions and unite to secure ultimate victory. For this reason, I have urged that we end, or at least suspend, the intra-community debate over whether to seek marriage. The ship has sailed.[1]
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> —Evan Wolfson (1993)

> Only marriage between a man and a woman is valid or recognized in California.[2]
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> —Proposition 8 (2008)

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[1] Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 611 (1994). Evan Wolfson is Executive Director of the organization Freedom to Marry. *See* http://www.freedomtomarry.org/ (last visited Mar. 7, 2010). In 1993, he was writing in the wake of the Hawaii Supreme Court decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), which found that Hawaii's prohibitions on same-sex marriage potentially violated the Hawaiian state Constitution's guarantees of equality. *Id.* at 67.

[2] Cal. Prop. 8 (2008) (codified as CAL. CONST. art. I § 1.5). Proposition 8 is also known as the California Marriage Protection Act, and it was approved by voter-ballot initiative and enacted into law by Californians on November 4, 2008. For more information on Proposition 8, see http://www.voterguide.sos.ca.gov/title-sum/prop8-title-sum.htm.

> There is a position—not at all unfamiliar in contemporary discussion—which says that to be a citizen is essentially and simply to be under the rule of the uniform law of a sovereign state. . . . [T]his is a very unsatisfactory account of political reality in modern societies.[3]
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> —Archbishop of Canterbury Rowan Williams (2008)

American family law is in tumult, and that is a good thing. The debate over same-sex marriage has opened the floodgates of contestation, debate, and imagination over the regulation of interpersonal relationships in the United States.[4] The faltering of one major American taboo—that of same-sex intimacy—has encouraged citizens, activists, and lawyers to question other social and legal taboos and, also, to attempt to construct new ones. For example, active debates concerning whether the state might permit and regulate (or at least de-criminalize) polygamy are now occurring,[5] as are discussions concerning the wisdom of the state sponsoring marriage in the first place.[6] Startling proposals to constitutionalize family law

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[3] *See* Rowan Williams, Archbishop of Canterbury, Civil and Religious Law in England: A Religious Perspective, Lecture at the Royal Courts of Justice (Feb. 7, 2008), *available at* www.archbishopofcanterbury.org/1575.

[4] *See* Kerry Abrams & Peter Brooks, *Marriage as a Message*: *Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J. L. & HUMAN. 1, 2 (2009) (arguing that "[t]he more American courts, and the American people, weigh in on same-sex marriage, the more problematic the very concept of 'marriage' becomes").

[5] *See, e.g.*, Michèle Alexandre, *Lessons from Islamic Polygamy: A Case for Expanding the American Concept of Surviving Spouse So As to Include De Facto Polygamous Spouses*, 64 WASH. & LEE L. REV. 1461, 1461 (2007) (discussing the desirability of creating "legal remedies for vulnerable individuals living and operating in de facto polygamous unions"); Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543, 1548 (2005) (questioning "the privileged position that the incest taboo has maintained in the law governing sexuality and the family . . . and [] propos[ing] that the law reappraise the extent to which disgust, rather than reasoned argument, sustains laws directed at sexual and familial choice"); Adrienne Davis, *The Game of Love: Polygamy, Default Rules, and Bargaining for Equality* (Wash. Univ. Sch. of Law, Working Paper No. 09-09-01, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1480906; Emily J. Duncan, *The Positive Effects of Legalizing Polygamy: "Love is a Many-Splendored Thing"*, 15 DUKE J. GENDER L. & POL'Y 315 (2008); Shayna M. Sigman, *Everything Lawyers Know About Polygamy is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101 (2006) (arguing against the criminalization of polygamy, but not necessarily for formal recognition by the state of polygamous relationships).

[6] *See, e.g.*, NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008); John G. Culhane, *Marriage Equality? First, Justify Marriage (If You Can)*, 1 DREXEL L. REV. 485, 511 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1428971 (asking "Which of marriages [sic] many benefits are justified, and to what extent? . . . How might we tie benefits and burdens to facts rather than to status?"); *see also* Melissa Murray, *Equal Rites and Equal Rights*, 96 CAL. L. REV. 1395 (2008) (discussing the California

have been another consequence of the same-sex marriage debate.[7]

American family law now has an energetic politics, which can only be a welcome development after years of widespread complacence towards an entrenched and encrusted mediocrity called "marriage." It is no longer possible (nor has it ever been desirable) to wish an end to these family law debates, whether these debates occur within the gay and lesbian community, or without, and whether these debates concern same-sex marriage or its slippery-slope progeny.

Moreover, like the United States itself, American family law does not exist in a nationalistic bubble in a globalized world. Indeed, the American discussion of same-sex marriage has always been an especially rich one, and has also maintained vitality in the face of great odds, because of this discussion's transnational character. Defying the commonplace image of family and family law being exclusively domestic concerns, the gay, lesbian, and bisexual movement[8] for same-

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Supreme Court's opening the door to the possibility that the State of California may create a new type of officially-recognized relationship, equally available to all people, which is not called "marriage").

[7] I am referring here specifically to amendments to the U.S. Constitution proposed in both the House of Representatives and Senate in 2005-06 which would have constitutionalized an opposite-sex definition of marriage for the United States. *See, e.g.*, Marriage Protection Amendment, H.R.J. Res. 88, 109th Cong. (2006), Marriage Protection Amendment, S.J. Res. 1, 109th Cong. (2005) (both proposing constitutional language that "[m]arriage in the United States shall consist only of the union of a man and a woman.").

[8] This movement is also known as the "LGBT" (lesbian, gay, bisexual, and transgendered) rights movement. This Article uses the expression "gay, lesbian, and bisexual" (or "gay and lesbian" as an unfortunately useful shorthand) instead of the more-inclusive "LGBT" terminology, since many of the issues concerning same-sex marriage are only occasionally issues for transgendered people. In this respect, "[s]ame-sex marriages already exist in the transgender community." Phyllis Randolph Frye & Alyson Dodi Meiselman, *Same-Sex Marriages Have Existed Legally in the United States for a Long Time Now*, 64 ALB. L. REV. 1031, 1036 (2000). Same-sex marriages can arise in the transgendered community as a result of post-marital changes in the natal sex of one partner in an opposite-sex marital relationship. *See generally* Jennifer L. Levi, *Marriage and Civil Unions*, *in* REPRESENTING NONTRADITIONAL FAMILIES (2006) (noting that there is a strong presumption of continuing legality of marriages in such situations since "[a]ll states abide by a strong public policy in favor of validating marriages, and an otherwise lawful marriage may only be terminated by death or divorce"). Same-sex marriages can also arise in the transgendered community when states refuse to legally recognize post-natal sex changes. As a consequence, "same-sex-appearing marriages," Frye & Meiselman, *supra*, at 1033, can result when one person in an opposite-sex relationship transitions between sexes yet is still allowed to marry a partner of the "same" sex because the state refuses to legally recognize the sex change. This ironic result of the refusal of a state to permit/recognize post-natal changes in the legal sex of individuals can be found in Tennessee, Texas, Kansas, Florida, and Ohio. *See* Julie A. Greenberg, *When Is a Same-Sex Marriage Legal? Full Faith and Credit and Sex Determination*, 38

sex marriage has been an especially transnational one. For example, news of same-sex marriage developments in the Netherlands, South Africa, Spain, and elsewhere redounded quickly to the United States,[9] and comparable developments in Massachusetts, California, and Connecticut now reverberate around the world.[10] Yet, despite the transnational character of the same-sex marriage debates, rigorous transnational analyses with respect to some of the key concepts at play in today's (and tomorrow's) debates are few in number.[11]

With this situation in mind, this Article's goals are two-fold and related, namely 1) to contribute to the radical re-thinking of family law that is on-going in the contemporary United States by 2) analyzing recent U.S. developments with respect to same-sex marriage from a transnational perspective. In doing so, this Article argues against the odd and overstated quality of recent American state court discussions concerning the *necessary* relationship between dignity and family law pluralism. These discussions, and the conclusions that they have given rise to, have resulted not only in the erasure[12] of

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CREIGHTON L. REV. 289, 296-98 (2005). Finally, and more theoretically, transgendered individuals may object to the entire methodology concerning the duality or even knowability of "sex" that is often deployed when gay and lesbian activists advocate for "same-sex" marriage. *See* Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219, 220 (1997) (noting that "[b]oth the opponents and the proponents of same-sex marriage have generally assumed that 'same-sex marriage' is equivalent to 'gay or lesbian marriage'").

[9] *See, e.g.*, N.J. CIVIL UNION REVIEW COMMISSION, THE LEGAL, MEDICAL, ECONOMIC & SOCIAL CONSEQUENCES OF NEW JERSEY'S CIVIL UNION LAW 37 (2008) (discussing international developments in same-sex relationship-recognition); Anthony Deutsch, *Dutch Lawmakers Make Marriage Legal for Gays*, CHI. SUN-TIMES, Sept. 12, 2000, at 3 (describing the enactment of a bill "converting the country's 'registered same-sex partnerships' into full-fledged marriages" and giving gay couples "divorce guidelines" as well as "wider adoption rights"); Chris Rovzar, *Spanish Lessons*, THE ADVOCATE, Jan. 16, 2007, *available at* http://www.advocate.com/issue_story_ektid 41071.asp; Michelangelo Signorile, *Gay Marriage in U.S. Gets Boost*, NEWSDAY, Jun. 20, 2003 (describing recent same-sex marriage developments in Canada and their potential impact on the U.S.).

[10] *See, e.g.*, Sarah Beresford & Caroline Falkus, *Abolishing Marriage: Can Civil Partnership Cover It?*, 30 LIVERPOOL L. REV. 1, 3-5 (2009) (discussing U.S. same-sex marriage developments in the context of debates in the United Kingdom over the recognition of civil partnerships, as opposed to marriages, for same-sex couples); Tarunabh Khaitan, *Beyond Reasonableness: A Rigorous Standard of Review for Article 15 Infringement*, 50 J. INDIAN L. INST. 177, 180 n.13 (2008) (mentioning California same-sex marriage litigation while arguing for a heightened standard of review in the enforcement of Indian constitutional equality norms).

[11] POLIKOFF, *supra* note 6, at 110-22, provides a welcome exception to this general rule.

[12] For example, in both Connecticut and New Hampshire, after the legalization of same-sex marriages in those two states, civil unions were automatically converted into "marriages." *See* GAY & LESBIAN ADVOCATES & DEFENDERS, QUESTIONS

profound and enviable gay and lesbian legal achievements—"domestic partnerships," "civil unions," and the like—but also to a severe backlash in the form of Proposition 8 and similar state ballot initiatives.

The conventional (liberal) view is that Proposition 8 and similar laws which create "separate but equal" relationship-recognition regimes for homosexuals[13] (as opposed to traditional heterosexual marriage) pose insurmountable affronts to gay and lesbian dignity. Using a transnational perspective and analysis, however, this Article proposes an alternative, more optimistic take on the relationship between dignity, same-sex marriage, and legal pluralism. Indeed, while the political campaign around Proposition 8 was heated and at times vitriolic, the ballot initiative ultimately returned California to a situation of family law pluralism, i.e. a situation where same-sex and opposite-sex couples are each governed by different (family) laws. In this instance, these different family laws grant essentially *the same* rights and responsibilities to each sort of couple. As this Article argues, however, there are other possible results from maintaining a separate system of family law for gays and lesbians, namely the possibility of gay and lesbian people exercising *agency* with respect to the family laws which directly affect them. With this agency, gays and lesbians would have the possibility of experiencing something more than "separate but equal" family laws being applied to them. Indeed, gays and lesbians would have the opportunity to *author*—or, in other words, to *exercise agency* with respect to—their own "separate *and better*" alternatives to (heterosexually-

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AND ANSWERS ABOUT CONNECTICUT'S TRANSITION FROM CIVIL UNIONS TO MARRIAGE 4 (2009), http://www.glad.org/uploads/docs/publications/ct-cu-to-marriage.pdf (last visited Feb. 25, 2010); Andrew J. Manuse, *New Hampshire Legalizes Gay Marriage*, REUTERS, Jun. 3, 2009, *available at* http://www.reuters.com/article/idUSTRE5526NV20090603. In Vermont, after the legalization of same-sex marriage there in September, 2009, no new civil unions could be entered into, but existing civil unions were not automatically converted into marriages. *See* Vermont.com, Guide to Vermont Civil Marriage, http://www.vermont.com/civilmarriagefaq.cfm (last visited Feb. 25, 2010).

These examples suggest that William Eskridge's optimistic prediction of the "sedimentary" effects of same-sex marriage laws has been somewhat disproved. *See* WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 121 (2002) ("Each step toward same-sex marriage is typically (but not always) *sedimentary*: rather than displacing earlier reforms, the new reform simply adds another legal rule or institution on top of an earlier one."); *see also id*. at 210, 218-19.

[13] When this Article uses the term "homosexual," it does so in the manner that one finds the term "heterosexual" being used, i.e. in a purely descriptive, generic, and non-judgmental manner.

authored) "majoritarian marriage."[14] These positive aspects to Proposition 8, and family law pluralism more generally, should not be overlooked, and this Article explores how they can be capitalized upon in a principled, dignity-oriented manner.

In refusing to be defeated by either the hate or the hopelessness that has infused the debate over Proposition 8 (and similar measures), this Article attempts to help the American gay and lesbian civil rights movement find a dignified way out of its current quagmire with (ostensibly) anti-gay forces,[15] and the costly and counter-productive war over same-sex marriage. The traditional civil rights paradigms and strategies disparaging "separate but equal"[16] laws that this

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[14] For a more detailed discussion of how I understand and use the term "agency" in this Article, see *infra* Part III.

[15] Many people who are working to preserve "marriage" for heterosexuals only would contest the assertion that they are "anti-gay," arguing rather that they are simply "pro-traditional marriage." I am not convinced by a great number of these people, and I believe that a certain virulent homophobia underlies much of their opposition to same-sex marriage. In this, I am in partial accord with Martha Nussbaum's diagnostic (and critical) observations concerning "traditional marriage" arguments that implicitly or explicitly assume that "to associate traditional marriage with the sex acts of same-sex couples is to defile or contaminate [traditional marriage]." Martha Nussbaum, *A Right to Marry? Same-sex Marriage and Constitutional Law*, DISSENT (Summer 2009), *available at* http://www.dissentmagazine.org/article/?article =1935. That being said, I also believe that many same-sex marriage advocates are less than homophilic, especially when they disparage activity that is typically ascribed to gay men (e.g. sexual promiscuity). For example, describing the factors that he thinks contributed historically to the gay and lesbian push for same-sex marriage rights, well-known professor and same-sex marriage advocate William Eskridge has written:

> Whatever gravity gay life may have lacked in the disco seventies it acquired in the [AIDS] health crisis of the eighties. What it lost in youth and innocence it gained in dignity. Gay cruising and experimentation . . . gave way somewhat in the 1980s to a more lesbian-like interest in commitment. Since 1981 and probably earlier, gays were civilizing themselves. Part of our self-civilization has been an insistence on the right to marry.

WILLIAM N. ESKRIDGE, JR. THE CASE FOR SAME-SEX MARRIAGE 58 (1996); *see also* David B. Cruz, *"Just Don't Call it Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 943-44 (2001) (arguing that "[s]ame-sex couples, precluded by the mixed-sex requirement from using civil marriage to express the integrity of their sexuality, are . . . subjected to the 'sex as lifestyle' presumption").

[16] For previous examples of work that invokes arguments about the unconstitutionality of "separate but equal" family law institutions, using case law from previous civil rights struggles involving race and sex, see David Buckel, *Government Affixes a Label of Inferiority on Same-Sex Couples When It Imposes Civil Unions and Denies Access to Marriage*, 16 STAN. L. & POL'Y REV. 73, 74 (2005); Barbara Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate but (Un)Equal*, 25 VT. L. REV. 113 (2000); Michael Mello, *For Today, I'm Gay: The Unfinished Battle for Same-Sex Marriage in Vermont*, 25 VT. L. REV. 149, 156 (2000); Mark Strasser, *Mission Impossible: On* Baker*, Equal Benefits, and the Imposition of Stigma*, 9 WM. & MARY BILL OF RTS. J. 1 (2000). All of these articles claim a parallel between the modern-day system of reserving "marriage" for heterosexuals, while granting "civil unions" or "domestic partnerships" to homosexuals, and the

movement heavily leans upon are not gaining widespread traction with respect to same-sex relationship recognition, even taking into account recent same-sex marriage developments in the District of Columbia, Iowa, and some Northeastern states.[17] Moreover, even if these paradigms were to gain more widespread currency, there are real harms to gay and lesbian agency—and, as a result, dignity—that accompany gay and lesbian absorption into majoritarian family law, and these harms should not be overlooked.

Part I begins this Article with an exploration and excavation of two recent and important state supreme court judgments, from California and Connecticut, which exemplify the current state of mainstream liberal legal thinking with respect to the legalization of same-sex marriage. This Part focuses on how the crucial concept of "dignity" is deployed in these two legal decisions in support of the argument that gays and lesbians are denied dignity, and made second-class citizens, when the state recognizes dyadic, intimate, same-sex relationships differently than it does comparable opposite-sex relationships.[18] According to both states' supreme courts, any relationship-recognition system that grants heterosexuals the possibility of "marriage," while only holding out "domestic partnerships" or "civil unions" to homosexuals, smacks of the now-repudiated idea that institutions can be "separate but equal."

Part II contests the California and Connecticut Supreme Courts' understanding of how dignity and legal uniformity must *necessarily* be connected. It does so by broadening the discussion of dignity and family law to look at both outside of the United States. While liberal advocates in the United States have argued that transnational and comparative experience is relevant and important with respect to some of the leading

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nineteenth-century system of maintaining "separate but equal" railway cars for persons of different races, the constitutionality of which was upheld in the now widely-disparaged U.S. Supreme Court decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[17] Marriage between same-sex partners is now legally available in five states: Connecticut, Iowa, Massachusetts, New Hampshire and Vermont. Lambda Legal, Status of Same-Sex Relationships Nationwide, http://www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html (last visited Feb. 22, 2010). Same-sex marriage has also very recently become available in the District of Columbia.

[18] This Article uses the conventional expression "opposite-sex relationships" to describe male-female pairings, but does not intend to endorse the view that there are only two sexes or that, even if there are, that they have to be configured as dyadic and "opposite."

legal issues of the day,[19] the ostensibly liberal California and Connecticut Supreme Court decisions are astonishing in their overwhelmingly domestic focus. Part II compensates for this lack by showing what a more rigorous transnational investigation centered on dignity and family law pluralism would unearth. The foreign jurisdictions examined in this Part include Canada, the United Kingdom, and India. As this Part discusses, in these national contexts, dignity and its conceptual cognates (e.g. respect, tolerance, minority rights) have been invoked not to amalgamate minorities into a unitary, common family law system but, instead, to provide minorities with legal space in which to implement non-majoritarian visions of family, community, and the good life.

Part III brings the discussion back home, showing how a domestic consideration of transnational notions of dignity and family law pluralism could play out in the United States. Provocatively, this Part argues that the dignity of gay and lesbian people could be *enhanced* by a separate system of relationship-recognition and family law for same-sex unions. Such a separate system would create legislative space and freedom for the exercise of gay and lesbian *agency*, and the elaboration of "separate *and better*" alternatives to the straitjacket of majoritarian marriage. However, as this Part also discusses, in order for this potential to be realized, there will have to be transformations in the imagination and aims of the current gay and lesbian rights movement, as well as in the larger social and legal context in which this movement is situated.

This Article thus ends by confronting squarely but confidently the reality of a twenty-first century United States—one where same-sex marriage has little traction or instantiation, and one where conservatives' success at colonizing family law more generally cannot be elided. Indeed, instead of perpetually lamenting this reality, this Part concludes by working to creatively generate new legal thinking[20] which de-links the dignity of gay and lesbian people

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[19] *See, e.g.*, Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse*, 2 INT'L J. CONST. L. 91, 92-93 (2004); WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 83 (2002).

[20] Of course, knowledge is (often) cumulative, and my arguments here clearly build off of a great deal of previous important work in queer theory, political theory, and even linguistics. For previous examples of work that has made similar—yet also quite different—points with respect to some of the arguments presented in this Article,

with majoritarian marriage and, instead, locates this dignity in the agency of gay and lesbian people with respect to their own lives, their own families, and their own laws. Indeed, one way of both inhabiting and expressing this agency, and dignity, would be to assert political and legislative control over a separate body of family law for gay and lesbian people and families. Such a move would not be motivated by compromise or capitulation,[21] or utopian thinking, but by a deeply principled quest for dignity in a contemporary United States that has demonstrated its eager readiness to permit gays and lesbians to occupy a different legal arena than heterosexuals. With this

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see generally Shahar Lifshitz, *Married Against Their Will?: Toward a Pluralist Regulation of Spousal Relationships*, 66 WASH. & LEE L. REV. 1565, 1573 (2009) (distinguishing opposite-sex and same-sex couples and "suggest[ing] a unique legal regime for the latter," but primarily as an unfortunately necessary result of the fact that same-sex couples face "legal restrictions from getting married"); POLIKOFF, *supra* note 6; Douglas W. Allen, *An Economic Assessment of Same-Sex Marriage Laws*, 29 HARV. J.L. & PUB. POL'Y 949, 980 (2006) (advocating but only briefly developing "a separate legal structure called 'homosexual marriage'," and doing so from a hetero-centric perspective which valorizes "traditional marriage"); Marie A. Failinger, *A Peace Proposal for the Same-Sex Marriage Wars: Restoring the Household to Its Proper Place*, 10 WM. & MARY J. WOMEN & L. 195, 198 (2004) (characterizing same-sex marriage advocacy as "ultimately mimic[king] rather than resolv[ing] the problems with using the 'choice'-based nuclear family as the favored legal model for ordering intimate relationships"); ESKRIDGE, *supra* note 12 (evincing interest in pluralistic "tailor-made regulatory regimes" for families but repeatedly characterizing any non-marital regime for same-sex partners as of a "compromise" nature); Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CAL. L. REV. 1479, 1490-91 (2001) (diagnosing and expressing skepticism towards "metanarratives" about marriage); Paula L. Ettelbrick, *Avoiding a Collision Course in Lesbian and Gay Family Advocacy*, 17 N.Y.L. SCH. J. HUM. RTS. 753, 758 (2000) (proposing a "continuum of family recognition options," all of which would be open to both homosexuals and heterosexuals on the basis of formal equality); MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE (1999) (providing perhaps the most rousing and wide-ranging queer critique of same-sex marriage advocacy that has been made in the past many years).

[21] While I am sympathetic to the proposals recently put forward by David Blankenhorn and Jonathan Rauch with respect to the legislation of a federal civil union regime—as distinguished from marriage—I would resist their characterization of this as a "compromise." *See* David Blankenhorn & Jonathan Rauch, *A Reconciliation on Gay Marriage*, N.Y. TIMES, Feb. 22, 2009; *see also* William N. Eskridge, Jr., *How Government Unintentionally Influences Culture (The Case of Same-Sex Marriage)*, 102 NW. U. L. REV. 495, 496 (2008) (identifying domestic partnerships as a "compromise" between same-sex marriage advocates and opponents); Nussbaum, *supra* note 15 (identifying civil unions as a "compromise offer"). For more discussion on how *principle* can provide the foundation for belief in legal pluralism, see Martha Minow, *Is Pluralism an Ideal or a Compromise?: An Essay for Carol Weisbrod*, 40 CONN. L. REV. 1287 (2007). For another articulation of the relationship between legal pluralism and higher ideals, see Katharine Bartlett's argument that "in reducing the power of individuals to make their own family decisions, family-standardizing reform reduces the capacity of individuals to develop as *moral beings*." Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 817 (1998) (emphasis added).

in mind, this Article aims to imagine how gay and lesbian dignity might be enhanced rather than diminished by looking broadly, traveling widely, and viewing the world with curiousity and xenophilia, rather than dread and homophobia.

I. CALIFORNIA AND CONNECTICUT

> Few expressions call forth the nod of assent and put an end to analysis as readily as "the dignity of man."[22]
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> —Bertram Morris (1946)

This Part explains and explores two recent and important state supreme court judgments, from California and Connecticut, which exemplify the current state of mainstream liberal legal thinking with respect to the legalization of same-sex marriage. This Part concentrates on these two state high court judgments because they are the most recent state supreme court judgments that explicitly invoke the concept of dignity in their resolution of the question presented in each case. By way of comparison, the recent Iowa Supreme Court judgment legalizing same-sex marriage in that state did not use the word "dignity" even once in its judgment.[23] Prior to the California and Connecticut high court decisions, the Supreme Judicial Court of Massachusetts had issued an advisory opinion in 2004 to that state's Senate on a question very similar to the one that both the California and Connecticut courts addressed in their opinions, namely the constitutionality of a state government naming officially-recognized, otherwise-equivalent *same-sex* relationships something different than "marriage."[24] However, I do not discuss this opinion in detail in this Part because so much of the analysis in that opinion is relied upon and utilized by the California and Connecticut Supreme Courts.[25] In the dual interests of brevity and currency, this Part

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[22] Bertram Morris, *The Dignity of Man*, 57 ETHICS 57, 57 (1946).

[23] *See* Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

[24] *See* Opinions of the Justices to the Senate, 802 N.E.2d 565, 569 (Mass. 2004). Earlier, of course, the Massachusetts Supreme Judicial Court had issued its path-breaking opinion, *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), legalizing same-sex marriage in the first place. The concept of dignity played a role in this opinion as well, with the court declaring that "[t]he Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens." *Id.* at 948.

[25] *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384, 398 n.3 (Cal. 2008); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 417 (Conn. 2008).

focuses on these two most recent state supreme court opinions instead.

In the spring of 2008, the California Supreme Court handed down its groundbreaking decision concerning same-sex marriage, *In re Marriage Cases*.[26] In this case, the court was asked to decide whether California's relationship-recognition system was consistent with the California state constitution's protections of the right to marry and the right to equality.[27] Under this relationship-recognition system, "marriage" was reserved for opposite-sex couples, while same-sex couples had access only to a parallel "domestic partnership" regime.[28] Like California, some other states had also created two parallel systems of family law within their borders,[29] but California's regime of separate laws for different sexual orientations was unusual in that it accorded domestic partners "virtually all of the same substantive legal benefits and privileges, and . . . legal obligations and duties . . . that California law affords to and imposes upon a married couple."[30] Accordingly, what the California Supreme Court had to decide in this case was whether California's "separate but equal"[31] family law system was constitutional under the California Constitution. Ultimately, the court held that this system was not constitutional, and that same-sex couples had to be given "marriage" licenses just like opposite-sex couples.[32]

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[26] *In re* Marriage Cases, 183 P.3d 384, *superseded by* CAL. CONST. art. I, § 7.5.

[27] *See id.* at 400.

[28] *See id.* at 409, 413.

[29] For example, Hawaii has enacted a law concerning "reciprocal beneficiaries" and Wisconsin has adopted a form of "domestic partnership," but neither scheme provides the same rights and obligations as "marriage," or California's expansive, marriage-like "domestic partnership" regime. *See* Lambda Legal, Status of Same-Sex Relationships Nationwide, http://www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html (last visited Jan. 15, 2010).

[30] *In re* Marriage Cases, 183 P.3d at 398. According to the court, nine differences remain between domestic partnerships and marriages in California. *Id.* at 416-17 n.24. Some of these differences are arguably to the benefit of people entering into a domestic partnership, while others arguably impose burdens that people entering marriage do not face. An example of an advantage would be that domestic partnerships are easier to dissolve than marriages in California. An example of a burden placed solely on people wishing to enter a domestic partnership is the requirement that such people have a common residence. There is no such common-residence requirement for people marrying. *See id*.

[31] The court explicitly links California's system of maintaining a "*separate* institution of domestic partnership," *id.* at 445 (emphasis added), with the (ostensibly) historic practice of "relegat[ing] . . . racial minorities to *separate* and assertedly equivalent public facilities and institutions," *id.* at 451 (emphasis added).

[32] The court holds that California's system was unconstitutional on both a "fundamental right to marry" and equal protection grounds. *See id.* at 419, 433-34, 452.

There are many groundbreaking and interesting aspects to this decision. For example, this decision represented the first instance of a state's highest court applying a "strict scrutiny" standard to discrimination against gays and lesbians.[33] The decision was also noteworthy in its contemplation of the possibility that the State of California might create a relationship regime—available to everyone—that would use a rubric other than "marriage."[34] Finally, and without any sense of irony, the court seemed to agree with the same-sex marriage advocates litigating this case that there existed a fundamental "right to remain in the closet" in the State of California.[35]

As important as all of the above features of the California decision are, this Part concentrates on an aspect of the court's decision that has remained under-examined in the academic literature, namely the court's discussion of the

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[33] *See id.* at 441-42; *see also* Kenji Yoshino, *Magisterial Conviction: Why the California Supreme Court Did More than Legalize Gay Marriage*, SLATE, May 15, 2008, http://www.slate.com/id/2191530/ (discussing uniqueness of California Supreme Court opinion with respect to applying strict scrutiny standard to sexual orientation discrimination).

[34] Wrote the court:

> When a statute's differential treatment of separate categories of individuals is found to violate equal protection principles, a court must determine whether the constitutional violation should be eliminated or cured by extending to the previously excluded class the treatment or benefit that the statute affords to the included class, or alternatively should be remedied by withholding the benefit equally from both the previously included class and the excluded class. A court generally makes that determination by considering whether extending the benefit equally to both classes, or instead withholding it equally, would be most consistent with the likely intent of the Legislature, had that body recognized that unequal treatment was constitutionally impermissible.
>
> . . . [T]here can be no doubt that extending the designation of marriage to same-sex couples, rather than denying it to all couples, is the equal protection remedy that is most consistent with our state's general legislative policy and preference.

In re Marriage Cases, 183 P.3d at 452-53; *see also* Melissa Murray, Remark, *Equal Rites and Equal Rights*, 96 CAL. L. REV. 1395 (2008) (discussing the California Supreme Court's opening the door to the possibility that the State of California may create a new type of officially-recognized relationship, equally available to all people, which is not called "marriage").

[35] The nomenclature for this right is mine, and it is a reaction to the court's sympathy for the plaintiffs' argument that "one consequence of the coexistence of two parallel types of familial relationships is that—in the numerous everyday . . . settings in which an individual is asked whether he or she 'is married or single'—an individual who is a domestic partner and who accurately responds to the question by disclosing that status will . . . be disclosing his or her homosexual orientation." *In re* Marriage Cases, 183 P.3d at 446. The court links this allegedly coercive disclosure to the fundamental right to privacy that is contained within California's state constitution. *See id.*

concept of "dignity" and its relationship to pluralistic family law systems. The court's words on the subject of how dignity relates to family law pluralism are worth quoting at length:

> One of the core elements of the right to establish an officially recognized family that is embodied in the California constitutional right to marry is a couple's right to have their family relationship accorded dignity and respect equal to that accorded other officially recognized families, and assigning a different designation for the family relationship of same-sex couples while reserving the historic designation of "marriage" exclusively for opposite-sex couples poses at least a serious risk of denying the family relationship of same-sex couples such equal dignity and respect.
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> . . . .
>
> . . . [R]etaining the designation of marriage exclusively for opposite-sex couples and providing only a separate and distinct designation for same-sex couples may well have the effect of perpetuating a more general premise—now emphatically rejected by this state—that gay individuals and same-sex couples are in some respects "second-class citizens" who may, under the law, be treated differently from, and less favorably than, heterosexual individuals or opposite-sex couples.[36]

Like other parts of the court's opinion, the court's discussion of dignity here was groundbreaking, but perhaps in an unanticipated way. For many people outside of the United States (especially), the court's equation of dignity and family law uniformity *is* revolutionary, but mainly because it seems so ahistorical and ungrounded in real-world experience. Part III will discuss these global family law experiences in more detail, and what they can tell us about the complicated relationship between dignity and family law pluralism.

That being said, the reality of family law around the globe did not completely escape the court's attention in its opinion. For example, when discussing the California Attorney General's arguments pertaining to the historical definition of marriage,[37] the court did observe that "until recently, there has been widespread societal disapproval and disparagement of

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[36] *Id.* at 400, 402.

[37] Noted the court:

> The Attorney General and the Governor maintain . . . that because the institution of marriage traditionally (both in California and throughout most of the world) has been limited to a union between a man and a woman, any change in that status necessarily is a matter solely for the legislative process.

Id. at 447-48.

homosexuality in many cultures" and that, as a result, the designation of marriage continues to apply only to a relationship between opposite-sex couples in the overwhelming majority of jurisdictions in the United States, and around the world.[38] Furthermore, the court ably made use of a Canadian Supreme Court opinion when describing how the history of discrimination against gay people cautions against thinking that any separate and parallel family law system for them can be anything but discriminatory.[39] Yet, as the next Part discusses, the court's global vision in its decision was extremely partial, avoiding not only a deeper exploration of Canadian family law realities and debates, but similar ones pertaining to family law pluralism, dignity, and minority rights elsewhere.

Less than six months after the California Supreme Court's decision, the Connecticut Supreme Court followed with its own path-breaking opinion on same-sex marriage. In *Kerrigan v. Commissioner of Public Health*,[40] the Connecticut Supreme Court decided whether—in the court's own words—Connecticut's practice of "segregat[ing] heterosexual and homosexual couples into [the] separate institutions" of (respectively) "marriage" and "civil union" violated the Connecticut Constitution's protections as to substantive due process and equality.[41] Similar to California's system of parallel

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[38] *Id.* at 451 n.70.

[39] Noted the court:

> [P]articularly in light of the historic disparagement of and discrimination against gay persons, there is a very significant risk that retaining a distinction in nomenclature with regard to this most fundamental of relationships whereby the term "marriage" is denied only to same-sex couples inevitably will cause the new parallel institution that has been made available to those couples to be viewed as of a lesser stature than marriage and, in effect, as a mark of second-class citizenship. As the Canada Supreme Court observed in an analogous context: "One factor which may demonstrate that legislation that treats the claimant differently has the effect of demeaning the claimant's dignity is the existence of pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue . . . . 'It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them, since they are already vulnerable.'"

Id. at 445 (second and third alterations in original) (quoting M. v. H., [1999] 2 S.C.R. 3, 54-55 [¶ 68] (Can.)).

[40] *See generally* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008).

[41] *Id.* at 412. The Connecticut Supreme Court understands the Connecticut Constitution's due process guarantee to incorporate the "the fundamental right to marry the person of [one's] choice." *Id.* at 413.

relationship-recognition, Connecticut's civil union scheme "conferred on [civil] unions all the rights and privileges that are granted to spouses in a marriage."[42]

As with the California opinion which shortly preceded it, there were many interesting aspects to the Connecticut opinion. For example, like the opinion from California, the Connecticut Supreme Court (following plaintiffs' example)[43] used language evocative of the struggle for African-American civil rights when characterizing the parallel relationship recognition regime in Connecticut as involving "segregation."[44] In addition, like the California court, the Connecticut court also decided to apply a heightened level of scrutiny to sexual orientation classifications contained in law. In this respect, the court found that any sexual orientation classifications that a law may use are "quasi-suspect" and deserve "intermediate scrutiny,"[45] i.e. more scrutiny than "rational basis" review but less than the "strict scrutiny" that the California Supreme

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[42] *Id.*

[43] *Id.* at 413.

[44] *See supra* text accompanying note 40. The plaintiffs also had a slightly different argument, based on *sex*-segregation. As the court characterized their claims:

> [T]he plaintiffs maintained that, by limiting marriage to the union of a man and a woman, [the Connecticut] statutory scheme impermissibly segregates on the basis of *sex*. . . . The plaintiffs contended that [Connecticut's] statutes contravene the state constitutional prohibition against sex discrimination because these statutes preclude a woman from doing what a man may do, namely, marry a woman, and preclude a man from doing what a woman may do, namely, marry a man.

Kerrigan, 957 A.2d at 414 (emphasis added).

[45] *See Kerrigan*, 957 A.2d at 412. There exists quite a bit of irony in the constitutional methodology that the court deploys to justify its use of an intermediate level of scrutiny here. In this respect, while the court wields an age-old, unchanging, and overly-valorized institution of marriage throughout much of its opinion, the court holds much more flexible ideas about a constitution and its changing contours. For the court, when interpreting a constitution (such as Connecticut's), it is important to interpret it "in accordance with the demands of modern society" such that it will not remain "static [and] incapable of coping with changing times." *Id.* at 420-21 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819); State v. Dukes, 457 A.2d 10, 19 (Conn. 1988)). The court needed to take this flexible approach to constitutionalism because the Connecticut state constitution does not explicitly forbid sexual orientation discrimination yet, with its opinion, the court intended to extend intermediate scrutiny to legislation specifically distinguishing gay and lesbian people. *See Kerringan*, 957 A.2d at 425. As a result, however, marriage becomes more of a bedrock, foundational institution in Connecticut than even the Connecticut constitution itself. In this way, the Connecticut opinion is somewhat different than state court opinions that have used the "post-legal" (as opposed to "pre-legal") status of marriage in the process of arguing against the inclusion of same-sex couples within "marriage." For examples and discussion of such state court opinions, see generally Abrams & Brooks, *supra* note 4, at 20-28.

Court decided to exercise in relation to sexual orientation discrimination.

However, the strongest parallels between the Connecticut Supreme Court and the California Supreme Court's opinion were perhaps those found in the Connecticut court's holding that the denial of "real"[46] marriage to same-sex couples implicated the dignity interests of these couples, and also homosexual individuals more generally.[47] Indeed, the parallels could hardly be stronger, given that the Connecticut court largely relied on cutting-and-pasting from the California decision (and prior ones from Massachusetts) in the portions of its opinion dealing with the dignity question.[48]

When speaking for itself on the dignity question, the Connecticut high court found that the basic equality that Connecticut had legislated between marriage and civil unions was constitutionally defective because these different institutions did not operate in a historical vacuum. According to the court, "[a]lthough marriage and civil unions do embody the same legal rights under our law, they are by no means 'equal.' . . . [T]he former is an institution of transcendent historical, cultural and social significance, whereas the latter most surely is not."[49]

With respect to this asserted significance for marriage, and echoing plaintiffs' claim that marriage—more so than civil unions—is "special,"[50] the Connecticut Supreme Court's opinion explained in detail the unique and vital role that it believed marriage plays in the contemporary American polity. To do so, the opinion again relied heavily on quotations and citations

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[46] *Kerrigan*, 957 A.2d at 417.

[47] *See id.* at 417-18, 465-74. It should also be noted that the Connecticut Supreme Court is also worried about how the withholding of "marriage" from same-sex couples affects the well-being of any children such couples have. The court wrote:

> [T]he ban on same sex marriage is likely to have an especially deleterious effect on the children of same sex couples. A primary reason why many same sex couples wish to marry is so that their children can feel secure in knowing that their parents' relationships are as valid and as valued as the marital relationships of their friends' parents.

Id. at 474. For more on this harm to children, see also *id.* at 475 n.77.

[48] See *id.* at 417-18, 471-75 for the Connecticut Supreme Court's use of lengthy quotations from *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008), *superseded by* CAL. CONST. art. I, § 7.5; *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004); and *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

[49] *Kerrigan*, 957 A.2d at 418.

[50] *Id.* at 416 ("[Plaintiffs] contend that [marriage] is an institution of unique and enduring importance in our society, one that carries with it a special status.").

from other U.S. courts. Following these other courts' lead, then, the Connecticut court alternatively characterized marriage as "fundamental to our very existence and survival,"[51] "intimate to the degree of being sacred,"[52] and, citing a more ancient yet less hyperbolic precedent, "one of the most fundamental of human relationships."[53]

As a result of this remarkably (and perhaps uniquely) esteemed institutional history (for marriage), the withholding of the "marriage" nomenclature from same-sex couplings became acutely problematic for the court, especially given the fact that "historically [gays and lesbians have] been the object of scorn, intolerance, ridicule or worse."[54] Indeed, as a consequence of this historic stigmatization, the court believed that the separate legislation of civil unions could *only* be popularly perceived as "an official state policy that [civil unions are] inferior to marriage, and that the committed relationships of same sex couples are of a lesser stature than comparable relationships of opposite sex couples."[55]

Given these concerns, it should come as no surprise that, using its intermediate level of scrutiny, the Connecticut Supreme Court ultimately determined that Connecticut's relationship-recognition scheme violated the Connecticut Constitution's equality protections. In doing so, the court stressed the "overriding similarities" between opposite-sex and same-sex couples,[56] with gay and lesbian people "shar[ing] the same interest in a committed and loving relationship as heterosexual persons who wish to marry, and . . . shar[ing] the same interest in having a family and raising their children in a loving and supportive environment."[57] Given this asserted[58] fundamental equivalence between same-sex and opposite-sex couples, it became inescapable that the court would declare that "firmly established equal protection principles lead[]

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[51] *Id.* (quoting Loving v. Virginia, 388 U.S. 1, 12 (1967)).

[52] *Id.* (quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965)).

[53] *Id.* at 417 (quoting Davis v. Davis, 175 A. 574, 577 (Conn. 1934)).

[54] *Id.* at 418.

[55] *Id.* at 475.

[56] *Id.* at 424.

[57] *Id.*

[58] I use this word to indicate the unempirical nature of the court's findings in this respect. For evidence of significant differences between same-sex and opposite-sex marriages, see Scott James, *Many Successful Gay Marriages Share an Open Secret*, N.Y. TIMES, Jan. 29, 2010, at A17 (discussing widespread prevalence of non-monogamous marriages within the gay and lesbian community), *available at* http://www.nytimes.com/2010/01/29/us/29sfmetro.html.

inevitably to the conclusion that gay persons are entitled to marry the otherwise qualified same sex partner of their choice. . . . [S]ame sex couples cannot be denied the freedom to marry."[59]

The Connecticut Supreme Court's opinion thus reached the same basic conclusion as that of the California Supreme Court, while also using some of the same tools that the California court used (e.g. heightened scrutiny, the segregation metaphor). One remarkable difference between the two decisions, however, was that the Connecticut opinion never discussed non-U.S. legal or political experience. As discussed above, the California opinion did discuss and utilize such experience, but in an ungrounded and distorted manner. The next Part engages in a different reading of transnational legal experience with respect to the issue of how dignity and family law pluralism can relate to each other.

II. DIGNITY AND FAMILY LAW PLURALISM, TRANSNATIONALLY-SPEAKING

> Q: If you got married [in the United Kingdom], would you have a civil marriage as well as a *nikah* [Muslim religious marriage]?
>
> A. *I would have a civil marriage; I don't know if it is more sort of a tradition thing that happens now; you have your* nikah*, and then you have your civil marriage as well.*
>
> Q: Is there any other reason apart from the fact that it is what everyone else does?
>
> A: No.
>
> Q: Can you think of any reasons why you would want a civil marriage?
>
> A: No.[60]
>
> —Interview by Sonia Nurin Shah-Kazemi of a young Muslim woman in the United Kingdom (2001)

A. Introduction

California and Connecticut (and Massachusetts before them) clearly see family law pluralism—in particular,

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[59] *Kerrigan*, 957 A.2d at 482.

[60] SONIA NURIN SHAH-KAZEMI, UNTYING THE KNOT: MUSLIM WOMEN, DIVORCE, AND THE SHARIAH 33 (2001).

pluralism with respect to the law of relationship-recognition—as implicating dignity concerns. For both state high courts, state-recognized "marriage" is the path to dignity, and gay and lesbian people are necessarily forced into second-class citizenship if the majority's family law conventions are not opened up to them.

The choice by both the California and Connecticut Supreme Courts to invoke the language of dignity is important because, in the contemporary world, dignity is readily associated with the discourse of *human* rights. This is not to say that dignity has not featured in American constitutional discourse concerning *civil* rights—it most certainly has[61]—but it is to say that, in today's world, "dignity" is more easily conjoined with "human" than it is with any particular sub-species of humanity.[62] In other words, one speaks more easily of "*human* dignity" than one does "American dignity" or "European dignity" or "Indian dignity."[63] Moreover, to say that

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[61] *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (stating that the "dignity of man" underlies the Eighth Amendment and protects individuals from punishments that exceed current "civilized standards"). Dignity has also featured in American jurisprudential discussions of federalism. *See, e.g.*, Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002). In this case, concerning the constitutionality of a U.S. government agency's administrative hearing of a complaint by a private company against a South Carolina government agency's decision, the U.S. Supreme Court wrote: "The *preeminent* purpose of state sovereign immunity is to accord States the *dignity* that is consistent with their status as sovereign entities." *Id.* at 760 (emphasis added). This was not the first time that the Court recognized dignitary interests in upholding (a certain view of) states' sovereignty rights. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 715 (1999); *Ex parte* Ayers, 123 U.S. 443, 505 (1887). However, it is one of the most recent and strongest statements as to those interests in the modern period. For an overview of how dignity has been deployed in U.S. Supreme Court jurisprudence, see generally Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2005).

[62] Some may disagree, but it is striking to note the regular invocation of the larger expression "human dignity" in any number of articles, rather than the simpler term "dignity." For example, Maxine Goodman's article, *supra* note 61, is entitled "Human Dignity in Supreme Court Constitutional Jurisprudence" when it might (conceivably) have been entitled simply "Dignity in Supreme Court Constitutional Jurisprudence." Interestingly, even Neomi Rao finds the use of the term "human dignity" seemingly inescapable, even while trying to parochialize the concept. For example, she writes: "Perhaps we should direct our attention to developing an *American conception of human dignity* based on the Constitution as well as on our legal traditions." *See* Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 255 (2008) (emphasis added) (proposing and arguing for an American legal definition of dignity that would differ from prevailing notions of dignity commonly deployed in European legal argumentation).

[63] *But see* Rao, *supra* note 62; James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1161 (2004) (finding a European conception of "personal dignity" which is tightly linked to the somewhat peculiar European ideas that one has "rights to one's image, name, and reputation") (emphasis omitted).

"dignity" is compromised by a particular law or legal framework suggests that one's analysis in this respect can and should be extended to all of humanity.[64]

As this Part demonstrates, however, it is difficult to claim that "separate but equal" family law regimes *necessarily* implicate the dignity interests of minorities or "second-class citizens"[65] if one looks globally at all of humanity. In particular, countries that implement family law via "personal law"[66] often do so either to affirmatively pursue multiculturalist legal policies, or do so in response to concerns (and resistance) from minorities about efforts to coerce them into majoritarian understandings of family, community, and the good life. Additionally, even in countries that legislate and enforce family law in a manner resembling more closely American-style family law, increasingly there are efforts to allow (religious) minorities to pursue alternative visions of family via non-state arbitration of family law matters. This Part will look at both kinds of countries, broadening the discussion of dignity and legal pluralism to take account of legal realities and developments in places as diverse as Canada, the United Kingdom, and India.

This Part's selection of countries from which one can learn more about dignity and family law pluralism benefits from being diverse and broad-based, instead of narrow and unrepresentative of the world's different cultural and legal traditions. The selection of Canada, the United Kingdom, and India as case-studies is also beneficial because, like the United States, each country is (proudly) a multi-ethnic, multi-religious democracy where debates over minority rights and cultural rights are common and longstanding. In other words, each of these three countries has a great deal of experience with "the dignity question," and each of these countries has struggled with the reality of a diverse population that does not possess any single notion of "the good life." Indeed, compared to these three countries, the United States is somewhat of a latecomer to discussions concerning dignity and family law pluralism.[67]

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[64] *See generally* Menachem Mautner, *From "Honor" to "Dignity": How Should a Liberal State Treat Non-Liberal Cultural Groups?*, 9 THEORETICAL INQUIRIES LAW 609, 626 (2008) (discussing link between universal human rights and human dignity).

[65] *In re* Marriage Cases, 183 P.3d 384, 402 (Cal. 2008), *superseded by* CAL. CONST. art. I, § 7.5.

[66] *See* discussion *infra* Part II.C.

[67] I say "somewhat" here keeping in mind that it was American-style federalism itself that created the opportunity for both California and Connecticut to

It should be emphasized from the outset that the claim of this Part is *not* that the dignity argument with respect to American gays and lesbians is wrong per se.[68] The point, instead, is to highlight the fact that the dignity claim is a far-more-complicated one than it is typically made out to be by American lawyers and judges. This being the case, it is hoped that by stripping the dignity claim of its veneer of obviousness, it will be possible to see why the claim very much *might be* incorrect. Essentially, after peeling away some of the self-righteous rhetoric that provides both swords and shields for all sides in the same-sex marriage debates, this Part hopes to show how the dignity claim does not (conceptually or experientially) necessarily win the battle for same-sex marriage advocates. However, it does not lose it for them either. Finally, it should also be noted that many people feel that supporters of Proposition 8 acted in quite an undignified manner in the advertising campaign leading up to the California vote.[69] Both sides of the debate have their difficulties with dignity.

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develop family law systems different than that found in New York, namely systems in which "marriage" and its homosexual sidekicks (i.e. "domestic partnerships" and "civil unions") *differed minimally* in economic and legal benefits. There is a common inability, however, in American discussions of family law pluralism to conceive of this pluralism at a level different than that of the 50 states.

[68] Clearly, the fact that religious minorities around the world are not using dignity claims to argue for their amalgamation into majoritarian marital and family law does not necessarily preclude gays and lesbians in the United States from—correctly—doing so. There are real differences between other countries' religious minorities and America's sexual minorities, and also the histories of the family law systems that govern in each country. For one, many religions have had family law traditions that predate secular states and secular norms by centuries. Gays and lesbians, on the other hand, have often been excluded or excommunicated from the family altogether. It would not be surprising if each kind of community or cultural grouping sees different things in the family, and needs different things to feel "whole" or dignified. That being said, it would be a mistake to believe that American sexual minorities, to the extent that they do feel socially excluded, all necessarily view "marriage" as the antidote for that feeling of exclusion. It is also another question altogether whether such an antidote is necessarily the proper one for the future (as opposed to now). In this respect, it is my hope that the non-American family law examples discussed in this Article will incite a great deal of future exploration of dignified alternatives to majoritarian marriage. These possible alternatives are presently being ignored by mainstream actors in the American same-sex marriage debates.

For more on the cultural and legal obstacles that American gays and lesbians face with respect to imagining themselves like a (religious) "community" or "culture" with attendant legal rights and privileges, see *infra* Part III.

[69] *See, e.g.*, Andy Birkey, *Kersten's 'Bullying Tactics' Unhelpful to Gay Marriage Debate*, STAR TRIB. (Minneapolis), Jan. 26, 2010, *available at* http://www.startribune.com/yourvoices/82763402.html?elr=KARKSUUUODEY3LGDI07; E.J. Schultz, *Prop. 8 TV Ad Raises Questions: Controversy Swirls Around the Teaching of Gay Marriage in*

This Part begins with a discussion of how the question of dignity has played out in recent debates over family law pluralism in Canada and the United Kingdom. It then moves to a discussion of "personal law" and dignity, in the paradigmatic (but not exhaustive) instance of India. The latter discussion is important because, whether known to Americans or not, the family law situation that is emerging in the United States (both before and after Proposition 8) strongly resembles a personal law system, i.e., a system of legal organization whereby different communities possess different laws within a given field of law (e.g. family law).[70] The lessons concerning dignity that the Indian system provides are thus quite instructive.

B. Private Ordering, Family Law Arbitration, and Dignity

This section will discuss two jurisdictions relatively familiar to the American lawyer—Canada[71] and the United Kingdom—where religious minorities have used or are using non-state court arbitration (and "alternative dispute resolution" more broadly) to enforce family law norms that differ from those which are legislated by the state and enforced in state courts. In the academic literature, one commonly sees arbitration referred to as a type of "private ordering" of family law.[72]

School Classrooms, THE FRESNO BEE, Oct. 15, 2008, *available at* http://www.fresnobee.com/2008/10/14/937113/prop-8-tv-ad-raises-questions.html; John Wildermuth, *Prop. 8 Supporters Fight Fierce TV Ad Battle*, S.F. CHRON., Oct. 11, 2008, *available at* http://articles.sfgate.com/2008-10-11/news/17134454_1_same-sex-marriage-ban-gay-marriage.

[70] Traditionally, personal law has been viewed as a kind of legal system that shares little with territorially-premised legal systems. I believe this view of things is wrong, however. *See generally* Jeffrey A. Redding, *Slicing the American Pie: Federalism and Personal Law*, 40 N.Y.U. J. INT'L L. & POL. 941 (2008). Indeed, in light of the pattern in U.S. state laws which is emerging with respect to the definition and enforcement of marriages versus domestic partnerships (or civil unions), it is time to question any easy conclusion about the existence of sharp differences between the American system of family law and Indian personal law. Indeed, just as Muslims and Hindus form families according to different laws in India, now so do homosexuals and heterosexuals utilize different family laws in some American states.

[71] The particular jurisdiction within Canada that I will be focusing on here is that of Ontario. However, some of this discussion necessarily implicates discussion about Canada as a whole. Thus, depending on the situation, I will sometimes specifically refer to "Ontario," and other times to "Canada" more generally.

[72] *See generally* Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQUIRIES LAW 573 (2008).

Arbitration, like personal law,[73] results in family law pluralism. However, arbitration differs from personal law in that the family law pluralism that results in a personal law system is (arguably) more dependent on, and more the creation of, the state. Arbitration, on the other hand, is imagined as existing "outside" of the state, and as providing an "alternative" to the state's monolithic rules.[74] In this way, arbitration potentially allows for even greater family law pluralism than a personal law system does, as the potential variation in family law rules corresponds to the (larger) diversity found amongst cognizable *couples* (as opposed to cognizable *communities*) in society.

In 2003, Canadian politics become preoccupied with the issue of family law pluralism and, in particular, efforts by the Ontario-based Islamic Institute of Civil Justice (IICJ) to offer religiously-premised family law arbitration services to Muslims in Canada's Ontario province. At the time, the president of this organization, Syed Mumtaz Ali, was said to have suggested that Canadian Muslims would not be "good Muslims" if they did not choose to have their family law issues decided outside of the secular Canadian legal system and according to Islamic law.[75] As one can imagine, coming as they did so soon after 9/11,

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[73] *See* discussion *infra* Part II.C.

[74] As the Ontario "Boyd Report" described it:

> [D]isputants may . . . give up on the quest for an agreed resolution to the[ir] dispute, and choose instead to have a neutral third party decide the[ir] dispute. When this is done by agreement of the parties to the dispute, it is known as arbitration. . . . [Arbitration is] private; [it does] not depend on "the law" to make [it] work, and [it does] not involve any governmental or state action.

MARION BOYD, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION 9-10 (2004) [hereinafter *Boyd Report*]; *see also* Shachar, *supra* note 72, at 580-81 (noting the difference between "calls for fair and just *inclusion* in the public sphere—the latter vividly captured by Iris Young's image of a 'heterogeneous public, in which persons stand forth with their differences acknowledged and respected'" and "claims for *opting out of*, or seceding from, the effects of the polity's public laws and norms. Let us call the former pattern of multicultural inclusion *public accommodation*, and the latter, *privatized diversity*.").

[75] *Boyd Report*, *supra* note 74, at 3 (interpreting a news report of Syed Mumtaz Ali's comments at a conference); *see also* Judy Van Rhijn, *First Steps Taken for Islamic Arbitration Board*, LAW TIMES, Nov. 25, 2003, *available at* http://www.freerepublic.com/focus/f-news/1028843/posts. Prior to this 2003 conference, in a 1995 interview, Mr. Ali had also declared that

> [a]s Canadian Muslims, you have a clear choice. Do you want to govern yourself by the personal law of your own religion, or do you prefer governance by secular Canadian family law? If you choose the latter, then you cannot

such efforts and statements struck a nerve in both secular and religious Canada, and much public controversy ensued.[76] While a great deal of this controversy was the result of Islamophobic and/or racist sentiment,[77] and overlooked the fact that Ontario Jews and Christians both had been using religiously-informed, legally-sanctioned arbitration to resolve their family law disputes for years,[78] it nonetheless represented a serious crisis for the Ontario government. As a result, a special report was commissioned by the provincial Government of Ontario in 2004, and this report, known as "the Boyd Report," was issued at the end of 2004.[79] An examination of the Boyd Report's discussion is instructive and important here, as this discussion demonstrates the existence of differing visions of the relationship between dignity and family law pluralism than those articulated by the California and Connecticut Supreme Courts.

At the time of the controversy, Ontario's Arbitration Act[80] could be used to arbitrate a variety of family law (including inheritance) disputes outside of the courts, according to any body of law that the parties to the dispute chose. Certain

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> claim that you believe in Islam as a religion and a complete code of life actualized by a Prophet who you believe to be a mercy to all.

Interview by Rabia Mills with Syed Mumtaz Ali, President, Canadian Society of Muslims (Aug. 1995), http://muslim-canada.org/pfl.htm. That being said, Syed Mumtaz Ali's organization, the Canadian Society of Muslims, also stated in 2003 that

> [o]nce [a] matter comes to [Muslim arbitration,] the parties will be free to choose the law that they wish to rely upon. This model will not exclude application of Canadian laws if the parties wish to do so. It is expected that the Muslim Law and associated Case Law created through the old Anglo-Mohammadan Law precedents would be the model for Personal Law cases initially, but any other *Fiqh* could also be relied upon if the parties so desire.

Darul-Qada: Beginnings of Muslim Civil Justice System in Canada, CAN. SOC'Y MUSLIMS NEWS BULL., Apr. 2003, *available at* http://muslim-canada.org/news03.html.

[76] *See infra* note 97.

[77] The *Boyd Report* acknowledges this explicitly. *See Boyd Report*, *supra* note 74, at 68.

[78] *See id.* at 55-57. This report notes that representatives of one Jewish organization providing family law arbitration services told investigators for the report that Orthodox Jews are forbidden by their religion from bringing their legal disputes before "secular judges." *Id.* at 55. The report also received a submission from one Christian organization (the Christian Legal Fellowship) representing hundreds of Christian lawyers, law professors, and law students, in which it was noted that "[m]any [faith] communities may feel that their core values, including the sanctity of the nuclear family are threatened by having their disputes resolved outside of their faith community by persons having no familiarity with their belief system." *Id.* at 56.

[79] *See id.*

[80] Arbitration Act, R.S.O., ch. 17 (1991), *available at* http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_91a17_e.htm#BK3.

family law issues were outside of the power of an arbitrator to decide in a legally binding manner, including the basic status of a marriage (i.e. an arbitrator cannot declare a divorce; only a civil court can) and the custody of any children.[81] However, disputes pertaining to spousal division of property, spousal support, child support, and inheritance could all be conclusively decided outside of the state's courts,[82] in front of any kind of arbitrator (e.g. a Jewish rabbi, or a Muslim imam), according to any body of law (religious or otherwise).[83]

In the recommendations it laid out with respect to how religious family law arbitration should proceed in Ontario in the future, the Boyd Report attempted to walk a careful path between the possibility of two different kinds of legal regimes, each of which the report found extreme and undesirable. The first of these regimes the Boyd Report called "secular absolutism," and it identified this type of legal system with the legal regime presently found in France.[84] Under a "secular absolutist" system, "the state must abstain from any involvement in religious matters, and religious authorities must be prohibited from having *any authority whatsoever* over matters that are regulated elsewhere by state law," including, presumably, family law.[85] Under such a (secular) system of law, the state is where the definition and enforcement of one family law, for everyone, both begins and ends.

The other extreme to be avoided, according to the Boyd Report, is a system whereby any group, such as Canadian Muslims, is allowed to establish a "separate" legal regime "distinct from [that of] the rest of Canadians, with the goal of political autonomy for the . . . community in this country."[86] Such a system is problematic because

> Ontarians do not subscribe to the notion of "*separate but equal*" when it comes to the laws that apply to us. . . . A policy of compelling people to submit to different legal regimes on the basis of religion or culture would be counter to [Canadian] *Charter* values. . . . Equality before and under the law, and the existence of a *single legal regime*

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[81] *See generally Boyd Report*, *supra* note 74, at 14, 16.

[82] *See generally id.* at 11-28.

[83] See generally *id.* at 12, for a discussion of parties' freedom to choose both the arbitrator and the body of law which would apply to the resolution of their dispute.

[84] *Id.* at 89.

[85] *Id.* (emphasis added).

[86] *Id.*

> available to all Ontarians are the cornerstones of our liberal democratic society.[87]

While invoking the talismanic vocabulary of "separate but equal" to decry any extreme form of family law pluralism, the Boyd Report's observations as to the desirability of family law uniformity were clearly agonized, and perhaps ambivalent. The report, for example, was forced to acknowledge—as any contemporary Canadian discussion of Canadian legal pluralism would have to—that Canada has a rich tradition of "separate but equal" legal regimes, most notably in historically-francophone Quebec and also the aboriginal First Nations territories. With respect to the legal situation of Quebec, the report noted how

> the historical context clarifies why Britain tolerated the use of the French civil law in Quebec after defeating the French and why that system of law was continued in our Constitution. Indeed, Canada is a delicate balancing act where protection of the religious, language and legal rights of both French and English have marked our ethos from the beginning.[88]

With respect to the First Nations and their legal particularity in the Canadian set-up, the Boyd Report was even more adamant—and, as a result, also more tortured—about the inapplicability of this "separate but equal" legal situation for any claim to an autonomous, religiously-premised and religion-controlled[89] system of (family) law for Muslims, or any other non-First Nations group:

> To compare any group of people, whether they are distinct on a cultural, ethnic or religious basis, to the First Nations of Canada in this country's legal and historical context reveals a misunderstanding of the nature of the relationship between the Canadian state and the First Nations. From [this report's] perspective, comparisons in this direction are erroneous at best.[90]

Ultimately, the report's legal conclusions here, to their detriment, rested on arguments about the First Nations' singularity in Canada's Constitution Act and other important

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[87] *Id.* at 88 (emphasis added).

[88] *Id.* at 79.

[89] As the *Boyd Report* describes this model: "According to such a conception of minority rights, the Muslim community, and other communities arbitrating family law matters using religious principles, would be able to do so based on whatever internal rules they adopt and the state would have no right to intervene." *Id.* at 90.

[90] *Id.* at 87-88.

legislation.[91] Perhaps at the time of this report's writing, this kind of argument looked like an unimpeachable and ingenuous one. Now, however, in light of American same-sex marriage opponents' invocation of the U.S. Constitution's Fourteenth Amendment's historical rooting in anti-racism—and *only* anti-racism[92]—the Boyd Report's similar mode of argumentation looks intellectually half-hearted at best, and desperate and Islamophobic at worst.

Ultimately, the Boyd Report ended up endorsing the basic system of optional arbitration for select family law matters that then existed in Ontario, while making suggestions on the margins for reforms to this system.[93] As the report saw it, the benefits of this existing system included that it was consistent with the basic Canadian commitment to multicultural policies, which "[a]llow[] and support[] communities' and individuals' links to cultures (including their

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[91] *Id.* at 87.

[92] See, for example, Lynn Wardle's argument that

> [w]hatever else may be said about the Fourteenth Amendment, it is undeniable from both its text and its history that it was intended to outlaw state action designed to foster *racism*—to outlaw government policies that manifest the demeaning notion of *racial* inferiority. Three constitutional amendments especially embrace the value of *racial* equality in our legal system. By contrast, nothing in the Fourteenth Amendment discloses a comparable intent to protect or promote the social or legal equality of homosexual relations.

Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 78-79 (1996) (emphasis added).

[93] The *Boyd Report* noted that it

> did not find any evidence to suggest that women are being systematically discriminated against as a result of arbitration of family law issues. Therefore the Review supports the continued use of arbitration to resolve family law matters . . . . *The* Arbitration Act *should continue to allow disputes to be arbitrated using religious law, if the safeguards currently prescribed and recommended by this Review are observed*.

Boyd Report, *supra* note 74, at 133. Many of the reforms suggested by the *Boyd Report* are relatively minor, such as requiring arbitrators to provide written reasons for their decisions and to keep and transmit to the government better written records of their decisions. *Id.* at 140. Some recommendations are more significant, such as the recommendation to require that the agreement to arbitrate a family dispute be reconfirmed at the time of the family law dispute instead of, say, allowing an agreement entered into at the time of the marriage to necessarily hold sway. *Id.* at 134. A potentially important recommendation is that the Arbitration Act should be amended to more concretely define what its requirement of a "fair and equal process" in arbitration means. *Id.* at 136.

religions) of origin,"[94] and that, at heart, this existing system supported "inclusion which takes account of difference."[95]

Despite the Boyd Report's basic endorsement of the status quo, the Government of Ontario nonetheless rejected the report's recommendations, and indeed went so far as to make illegal any arbitration conducted according to any body of law other than the law of Ontario or of another Canadian

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[94] *Id.* at 90. Ayelet Shachar, another Canadian defender of the availability of some form of religious family law arbitration, has similarly stressed how religious law can "offer religious women a significant source of meaning and value," Shachar, *supra* note 72, at 575, and as a result, can leave them feeling "obliged to have at least some aspects of their marriage and divorce regulated by religious principles and communal institutions," *id.* at 604. Shachar has also argued the decision to ban religious arbitration is "not an ideal normative and jurisprudential solution," given that the government's

> "out of sight, out of mind" approach [to religious arbitration] will probably not be of much assistance to vulnerable group members in blocking communal pressures to resolve family disputes by turning to "their" group's authorities which, now legally unrecognized, remain free of *any* regulatory oversight, whether ex ante or ex post.

Id. at 604-05 (emphasis added).

[95] *Boyd Report*, *supra* note 74, at 89. The report continued onward to distinguish its endorsement of "*inclusion* which takes account of difference" from "*exclusion* based on difference." *Id.* (emphasis added). Again, however, this statement about arbitration as inclusion, instead of "separate but equal" exclusion, is a curious one, and appears to be motivated by the Boyd Report's need to distinguish religious arbitration from Quebecois or First Nation legal separatism. The Boyd Report's distancing moves in this respect are somewhat dubious, however, especially when they result in the statement that Jews', Muslims', and others' resort to religious arbitration—instead of the state's courts—ultimately amounts to a vigorous *endorsement* by religious communities of the state and its legal norms and institutions:

> By availing itself of provincial legislation that has been in place for over a decade, and that has been used by others, the Muslim community is drawing on the dominant legal culture to express itself. By using mainstream legal instruments minority communities openly engage in institutional dialogue. And by engaging in such dialogue, a community is also inviting the state into its affairs, particularly since the *Arbitration Act*, even in its present form, specifically sets out grounds for state intervention in the form of judicial oversight. Use of the *Arbitration Act* by minority communities can therefore be understood as a desire to engage with the broader community.

Id. at 93.

In fact, opposition to and hostility towards the state's system of courts and legal administration was relatively strong amongst some groups. For example, the Orthodox Jewish non-state court in Toronto (*Beis Din*) even opposed the Boyd Report committee's relatively timid exploration of enhanced training for and regulation of religious arbitrators. *See id.* at 116-17. With respect to aboriginal peoples, the Boyd Report also acknowledged the submission of the Ontario Federation of Indian Friendship Centres, and its concerns that state regulation of arbitrators working on aboriginal family law matters would "tend to ignore the wisdom and experience so important within [our] communities and tie the process to the 'white man's system of justice,' from which the community seeks relief." *Id.* at 117 (paraphrasing the submission by the Ontario aboriginal group).

jurisdiction.[96] This significant change in the law of arbitration was clearly the consequence of post-9/11 heightened anxiety concerning the loyalties and intentions of Canadian Muslims.[97] This dramatic post-Boyd Report turn of events notwithstanding, the Boyd Report's discussions and conclusions, as well as the politics to which they are a response, are instructive and important in that they demonstrate that alternative visions of the relationship between dignity and family law pluralism exist and are potentially viable in the modern, secular state.[98]

While a certain sort of family law pluralism has been shut down in Canada post-Boyd, the Islamophobia that underlies this move is not necessarily instructive of how dignity-minded individuals and governments should themselves come out on the question of family law pluralism. As the present situation in the United Kingdom suggests, other

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[96] *See* Family Arbitration Regulations (Arbitration Act), R.R.O./2007-134 (Ont.). After this amendment, the Arbitration Act in Ontario now reads:

> Other third-party decision-making processes in family matters
>
> 2.2 (1) When a decision about a matter described in clause (a) of the definition of "family arbitration" in section 1 is made by a third person in a process that is not conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction,
>
> (a) the process is not a family arbitration; and
>
> (b) the decision is not a family arbitration award and has no legal effect. 2006, c. 1, s. 1 (2).

See Arbitration Act, R.S.O., ch. 17 (1991), *available at* http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_91a17_e.htm#BK3.

[97] *See* Shachar, *supra* note 72, at 584; *see also* Haroon Siddiqui, Op-Ed., *Sensationalism Shrouds the Debate on Sharia*, TORONTO STAR, June 12, 2005, at A17.

[98] They are also witness to the fact that religious persons are in the forefront of efforts to reform secularism and the hegemonic political embodiments, such as the state, with which secularism has often been associated. This is not to say that religious people in Canada were united in challenging the preeminence of the Canadian state's role in regulating family relationships; they were not. In this respect, the *Boyd Report* was exemplary in its serious engagement with differences of opinion *amongst Muslims* (as well as amongst people of other religious faiths) about the proper goals of the community—including how best to obtain respect and dignity for this community. These differing views spanned the spectrum from a desire to establish a completely autonomous legal system for Canadian Muslims, *see Boyd Report*, *supra* note 74, at 88, to those of the Muslim Canadian Congress (MCC). The MCC is described as a private national organization that viewed itself as "progressive," and which also claimed that the Arbitration Act "does *not* cover family law disputes" and "that if indeed the government takes the position . . . that the Arbitration Act can deal with these matters, then the . . . Act is unconstitutional . . . in that . . . [it b]reaches the unwritten constitutional norms enunciated by the Supreme [C]ourt of Canada . . . namely the rule of law, constitutionalism, federalism, and respect for minorities." *Id.* at 29-30.

jurisdictions—equally afflicted by Islamophobia—might be on a different path.

In early 2008, the Archbishop of Canterbury, Rowan Williams, delivered a widely reported-upon and controversial talk in the United Kingdom on the topic of "Civil and Religious Law in England: A Religious Perspective."[99] Conceived as a general talk about how to respond to "the presence of communities [in the United Kingdom] which, while no less 'law-abiding' than the rest of the population, relate to something other than the British legal system alone,"[100] the Archbishop's words resonated widely and loudly in a country still recovering from the 2005 attacks on its capital's public transportation system, and the fears of a Muslim "fifth-column" that these attacks engendered. Journalistic reporting of the lecture focused on its comments concerning the place of Islamic law[101] in an ostensibly secular[102] legal system. However, the Archbishop himself emphasized that he was trying to speak *generally* "about the right of religious believers . . . to opt out of certain legal provisions—[for example,] the problems around Roman Catholic adoption agencies which emerged in relation to the Sexual Orientation Regulations [the previous spring]."[103]

While the Archbishop's widely-publicized speech was a response to recent events and concerns, debates concerning the limits to legal pluralism in the United Kingdom have actually been ongoing for some time. For example, in the 1970s, U.K. Muslim organizations organized to demand the formal recognition of a separate system of family law in the United

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[99] *See* Rowan Williams, Archbishop of Canterbury, Lecture at the Royal Courts of Justice, Civil and Religious Law in England: A Religious Perspective (Feb. 7, 2008), *available at* www.archbishopofcanterbury.org/1575.

[100] *Id.*

[101] *See, e.g.*, Ruth Gledhill & Phillip Webster, *Archbishop of Canterbury Argues for Islamic Law in Britain*, TIMES, Feb. 8, 2008, *available at* http://www.timesonline.co.uk/tol/comment/faith/article3328024.ece; Jonathan Petre & Andrew Porter, *Adopt Sharia Law in Britain, Says the Archbishop of Canterbury Dr. Rowan Williams*, DAILY TELEGRAPH, Feb. 8, 2008, *available at* http://www.telegraph.co.uk/news/uknews/1578017/Adopt-sharia-law-in-Britain-says-the-Archbishop-of-Canterbury-Dr-Rowan-Williams.html; *Sharia Law in UK is 'Unavoidable'*, BBC NEWS, Feb. 7, 2008, *available at* http://news.bbc.co.uk/2/hi/uk_news/7232661.stm.

[102] It is somewhat of a challenge to characterize the English legal system as "secular" when, as the Archbishop himself acknowledged, "the law of the Church of England is the law of the land." Williams, *supra* note 99. The Archbishop went on to note, however, that the "daily operation" of that Church law "is in the hands of [non-Church] authorities to whom considerable independence is granted." *Id.* That being said, later in his talk, the Archbishop spoke admirably of what he characterized as a necessary "theology of law." *Id.*

[103] *Id.*

Kingdom for Muslims.[104] While these efforts to garner the state's official endorsement and enforcement of a separate family law system for Muslims in the United Kingdom were essentially unsuccessful, Muslim non-governmental organizations have developed a number of non-state Muslim legal institutions all over the United Kingdom in the past two decades.

These institutions, or "shari'a councils," use procedures and practices informed by Islamic legal and moral norms to provide mediation and family law dispute resolution services for disputes arising in Muslim families. They identify themselves with names like "Muslim Marriage Guidance Council," "Islamic Sharia Council," and "Muslim Arbitration Tribunal."[105] Most of these institutions see themselves as merely mediators in Muslim couples' mundane problems and disagreements, offering non-binding advice as to Islamic family norms. Some of these institutions also hear and decide individuals' petitions for religious divorce, and issue religious divorces.[106] However, these declarations of divorce have no civil law effect, since only a state court can declare an officially-married couple legally divorced.[107] Only one institution, the Muslim Arbitration Tribunal, has taken the steps to officially register itself under the state's Arbitration Act, so that it may

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[104] *See generally* Sebastian Poulter, *The Claim to a Separate Islamic System of Personal Law for British Muslims*, *in* ISLAMIC FAMILY LAW 147 (Chibli Mallat & Jane Connors eds., 1990).

[105] *See generally* Sameer Ahmed, Pluralism in British Islamic Reasoning: The Debate Over Official Recognition of Islamic Family Law in the United Kingdom 50-60 (2006) (unpublished Ph.D. dissertation, Oxford University) (on file with author); *see also* John R. Bowen, *Private Arrangements: "Recognizing Sharia" in England*, BOSTON REV., March/April 2009, at 15 (providing a general overview of the functioning of the Muslim Arbitration Tribunal and Islamic Sharia Council).

[106] For example, John Bowen reports that at the February 2008 monthly meeting of scholars associated with the Islamic Sharia Council that, with respect to the seven cases that these scholars heard as a group that month, the scholars either dissolved the marriage in question or deferred a decision and asked for more information. Incidentally, all seven cases were requests by women to divorce their husbands. *See* Bowen, *supra* note 105, at 16. For a general overview of these institutions' functions, see Samia Bano, *In Pursuit of Religious and Legal Diversity: A Response to the Archbishop of Canterbury and the 'Sharia Debate' in Britain*, 10 ECCLESIASTICAL L.J. 283, 294-96 (2008). For a detailed scholarly study of one such institution, namely the Muslim Law (Shariah) Council, based in West London, see generally SHAH-KAZEMI, *supra* note 60.

[107] *See* Bowen, *supra* note 105, at 16; *see also* Lucy Carroll, *Muslim Women and 'Islamic Divorce' in England*, 17 J. MUSLIM MINORITY AFF. 97 (1997), *available at* http://www.wluml.org/node/304.

resolve civil (including intra-family) disputes[108] in a legally binding manner, using the tools of state-defined arbitration.

As in Canada,[109] Muslim opinion in the United Kingdom as to the desirability of establishing a distinct set of legal institutions for Muslims is not univocal; there are both Muslim supporters and Muslim detractors of efforts to establish non-state Muslim legal institutions. For example, as in Canada, some Muslims see the effort to establish officially-recognized and supported Islamic law in the United Kingdom as no different than—and as necessary as—the state's recognition of sub-national territorial-cum-community laws. For example, one Muslim commentator has remarked that "[T]his country has already two laws—one law of inheritance applies to England and Wales and one law of inheritance applies to Scotland. How are these two laws able to coexist peacefully without disrupting the legal system of this country? Similarly, Islamic family law can coexist with this law without disrupting the whole legal structure."[110]

Other Muslims, while supporting non-state Muslim legal institutions (such as shari'a councils), believe that the effects on the Muslim community that could result from the state establishing or officially-recognizing Islamic legal institutions might be extremely detrimental. These possible effects include a potential exacerbation of intra-community communal tensions as groups vie with each other for the state's patronage, or a corruption in the content of Islamic law as state concerns and priorities come to infiltrate previously autonomous religio-legal discussions.[111] Other Muslims worry explicitly about any sort of Muslim separateness, with these worries echoing those found in the U.S. about "separate but equal" legal regimes. For example, one commentator has argued that "Muslims should try to integrate themselves into society. . . . A separate system would create a *stigma* and lead people to discriminate against Muslims."[112] Finally,

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[108] Not all of these arbitration matters involve intra-family civil disputes. The website of the Muslim Arbitration Tribunal reports that they also handle "Commercial and Debt Disputes" and "Mosque Disputes." *See* Muslim Arbitration Tribunal, http://www.matribunal.com/cases.html (last visited Feb. 10, 2010).

[109] *See supra* note 98.

[110] Syed Aziz Pasha, Union of Muslim Org., Address in London (Aug. 22, 2004), in Ahmed at 79.

[111] *See id.* at 83-84.

[112] *Id.* at 85 (emphasis added); see also Samia Bano's worry about the development of a "new normative discourse, which stigmatises Muslims as the

commentators have expressed worry that the welfare of Muslim women can be compromised by the "privatization" of family law enforcement and efforts to increasingly locate that enforcement in non-state, community-premised—and potentially patriarchal—bodies and organizations.[113]

This diversity of opinions being the case, there is evidence suggesting that the number of Muslims using the services of these non-state Muslim institutions might very well be on a steady rise.[114] If that is actually the case, this would not be surprising in light of the finding by one recent poll of (500) British Muslims "that a clear majority [of those polled] want Islamic law introduced into this country in civil cases relating to their own community. Some 61% wanted Islamic courts—operating on shari'a principles—'so long as the penalties did not contravene British law.'"[115] Another recent study suggests that 37% of British Muslims aged 16-24 "would prefer to live under *sharia* law [as opposed to British law]," which is significantly higher than the 17% of British Muslims 55-years-old and older who would prefer the same.[116]

'Other'—in conflict with, incompatible with and, most importantly, disloyal to the state." Bano, *supra* note 106, at 287. Bano goes on to argue that "Muslim engagement with the law and sharia must be read within the broader social and political context in which [Muslims] operate [and] must . . . not fall in to the traps of cultural essentialism and homogeneity that reproduce the binaries that [one] seeks to dismantle and displace." *Id.*

[113] *See, e.g.*, Bano, *supra* note 106, at 300-01. Bano is critical of ongoing discussions concerning shari'a councils which do not take into account the experiences and views of "Muslim women, who are the primary users of [shari'a councils]." *Id.* at 288. While Bano's research reports a variety of views amongst Muslim women with respect to shari'a councils—with some women enthusiastically supporting these councils and other women far more skeptical—Bano herself is clearly troubled by efforts to enhance the powers and authority of shari'a councils. *See id.* at 309 (noting that Bano is writing "with the conviction that Muslim women remain extremely cautious of initiatives to accommodate sharia into English law"); *see also* SHAH-KAZEMI, *supra* note 60, at 70 for her research findings that "formal recognition of the shari'a system of laws in Britain would be problematic, and such recognition is not sought by . . . the majority of Muslim community organisations."

[114] The Islamic Sharia Council, one major such non-state Muslim legal institution, reports that from 1982-1995, 1500 cases were filed with it. From 1996-2009, however, at least 5500 cases were filed. Islamic Sharia Council, Islamic Sharia Council—About Us, http://www.islamic-sharia.org/about-us/about-us-9.html (last visited Feb. 10, 2010).

[115] *See* Alan Travis & Madeleine Bunting, *British Muslims want Islamic law and prayers at work*, THE GUARDIAN, Nov. 30, 2004, *available at* http://www.guardian.co.uk/uk/2004/nov/30/immigrationpolicy.

[116] *See* MUNIRA MIRZA, ABI SENTHIKUMARAN & ZEIN JA'FAR, LIVING APART TOGETHER: BRITISH MUSLIMS AND THE PARADOX OF MULTICULTURALISM 5 (2007), *cited in* Samia Bano, *Islamic Family Arbitration, Justice and Human Rights in Britain*, LAW, SOCIAL JUSTICE & GLOBAL DEVELOPMENT (2007), *available at* http://www.go.warwick.ac.uk/elj/lgd/2007_1/bano. In this piece by Samia Bano, Bano is critical of the

Clearly, people's responses to survey questions are more complicated and nuanced than any crude statistic can capture. However, these numbers in support of a separate legal system for a U.K. minority are nonetheless surprisingly robust, especially in light of the usual liberal claims that "separate" is necessarily "unequal." If that liberal claim is right, it appears that substantial numbers of British Muslims want to be stigmatized as unequal. While that is a possibility, what appears more probable is that substantial numbers of Muslims in the United Kingdom contest majority practices and values,[117] including Islamophobia.[118] Other Muslims worry less about majority ill-will than they do about majority (cultural) incompetence.[119]

While the future direction of the debate over official recognition (in some manner) of Islamic (family) law in the United Kingdom is entirely unpredictable, the fact that the head of the Church of England is making speeches speaking favorably of (some) Islamic legal institutions, and advocating more legal pluralism, suggests that monumental change is afoot. Whatever the outcome(s) of this debate, its existence, similar to the Ontario debate, demonstrates that alternative visions of the relationship between dignity and family law pluralism exist and are viable in the modern, secular state.

In both Canada and the United Kingdom, then, members of religious minorities have recently deployed arguments relating to dignity to argue *against* the universal application of majority-defined state family law norms. In Canada, these arguments ultimately proved unsuccessful in the face of a dignity-defying Islamophobia, and religious family

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survey methodology used by Mirza, Senthikumaran & Ja'far and contests the accuracy of their findings. *See id.*

[117] Speaking of Muslims in England, Ihsan Yilmaz writes that "[m]ost . . . see Western society as aimless and rootless, marred by increasing vandalism, crime, juvenile delinquency, the collapse of marriages, growing numbers of illegitimate children, and near constant stress and anxiety. They view Islam as the positive alternative." Ihsan Yilmaz, *Muslim Alternative Dispute Resolution and Neo-Ijtihad in England*, 2 ALTERNATIVES: TURKISH J. OF INT'L REL. 121-22 (2003).

[118] Yilmaz, *supra* note 117, notes the disparity in how English Jews and Sikhs are protected under the Race Relations Act, but not Muslims. "As a result, there has been widespread alienation from the state among [Muslims]." *Id.* at 122.

[119] See SHAH-KAZEMI, *supra* note 60, at 53-55, 71-77 for examples and discussion of incompetence on the behalf of British (non-Muslim) lawyers giving advice to their Muslim clients on both English and Islamic law. In one instance, one of these lawyers drew up a *talaqnama* for his female client, in which he had his client—a woman—attempt to divorce her husband by pronouncing "I TALAK YOU" thrice. *See id.* at 54-55.

law arbitration in one leading province of that country (Ontario) has been severely curtailed. Both Jews and Muslims—the two minorities who had been the most vocal in trying to protect the availability of religiously-informed non-state family law arbitration for their communities—have been forced to abide by the state's legislated family law rules.[120] In the United Kingdom, the debate is gaining momentum. Following the important and widely-discussed speech by the Archbishop of Canterbury on legal pluralism and dignity, the issue of non-state arbitration for religious minorities' family law issues is very much on the national radar, as is the question how the dignity of religious minorities can be enhanced by the existence of increased family law pluralism. In short, in both Canada and the United Kingdom, a positive relationship between dignity and legal pluralism has been discussed and made possible; any assumption of dissonance and incoherence between these two ideas is itself incoherent in these non-American contexts.

C. Personal Law, "Separate But Equal" Family Laws, and Minority Rights

The debates in Canada and the United Kingdom concerning family law pluralism are, in part, a debate about "private ordering," or the ability of people to "privately" construct alternatives to the state's monolithic family law rules, norms, and assumptions. However, another model of family law pluralism—namely, that of "personal law"—is also widely practiced and debated around the globe. In contrast to the *private* ordering model, this form of family law pluralism is one where *the state itself* is explicitly involved in defining and/or enforcing[121] different family laws for different communities.

As a method of legislating and administering laws, personal law has a long history, dating back at least to the time of the Romans.[122] However, personal law is still found all over

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[120] *See supra* note 96.

[121] States that have personal law systems will differ to the extent they will allow communities to legislate, administer, and otherwise enforce their particular personal laws. There is no single model of a personal law system, though there are commonalities between such systems. For a comparison of two widely-studied personal law systems, see Marc Galanter & Jayanth Krishnan, *Personal Law and Human Rights in India and Israel*, 34 ISR. L. REV. 101, 115 (2000).

[122] *See* FRIEDRICH KARL VON SAVIGNY, PRIVATE INTERNATIONAL LAW AND THE

the modern world. While often, but not always, the product of European colonial rule, this kind of (family) law system has been retained in many post-colonial states, including Israel, Malaysia, Pakistan, and India.[123]

At a very general level, a personal law system is a legal system in which laws or legal norms bind "different" people differently, sorting people into various legal regimes depending on the "type of person" involved.[124] The aspects of personhood that most contemporary personal law systems use to distinguish between people are those relating to religion and ethnicity.[125]

As indicated, India is one prominent country where the administration of family law is organized around a personal law model. India's personal law system is one that is premised on people's religiously communal identifications.[126] When people refer to India's personal law system, then, they mean the system of Indian family law whereby Hindus, Muslims, Christians, and others are governed by different family law codes, practices, and norms.[127] In this system of family law, one finds the "Hindu Marriage Act" (which also governs divorces

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RETROSPECTIVE OPERATION OF STATUTES: A TREATISE ON THE CONFLICT OF LAWS AND THE LIMITS OF THEIR OPERATION IN RESPECT OF PLACE AND TIME 58-59 (William Guthrie trans., Lawbook Exchange 2003) (1880).

[123] *See generally* Redding, *supra* note 70.

[124] *See generally id.* The factors that are important to personhood may differ from society to society. As a result, any given personal law system might look unlike any other such system. However, what characterizes all personal law systems is that the law which applies to one in such systems depends on the "kind of person" one is, instead of on one's generic membership in an undifferentiated polity. *See generally id.*

The terms "personhood" and "type of persons" are used here to emphasize that not every law that distinguishes between persons is a personal law, but only those laws that distinguish between socially and politically relevant "types" of people. This, obviously, will differ from society to society. For example, "high-caste" and "low-caste" people are relevant types of people in India, in a way that they are not for the vast majority of Americans. Race rather than caste, in this respect, is more central to the American discussion. *See generally id.*

[125] *See generally id.* That being said, personal law is not just law that distinguishes between people with different kinds of communal or kinship ties (religion and ethnicity being two prime examples of such ties). The term "personal law" has, in fact, not been strictly limited (either historically or contemporarily) in this way. *See, e.g.*, RAMANI MUTTETUWEGAMA, PARALLEL SYSTEMS OF PERSONAL LAWS IN SRI LANKA 3-5 (1997) (discussing the quasi-territorial, quasi-ethnic aspects of Sri Lankan personal law).

[126] Galantar & Krishnan, *supra* note 121, at 103.

[127] *Id.* at 109. Presently in India, the central government (and, to a much lesser degree, state governments) legislates on different religious communities' personal laws. Furthermore, there is a relatively unified, hierarchically-organized national judiciary in India that enforces and administers this legislation, as well as the large amount of uncodified religious personal law that is found in judicial precedents. *Id.* at 109.

between Hindu marital parties), and also the "Indian Christian Marriage Act."[128] Furthermore, the "Indian Divorce Act" governs Christian divorces, while the "Dissolution of Muslim Marriages Act" governs some kinds of Muslim divorces.[129] There are also many other examples of these kinds of statutes in India, as well as a large body of religion-specific, judicially-developed common law that relates to the family.[130]

While the motivations behind personal law systems are surely complex and dynamic over the course of history,[131] today they are in very large part "intended to help ethnic groups and religious minorities express their cultural particularity and pride without it hampering their success in the economic and political institutions of the dominant society."[132] Looking at

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[128] *Id.* at 109 n.42.

[129] The Indian Divorce Act, No. 4 of 1869, India Code, *amended by* The Indian Divorce (Amendment) Bill, Act No. 51 of 2001, India Code, *available at* http://indiacode.nic.in/ (search "search Indiacode: Short Title" for "The Indian Divorce Act"; then follow "Download full act" hyperlink under search results); The Dissolution of Muslim Marriages Act, No. 8 of 1939, India Code, *available at* http://indiacode.nic.in/ (search "search Indiacode: Short Title" for "The Dissolution of Muslim Marriages Act"; then follow "Download full act" hyperlink under search results).

[130] Galantar & Krishnan, *supra* note 121, at 109. There is also family law (for example, the recently-enacted "Protection of Women from Domestic Violence Act of 2005") which is not administered along communitarian lines. *See* The Protection of Women from Domestic Violence Act, No. 43 of 2005, India Code, *available at* http://indiacode.nic.in/ (indicating that this Act is applicable to "any woman").

[131] India's present personal law system can be traced back at least to the 1772 decision by Warren Hastings, the British viceroy for India at the time, to "in all Suits regarding Marriage, Inheritance, Cast, and other religious Usages or Institutions, [apply] the Laws of the Koran with respect to [Muslims], and those of the Shaster with respect to [Hindus]." A Plan for the Administration of Justice (1772); *see also* WILLIAM H. MORLEY, THE ADMINISTRATION OF JUSTICE IN BRITISH INDIA; ITS PAST HISTORY AND PRESENT STATE: COMPRISING AN ACCOUNT OF THE LAWS PECULIAR TO INDIA 177, 177-78 (1858). For a discussion of this British policy, see Galanter & Krishnan, *supra* note 121, at 106; *see also* M.B. HOOKER, LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS 60 (1975).

While one might have expected otherwise from such an ambitious announcement, ultimately Hastings' decision was only fully implemented in the areas of marriage, divorce, inheritance, and adoption law, as well as in the management of religious endowments. After independence, and after much debate, the post-colonial Indian state decided to continue this basic split between universally oriented criminal law and personally oriented family law.

[132] WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 31 (1995). Rina Verma Williams has characterized the post-colonial retention of personal law systems as "a way to avert ethnic unrest and preserve cultural autonomy in multiethnic societies." RINA VERMA WILLIAMS, POSTCOLONIAL POLITICS AND PERSONAL LAWS: COLONIAL LEGAL LEGACIES AND THE INDIAN STATE 7 (2006). Finally, India's post-Independence leader, Jawaharlal Nehru, himself remarked that "we do not dare touch the Moslems [with respect to their personal law] because they are a minority and we do not wish the Hindu majority to do it. These are personal laws and so they will remain for the Moslems, unless they want to change them." *See* TIBOR MENDE, CONVERSATIONS WITH MR. NEHRU 57 (1956), *cited in* WILLIAMS, *supra*,

personal law systems in India and elsewhere, what is interesting to note is that "second class" citizens—for example, Muslims in the case of Hindu-majority India—often oppose any effort to amalgamate them into a common, unitary family law system.[133]

Perhaps the best example of this kind of opposition to majoritarian absorption, in the Indian context at least, is a still-potent controversy which dates from the mid-1980s. This controversy, widely known as "the Shah Bano crisis," resulted from a decision handed down by the Indian Supreme Court in the case of *Mohd. Ahmed Khan v. Shah Bano Begum*.[134] The question presented was whether the Indian Code of Criminal Procedure's requirement that a man indefinitely financially maintain his ex-wife after a divorce if she is "unable to maintain herself"[135] was applicable to Muslim men, who arguably have more limited responsibilities[136] toward their ex-wives under classical Islamic family law. Ultimately, the Indian Supreme Court determined that 1) the Code of Criminal Procedure's requirements superseded any contradictory Muslim personal law rules and requirements,[137] and 2) nothing in Muslim personal law forbade indefinite maintenance to a divorced wife "who is unable to maintain herself."[138]

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at 116. *But see* MAHMOOD MAMDANI, CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM 111 (1996) (arguing that colonial-era legal pluralism "was more an expression of power relations in a colonial society than a recognition and tolerance of any multicultural diversity").

[133] It is important to note here that at India's independence, conservative Hindu organizations also opposed the newly independent state's (ultimately successful) attempts to reformulate Hindu personal law, using arguments about the inappropriateness of (secular) state "interference" in religious personal laws. *See* WILLIAMS, *supra* note 132, at 19, 104-14. Later, this particular brand of Hindu politics radically changed, such that while "[i]n the 1980s, religious identity for the Muslim community became virtually coterminous with the preservation of their personal law[, f]or some Hindus, . . . Indian national identity became virtually coterminous with forcing the Muslim community to give up their personal law." *Id.* at 127.

[134] (1985) 3 S.C.R. 844.

[135] INDIA CODE CRIM. PROC. § 125(1)(a).

[136] Under most classical interpretations of Islamic divorce law, it is generally the rule that a man is required to financially maintain his (ex-)wife up until the time she has, post-divorce, menstruated three times. *See* DAVID PEARL & WERNER MENSKI, MUSLIM FAMILY LAW 182-84, 280-82 (3d ed. 1998).

[137] Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 3 S.C.R. 844, 854-56.

[138] *Id.* at 859-62. Arguably, the first holding was sufficient to have settled the case, and it was gratuitous and provocative for the Indian Supreme Court to have interpreted the Muslim community's personal law. This seems especially the case given that other portions of the court's opinion took a patronizing tone in regards to the content of such personal law. The lead paragraph in this opinion, in fact, included the following remarks: "it is alleged that the fatal point in Islam is the degradation of woman. To the Prophet is ascribed the statement, hopefully wrongly, that Woman was

The opinion ignited large protests by conservative Muslims across India (and smaller counter-protests by a number of dissident Muslim women and their allies).[139] Eventually, then-Prime Minister Rajiv Gandhi and his government acquiesced to conservative Muslim demands to pass a law to eliminate Muslim (and only Muslim) women's rights to petition for and receive indefinite post-divorce maintenance from their ex-husbands.[140] While the legal effect of this relatively recent addition to India's personal law system has been whittled back over time, the law still remains on the books, and Muslim political and social organizations would most likely intensely resist its removal.[141]

This dispute over Muslim personal law is both cause and symptom of a larger social and political debate about the secular credentials of a post-colonial Indian state (as opposed to the "Islamic" post-colonial Pakistani state). There is no foreseeable end to this debate, but neither is there any foreseeable end to the enforcement of personal law. Amongst India's religious minorities, it is common to find antagonism to the idea that everyone in India should be bound to one uniform civil (family law) code. While religious feminists are working

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made from a crooked rib, and if you try to bend it straight, it will break; therefore treat your wives kindly." *Id.* at 849-50 (internal quotation marks omitted).

[139] *See* Kirti Singh, *The Constitution and Muslim Personal Law, in* FORGING IDENTITIES: GENDER, COMMUNITIES, AND THE STATE 96, 101-03 (Zoya Hasan ed., 1994); WILLIAMS, *supra* note 132, at 145 (documenting smaller size of counter-protests by progressive Muslims).

[140] *See* The Muslim Women (Protection of Rights on Divorce) Act, No. 25 of 1986, *available at* http://indiacode.nic.in/fullact1.asp?tfnm=198625. In response to this legislation, cries of "appeasement" were effectively raised by Hindu nationalist quarters, which eventually helped lead to the national electoral successes of the Hindu-nationalist BJP political party. These successes, in turn, led to a severe polarization in Hindu-Muslim relations in India, a corresponding increase in violence between the two communities, and the drawing of new and sharper boundaries between the two communities. These communal problems, and the challenges they present for legislation and judicial decision-making in the area of personal law, persist today. *See* Redding, *supra* note 70, at 967-68.

[141] For the results of different surveys of Muslim public opinion on the issue of personal law reform, see WILLIAMS, *supra* note 132, at 58. For example, a 1996 survey found that 67% of Muslims (and over 50% of Christians) favored the retention of India's personal law system, while only 42% of Hindus favored keeping this system. *Id.* Another 1995 survey of 200 Muslim women found that while 62% of respondents thought that Muslim personal law in India should be reformed in at least one aspect or another, only 14% would go so far as to eradicate the Indian method of organizing family law along a personal law model itself. *See* Sabeeha Bano, *Muslim Women's Voices*, 47 ECON. & POL. WKLY 2981, 2982 (1995). All of these results should be appropriately contextualized and qualified by noting both the enormous size of India's Muslim population—approximately 150 million—and the large number of class, caste, regional, and sectarian differences which internally differentiate this population.

for more women-friendly versions of personal law, such a project has goals different than delegating family law solely to patriarchal others, whether those "others" be religiously- or secularly-spirited.[142] The result is that the Indian constitution's declaration that India is a "sovereign, socialist, *secular*, democratic republic"[143] is read as including a commitment to enforcing "separate but equal" family law.[144]

Ultimately, as this section's (brief) discussion of India's personal law system suggests, many people in India view family law pluralism as not only co-existing with the dignity of

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[142] For results of a poll of Muslim women which are consistent with this observation, see, for example, *supra* note 141. More generally, Madhavi Sunder has noted how

> [i]ndividuals in the modern world [are] increasingly demand[ing] change *within* their religious communities in order to bring their faith in line with democratic norms and practices. Call this the New Enlightenment: Today, individuals [are] seek[ing] reason, equality, and liberty not just in the public sphere, but also in the private spheres of religion, culture, and family.

Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1403 (2003) (emphasis added). Finally, Kumkum Sangiri has remarked on the (perhaps) less-than-obvious patriarchal objectives of India's ostensibly liberatory/secular state by noting that "[b]eneath the opposition between a state-imposed uniform civil code and personal laws that are sought to be reformed from 'within' a community . . . lies an unresolved but entirely patriarchal concern: who will control and regulate women . . . ." Kumkum Sangari, *Politics of Diversity: Religious Communities and Multiple Patriarchies*, ECON. & POL. WKLY. 3287, 3296 (1995).

[143] INDIA CONST. Preamble (emphasis added). The Constitution of India also includes a number of equality provisions. *See, e.g.*, INDIA CONST. art. 14 (equality before law), art. 15 (sex equality), art. 16 (equality of opportunity in public employment), art. 17 (abolition of untouchability).

Many Indian feminists (and Hindu nationalists) have argued that the maintenance of different family laws for persons of different religious faiths is inconsistent with the Constitution (and its guarantees of religious and sexual equality). *See generally* FLAVIA AGNES, LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA 192-202 (2000). However, many members of minority religious faiths have vociferously disagreed, basing their arguments on Article 26 of the Constitution, amongst other arguments. *See generally id.* at 100-23, 192-202. Article 26 guarantees that "[s]ubject to public order, morality and health, every religious denomination or any section thereof shall have the right . . . to manage its own affairs in matters of religion." INDIA CONST. art. 26.

Both sides of this dispute utilize Article 44's judicially-unenforceable plea for a "uniform civil code" in support of their constitutional and legal positions. *See* AGNES at 193. Article 44, part of the Constitution's judicially-unenforceable "Directive Principles of State Policy," reads as follows: "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India." INDIA CONST. art. 44.

[144] Members of the Bharatiya Janata Party (BJP), a Hindu nationalist party, would likely disagree. However, on this point, even these members would likely concede that their position that secularism is threatened by allowing minorities to be kept "separate and not equal" is a position swimming against the tide of history and practice. *See* WILLIAMS, *supra* note 132, at 171-72 (quoting a BJP publication and its use of "separate and not equal" phraseology).

minorities, but actually as somewhat of a *pre-requisite* for that dignity. Of course, there are intense disagreements among different members of any given minority group about the proper content of the family law that applies to the group.[145] Furthermore, these disagreements are often resolved at the expense of minority women. These (fortunate) debates and (unfortunate) abuses aside, the legal and political situation in many personal law systems nonetheless presents a very different take on the relationship between dignity and family law pluralism than that found in the California and Connecticut supreme courts' recent opinions. In these systems with communally-premised personal law systems, both refuge and dignity are found outside of the confines of majoritarian marriage and family law.

D. Conclusion

The California and Connecticut supreme courts viewed gay and lesbian dignity as *inextricably* bound up in formal equality and access to the (heterosexual) institution of majoritarian marriage. This account of dignity is not necessarily wrong,[146] but as the discussion in this Part (and Part I) has suggested, this account involves more assertion than analysis, and ignores the ways in which numerous people around the globe have felt that something other than mimicry of the majority creates a feeling of dignity in their lives. In this respect, religious people (amongst others) both inside and outside of the United States have attempted to exert *agency* over—and, hence, experience dignity with respect to—their family law.[147] In other words, these people have demonstrated how dignity inheres in being active authors of their law and, in this way, exercising both authority over and responsibility for this law.[148]

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[145] One might note that, at the very least, this intra-community disagreement is on full display in India, whereas legal and judicial discussions concerning same-sex marriage in the United States obscure and ignore debate within the gay and lesbian community about the desirability of marriage.

[146] *See* discussion *supra* note 68.

[147] For a more detailed discussion of how I am understanding and using the term "agency" in this Article, see *infra* Part III.

[148] This is the case even when (religious) people have sought particularized religious *exceptions* from otherwise generally-applicable law, as opposed to *affirmatively* drafting altogether-alternative legislation containing independently-authored norms. In this respect, arbitration of family law matters often involves *both*

The family law terrain in Canada, the United Kingdom, and India has been, and remains, contested. While great uncertainty exists in how these (and many other) states will ultimately resolve the competing interests and pressures present in these contemporary family law debates, what seems far more certain is that legal pluralism with respect to the state's regulation of the family will persist (and perhaps predominate) as a mode of contemporary governance. Majorities' intolerance of minorities threatens this pluralism, but this intolerance is also one of the major antecedents to the felt need for pluralism.

"Separate but equal" family law is thus here to stay, and arguments relating to minority rights, religious liberty, and human dignity will continue to support this kind of administration of family law, and also to put pressure on it. Ultimately, then, dignity is a much more complicated, contested, and dynamic concept than contemporary U.S. same-sex marriage advocates (including supportive courts) appear willing to acknowledge. Moreover, protecting gay and lesbian dignity may very well require something different than amalgamating gays and lesbians into a heterosexually-dominated majoritarian marriage regime, in which gays and lesbians will continually be democratically outmatched with respect to this regime's substantive content and norms. The next Part explores what a different approach to gay and lesbian dignity in the United States might look like.

III. SPECIAL RIGHTS, DIGNITY, AND THE FUTURE OF GAY AND LESBIAN RELATIONSHIP-RECOGNITION

> Marriage is not the same thing as love. For their part, heterosexuals have shown us what marriage is worth and how long it lasts. . . . Rather than accept the narrowness under which heterosexuals themselves chafe, why not invite them to share in what we [homosexuals] know about the multiples ways in which relationships can form? If we come to heterosexuals and their institution, we valorize the mechanism of our oppression. Let them come to us.[149]
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> —Steven K. Homer (1994)

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exception from otherwise generally-applicable family law and the affirmative legislation of law (both procedural and substantive) to govern the issues at hand.

[149] Steven K. Homer, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 504, 530 (1994).

> At first I was calling it getting "civilized," but that wasn't going over very well. "Getting unionized," that's what the TV reporters are saying. Others are saying "united."[150]
>
> —Jon Pominville
> Middlebury, VT Town Clerk (2000)

Buried in the California Supreme Court's decision in *In re Marriage Cases* was the following observation by the court about the need for same-sex couples to be able to "marry," as opposed to enter into a (equally privileged) "domestic partnership":

> Because the constitutional right of privacy ordinarily would protect an individual from having to disclose his or her sexual orientation under circumstances in which that information is irrelevant, the existence of two separate family designations—one available only to opposite-sex couples and the other to same-sex couples—impinges upon this privacy interest, and may expose gay individuals to detrimental treatment by those who continue to harbor prejudices that have been rejected by California society at large.[151]

While playing a minor part in its overall decision, the court's invocation of the proverbial "closet" to justify same-sex marriage rights is instructive more generally about some of the real injuries to gay and lesbian dignity, as well as other gay and lesbian interests, that the push for same-sex marriage is inflicting. And indeed, in addition to giving the closet a new door (and lock), gay and lesbian activists' pursuit of same-sex marriage rights has resulted in a number of other curious tactics. These include 1) conveying to fellow (sexual) minorities that they are not welcome to join the struggle for gay and lesbian civil rights,[152] 2) re-validating sexual shame and

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[150] Carol Ness, *Couples Flock to Vermont, Only Legal Place to Get Hitched*, S.F. EXAMINER, Aug. 7, 2000, at A1 (quoting Jon Pominville, a town clerk in Middlebury, Vermont, on public confusion over how to refer to people getting a Vermont civil union).

[151] *In re* Marriage Cases, 183 P.3d 384, 446 (Cal. 2008), *superseded by* CAL. CONST. art. I, § 7.5.

[152] I am thinking here of how some same-sex marriage advocates have opposed the extension of rights that they are seeking to those wishing to enter polygamous marriages. For a sampling of academic literature that advocates this two-track approach to the right to marry, see, for example, Hema Chatlani, *In Defense of Marriage: Why Same-Sex Marriage Will Not Lead Us Down A Slippery Slope Toward the Legalization of Polygamy*, 6 APPALACHIAN J.L. 101 (2006) (arguing that the legalization of polygamous marriage would pose problems for social order and gender equality that same-sex marriage does not); Jaime M. Gher, *Polygamy and Same-Sex Marriage: Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559 (2008) (arguing that both polygamists and gays and lesbians have faced persecution in the U.S. but nonetheless suggesting, mostly for tactical

mockery as legitimate weapons in American political discourse,[153] and 3) running rough-shod over (intimate) logic and experience.[154]

Some of these tactics have surely been born out of frustration, while others are the result of nakedly tactical considerations. With respect to tactical decisions about who to include in the movement, and who to exclude, given the difficult (if not dangerous) social climate in the United States with respect to gay and lesbian issues, it is not surprising that gay and lesbian activism has tried to weave a path of least resistance for itself, distancing itself publicly from politically unpopular allies in an attempt to mimic the majority.

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reasons, that same-sex marriage activists distance themselves from pro-polygamy activists); Elizabeth Larcano, *A "Pink" Herring: The Prospect of Polygamy Following the Legalization of Same-Sex Marriage*, 38 CONN. L. REV. 1065, 1067 (2006) (arguing that there are a large number of differences both between polygamous and same-sex unions, and between polygamist and gay and lesbian persons); Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1617 (1997) (arguing that polygamous marriages are patriarchal while same-sex marriages are not).

[153] I am thinking here of the gay and lesbian protests which erupted around the country in late 2008 in the wake of the passage of Proposition 8 in California. *See, e.g.*, *Gay-Marriage Rally Held at NYC Mormon Temple*, Associated Press, Nov. 12, 2008, *available at* http://www.newsday.com/news/new-york/gay-marriage-rally-held-at-nyc-mormon-temple-1.885717?qr=1; *Prop 8 Protest in New York City*, TOWLEROAD, Nov. 9, 2008, *available at* http://www.towleroad.com/2008/11/prop-8-protes-1.html; Chris Rovzar, *Gays Turn Anger, Snappy Sarcasm Toward Mormon Church*, DAILY INTEL, Nov. 13, 2008, *available at* http://nymag.com/daily/intel/2008/11/gays_turn_anger_snappy_sarcasm.html. A constant refrain at these protests involved the willful distortion and mocking disrespect of religious (and, most notably, Mormon) beliefs and practices. Some signs at these protests contained the following slogans and statements: "You want three wives, I want one husband," "I Don't Need 5 Wives Just 1 Husband," and "Keep Your Magic Undies Off My Civil Rights." For photos of signs at Proposition 8 protests outside of Mormon temple and elsewhere, see http://www.nbclosangeles.com/news/local/Prop_8_Protestors_March_LA_Streets.html (last visited Feb. 11, 2010), http://lh6.ggpht.com/_780ZZpC_ZNU/SRgdL1yCBwI/AAAAAAAAAjs/nIvwa8j4u4w/s400/Not5WivesCropx390.jpg (last visited Feb. 11, 2010), http://www.utne.com/uploadedImages/utne/blogs/Spirituality/Prop8protest.jpg (last visited Feb. 11, 2010). For a statement from the Mormon religion's leadership firmly disavowing polygamy, see The Church of Jesus Christ of Latter-Day Saints, Polygamy: Latter-day Saints and the Practice of Plural Marriage, *available at* http://www.newsroom.lds.org/ldsnewsroom/eng/background-information/polygamy-latter-day-saints-and-the-practice-of-plural-marriage (last visited Feb. 11, 2010).

[154] For example, arguing for same-sex marriage rights, one attorney has remarked: "I used to say, 'Why do we want to get married? It doesn't work for straight people . . . .' But now I say we should care: They have the privilege of divorce and we don't. We're left out there to twirl around in pain." Kirk Johnson, *Gay Divorce: Few Markers in This Realm*, N.Y. TIMES, Aug. 12, 1994 (quoting Margaret M. Cassella). While for some people there might be something glamorous, and hence desirable, about the figure of the divorcée, I believe it is rather doubtful to argue that gays and lesbians need marriage because they want divorce. This would seem to be a case of putting the cart before the horse.

Nonetheless, such political and legal strategies are compromising gay and lesbian dignity, as are strategies that seek alignment with institutions that have been and will remain captive to majoritarian interests, i.e. institutions where gays and lesbians will be unable to exercise much agency with respect to laws and policies that will directly affect gay and lesbian lives and well-being. Marriage is one such majoritarian institution.

This Part aims to sketch a vision for gay and lesbian dignity that is different than the coercive one articulated by the California and Connecticut supreme courts, and also by leading gay and lesbian advocacy organizations which are attempting to legalize same-sex marriage. This alternative, and arguably more robust, vision of gay and lesbian dignity is one which is informed by the comparative experience discussed in Part II. It is also one that is informed by a close reading (below) of a desire expressed by many ordinary gays and lesbians post-Proposition 8, namely a desire for more *agency* with respect to laws and policies affecting gay and lesbian lives. Ultimately, the vision of dignity sketched here is one which cooperates neither with any homophobic desire to socially erase gay and lesbian existence, nor homophobic efforts to force gays and lesbians to conform with heterosexually-authored codes of behavior.

This Part will repeatedly invoke the idea of "agency," so a few words of how this term is being used are in order. What constitutes agency is, obviously, a difficult question, which requires more discussion than space here permits. Briefly, however, this Part understands the existence of (individual or collective) "agency" to mean the ability of persons to engage in a complicated "calculus of action"[155] directed toward their "self-realization/self-fulfillment."[156] However, this Part does not employ the term as a synonym for (personal or communal) "autonomy," or any simplistic notion of (personal or communal) "sovereignty." Similarly, this Part does not mean to equate "agency" with simplistic notions of "freedom" or "choice" or otherwise suggest that agency implies a socially and culturally unfettered ability to pick and choose with abandon what one desires in life. Such freedom (of choice) does not exist in this

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[155] *See* PERVEEZ MODY, THE INTIMATE STATE: LOVE-MARRIAGE AND THE LAW IN DELHI 193 (2008).

[156] SABA MAHMOOD, POLITICS OF PIETY: THE ISLAMIC REVIVAL AND THE FEMINIST SUBJECT 13 (2005).

life. Instead, agency is more about the *authorship* of one's (individual or collective) path, given the opportunities, obstacles, language, and grammar that one's social, cultural, and political contexts continually (and somewhat unpredictably) provide.

Indeed, the "separate" system of gay and lesbian family law that this Part argues for—and which this Part explicitly links to the idea of gay and lesbian agency—will have to, under existing governmental structures, come into force through legislation passed by heterosexually-dominated state legislatures. This is unavoidable. That being said, the thought here is that gays and lesbians have the very real possibility of exercising a certain kind of political ownership over "domestic partnerships," "civil unions," or other forms of gay and lesbian relationship-recognition that any given state legislature might create. With this gay and lesbian ownership, significant gay and lesbian authorship of gay and lesbian law could follow—perhaps informed by practice elsewhere, such as India, where the national Parliament is responsible for legislating and otherwise enabling (the bulk of) religious communities' personal law, and these same communities have been able to exercise a great deal of say with respect to this legislation.[157] This would be agency, as this Part understands and uses this idea.

More specifically, this would be *American agency*, and indeed this Part does not understand or use "agency" in a way that is de-linked from local context, which includes local imaginations of the possible. With respect to these local imaginations, in some contexts—including perhaps the contemporary United States—"[agency] is entailed not only in those acts that resist norms but also in the multiple ways in which one *inhabits* norms."[158] In other words, in some contexts, agency exists where one finds "*submission* to certain forms of (external) authority."[159] This being the case, this Part does not insist that gay and lesbian agency find expression in a system of relationship-recognition and family law that is completely different than majoritarian marriage and majoritarian family law. The "separate" system of gay and lesbian family law that this Part (following extant Californian practice) suggests, and

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[157] *See* Galanter & Krishnan, *supra* note 121, at 109 (2000). *But see* WILLIAMS, *supra* note 132, at 98-99.

[158] MAHMOOD, *supra* note 156, at 15.

[159] *Id.* at 31 (emphasis added).

begins to sketch, is not intended to be different for difference's sake. In fact, no pluralist system of law anywhere in the world functions in this facile way. Instead, the separate system of family law that this Part suggests is intended to provide a space[160] from which gays and lesbians can argue for, and implement, a different set of norms than majoritarian ones *if and when* differences with the majority arise. Preserving this potential for difference is important for gay and lesbian agency and—as this Article understands the relationship between agency and dignity—gay and lesbian *dignity*.

This Part proceeds in three sections. The first section shows, very generally, how one might see Proposition 8 in a positive light, by demonstrating how this allegedly anti-gay ballot initiative resulted in something that anti-gay activists have feared and railed against for some time now, namely "special rights" for gays and lesbians.[161] Indeed, the fact that Proposition 8 effectively resulted in a successful initiative for gay and lesbian "special rights" signifies an important reworking of anti-gay activists' political and legal agendas. Consequently, gay and lesbian activists would be remiss in not grappling with—and capitalizing on—this important shift in the legal and political terrain and the unprecedented opportunities for gay and lesbian agency (and dignity) that have opened up as a result of Proposition 8.

Building on the first section's re-reading of Proposition 8 through the lens of "what your enemies do *not* want for you might very well be what you *should* want," the second section of this Part begins to provide a more affirmative account of how parallel relationship-recognition regimes defend important gay and lesbian interests. With respect to these interests, this section first engages seriously with what ordinary gays and lesbians expressed about their needs after Proposition 8. As this section reads those needs, they included *more agency* vis-à-vis the laws that govern gay and lesbian lives and families.

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[160] Jim Bohman argues in a similar vein when he writes that "sometimes separate jurisdictions can serve a public function, to the extent that they provide the public *space* needed for groups like Native Americans to have a more coherent and effective voice in the larger, civic public sphere." James Bohman, *The Moral Costs of Political Pluralism: The Dilemmas of Difference and Equality in Arendt's "Reflections on Little Rock"*, *in* HANNAH ARENDT: TWENTY YEARS LATER 53, 73 (Larry May & Jerome Kohn eds., 1996) (emphasis added).

[161] For a history of the anti-gay use of the "special rights" terminology, see generally TINA FETNER, HOW THE RELIGIOUS RIGHT SHAPED LESBIAN AND GAY ACTIVISM 84-100 (2008).

After diagnosing this gay and lesbian desire for more agency with respect to the laws affecting gay and lesbian lives, this section moves on to diagnose and discuss in detail how this agency is threatened by gay and lesbian amalgamation into existing majoritarian marriage regimes in the United States. Like Part II's discussion of the legal and political experiences of minorities around the globe and the desire for more agency that these experiences have given rise to, the discussion in this section similarly provides examples of (heterosexual) majoritarian indifference and/or hostility in the contemporary United States (as well as just across the border in Canada). Accordingly, in the same way that global minorities have sought both dignity and refuge via pluralist legal set-ups, this section suggests that such set-ups might serve as helpful templates for gay and lesbian action, and dignity, in the contemporary American same-sex marriage debates. In other words, this section argues that gay and lesbian relationship-recognition politics in the United States should be a great deal less sanguine about the dignity that majoritarian marriage slyly promises, and why American gay and lesbian politics should be more receptive to learning from the politics and practices of legal pluralism elsewhere.

The final section of this Part concludes by offering two specific suggestions of how gay and lesbian non-majoritarian relationship-recognition regimes might offer different—and better—alternatives to those provided by majoritarian marriage. While, as this Part has already discussed, it is not at all necessary for gay and lesbian agency that gay and lesbian relationship-recognition regimes be entirely different than majoritarian marriage, there are some distinct ways in which domestic partnership/civil union regimes might be structured in order to better demonstrate their distinct worth. In making these two particular suggestions—one concerning the nomenclature of gay and lesbian relationship-recognition regimes, and the other concerning the substance of such regimes—this concluding section will also be able to respond to two major concerns that contemporary same-sex marriage advocates will likely have about this Part's arguments and proposals. These concerns are: 1) the alleged inability of the "domestic partnership" or "civil union" nomenclature to provide anything more than an inferior and insulting neologism in the face of the magical-realism of the word "marriage," and 2) the restrictions on "choice" that are implicit in creating separate

relationship recognition regimes that are each available *only* to certain type of couples (e.g. same-sex versus opposite-sex).

The conventional terrain over which the same-sex marriage debates are transpiring is creating serious impediments to gay and lesbian dignity. As a result, this Part attempts to re-conceptualize and reframe basic terms of reference in the same-sex marriage debates in order to advance gay and lesbian dignity. As this Part demonstrates, what looks like homophilia can very much be homophobia, and what looks homophobic can prove homophilic. That being said, this Part focuses less on the conceptual, legal, and political missteps of advocates for same-sex marriage—the homophobia of their brand of homophilia—than it does on the homophilia in others' homophobia. At one level, then, the goal of this Part is to find homophilic opportunity in some of the ironies that have been opened up in a world where (ostensibly) homophobic initiatives, such as Proposition 8, are par for the course. More particularly, this Part means to demonstrate how same-sex "domestic partnerships" or "civil unions"—separate from opposite-sex "marriage"—can be dignity-enhancing for gays and lesbians. Indeed, they are not "separate but equal" institutions, but potentially "separate *and better*" ones.

A. Special Rights and the Anti-Homophobic Promise of Proposition 8

To begin to see how measures like Proposition 8 (and the plural relationship-recognition system that it returned California to) might align with gay and lesbian interests, because of the way that this measure resulted in *special* recognition of same-sex relationships, one need only examine a provision attached (ironically) to recent legislation banning discrimination on the basis of sexual orientation in the State of Connecticut. According to this 2005 addition to the General Statutes of Connecticut, nothing contained in the Connecticut anti-discrimination legislation shall be

> deemed or construed (1) to mean the state of Connecticut condones homosexuality or bisexuality or any equivalent lifestyle, (2) to authorize the promotion of homosexuality or bisexuality in educational institutions or require the teaching in educational institutions of homosexuality or bisexuality as an acceptable lifestyle, (3) to authorize or permit the use of numerical goals or quotas, or other types of affirmative action programs, with respect to homosexuality or bisexuality in the administration or enforcement of the [state's antidiscrimination laws], (4) to authorize the recognition

> of or the right of marriage between persons of the same sex, or (5) to establish sexual orientation as a specific and separate cultural classification in society.[162]

The incredible fear that homosexuality might gain social credence as either a lifestyle or recognized cultural group is palpable in this recent legislative declaration.

The fear that gays and lesbians might find benefit from or even want "special rights" is older than this recent Connecticut legislation might indicate. Indeed, before there was this Connecticut law (and before there was Proposition 8), there was Amendment 2, the infamous 1992 amendment to the Colorado State Constitution that declared that

> [n]either the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.[163]

As is well known, Amendment 2 was challenged using the federal constitution in the U.S. Supreme Court, the result of which was the landmark *Romer v. Evans* decision.[164] The terrain over which the legality of Amendment 2 was fought, both inside and outside of the Supreme Court, concerned whether Amendment 2 was an appropriate response to the supposed menace of "special rights" for gays and lesbians (and bisexuals). As the Supreme Court described it, "[Colorado's] principal argument in defense of Amendment 2 is that it puts gays and lesbians in the same position as all other persons. So, the State says, the measure does no more than deny homosexuals special rights."[165]

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[162] CONN. GEN. STAT. § 46A-81R (2005), *repealed by* R.B. 899, 2009 Gen. Assem., Jan. Sess. (Conn. 2009) (implementing the Connecticut Supreme Court's *Kerrigan v. Comm'r of Pub. Health* decision, recognizing marriages and relationships providing "substantially the same rights, benefits, and responsibilities entered into in another state or jurisdiction," and providing for the merger of "existing civil unions into marriages" in Connecticut).

[163] COLO. CONST. art. 2 § 30(b), *invalidated by* Romer v. Evans, 517 U.S. 620 (1996).

[164] Romer v. Evans, 517 U.S. 620 (1996).

[165] *Id.* at 626; see also Justice Scalia's dissenting opinion, in which he writes:

> [A]ssuming that, in Amendment 2, a person of homosexual 'orientation' is someone who does not engage in homosexual conduct but merely has a tendency or desire to do so, *Bowers* still suffices to establish a rational basis

In its opinion, the Supreme Court disagreed with the State of Colorado, holding that Amendment 2 violated the Equal Protection Clause of the U.S. Constitution.[166] In the process, the Court also found that it was not gay and lesbian people who were seeking legal peculiarity in Colorado, but the proponents of Amendment 2 themselves. Wrote the Court:

> [T]he amendment imposes a special disability upon [homosexual] persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury. We find nothing special in the protections Amendment 2 withholds.[167]

The Connecticut legislature's recent efforts to pre-empt an (alleged) gay and lesbian effort to be viewed as "special" is just the latest installment, then, in what has been a recurring theme in anti-gay polemics in the United States. Similarly, same-sex "marriage" can be viewed as the latest instance of gay and lesbian advocates explicitly (and fearfully) rejecting any mark of special-ness or distinction. Given the history of majoritarian pillorying of gays and lesbians for their allegedly constant attempts to seek special legal accommodation, Proposition 8's creation of (or return to) a special relationship-recognition regime for same-sex couples is extremely noteworthy. Indeed, given anti-gay fears of how gays and lesbians might fruitfully capitalize upon any sort of potential special recognition by the law, the fact that Proposition 8 and other measures actually create "special" parallel relationship-recognition regimes for gay and lesbian persons deserves closer scrutiny and appreciation from advocates for gays and lesbians. Now may very likely be the time to re-examine the typical gay and lesbian urge to retreat into the majority.

Of course, this will not be easy for such advocates, given the particular course that anti-gay stigmatization has taken in

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> for the provision. If it is rational to criminalize the [homosexual] conduct [according to our *Bowers* precedent], surely it is rational to deny *special* favor and protection to those with a self-avowed tendency or desire to engage in the conduct.

Id. at 642 (Scalia, J., dissenting) (emphasis added).

[166] *Id.* at 635.

[167] *Id.* at 631.

the United States for so long. For gays and lesbians in the United States, there have long been negative consequences associated with the claim that gays and lesbians seek "special" and unique privileges in an otherwise egalitarian America, and also with the corollary description of homosexuality as mere "lifestyle"[168]—the same "lifestyle" that the "rich and famous" always already enjoy.[169] In response to this particular brand of anti-gay baiting, gay and lesbian advocates have typically fled from anything associated with either term.[170] However, in the

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[168] This pejorative use of "lifestyle" can be found in many places including, as Douglas NeJaime has documented, the educational context. *See* Douglas NeJaime, *Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation*, 32 HARV. J.L. & GENDER 303, n.139 (2009); *see also* ALA. CODE § 16-40A-2(c)(8) (LexisNexis 1992) (requiring sex education program materials to "emphasi[ze] . . . in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under the laws of the state"); ARIZ. REV. STAT. ANN. § 15-716(c)(1)-(3) (1995) (prohibiting instruction that (1) "[p]romotes a homosexual life-style," or (2) "[p]ortrays homosexuality as a positive alternative life-style"); S.C. CODE ANN. § 59-32-30(A)(5) (2004) (prohibiting health education programs from discussing "alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships except in the context of instruction concerning sexually transmitted diseases"); TEX. HEALTH & SAFETY CODE ANN. § 85.007 (Vernon 1999) (requiring education programs for persons eighteen-years-old and younger to "state that homosexual conduct is not an acceptable lifestyle and is a criminal offense").

[169] *See, e.g.*, *Romer*, 517 U.S. at 645-46 (Justice Scalia's finding that homosexuals have "high disposable income").

[170] For example, in the *Romer* litigation, it became *everyone's* objective in the litigation to flaunt their mundane, "un-special" credentials. Justice Kennedy's majority opinion, for example, found that

> Amendment 2 confounds th[e] normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. The absence of precedent for Amendment 2 is itself instructive . . . . It is not within our constitutional tradition to enact laws of this sort.

Id. at 633. Justice Scalia's minority, dissenting opinion argued the elite nature of both American homosexuals and their supporters:

> It is . . . nothing short of preposterous to call "politically unpopular" a group [e.g. homosexuals] which enjoys enormous influence in American media and politics. . . . When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn.

Id. at 652.

As a result, whatever victory for gay and lesbian people that *Romer*'s outcome represented, the opinion's silences and lapses also tell a story of equally-important missed opportunities. Examining the history which led up to this state constitutional amendment, as well as the Supreme Court's particular focus in this case, one finds the entire legal battle centered around the question of whether Amendment

process, they have arguably stymied consideration that they are akin to other sorts of "cultural" groups that might benefit from multiculturalist policies and the "protected status" (or even "quotas"[171]) that forms of multiculturalism can distribute to cultural groups. As a result of this pressure to culturally dissolve, and also politically disassociate from controversial social "re-engineering" plans, gay and lesbian activists have found it difficult to ask for (or even imagine the possibility of) *strong* remedies for discrimination that have been implemented (however unevenly or ineffectively) with respect to other discriminated-against groups.[172] Affirmative action, for example, is one such remedy, and the surprise and debate—both within and without the gay and lesbian community—that greeted Middlebury College's 2006 announcement (later disavowed) that it would affirmatively act to admit openly-homosexual students is but one example of this.[173]

2's eradication of Colorado municipal non-discrimination statutes (amongst other measures put into place in Colorado ensuring non-discrimination on the basis of sexual orientation) marked an end to "special-ness" and a return to equality, or whether this outcome itself created a state of exception and marked some people as legal "outlaws." In other words, only Amendment 2's silencing of gay and lesbian people's "claims of discrimination" was dealt with in the case; the other parts of Amendment 2 which envisioned the possibility of giving gay and lesbian people "minority status, quota preferences, [and/or] protected status" were completely ignored. Indeed, most fundamentally, the debate in the case failed to ask, "What's wrong with being 'special'?"

[171] *See* text accompanying *supra* notes 162 and 163.

[172] This is not to say that gays and lesbians are necessarily in the *same* position as discriminated-against racial and ethnic minorities in the United States, nor that gays and lesbians should imbricate themselves in all of the tropes and technologies relating to countering racial and ethnic discrimination (e.g. "separate but equal") in the United States, but it is to say that "despite the adoption of a goal of civil rights, gay collective identity is at present closer in form to that of the white ethnic groups than to those of racial minorities. Movement away from a political consciousness based on white 'ethnicity' . . . might increase the gay movement's capacity to pose a more fundamental challenge to the socio-sexual order." Steven Epstein, *Gay Politics, Ethnic Identity: The Limits of Social Constructionism, in* FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY 239, 291 (Edward Stein ed., 1990).

[173] *See* Heather Schwedel, *Pondering Affirmative Action for Gays*, THE DAILY PENNSYLVANIAN, Oct. 30, 2006, *available at* http://media.www.dailypennsylvanian.com/media/storage/paper882/news/2006/10/30/News/Pondering.Affirmative.Action.For.Gays-2409198.shtml, for an example of the confusion and debate that accompanied the supposed Middlebury College announcement; *see also* John Calapinto, *The Harvey Milk School Has No Right to Exist. Discuss*, N.Y. MAG., May 21, 2005, *available at* http://nymag.com/nymetro/news/features/10970/ (discussing liberal unease with educational admission policies that give preferential treatment to gay and lesbian students). *See generally* David Luc Nguyen, *Taking Affirmative Action: Do Gays Deserve the Same Boost Into College as Racial Minorities?*, Jan. 30, 2007, *available at* http://www.thefreelibrary.com/Taking+affirmative+action:+do+gays+deserve+the+same+boost+into...-a0159593303.

Thus, as much as the contemporary gay and lesbian civil rights movement links itself to the civil rights struggles of before, an important disjuncture emerges with respect to the issue of group identity and group cohesiveness. This has important ramifications for the question of what to ask for legally and politically. The next section argues that gays and lesbians should not abandon the prospect of "special rights," and the legal agency they can result in, especially where an unlikely opportunity to get both has finally presented itself in the form of domestic partnerships, civil unions, and the like.

B. The Possibility of Claiming Special Rights and Dignity

Gay and lesbian advocates' fear of "lifestyle" and "special rights" allegations is real.[174] However, this understandable fear need not be paralyzing. And, indeed, many ordinary gay and lesbian people viewed Proposition 8 not as a paralytic, total defeat, but as a spur for action. This section first demonstrates how gay and lesbian people in the United States, like other people around the globe, have recently been arguing for a great deal more agency vis-à-vis the laws that directly impact their lives and families. It then proceeds to show how the amalgamation of gays and lesbians into majoritarian marriage regimes threatens this agency. This discussion sets the stage for the next section's exploration of how a more legally-pluralistic relationship-recognition system provides for gay and lesbian agency—and dignity—in ways that gay and lesbian advocates' pursuit of majoritarian marriage has not, and cannot.

In the aftermath of the Proposition 8 vote, many gays and lesbians expressed the feeling that the vote left them feeling powerless with respect to their destiny, in at least three different ways. First, many gay and lesbian Californian's lamented the control that *non-Californian*, *out-of-state* forces seemed to have over the outcome of the vote. For example, Lorri Jean, CEO of the Los Angeles Gay and Lesbian Center publicly stated:

> We have been critical of all of the *out-of-state* conservative religious groups that made significant contributions to the campaign, including the Knights of Columbus National Headquarters in Connecticut and Focus on the Family in Colorado. But the truth is that the LDS church leadership in Utah specifically directed its

[174] *See, e.g.*, Cruz, *supra* note 15, for an articulation of this common fear.

> membership to get involved with the Yes campaign in an unprecedented way—both in terms of volunteer time and dollars.[175]

Second, as this statement by Jean simultaneously reveals, many gay and lesbian people felt that Proposition 8's passage demonstrated how *religious* groups were dictating the laws of a *secular* state, which many gay and lesbian Americans clearly feel an especially strong (if secular) attachment to.[176] Finally, and similarly, there were many gay and lesbian laments that the civil rights of a *minority* should not be dictated by the votes of a *majority*.[177]

Agency, then, has been an important issue for many ordinary gay and lesbian people, even if it has been neglected by lawyers, judges, and academics in their discussions of the same-sex marriage issue. Taking this concern for gay and lesbian agency seriously, the rest of this section will highlight the ways in which a unitary relationship-recognition system

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[175] Lorri L. Jean, *No on Proposition 8 Frequently Asked Questions*, http://laglc.convio.net/site/PageServer?pagename=Prop_8_FAQ (last visited Jun. 12, 2009) (emphasis added).

[176] *See, e.g.*, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, THE RELIGIOUS RIGHT'S WAR ON LGBT AMERICANS: CHURCH, STATE, AND YOUR FREEDOM AT RISK 1 (noting that Rev. Barry W. Lynn, executive director of Americans United for Separation of Church and State, had previously commented on Proposition 8 by stating: "Allowing powerful religious groups to take away minority rights by referenda is fundamentally at odds with what America is about."), *available at* http://www.au.org/resources/brochures/the-religious-rights-war-on-lgbt-americans/lgbt-2009.pdf (last visited Jan. 15, 2010). For a more quotidian example of this sentiment, see Linda Morgan, *Letter to the Editor, Church and State*, S.F. CHRON., Oct. 25, 2008, at B4 (arguing that "[t]he separation of church and state is meant to prevent the use of state power to enforce the religious views of any particular group on society as a whole. It is, in fact, the proponents of Proposition 8 who are seeking to compel all of us to abide by their vision of right and wrong.").

[177] *See, e.g.*, Jennifer Harper, *Inside the Beltway*, WASH. TIMES, Nov. 6, 2009, at A7 for a quote by Geoff Kors, executive director of Equality California, stating his belief that "people's lives should never be put up for a popular vote. Civil rights for minority groups should be decided by the sound reason of the legislature and the courts—not by the will and whims of the majority."; see also Frank Rich, Op-Ed., *The Bigots' Last Hurrah*, N.Y. TIMES, Apr. 19, 2009, § WK, at 10, for this acerbic commentary:

> Some [same-sex marriage] opponents grumbled anyway [after the Iowa Supreme Court decision legalizing same-sex marriage], reviving their perennial complaint, dating back to Brown v. Board of Education, about activist judges. But the judiciary has long played a leading role in sticking up for the civil rights of minorities so they're not held hostage to a majority vote.

Finally, Stuart Milk, nephew of Harvey Milk, has recently proclaimed that "[t]aking away a civil right we had is a violent act. . . . As Harvey would say, when you let the majority deprive the minority of their civil rights, you start a shopping list. . . . Who is next?" *See* Meredith May, *Rally in Castro on Eve of Prop. 8 Hearing*, S.F. CHRON., Mar. 5, 2009, at B1.

threatens this agency, in order to set the stage for the next section's specific (yet preliminary) suggestions for how a pluralist system might do things (somewhat) differently and (very likely) better.

Again, the best place to begin to understand how gay and lesbian agency is threatened by a unitary marriage regime for one-and-all is the California Supreme Court's recent same-sex marriage decision. In this respect, the California Supreme Court, while discussing the nomenclature politics of relationship-recognition, opined that

> because of the long and celebrated history of the term "marriage" and the widespread understanding that this word describes a family relationship unreservedly sanctioned by the community, the statutory provisions that continue to limit access to this designation exclusively to opposite-sex couples—while providing only a novel, alternative institution for same-sex couples—likely will be viewed as an official statement that the family relationship of same-sex couples is not of comparable stature or equal dignity to the family relationship of opposite-sex couples.[178]

Distilling the California Supreme Court's opinion here, then, one learns that, in California, there is apparently one community ("the community"), which for a long time has "unreservedly" endorsed an unchanging, universally understood (i.e., "well-understood") institution known as "marriage."

One might worry that the monolithic, "transcendent"[179] vision of marriage painted by the California Supreme Court here—and, later, by the Connecticut Supreme Court[180]—is a decidedly un-secular one. Not only is there an undeniable shade of sectarian monotheism coloring this vision of marriage—the single, indivisible god here being "marriage" itself—but also, at times, an outright religiosity presents itself in these opinions. Discussing the nature of marriage, for example, the Connecticut Supreme Court wrote:

> [T]he following observation of Connecticut Catholic Conference, Inc., which filed an amicus brief in support of the defendants, is relevant. "In our culture, there has been a consensus on . . . [the] unique ethical foundations [of marriage]: that the union should be for life (permanency), that the union should be exclusive (fidelity), and that

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[178] *In re* Marriage Cases, 183 P.3d 384, 452 (Cal. 2008), *superseded by* CAL. CONST. art. I, § 7.5.

[179] *See* Kerrigan, 957 A.2d at 418.

[180] *Id.*

> the love that sustains and nurtures the union should be characterized by mutual support and self-sacrifice (selflessness)." These ideals apply equally to committed same sex and committed opposite sex couples who wish to marry.[181]

Thus, here one finds a secular court quoting a religious brief in support of an antiquated vision of (heterosexual) marriage.[182] It would seem to be a small step between this kind of religious influence on secular marriage and the type of religious influence on secular government that many gays and lesbians protested in the aftermath of Proposition 8.[183] To the extent that one is worried about gay and lesbian agency in one context, one might also be worried about it in the other.

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[181] *Id.* at n.76 (quoting Brief of Connecticut Catholic Conference, Inc. as Amicus Curiae in Support of Defendant-Appellees at 11, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2007) (No. 17716)). Of course, this is also a sectarian observation. With respect to divorce, there has been and remains intense disagreement between Catholics and Protestants over the availability of religious divorce, and both Christian traditions have serious objections with aspects of Muslim divorce law.

[182] It should be noted that once one puts this Connecticut opinion side-by-side with the California Supreme Court's opinion, one has two high courts describing marriage in a way that appears as monolithic and impervious to change as the description of marriage put forward by advocates working to keep the institution heterosexual. When this latter set of advocates cite "the historic and well-established nature of th[e opposite-sex] limitation [for marriage] and the circumstance that the designation of marriage continues to apply only to a relationship between opposite-sex couples in the overwhelming majority of jurisdictions in the United States and around the world," *In re* Marriage Cases, 183 P.3d at 450, they do so in order to accuse their adversaries of trying to "redefine" the (single possible) definition of "marriage." *Id.* at 470 (Corrigan, J., concurring and dissenting). For both (ostensibly pro-gay) advocates and (anti-gay) opponents of same-sex marriage, then, there can only be one type of marriage for "the" single community that supposedly comprises the polity. Given these (unnecessarily-inflated) stakes, one can perhaps better appreciate the intensity of the conflict between the two sides.

See also these additional comments by Justice Baxter:

> The bans on incestuous and polygamous marriages are ancient and deep-rooted, and, as the majority suggests, they are supported by strong considerations of social policy. *Our society* abhors such relationships, and the notion that our laws could not forever prohibit them seems preposterous. Yet here, the majority overturns, in abrupt fashion, an initiative statute confirming the equally deep-rooted assumption that marriage is a union of partners of the opposite sex. The majority does so by relying on its own assessment of contemporary community values, and by inserting in our Constitution an expanded definition of the right to marry that contravenes express statutory law.

Id. at 463 (Baxter, J., concurring and dissenting) (emphasis added). Of course, this statement ignores the fact that "incestuous" is a notoriously difficult term to define, and may or may not include first-cousin marriages. Given this reality, and the fact that there are surely people who are California citizens who, for religious or secular reasons, believe in polygamy (and "incest"), the assertion here of one society—"our society"—is truly a hegemonic move.

[183] *See supra* note 176.

Similar concerns about the possibility of gay and lesbian agency vis-à-vis majoritarian marriage can be raised in the aftermath of another same-sex marriage judicial decision, though one that did not uphold same-sex marriage rights. Specifically, in a recent (2006) opinion, *Hernandez v. Robles*, New York's highest court argued the existence of a persisting connection between marriage and hetero-sex. Explaining its decision to uphold the traditional legal definition of marriage in that state, the New York court emphasized that marriage was for heterosexuals, and heterosexuals only, because "[h]eterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. . . . [Same-sex] couples can become parents by adoption, or by artificial insemination or other technological marvels, but they do not become parents as a result of accident or impulse."[184] In other words, marriage is important as a social prophylactic when the condom breaks.

This judicial decision, and ones like it,[185] is indicative of the hold that majoritarian (heterosexual) concerns and priorities presently have, and will likely maintain, over the institution of marriage in the United States.

While the New York court ultimately used these majoritarian concerns and priorities to deny gay and lesbian access to the institution of marriage, it seems likely that such majoritarian concerns will motivate the future direction (including potential regression) of marriage *even if* gays and lesbians are allowed to "marry" the intimate partner of their choice.

If such a concern seems preposterous, one only has to examine what happened in Canada *after* the introduction of same-sex marriage rights there in 2005. In two recent cases,[186]

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[184] Hernandez v. Robles, 7 N.Y.3d 338, 359, 855 N.E.2d 1, 7 (2006). *See generally* Kenji Yoshino, Op-Ed., *Too Good for Marriage*, N.Y. TIMES, Jul. 14, 2006, *available at* http://www.nytimes.com/2006/07/14/opinion/14yoshino.html.

[185] *See* Standhardt v. Superior Court *ex rel.* County of Maricopa, 77 P.3d 451 (Ariz. 2003); Morrison v. Sadler, 821 N.E.2d 15, 24-26 (Ind. Ct. App. 2005); Conaway v. Deane, 932 A.2d 571 (Md. 2007); Lewis v. Harris, 908 A.2d 196, 216-17 (N.J. 2005); Andersen v. King County, 138 P.3d 963, 982 (Wash. 2006).

[186] P. (S.E.) v. P. (D.D.), [2005] 50 B.C.L.R.4th 358 (Can.); Thébeau v. Thébeau, [2006] 302 N.B.R.2d 190 (Can.). A focus on troubling, recent developments in Canada is especially appropriate here because of the way previous scholarly work has attempted to use Canadian experience to argue the unalloyed benefits of extending marital regimes to same-sex couples in the United States. *See, e.g.*, Mark E. Wojcik, *The Wedding Bells Heard Around the World: Years From Now, Will We Wonder Why We Worried About Same-Sex Marriage?*, 24 N. ILL. U. L. REV. 589, 636-47 (2004); Renée M. Landers, *A Marriage of Principles: The Relevance of Federal Precedent and*

Canadian provincial high courts have held extra-marital same-sex conduct to constitute "adultery" for purposes of the Divorce Act.[187] Under the historic Divorce Act, both "adultery" and "cruelty" constituted the sole fault grounds for divorce.[188] However, neither term is defined in the Act and, given the historically opposite-sex nature of marriage, it might seem that the former term necessarily involves opposite-sex intimacy.[189] As the British Columbia Supreme Court summarized the then-present law of "adultery" in its 2005 opinion, *P. (S.E.) v. P. (D.D.)*, "[a]lthough there is some uncertainty in the common law as to the precise definition of adultery, until now the courts in Canada have generally said that the act of adultery is between persons of the opposite sex."[190]

Nonetheless, in this case, the British Columbia Supreme Court deemed it necessary to "incremental[ly] change" this definition of adultery. It did so, noting that it took

> parliament's [recent] enactment of the *Civil Marriage Act* to be a legislative statement of the current values of our society [that is] consistent with the *Charter* [and which we are] obliged to use as a guide to [our] consideration of the current common law definition of adultery. Individuals of the same sex can now marry and divorce and the common law would be anomalous if those same-sex spouses were not bound by the same legal and social constraints against extra-marital sexual relationships that apply to heterosexual spouses.[191]

While deciding to apply the pre-modern heterosexual offence of adultery to homosexuals in this case, the court declined to define what specific acts of same-sex intimacy would constitute "adultery," given that historical case law on this point seemed to primarily concern penile-vaginal contact.[192]

International Sources of Law in Analyzing Claims for a Right to Same-Sex Marriage, 41 NEW ENG. L. REV. 683, 703-05 (2007).

[187] Canada Divorce Act, R.S.C., ch. 3 (1985).

[188] No-fault divorce is also available if "the spouses have lived separate and apart for at least year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding." *Id.*

[189] This conclusion is strengthened by the fact that, historically as well, "engag[ing] in a homosexual act" provided a *separate* fault ground for divorce. *See* P. (S.E.) v. P. (D.D.), [2005] 50 B.C.L.R.4th 34 (Can.) (citing Canada Divorce Act, R.S.C. ch. 24 (1967-68)). This provision was removed in 1985, leaving "adultery" and "cruelty" as the sole fault grounds for divorce. *See id.* at 4.

[190] *Id.*

[191] *Id.* at 16-17.

[192] But see *Orford v. Orford*, [1921] 45 O.L.R. 15 (Can.) for a case where "artificial insemination, without the consent of the husband" was held to constitute

What parts of the male anatomy might have similarities to the vagina (in the case of male-male "adultery"), and what parts of the female body might be considered a penis (in the case of female-female "adultery"), the court explicitly declined to say. Indeed, the bashful court noted that such graphic explicitness would be neither "necessary [n]or desirable."[193]

As Part II discussed, the inability of majoritarian institutions to take into account non-majoritarian interests—much less find it "necessary or desirable" to do so—is one major reason why non-majoritarian peoples around the world have sought refuge and dignity outside of such institutions. With this in mind, this Article has proposed that a new goal for gay and lesbian people in the United States should be the imagination and legislation of a separate, more-homosexually-centered family law and relationship-recognition system. Indeed, the goal should not be a "separate but equal" system, but a "separate *and better*" one, the latter determination derived in part from the democratic-pedigree of the process behind this system's formulation and its tight responsiveness to the people who will be specifically bound by it.

"Domestic partnerships" or "civil unions" provide one way out of the majoritarian problem. This is not to say that they provide the only way out, or necessarily the best way out forever, but they do represent a crucial beginning of the solution for America's odd (and ironic)[194] incapacity to envision more than one possibility of the good intimate life, or to engage with family law pluralism in a sustained and rigorous manner. The existence and continuing development of legal alternatives to majoritarian marriage should be encouraged. Domestic partnerships and civil unions can be conceived of, not as a way-station on the road to majoritarian marriage, but as a way to avoid majoritarian marriage altogether.

The next section concludes this Part by discussing how one might further develop and improve the separate and

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adultery because it involved "the possibility of introducing into the family of the husband a false strain of blood." *See also* P. (S.E.) v. P. (D.D.) at 8-10.

[193] P. (S.E.) v. P. (D.D.) at 18.

[194] The ironies here are manifold, but one of the most interesting is the disconnect between a general American obsession with ensuring freedom generally, yet American paranoia with respect to *sexual* freedom particularly. See JANET R. JAKOBSEN & ANN PELLEGRINI, LOVE THE SIN: SEXUAL REGULATION AND THE LIMITS OF RELIGIOUS TOLERANCE, at ix (2003), for an attempt to understand "why the high value set on freedom in the United States comes crashing to the floor when it comes to sex. If freedom is such an important value in American life, then why isn't sexual freedom a mainstream American value too?"

(arguably) better system of domestic partnerships and civil unions that has gained traction in the United States, including in its most populous state (California). The following necessarily consists only of musings at the minimum, and suggestions at the most, as the particular features of this system should be left to the results of a future gay and lesbian community-oriented discussion and debate.[195] The proposal here, after all, is a self-consciously democratic one. That being the case, two relatively specific recommendations will be advanced, namely that 1) gay and lesbian relationship-recognition schemes could use a different—and better—nomenclature than "domestic partnership," "civil union," and (also) "marriage," and 2) gay and lesbian relationship-recognition schemes should work to facilitate greater gay and lesbian *freedom* and *agency* (as opposed to something called "choice") by avoiding further legal entrenchment of pre-modern (heterosexually-authored) "sex offenses" such as adultery, infidelity, fornication, and the like.

C. Suggestions / Concerns

Any proposal for homosexual-authored and homosexual-respecting family law is likely to face only tepid (if any) support by traditional gay and lesbian (same-sex marriage) advocates. Their reaction will likely come back to arguments rehearsed in the California and Connecticut supreme courts, focusing on the alleged indignity of "separate but equal." Part II raised serious doubts about the correctness of these universally-oriented claims, however, using transnational experience. This transnational experience holds several potential (and perhaps conflicting) lessons, but this Part has focused on one that is particularly relevant in a post-Proposition 8 U.S., namely the dignity—read as including a robust notion of *agency*—that can blossom by building and maintaining different family law systems for different types of people.

This concluding section builds on this basic (but nonetheless neglected) observation by exploring what a dignity-enhancing family law system for gay and lesbian people—one that is distinct from the troubled marital (and divorce) system that heterosexuals have built for their own purposes and

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[195] As well as future academic research and commentary by myself and others. I consider this Article to be at the beginning of a much longer engagement by myself with the issues and ideas raised herein.

needs—might look like. In doing so, this section responds, in a more concrete fashion, to a concern about *nomenclature* which sits at the heart of gay and lesbian advocacy organizations' "separate but equal" claims. This section also responds to a somewhat more inchoate worry about the *bona fides* of restricting people from exercising a "choice" to enter into marriage, even if an equally (or even better) endowed alternative—for example, domestic partnership or civil union—is available to them.

Before beginning each of these particular discussions, several observations and clarifications are (again) in order. First, while in some respects this Article's proposal of the creation of a "separate *and better*" system of family law for gays and lesbians in the United States is a radical proposal, in many other respects it is just what remains to be worked out in the aftermath of Proposition 8 and similar measures. Even before Proposition 8, and before the legalization of same-sex marriage in California, gay and lesbian advocates in California had successfully argued for and helped legislate a separate system of relationship-recognition for same-sex couples that was broadly protective of such couples. Something similar happened in Connecticut (now replaced by a marriage regime for both opposite- and same-sex couples), and something similar now exists in New Jersey,[196] Nevada,[197] Oregon,[198] and Washington state.[199] While many people in California and elsewhere have viewed such separate systems as stepping stones towards (same-sex) marriage, recent events have demonstrated that it is far from certain that these struggles will actually end in marriage. Seen in this light, this Article's proposal is rather banal in its acknowledgment of present realities, though

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[196] N.J. STAT. ANN. § 37:1-28(d) (West 2007) ("Those rights and benefits afforded to same-sex couples under the Domestic Partnership Act should be expanded by the legal recognition of civil unions between same-sex couples in order to provide these couples with all the rights and benefits that married heterosexual couples enjoy.").

[197] *See* Human Rights Campaign, Nevada Marriage/Relationship Recognition Law, http://www.hrc.org/issues/1285.htm (last visited Jan. 21, 2010).

[198] H.B. 2007, 74th Leg. Assem., Reg. Sess. § 2(5) (Or. 2007) ("Sections 1 to 9 of this 2007 Act are intended to better align Oregon law with the values embodied in the Constitution and public policy of this state, and to further the state's interest in the promotion of stable and lasting families, by extending benefits, protections and responsibilities to committed same-sex partners and their children that are comparable to those provided to married individuals and their children by the laws of this state.").

[199] WASH. REV. CODE § 26.60.015 (2010) ("It is the intent of the legislature that for all purposes under state law, state registered domestic partners shall be treated the same as married spouses.").

admittedly it is radical to the extent that its proposal views gays' and lesbians' contributions to American discourses of sex, friendship, and family to be profound, insightful, and more worthy of emulation than much of what else has come to pass for common sense in the United States.

Second, while the suggestions below map out *differences* from the majoritarian marital regime that a separate gay and lesbian relationship-recognition regime might adopt (after democratic deliberation), this is not to suggest that any such regime must be completely different than what has come to pass before in order for this regime to prove its dignity/agency credentials. A separate system of family law is agency-enhancing because it provides a space from which to argue for a different set of norms than majoritarian ones *if and when* differences with the majority arise. I repeat that a separate system is not intended to be different for difference's sake, and no pluralist system of law anywhere in the world functions in this facile way. To the same extent that American federalism retains its value even as the 50 different states often adopt the same laws and policies, and to the same extent that Christian personal law in India retains its value even as it shares a disavowal of polygamy with Hindu personal law, so too does the separate system of relationship-recognition for same-sex couples outlined here retain its value even as it overlaps with heterosexual norms and practices. Indeed, even if gays and lesbians (in a particular state) chose to call their relationship-recognition system something like "same-sex marriage," despite the arguably more-attractive nomenclature options presented below, this nomenclature overlap with opposite-sex "marriage" still preserves for the future—in the legal separateness of its regime—the possibility of difference, either with respect to nomenclature or other aspects of family law. In an era of increasingly strident right-wing American politics, this potential is not only worth fighting for, but very likely requisite.

Third, the proposal for "separate and better" family law for gays and lesbians presented here is different than proposals put forward by Nancy Polikoff and similarly-minded activists and scholars.[200] Polikoff's work,[201] in which she has developed an

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[200] *See, e.g.*, Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709, 710-12 (2002); BeyondMarriage.org, Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families and Relationships, http://beyondmarriage.org/full_statement.html (last visited Jan. 21, 2010).

approach to family law that she calls "valuing all families,"[202] is extremely important. Such an approach recognizes that

> [i]n every area of law that matters to same-sex couples, such as healthcare decision making, government and employee benefits, and the right to raise children, [non-marital] laws already exist in some places that could form the basis for just family policies for those who can't marry or enter civil unions or register their domestic partnerships, as well as for those who don't want to or who simply don't.[203]

For Polikoff, such non-marriage-premised laws could be expanded in number and scope, as an alternative to merely pursuing and further entrenching the current practice of handing out healthcare, employment, and parental rights solely through the institution of marriage—whether opposite-sex or same-sex.[204] The desirable goal, under Polikoff's approach, would be "[l]aws that value all families," i.e. laws which "ensur[e] that every relationship and every family has the legal framework for economic and emotional security," and not (more) laws which merely "legitimate[] gay relationships that mirror marriage."[205]

Clearly, this Article shares in Polikoff's desire to de-center the role that marriage attempts to play for all people in contemporary American life. However, this Article's proposals differ from Polikoff's in that its proposals are simultaneously more realistic than Polikoff's, and more radical. This "realistic radicalism" recognizes, like Polikoff, the need to start someplace else than "the package of rights that marriage gives different-sex couples and [merely] work[ing] down from there."[206] Instead, the goal should be something like, as Polikoff describes it, "identifying the needs of all LGBT people and work[ing] up from there to craft legislative proposals to meet those needs."[207] However, this Article's discussions are also motivated by a very realistic recognition that "marriage"—and, indeed, "family" itself—are extremely centrifugal terms in contemporary American political life, ones which have

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[201] The fullest statement of Polikoff's beliefs can be found in her most recent book. *See generally* NANCY D. POLIKOFF, *supra* note 6.

[202] *Id.* at 5.

[203] *Id.* at 9.

[204] *See id.*

[205] *Id.* at 210.

[206] *Id.* at 209.

[207] *Id.*

effectively—time and time again—subverted the possibility of radical "family values." In fact, they occasionally work to subvert the radical possibilities of Polikoff's own work.[208]

This being the case, a *new public vocabulary*—including a new nomenclature for same-sex relationships specifically—might very well be required to achieve the re-imagination of family values that both Polikoff and this Article desires. It is with this hunch, and for this reason, that this Article suggests a very public, and very political, and very "separate" system of gay and lesbian "family" law. Indeed, while "private ordering" of family law does contribute to increased agency, the suggestions presented here are not oriented towards further privatizing family law. In fact, they are much more oriented towards the "personal law" systems of family law which are found presently in locations as diverse as India and California. Separate (and better) systems of law for homosexuals—differing (to some degree) from majoritarian marriage in both nomenclature and substance—would not only help highlight and politicize homosexual lives, homosexual families, and homosexual family law,[209] but also heterosexual lives,

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[208] For example, Polikoff apparently considers it important, in order to "value all families," to provide a mechanism for unmarried partners (whether homosexual or heterosexual) to inherit wealth and property from one another in an orderly and predictable manner upon a partner's death. *See id.* at 184-89. One might wonder, however, whether a more-progressive move would be to altogether re-think unstated (yet powerful) norms that sanction the private transfer of (large amounts of) resources between dead and living members of a "family." The practice of inheritance is such a fundamental part of the law of "marriage" and "family," however, that it seems doubtful whether either institution—whether valued or de-valued—can really allow for any profound re-imagining (or eradication) of it.

[209] For this reason, I am in disagreement with some of the positions expressed by Marc Poirier in his recent, thoughtful work on the nomenclature issue. *See* Marc R. Poirier, *Name Calling: Identifying Stigma in the "Civil Union" / "Marriage" Distinction*, 41 CONN. L. REV. 1425, 1425 (2009). Poirier writes that

> to deploy "civil union" and "marriage" properly requires everyone involved in interactions where these names are to be used to identify the couple as same- or different-sex. The mere fact of imposing a nomenclature distinction is problematic. . . . The law's provision of a separate name serves to perpetuate microperformances and microidentifications of [the previously stigmatized category of "gay."]

Id. at 1437. Putting aside (for the time being), the issue of whether the law should be encouraging microperformances of "acting straight," any time any person seeks any type of recognition from the state, this interaction inevitably results in some loss of privacy. To (voluntarily) identify as "married" almost inevitably raises the question for the state (as well as employers, friends, and acquaintances): "To whom?" In this way, one might say that everyone (homosexual or heterosexual) who identifies as "married" is engaging in, at least in part, a flamboyant "coming out." As Kenji Yoshino has stated: "I'm sometimes asked . . . whether I consider same-sex marriage to be an act of covering or flaunting. I think it is both." KENJI YOSHINO, COVERING: THE HIDDEN

heterosexual families, and heterosexual family law. Indeed, such a proposal firmly puts the "majoritarian" into that which now simply passes as "marriage."[210]

Finally, a demurrer: For reasons of space, this section will not discuss how to actually procedurally operationalize a democratically-minded, (gay and lesbian) community-oriented legislative scheme. There are many questions to ponder in this respect. For example: Who counts as part of "the community"? How does one assess the community's sentiments on any given proposal? To do so, would one return to the same gay and lesbian advocacy organizations which have sought alignment with majoritarian practice in the first place? To legislate, would one have to rely on the unpredictable votes of state legislators who don't belong to "the community"? These are difficult questions, and this Article raises them to provide no conclusive answers. However, that being said, they are also questions that can only be raised in the event that gays and lesbians see a dignified alternative to majoritarian marriage in the first instance. This Article's primary goal is to raise the possibility of this alternative, as a starting point to a much longer gay and lesbian community-oriented discussion involving these additional questions, if and when they should arise.

1. Nomenclature

One aspect of any future same-sex relationship-recognition regime(s) that will generate public interest concerns what these same-sex relationships will be called by the state, and how to ensure dignity with this choice in

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ASSAULT ON OUR CIVIL RIGHTS 91 (2006); *see also* Poirier, *supra*, at 1488 n.375 (briefly acknowledging the difficulty that same-sex partners will have in hiding their homosexuality from the public even if they were legally-entitled to identify themselves as legally "married").

Moreover, the existence of a new kind of relationship such as "civil union" or "domestic partnership" puts a great deal—and unprecedented amount—of onus on *heterosexuals* to account for their decisions to "marry." In this way, heterosexuality becomes (micro)politicized in a way which previously only homosexuality was (by heterosexuals). In other words, with the advent of distinct forms of state relationship-recognition for homosexuals, heterosexuals' microperformances and microidentifications would now become greatly magnified.

[210] Here I am somewhat echoing the views of Cheshire Calhoun, when she argues that debates concerning the possibility of same-sex marriage are so disturbing for many heterosexuals because these debates shine light on the heterosexual desire for "heterosexual love, marriage, and family [to] have a uniquely *prepolitical*, foundational status in civil society." CHESHIRE CALHOUN, FEMINISM, THE FAMILY, AND THE POLITICS OF THE CLOSET: LESBIAN AND GAY DISPLACEMENT 127 (2000) (emphasis added).

nomenclature. Indeed, nomenclature appears to be the most crucial issue for a great number of people (whether heterosexual or homosexual) involved in the American same-sex marriage debates, overshadowing even (seemingly) important discussions about the substantive rights and responsibilities attaching to any potential same-sex relationship-recognition regime. The California Supreme Court described the importance of the issue of a nomenclature in the following noteworthy passage:

> [I]t . . . is significant that although the meaning of the term "marriage" is well understood by the public generally, the status of domestic partnership is not. While it is true that this circumstance may change over time, it is difficult to deny that the unfamiliarity of the term "domestic partnership" is likely, for a considerable period of time, to pose significant difficulties and complications for same-sex couples, and perhaps most poignantly for their children, that would not be presented if, like opposite-sex couples, same-sex couples were permitted access to the established and well-understood family relationship of marriage.[211]

Echoing this concern with same-sex relationship nomenclature, Ronald Dworkin has recently written, in a widely-noted essay, that with respect to marriage and the debate over same-sex "marriage" versus "civil unions": "We can no more now create an alternate mode of commitment carrying a parallel intensity of meaning than we can now create a substitute for poetry or for love."[212]

Dworkin's claim, many people have felt, is a powerful one.[213] It is also one that opens up a broader discussion about the possibility of re-signifying terms. This is a large topic, to be sure, but something must be said here and, most bluntly, it is that Dworkin's claim and ones like it largely work to obscure

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[211] *In re* Marriage Cases, 183 P.3d 384, 445-46 (Cal. 2008), *superseded by* CAL. CONST. art. I, § 7.5.

[212] Ronald Dworkin, *Three Questions for America*, N.Y. REV. BOOKS, Sept. 21, 2006, *available at* http://www.nybooks.com/articles/19271 (last visited Feb. 25, 2010).

[213] A recent crop of law review articles specifically addressing the nomenclature issue, and concluding that a different nomenclature for same-sex relationships is problematic, is evidence of the interest in this issue and also that most liberal thinkers broadly agree with Dworkin's conclusion here. *See, e.g.*, Courtney Megan Cahill, *(Still) Not Fit to be Named: Moving Beyond Race to Explain Why 'Separate' Nomenclature for Gay and Straight Relationships Will Never Be 'Equal,'* 97 GEORGETOWN L.J. 1155 (2009); Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 IND. L.J. (forthcoming 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1351133; Poirier, *supra* note 209, at 1437.

(and dishonor) the history of the gay and lesbian civil rights movement.

This movement is one that has spoken the "love that dare not speaks its name," one that has made "gay" synonymous with both homosexuality *and* happiness, and one which has organized marches around the world every summer attesting to the "pride" that (many) gays and lesbians possess despite living in a world that desires to shame them. More generally, the gay and lesbian civil rights movement has been one that has demonstrated vividly the protean quality of words and labels—including "family," "queer," and even "sex"—and the alchemic potential of any ambitious politics of nomenclature.[214] It is also a movement that has managed to convince many heterosexuals to stop using the gendered terms "husband" and "wife," or even the term "spouse," and instead use the term "partner" to describe their "significant others." In other words, despite the claims of Dworkin and like-minded others, neologisms can take hold, and the "disempowered" can change the terms of power's discourse—sometimes quite literally.

It would appear to be the case, then, that if gays and lesbians could seize the opportunities which now attach to having "their own" family law in jurisdictions as populated and influential as California, New Jersey, and elsewhere, they would have a great deal of potential to change not only the vocabulary surrounding their own relationships, but also that surrounding relationships more broadly.

It is the case that "domestic partnership" and "civil union" are old terms, from another era, and arguably boring. As the epigraph to this Part suggests, they are also too suggestive of some of the domesticating aspirations and requirements of these current institutions.[215] That being the

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[214] Indeed, one can view the insistence by mainstream gay and lesbian civil rights organizations and activists that "marriage" is the proper province of secular states, instead of churches and temples, *see supra* note 176, and their insistence that "marriage" can incorporate fertile, same-sex couplings—just as readily as it can sterile, opposite-sex couples—as a further testament to the general tendency of the larger gay and lesbian civil rights movement to believe in the possibility of challenging not only the conventional meaning of conventional words, but also what words should be used conventionally in the first place.

[215] *See also* Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1772-74 (2005) for the observation that

> [f]or good, as well as for ill, marriage now licenses couples to structure their lives as best suits them without losing recognition for their relationship. . . . [A] marriage certificate now allows heterosexual couples to have an open

case, (re)claiming gay and lesbian ownership of these separate, same-sex relationship-recognition regimes, and then acting upon that ownership, could create real opportunities for a more exciting and less sterile nomenclature. The possibilities with respect to this nomenclature are relatively boundless and do not have to remain static and stale like "marriage" itself. Given this Article's focus on dignity, one useful suggestion to contemplate might be that if gay and lesbian people want dignity, then they should give up the indirect pursuit of that through "marriage" and, instead, directly pursue that dignity by working to rename their state-recognized relationships as "dignity." Indeed, with this name chosen *by* gays and lesbians *for* a gay and lesbian-authored family law institution, the contrast could not be more clear or more poetic: gays and lesbians would now enter into "dignity" while heterosexuals would enter into "marriage."[216]

2. "Choice"

The above nomenclature suggestion not only highlights the exciting opportunities for new relationship nomenclatures that a more pluralistic system of relationship-recognition permits, but also the way in which "marriage" itself increasingly possesses an uncertain valence in the contemporary United States.[217] Quite a bit of the contemporary legal discussion on "marriage" versus "domestic partnership" and "civil union" has rhetorically and simplistically distorted the (ostensibly positive) valence that marriage holds in today's United States. While it might be possible (if unlikely) that gay and lesbian Midas-like magic can re-signify and revive the flagging fortunes of the *term* "marriage," it is very unlikely that

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> marriage, to live in different cities or in different apartments in the same city, to structure their finances as they please, without having their commitment or the legal benefits that follow from it challenged. . . . [In contrast, t]he requirements of actual cohabitation in a shared residence and commingled finances are quite typical of most domestic partner registries.

[216] One important objection to this suggestion might be that calling any sort of relationship "dignity" implies that people outside of that relationship—for example, single people who are gay or lesbian—are "undignified." I believe this objection is a legitimate one, though one potential response might be that the contemporary notion of dignity is a relatively universal and capacious value/trait and that it does not admit, conceptually at least, of its (potential) converse. In other words, there might be no dignified way, in our contemporary world, to treat someone with indignity or view them as undignified.

[217] *See* Abrams & Brooks, *supra* note 4, at 1.

gay and lesbian votes will ever be able to reform the legally-defined *institution* of majoritarian marriage, or other areas of family law linked to it. And whatever gains in dignity that gays and lesbians may accrue (and impart to others) by entering into "marriage" will very likely be outweighed by the loss of agency that gay and lesbian people will experience with respect to the definition and democratic legislation of laws that govern gay and lesbian lives and families.

This loss of agency that attaches to any gay and lesbian absorption into majoritarian marriage highlights the odd character of arguments that have been made about an alleged right to *choose* to "marry." These kinds of arguments, explicitly about something characterized as "choice," pop up here and there in the contemporary debates over same-sex marriage. For example, in *Goodridge*, the Massachusetts Supreme Judicial Court characterized the right at stake in that case as "the right to marry—or more properly, the right to choose to marry."[218] This concern for "choice" will also likely make itself heard as an objection to this Article's suggestion of a "separate and better" relationship-recognition regime for same-sex couples, the objection being that same-sex couples should—no matter what—have the right to "marry."

While this section has already addressed the (perhaps surprising) compatibility of same-sex "marriage" with "separate and better" family law for gays and lesbians, it is nonetheless worth addressing some of the troublesome implications of the particular kind of "choice" arguments that some same-sex marriage advocates are making presently, in the process drawing out some of the important differences between these implications and those emanating from this Article's particular suggestions.

In this respect, it is worth stating again that "choice" is an odd terrain over which to argue marriage rights. As Nancy Polikoff has astutely observed, "marriage would be a real *choice*"[219] if it were not so completely bound up with so many personal and social necessities (e.g. family and medical leave to take care of a sick marital partner).[220] As Polikoff even more

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[218] *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 957 (Mass. 2003).

[219] POLIKOFF, *supra* note 6, at 133.

[220] For similar reasons, Ruthann Robson calls marriage "compulsory." *See* Robson, *supra* note 200, at 777.

clearly states: "marriage is not a choice if it is the *only* way to achieve economic well-being and peace of mind."[221]

Nonetheless, contemporary same-sex marriage advocates are using this vocabulary of "choice" in their advocacy of same-sex marriage rights. And these advocates often seem to be understanding this "choice" to be embodying some sort of libertarian-utopia-like vision of a right to choose the nomenclature of one's state-recognized relationship. It is for this reason, indeed, that this Article anticipates "choice"-premised objections to its suggestion for a "separate and better" relationship-recognition regime for non-majoritarian unions. These objections would arise especially if some gay and lesbians who wanted to "marry" were not able to do so because the gay and lesbian community, as a whole, in a given state, had decided to use their delegated right to designate the nomenclature for their state-recognized unions in a manner such that gay and lesbian unions would be called something other than "marriage."

This libertarian formulation of "choice," however, is hard to understand, not least because the same advocates who endorse a right to choose "marriage" nomenclature for one's relationship do not intend to extend that general right to all people—including, most notably, those involved in polygamous relationships.[222] While perhaps such advocates would respond that, while they believe it inappropriate to extend the *substantive* rights, privileges, and burdens of marriage to polygamous groupings, they actually have no problem with the state merely *recognizing* polygamous "marital" unions, this complete bifurcation between the nomenclature and the substance of state relationship-recognition would be odd, not only as a matter of extant law,[223] but also with regards to same-sex marriage advocates' own goals. At the very least, it would open the door for (perhaps anti-gay) proposals to allow same-sex "marriages" but also to restrict the substantive benefits that accompany this particular form of "marital" recognition.[224]

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[221] POLIKOFF, *supra* note 6, at 133.

[222] *See supra* text accompanying note 152; *see also* Robson, *supra* note 200, at 771.

[223] This is not to deny that a more libertarian-like right to choose "marriage" nomenclature might (or should) develop, but it is to say that this right—in this formulation—does not presently exist. In fact, states routinely criminalize the conducting of "marriage" ceremonies both of and by unauthorized persons. *See, e.g.*, TEX. FAM. CODE ANN. § 2.202(c)-(d) (Vernon 2009).

[224] *See* Homer, *supra* note 149, at 516 (envisioning how "[e]ach benefit associated with marriage is susceptible to an analysis of the public policy that

"Choice" arguments, as they presently stand, are then not well-formulated: they do not stand on any deep foundation of extant United States legal practice and, furthermore, some formulations of these arguments actually open the door to forms of legal mischief that same-sex marriage advocates would themselves find troubling.

Moreover, anti-gay mischief is certainly afoot when arguments for *more "choice"* to enter into majoritarian marriage result in *less agency* for gays and lesbians with respect to laws that will deeply influence gay and lesbian lives and families. Indeed, it would seem that the right of "choice" is something different than the right to choose the laws that will heavily influence one's life path. In other words, it seems that "choice" is something that exists in a great deal of tension with agency.

As the Canadian example has demonstrated, more gay and lesbian "choice" can result in less gay and lesbian *freedom*, especially to the extent that gay and lesbian absorption into majoritarian marriage results in the application of pre-modern sexual morality norms—for example, the "sex offenses" of adultery, infidelity, fornication, and the like—to gays and lesbians. Canada has witnessed such misadventures with its recent application of the pre-modern (heterosexual) sex offense of adultery to (married) same-sex couples.[225] In the far more conservative and increasingly reactionary United States, the consequences of extending heterosexual traditions to homosexuals could be far more devastating. As Steven Homer has noted, to the extent that the availability of same-sex marriage gets linked, like opposite-sex marriage, to the "right to have sex, . . . [sexual morality] may easily turn on the married-unmarried distinction, leaving unmarried gays and lesbians with no sexual privacy. This would introduce into gay culture, for the first time, the concept of pre-marital sex."[226]

This cannot be what dignity absolutely requires.

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underlies it. Thus, to the extent that a court can find that a particular benefit does not belong to the class of benefits that make a couple married but rather reflects state recognition of the idiosyncracies of heterosexuality, that benefit can be denied to same-sex couples.").

[225] *See supra* text accompanying notes 187-190.

[226] Homer, *supra* note 149, at 513.

CONCLUSION

Dignity may be a universal human aspiration, but its attainment is complicated by the messiness of human history and the richly textured quality of both what *is* and what *can be imagined* in any given locality.

The issue of imagination is thus central to the debate over legal pluralism and dignity. As this Article has discussed, because of the way anti-gay discourse has been configured for so long in the United States, it is very difficult for gays and lesbians to view themselves, in any positive way, as comprising a relatively distinct lifestyle or cultural grouping. "Specialness" becomes conflated with "queer" and the history of homophobia with which that term is associated. Social and legal arguments then tend to congregate around claims that homosexuals are "just like" heterosexuals, and that the two groups must be treated exactly the same both for the purposes of equality and dignity.

This has certainly been the recent view of both the California and Connecticut Supreme Courts. For these courts, gay and lesbian dignity is compromised by family law pluralism. This Article has attempted to demonstrate, however, that an alternative way of imagining the connection between dignity, legal pluralism, and marriage is available. It has also hopefully ignited the imagination of those people who are interested in developing "separate *and better*" gay and lesbian alternatives to majoritarian (heterosexual) marriage.

These alternatives should be developed by gay and lesbian people through a truly democratic debate and process. The political and legal agency for gay and lesbian people that will accompany such a process is an important component of reinforcing the dignity of gays and lesbians. Proposition 8 was a difficult piece of legislation to swallow, but it does not have to spell the end of gay and lesbian dignity. That dignity was always there and, if anything, it just needs to be re-discovered. That being said, this re-discovery may have to happen by traveling to very unfamiliar places. This Article has hoped to facilitate that journey.