The Arc of History: Or, the Resurrection of Feminism's Sameness/Difference Dichotomy in the Gay and Lesbian Marriage Debate

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The arc of history is long, but it bends toward justice.[1]

I. INTRODUCTION

By all accounts, 1996 was the year of the Queer.[2] For members of the American gay and lesbian community[3] and those who support them,[4]

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1. 142 CONG. REC. S10105 (daily ed. Sept. 10, 1996) (statement of Sen. Mosely-Braun, quoting Martin Luther King, Jr.).

2. I use the word "queer" here not as a flippant sexual slur, but as a political statement. In America, language is power, and power (or the lack thereof) defines experience. David Fraser, discussing Foucault's theory of power as it relates to societal structures, noted that "[t]he ability to create, disseminate and alter discourse is essential to the exercise of hegemonic power. A group can control experience by controlling discourse and language. . . ." David Fraser, *What's Love Got To Do With It? Critical Legal Studies, Feminist Discourse, and the Ethic of Solidarity*, 11 HARV. WOMEN'S L.J. 53, 53 (1988). This relationship between language and power manifests itself in political ways; the answers in political "debate" (if there are any) are foreshadowed by the words with which we compose the questions and the way in which we relate or react to them. *See* ROGER MAGNUSON, ARE GAY RIGHTS RIGHT? MAKING SENSE OF THE CONTROVERSY 25

(1990). For example, the power of language and its political consequences has been made penultimately clear in the debate over "affirmative action," known to various political players as "reverse discrimination," "preferential treatment," "quotas," and "hiring goals." *See* MICHEL ROSENFELD, AFFIRMATIVE ACTION AND JUSTICE 42-43 (1991); *see also* Philip Fetzer, *"Reverse Discrimination": The Political Use of Language*, 12 NAT'L BLACK L.J. 212, 212 (1993) (noting that the phrase "reverse discrimination" is a "covert political term").

Similarly, political and cultural "debate" over the "rightness" of same-sex relationships is charged with meaning-laden language meant to create and crystallize power structures by naming and defining those who find themselves the "object" of debate—even within the community being defined. For example, the terms "gay" and "lesbian" as descriptors have been consciously chosen and used by much of the community in an attempt to eschew the negative neo-Victorian connotations of the term "homosexual." *See* MARGARET CRUIKSHANK, THE GAY AND LESBIAN LIBERATION MOVEMENT 3, 6-10 (1992) (discussing the impacts of Havelock Ellis and Sigmund Freud on perceptions of homosexuals as having "abnormal" sexual desires and arrested psychological development, leading to the popular belief that homosexuality is a treatable (and perhaps curable) psychological disorder); *see also* MAGNUSON, *supra*, at 21-24 (noting the longtime inclusion and ultimate deletion of homosexuality as a "mental disorder" in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders). Among more radical members of the community, however, the term "queer" has been reappropriated as a political and cultural statement. *See* CRUIKSHANK, *supra*, at 3. According to Carl Stychin, "[q]ueerness . . . suggests an unwillingness to fix difference in any ultimate literality . . . [Instead] unity is sought without imposing closure on any identity category through fixed conditions of membership." CARL STYCHIN, LAW'S DESIRE: SEXUALITY AND THE LIMITS OF JUSTICE 141 (1995). While I recognize and agree with those members of the community who reject "queerness" as a sexual descriptor (*see* CRUIKSHANK, *supra*, at 177), I join those who are among the political and cultural "Queer" and encourage this powerful use of language to describe political and cultural (dis)location. However, like Francisco Valdes, I also use "queer" spelled in the lower case to indicate its pejorative usage. *See* Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Interconnectivities*, 5 S. CAL. REV. L. & WOMEN'S STUD. 25, 26 n.1 (1995).

3. I agree with the many who believe that "[t]he gay community is a state of mind, not body." Stephen O. Murray, *Components of Gay Community in San Francisco, in* GAY CULTURE IN AMERICA: ESSAYS FROM THE FIELD 117 (Gilbert Herdt ed., 1992) (comments of Michael, self-identified "clone"). However, Yates Rist argues that the concept of gay "community" is "an insidious political fantasy": "We 'gays' share nothing but the amorphous consequences of the repression of same-sex sex and same-sex love . . . . The right response to the culture's tyranny over sexual and romantic expression is defiant politics, not misty-eyed myths about community." Darrell Yates Rist, *Reply to Responses on "The Deadly Costs of an Obsession,"* 132 CHRISTOPHER STREET 20 (1989). Rist's comments, however, seem to fuse the two crucially separate ideas of community reality and community sensibility. *See* Richard K. Herrell, *The Symbolic Strategies of Chicago's Gay and Lesbian Pride Day Parade*, *in* GAY CULTURE IN AMERICA, *supra*, at 251-52 n.31. The existence of a gay community, alone, does not ensure or even require that other political or cultural locations will be abandoned; in fact, the existence of community breeds disunity. Note, for example, the splintered "community" of American feminists who unite for the purpose of stamping out oppression of women in American society but invariably disagree on the means by which the end will be reached. *See* Section II *infra*; *see also* GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 128-48 (1995).

4. For example, national political action and support groups such as Parents, Families, and Friends of Lesbians and Gays ("PFLAG"), legal defense funds such as the Lambda Legal Defense Fund and Gay and Lesbian Advocates and Defenders, and regional, state, and local groups work tirelessly to advance the gay and lesbian community's legal, political, and social power and to provide much needed emotional support. *See* CRUIKSHANK, *supra* note 2, at 132-34.

it was a year full of tremendous legal and cultural promise. At both the national and state levels, the power of the gay and lesbian community as a political and social presence was recognized in earnest for the first time since the Stonewall Rebellion shook the nation's sensibilities in 1969.[5] At the state level, Hawaii became the first state in the Union to recognize same-sex marriage in the watershed decisions *Baehr v. Lewin*[6] and *Baehr v. Miike*,[7] using an equal protection analysis to limit Hawaii's discriminatory denial of marriage licenses to same-sex couples.[8] Political polls showed an increasing recognition and repudiation of discrimination against gays and lesbians in employment,[9] a sentiment which very nearly crept into the U.S. Code in the guise of the Employment Non-Discrimination Act of 1996.[10] For the first time ever,[11] the United States

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5. Stonewall has been eloquently described as "the shot heard round the homosexual world." *See* CRUIKSHANK, *supra* note 2, at 69. Patrons of the Stonewall Inn, a Greenwich Village bar catering to Puerto Rican drag queens and lesbians, lobbed beer cans and bottles at police officers during a then-standard surveillance and raid of gay and lesbian bars in the area. This encounter escalated into a two-night riot during which a crowd of 2,000 gays, lesbians, and sympathizers clashed with 400 New York City policemen. *See id.* What followed has been described as "a symbolic end to victim status." *Id.* Rey Rivera, who was there, later remarked, "To be there was so beautiful. It was so exciting. I said, 'Well great, now it's my time.'" *The Drag Queen—Rey "Sylvia Lee" Rivera, in* ERIC MARCUS, MAKING HISTORY: THE STRUGGLE FOR GAY AND LESBIAN EQUAL RIGHTS 1945-1990: AN ORAL HISTORY 191 (1992).

6. 852 P.2d 44 (Haw. 1993), *remanded sub nom.* Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *order aff'd*, 950 P.2d 1234 (1997).

7. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *order aff'd*, 950 P.2d 1234 (1997).

8. *See Lewin*, 852 P.2d at 66-67; *Miike*, 1996 WL 694235, at *19-20.

9. A recent Newsweek poll noted that 78 percent of the polling group acknowledged that gays and lesbians are victims of some discrimination, and 84 percent agreed that gays and lesbians should receive equal job opportunities. *See* David A. Kaplan & Daniel Kleidman, *A Battle, Not the War*, NEWSWEEK, June 3, 1996, at 24.

10. *See* S. 2056, 104th Cong. (1996). The Employment Non-Discrimination Act of 1996 (ENDA 1996) actually consisted of several amendments to the Equal Employment Opportunities Subchapter of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-17 (1998). In addition to the current proscriptions against discrimination on the basis of race, sex, religion, color, or national origin, ENDA 1996 would also have prohibited discrimination on the basis of sexual orientation. Sexual orientation was defined in ENDA 1996 as "homosexuality, bisexuality, or heterosexuality, whether such orientation is real or perceived." S. 2056 § 4(11). ENDA 1996 explicitly provided for exemptions for religious entities and prohibited the use of Title VII's "disparate impact" cause of action for discrimination on the basis of sexual orientation. *See* S. 2056 §§ 6, 8 (1996). However, the bill failed in the Senate by one vote. *See* 142 CONG. REC. S10139 (daily ed. Sept. 10, 1996).

Previous attempts to extend protection against employment discrimination had provoked little interest or response from Congress. *See, e.g.,* Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong. (1994); Civil Rights Amendments of 1975, H.R. 5452, 94th Cong. (1975). Congress has also been loath to protect gays and lesbians from other forms of discrimination. *See, e.g.,* Americans with Disabilities Act of 1990, 42 U.S.C. § 12211(a) (1998) (excluding homosexuality and bisexuality from the definition of "disability"); Family and Medical Leave Act of 1993, 10 U.S.C. § 101 (1998) (defining "spouse" as a "husband or wife, as the case may be"). In promulgating interpretive regulations, the Secretary of Labor relied heavily

Supreme Court in *Romer v. Evans*[12] invalidated an anti-gay state constitutional provision under the Equal Protection Clause of the Fourteenth Amendment.[13] In a magisterial opinion, Justice Kennedy noted that Colorado's Amendment 2[14] "fails, indeed defies, even [the] most conventional [equal protection] inquiry."[15] The American gay and lesbian community had waited long enough for the arc of history; finally, at last, it seemed to be bending.[16]

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on this definition to exclude domestic partners in committed relationships, including same-sex relationships. *See* 60 Fed. Reg. 2180, 2191-92 (1995).

11. The Supreme Court has, of course, heard cases involving the gay and lesbian community; however, no stretch of one's imagination could possibly characterize them as victories, and only once before has the Court dealt with a state anti-gay provision head-on, with disastrous results. *See* Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (holding in a 5-4 opinion that the Due Process Clauses do not confer a fundamental right to engage in sodomy with a same-sex partner). *See also* Hurley v. Irish-American Gay, Lesbian, & Bisexual Group, 515 U.S. 557 (1995) (holding state courts' application of public accommodation law violated defendants' First Amendment rights); San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987) (prohibiting use of the word "Olympics" by the Council in promoting its "Gay Olympics" program). For a good overview of the history of gay and lesbian legal strategy, see generally Patricia A. Cain, *Litigating for Gay and Lesbian Rights: A Legal History*, 79 VA. L. REV. 1551 (1993).

12. 116 S. Ct. 1620 (1996).

13. *See Evans*, 116 S. Ct. at 1628 ("A state cannot so deem a class of persons a stranger to its laws.").

14. The amendment at issue in *Evans* read as follows:

> No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither 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 discrimination. This section of the Constitution shall be in all respects self-executing.

COLO. CONST. art. II, § 30(b).

15. *Evans*, 116 S. Ct. at 1627. Other scholars and I find the opinion "magisterial." *See* Larry Catá Backer, *Reading Entrails: Romer, VMI, and the Art of Divining Equal Protection*, 32 TULSA L.J. 361, 363 (1997) (commenting on the "magisterial ambiguity" of *Evans*). However, other commentators have argued the opinion "reads more like a political manifesto," Kaplan & Klaidman, *supra* note 9, at 27, and "has no foundation in American constitutional law, and barely pretends to." *Evans*, 116 S. Ct. at 1637 (Scalia, J., dissenting).

16. Matt Coles, director of the American Civil Liberties Union Lesbian and Gay Rights Project, recollected "[i]t was 1981 when we had the first proposal in San Francisco to recognize gay relationships . . . . I was actually in the room when the term 'domestic partnership' was invented. People thought lesbians and gay men lived alone." Joan Biskupic, *Once Unthinkable, Now Under Debate; Same-Sex Marriage Issue to Take Center Stage in Senate*, WASH. POST, September 3, 1996, at A1. *See also* Norman Podhoretz, *How The Gay Rights Movement Won*, 102 COMMENTARY 32, 35 (November 1996) ("[T]he polity is now following the culture on the question of homosexuality.").

But as history has so often borne out, with bend comes backlash.[17] Conservative political action committees and politicians[18]—appalled at Hawaii's "assault" on the institution of marriage—marshaled their forces, grabbed the media's attention, and staked out the moral high ground,[19] seizing the initiative in what was, after all, a presidential election year.[20] What followed was a clandestine[21] and frenzied[22] effort by state legislatures[23] and Congress[24] to protect the sanctity of the venerable

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17. I refer, of course, to the nagging and sorry historical resistance to civil rights movements in American history. *See, e.g.*, SUSAN FALUDI, BACKLASH (1989) (examining American political, cultural, and legal minimization of and hostility toward feminism in the 1980s); Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (arguing that racial equality only occurs when the interests of whites and blacks converge); Miller v. Johnson, 515 U.S. 900, 926 (1995) (concluding that the Justice Department's "max-black" policy in applying § 5 of the Voting Rights Act was violative of the Fourteenth Amendment).

18. The Defense of Marriage Act (DOMA) was supported by several conservative groups, including the Family Research Center and the American Center for Law and Justice. *See* Henry J. Reske, *A Matter of Full Faith: Legislators Scramble to Bar Recognition of Gay Marriages*, 82 A.B.A. J. 32 (July 1996); *see also* Gary Bauer, *Family Research Council Perspective: The Defense of Marriage Act: What the Experts Have to Say* (visited Feb. 13, 1997) <http://www.heritage.org/townhall/FRC/perspective/pv96h5hs.html>; *Defense of Marriage Act is 'Cultural Watershed,' Bauer Says*, May 8, 1996 Press Release (visited Feb. 13, 1997) <http://www.townhall.com/townhall/FRC/press/050896.html>.

19. One need only imagine the Biblical references this debate provoked. One of the most memorable statements was made by one of the bill's many cosponsors in the Senate, ranking minority leader Senator Robert Byrd of West Virginia, who compared America to Belshazzar, King of Babylon, calling Daniel in to read the handwriting on the wall:

> Daniel interpreted the writing: "God hath numbered thy kingdom and finished it. Thou art weighed in the balance and art found wanting. Thy kingdom is divided and given to the Medes and Persians." That night Belshazzar was slain by Darius the Median, and his kingdom was divided.
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> Mr. President, America is being weighed in the balances. . . . [L]et us take our stand. The time is now. The subject is relevant. Let us defend the oldest institution, the institution of marriage between male and female, as set forth in the Holy Bible. Else we, too, will be weighed in the balances and found wanting.

142 CONG. REC. S10111 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd).

20. *See* 142 CONG. REC. S10113 (daily ed. Sept. 10, 1996) (statement of Sen. Boxer) (stating DOMA was the result of election-year politics).

21. The House debate on the bill took place in the wee hours of the morning. *See* 142 CONG. REC. H7441-03 (daily ed. July 11, 1996). Similarly, though President Clinton actively supported passage of the Defense of Marriage Act on conservative talk radio stations nationwide, he signed the bill at midnight to show his opposition to it, a technique one commentator likened to a "quarterback sneak." *See* Romesh Ratnesar, *Sign Language*, THE NEW REPUBLIC, Nov. 18, 1996, at 23.

22. The Defense of Marriage Act was introduced in the Senate on May 8, 1996, and was signed into law by President Clinton on September 20, 1996. *See* 142 CONG. REC. S4869 (daily ed. May 8, 1996); *see also* Ratnesar, *supra* note 21, at 23.

23. As of March 3, 1997, 28 states had considered enactment of a mini-DOMA. Search of LEXIS, Legis Library, Sttext File (March 3, 1997).

24. To their credit, several Members sought a closer look at the issue, proposing that the GAO prepare a study examining how recognition of same-sex marriage would affect the fisc and the polity. *See* 142 CONG. REC. H7492 (daily ed. July 12, 1996) (statement of Rep. Gunderson).

institution of marriage[25] from gay attack and invasion.[26] The end product of Congress' manic activity was the ill-monikered Defense of Marriage Act (DOMA).[27] Touted as the cure for what ails American families,[28] DOMA allows states to refuse to give effect to same-sex marriages validly contracted in sister states,[29] and provides a federal definition of marriage which excludes same-sex unions.[30] Its net effect is to deny committed gay and lesbian couples the legal protections enjoyed (and some would say taken for granted) by married heterosexual couples. Similarly, several state legislatures have enacted or attempted to enact "mini-DOMAs" which purport expressly to deny recognition of same-sex marriages contracted within and without the state. [31]

The "legal and cultural crisis"[32] which surrounds this political tug of war is simultaneously simple and complex. At its most basic level, the argument over gay and lesbian marriage turns on how American society should protect and promote morality; more simply, it turns on what values and practices should be included within the "morality" American society seeks to promote. To a more jaded eye, examination of the issue exposes

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Though the study would effect no change in policy and would simply serve as "the basis of information necessary for rational discussions in the future," the amendment which would have provided this study was killed in the Rules Committee. *See* 142 CONG. REC. H7493 (daily ed. July 12, 1996) (statement of Rep. Gunderson).

25. I use this phrase tongue-in-cheek. Marriage's value as a legitimate social structure even as between opposite-sex partners has been challenged by many of the radical persuasion as an oppressive, hegemonic structure. *See* CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 175 (1989) ("The law of rape divides women into spheres of consent according to indices of relationship to men . . . . Daughters may not consent; wives and prostitutes are assumed to, and cannot.").

26. *See infra* text accompanying notes 175-184.

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

28. *See* Press Release, *supra* note 18 (referring to DOMA as a "cultural watershed").

29. DOMA provides:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C. §1738c (1996).

30. DOMA provides:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7 (1996).

31. *See, e.g.*, ALASKA STAT. § 25.05.013 (Michie 1996); S.C. CODE. ANN. § 20-1-15 (Law. Co-op. 1997).

32. *See* Reske, *supra* note 18, at 32.

the political underpinnings of the gay and lesbian rights debate. Conservative and liberal political forces grapple for control over mainstream social and cultural values, wielding history and religion as weapons in an attempt to curry political favor with the populus (and ultimately win sorely needed votes). Current division over gay and lesbian marriage can also be characterized as a dispute between the separate yet equal powers of the judiciary and legislature. When has the court crossed the purported "fine line" between constitutional interpretation and judicial legislation, and what may legislatures do to curb perceived judicial excess without running afoul of constitutional principles? The debate over gay and lesbian marriage can be further interpreted as the linchpin battle of an American cultural revolution which seeks to reject traditionally defined institutions such as heterosexual marriage and nuclear families for more functional social structures which better reflect the fluidity and uncertainty of twentieth-century American life.

From my particular political position as a feminist with radical/postmodern tendencies, however, the political rhetoric surrounding the current firestorm over gay and lesbian marriage smacks of the wholly misguided preoccupation with what feminist legal theory, as well as critical race theory, styles the "sameness/difference" debate.[33] Feminist legal scholars initially framed their examination of the law's recognition of and impact on women's subjective lives around whether women were psychologically, biologically, or epistemologically the same as or different from men. Liberal feminists pressed woman's "sameness" as the sole route to true equality while cultural feminists asserted woman's "difference" as the primary factor relating to her oppression (and the key to her liberation).[34] Similarly, the judicial and legislative forces vying for authority in the gay and lesbian marriage debate put forward opposing characterizations of gay and lesbian subjective experience. The opinions in *Lewin* and *Miike* rely upon the "sameness" of gays, lesbians and heterosexuals in striking down anti-gay provisions; in fact, gay and lesbian status is incidental to the protections the courts provide in those cases.[35] Conversely, legislative actions like the Defense

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33. *See, e.g.*, Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758. I do not mean to minimize the importance of race theory's contributions in this area; I simply find the sex/sexual orientation analogy more appropriate.

34. *See* Linda J. Lacey, *Introducing Feminist Jurisprudence: An Analysis of Oklahoma's Seduction Statute*, 25 TULSA L.J. 775, 787-89 (1990).

35. *See* Baehr v. Lewin, 852 P.2d 44, 53 n.14 (Haw. 1993), *remanded sub nom.* Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *order aff'd*, 950 P.2d 1234 (1997); Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996), *order aff'd*, 950 P.2d 1234 (1997).

of Marriage Act rely heavily on a perception of homosexuality as a fundamental, epistemological "difference" from heterosexuality. This "difference" ostensibly provides the basis for denying gays and lesbians equal access to social and political institutions and equal protection from irrational discrimination.

I contend that much like it was for feminism, the "sameness/difference" debate will prove to be a jurisprudential red herring in the law governing gay and lesbian marriage.[36] Feminism, having learned its lesson, has begun to examine women's subjective lives through a more postmodern construct. In recognizing and rejecting the polarity and rigidity of modernist concepts of an essential "woman" inherent in the "sameness/difference" debate, feminism seeks to "avoid the mistakes of . . . essentialism and universalism"[37] by attempting to "deconstruct[] the unitary quality and character of gender identity in the law."[38] Similarly, the "sameness/difference" dichotomy used in the political and judicial rhetoric of 1996 places social, cultural, and political discourse on gay and lesbian marriage in a philosophical straitjacket. Sexuality, much like gender, is a fluid and multiplicitous concept in American culture which usually eludes narrow classification, but has been—for purposes of political and legal expedience—pigeonholed as essential, not experiential. In failing to recognize the failures of feminism's "sameness/difference" fetish and in framing the debate over gay and lesbian rights as an exercise in epistemological classification, I contend that courts and legislatures currently struggling with this issue cling mindlessly to the stereotypes, assumptions, and limitations which result from the use of a mental construct of an essential "queer." Ultimately, the use of the "sameness/difference" debate to define the parameters of sexual orientation as they relate to marriage simply serves to deprive political actors, the gay and lesbian community, and the American public of truly significant discourse.

II. OF FEMINISM AND THE SAMENESS/DIFFERENCE DEBATE: A PRIMER

American feminism is not monolithic. In fact, defining the contours of feminism has been an integral part of shaping and developing the concept of a truly feminist jurisprudence; the competing yet complementary theories which make up American feminism all contribute valuable and meaningful insights into women's subjective

36. *See* STYCHIN, *supra* note 2, at 145 ("[I]n assuming a primary and coherent sexual identity, the complexity of identity which many subjects experience is overlooked.").

37. MINDA, *supra* note 3, at 142.

38. *Id*. at 144.

interaction with other individuals and with the state. Feminists of all stripes generally concur on three basic propositions. First, feminist theorists believe that societal structures and institutions are created and controlled by men and that this patriarchy dominates and perpetuates those institutions by forwarding masculinity as an objective norm.[39] Second, feminists agree that women bear the brunt of patriarchy's institutionalized inequality.[40] Third, feminists emphatically seek substantive reform of the patriarchal society which oppresses them.[41] Beyond these three core beliefs, however, feminists strongly disagree over the means by which social and legal reform is (or should be) achieved, which in turn stems from fundamentally differing perceptions of women's subjective experience. Because of this, any discussion of the sameness/difference debate's impact on feminist legal thought will be illuminated by an analysis of the two major schools of feminist legal theory which have contributed to the sameness/difference dichotomy—liberal (or symmetrical) feminism and cultural (or relational) feminism—and two which have devalued it—radical (or dominance) feminism and postmodern feminism.

For liberal or "symmetrical" feminists, the key to women's liberation is "equal symmetry under the law."[42] Liberal feminists believe that by advocating formal equality (equal treatment for men and women in all circumstances) feminists can begin to question and challenge the unstated model of masculinity pervasive in legal rules and principles. According to liberal feminists, fighting for legal and social equality of men and women by challenging gender stereotypes should be the means by which patriarchy is eliminated. Liberal feminists believe "law and custom divide the sexes into two arbitrary and irrational gender roles that restrict [individual] potentialities";[43] they believe laws which divide political and social opportunity based on sex "treat[] women and men as statistical abstractions rather than as persons with individual capacities, inclinations, and aspirations."[44]

Undergirding these assumptions, however, is an "insistence on the fundamental similarity of men and women."[45] Liberal feminists have been described as "basically traditional liberals who focus their writings

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39. *See id.* at 128.
40. *See id.*
41. *See* Lacey, *supra* note 34, at 780.
42. MINDA, *supra* note 3, at 134.
43. MACKINNON, *supra* note 25, at 40.
44. Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 329-30 (1984-85).
45. Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 798 (1989).

on women's issues,"[46] using traditional liberal constructs of autonomy, individuality, rationality, and rights to support their analyses.[47] While this approach allows liberal feminists to talk the talk of the American legal system,[48] as a matter of consistency it also requires them to accept that these constructs accurately describe men and women as individuals, and that any actual differences ascribed to men and women attach because of individual choice and are therefore individual differences.[49] Liberal feminism, in assuming that parallel in male and female experience, tells women to "accept men's experience [as presented by liberal legalism] as the norm and . . . conform to it"[50] in order to gain true equality.

Conversely, cultural feminists assume that women and men are inherently different. Cultural feminism, best recognized in the work of Carol Gilligan, values the biological, psychological, and epistemological differences of women. According to feminist scholar Robin West, these differences, which manifest themselves in "[t]he potential for material connection with the other[,] define[] women's subjective, phenomenological and existential state."[51] Because of this innate "connection" with others, cultural feminists argue that "women are more nurtur[ing], caring, loving and responsible to others than are men,"[52] and that this sensitivity, or "ethic of care,"[53] should be "celebrated and encouraged, not obliterated."[54] Because current legal constructs fail to recognize the value of women's difference, law should theoretically be reconstructed to incorporate the ethic of care. Practically speaking, this entails, at base, "a recognition of women's contributions to society"[55] in their childbearing and caregiving roles through laws which protect and benefit women who perform them, with the ultimate goal of bringing the ethic of care to bear on other substantive areas of the law.[56] For cultural

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46. Lacey, *supra* note 34, at 788.

47. According to some feminists, these constructs are inherently masculine. *See, e.g.*, Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 7-9 (1988).

48. *See* Lacey, *supra* note 34, at 789.

49. *See, e.g.,* Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974) (holding that a state employee benefits plan excluding maternity benefits for normal pregnancy was not violative of the Fourteenth Amendment and that the program merely distinguishes between "pregnant persons and non-pregnant persons").

50. Lacey, *supra* note 34, at 789.

51. West, *supra* note 47, at 14.

52. *Id*. at 17.

53. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

54. Lacey, *supra* note 34, at 785.

55. *Id*. at 786.

56. *See, e.g.,* Leslie Bender, *Changing the Values in Tort Law*, 25 TULSA L.J. 759 (1990); Kathleen A. Lahey and Sarah W. Salter, *Corporate Law in Legal Theory and Scholarship: From Classicism to Feminism*, 23 OSGOODE HALL L.J. 543 (1985); Janet Rifkin, *Mediation from a*

feminists, women's difference, ultimately, will be their salvo; the transformative power of "the feminine" for cultural feminists creates the possibility of "a more humane social order."[57]

Cultural feminism's strength, however, is ultimately its weakness. The ethic of care which distinguishes men from women also can reinforce traditional stereotypes of "woman's place" and "woman's work," which do not accurately define all women. Though cultural feminism has tried mightily to "reclaim the complements of Victorian gender ideology while rejecting its insults,"[58] its attempts at implementing the ethic of care in a legal culture which has not yet debunked those stereotypes have met with mixed results. For example, Joan Williams has elaborated on the harmful stereotypes which attend cultural feminism as illustrated in *Sears v. EEOC*,[59] a Seventh Circuit case relying upon the "difference" between male and female work habits to deny women opportunities to work in traditionally "masculine" sales positions.[60]

This fundamental schism between liberal and cultural feminists regarding the subjective lives of women, styled the "sameness/difference debate" in feminist literature,[61] has preoccupied feminism for several years. Gary Minda has noted that "[c]onsiderable intellectual energy and ink" has been expended in this effort to characterize and label an essentially subjective experience of women.[62] Recently, however, radical and postmodern feminists have sought to debunk the legitimacy of sameness/difference analysis as an academic exercise in futility. For radical feminists, gender inequality is "a matter of dominance and subordination, rather than of sameness and difference."[63] Dominance theory asserts that power imbalances between men and women preexist the state, but that the state crystallizes the imbalance and characterizes it as "equality." Hence, law is masculine, in that the state legitimates the preexisting distribution of power, and "objective, neutral" legal referents

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Feminist Perspective: Promise and Problems, 2 LAW & INEQ. J. 21 (1984); Patricia Tidwell and Peter Linzer, *The Flesh-Colored Band Aid: Contracts, Feminism, Dialogue and Norms*, 28 HOUS. L. REV. 791 (1991).

57. Williams, *supra* note 45, at 811 (quoting SUZANNE LEBSOCK, THE FREE WOMEN OF PETERSBURG: STATUS AND CULTURE IN A SOUTHERN TOWN, 1784-1860 144 (1984)).

58. *Id.* at 807.

59. 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd,* 839 F.2d 302 (7th Cir. 1988).

60. *See* Williams, *supra* note 45, at 813-22 (discussing the impact of *Sears* on feminist theory).

61. *See* Lacey, *supra* note 34, at 788-89.

62. MINDA, *supra* note 3, at 130.

63. Lisa R. Pruitt, *A Survey of Feminist Jurisprudence*, 16 U. ARK. LITTLE ROCK L.J. 183, 198 (1994).

reflect male experience and power as norms.[64] Catharine MacKinnon argues that the progression is "at root a question of hierarchy."

> Here, on the first day that matters, dominance was achieved, probably by force. By the second day, division along the same lines had to be relatively firmly in place. On the third day, if not sooner, differences were demarcated, together with social systems[,] to exaggerate them in perception and in fact, *because* the systematically differential delivery of benefits and deprivations required making no mistake about who was who. Comparatively speaking, man has been resting ever since.[65]

According to MacKinnon, since women's "difference" is a socially constructed byproduct of the power imbalance between women and men, and "sameness" presumes an objectively neutral but subjectively masculine referent, both can be used to reinforce the patriarchal status quo because neither challenges the power structures which subordinate women. Instead, women must demand societal transformation.[66]

Postmodern feminists similarly seek to expose a "pernicious dynamic beneath sameness/difference debates."[67] Postmodern legal scholars seek to destabilize and skew notions of "self" in law. For postmoderns, the self, or legal subject, is a social creature defined and constructed through its relationships with others.[68] Postmodernism embraces the idea of a "situated self" which is "embedded in a matrix of social and psychological factors that interact in different contexts."[69] Postmodern feminists argue that this idea of the situated self renders the essential constructs of "woman" embodied in liberal and cultural feminism false. Instead, gender is a "socially constructed artifact";[70] for any woman, gender gathers meaning from and gives content to her other social and cultural referents. For postmodern feminists, there is no "essential woman" to be found by liberal and cultural feminists because she does not exist; there is only the construct of "gender," which eludes measurement by any single social, cultural, or political yardstick. Accordingly, cultural and liberal feminists miss the mark entirely. Feminists should be in the business of uncovering and examining social and cultural multiplicity and fluidity in women's lives and how those constructs inform their experience as gendered beings, not looking for the answer to an unanswerable question.

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64. *See* MACKINNON, *supra* note 25, at 164-66.
65. CATHARINE MACKINNON, FEMINISM UNMODIFIED 40 (1988).
66. *See id.* at 32-34.
67. Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J 296, 297.
68. *See* MINDA, *supra* note 3, at 241.
69. Williams, *supra* note 67, at 307.
70. MINDA, *supra* note 3, at 143.

Radical and postmodern theories have their detractors, of course. Radical feminism, particularly its characterization of women's sexual and expressive freedom as "false consciousness" resulting from male domination and oppression, has been accused of the same essentialism which plagues liberal and cultural feminism,[71] an essentialism which itself seems false even to women who are sympathetic to feminist issues.[72] Similarly, postmodern feminist applications have been attacked as overly deferential to the social, cultural, and political structures which define gender (and hence gender oppression).[73] As Sabina Lovibond asked, tongue-not-entirely-in-cheek, of postmodern feminists, "[h]ow can anybody ask me to say goodbye to 'emancipatory metanarratives' when my own emancipation is still such a patchy, hit-and-miss affair?"[74] Though these criticisms have resonance with me (and, I imagine, with most thinking feminists), they do not necessarily reflect a burning desire to return to the polarity with which early feminists viewed "woman." In fact, they seem to inherently recognize that no one way of examining the problem of gender will be satisfying in every specific circumstance. By rejecting the notion that any single approach or theory concerning a problem will yield a "right" result, I believe feminism is beginning to reject the "double bind"[75] which the law governing sex and sexuality at first blush appears to require. To that end, feminists have begun to explore the many ways in which law and culture can be bent to feminism's purposes. As Mary Becker notes, feminists "should regard the variety of [feminist] approaches available today as a set of tools to be used as appropriate."[76]

These lessons of feminism have unfortunately not yet reached those political and judicial actors who currently struggle to sort out the legal and social implications of gay and lesbian marriage. In this second wave of what some consider the last civil rights movement,[77] gay and lesbian activists and supporters attempting to pierce the legal veil surrounding marriage have adopted, and courts have accepted, the relatively successful "sameness" litigation strategy used by liberal feminists in the early 1970s. Conversely, the political rhetoric that legitimates federal and state legislation such as the Defense of Marriage Act portrays gays and lesbians

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71. *See id*. at 138.

72. *See* Lacey, *supra* note 34, at 791-92.

73. *See* MINDA, *supra* note 3, at 145.

74. Sabina Lovibond, *Feminism and Postmodernism*, *in* POSTMODERNISM AND SOCIETY 161 (Boyne and Rattansi eds., 1995).

75. MINDA, *supra* note 3, at 130.

76. Mary Becker, *Strength in Diversity: Feminist Theoretical Approaches to Child Custody and Same-Sex Relationships*, 23 STETSON L. REV. 701, 701 (1994).

77. *See* 142 CONG. REC. H7447 (daily ed. July 11, 1996) (statement of Rep. Farr).

as biologically, epistemologically, and psychologically different from heterosexuals. Although I recognize that this bipolar structure bestows considerable short-term legal and political advantages on those who seek to "win" the battle over gay and lesbian marriage, its long-term impact will be to crystallize culturally an essential image of gays and lesbians, one which imposes sexual orientation as their defining referent. In the sections which follow, I discuss how notions of gay and lesbian essentialism permeate legislative and judicial consciousness in *Baehr v. Lewin*, *Baehr v. Miike*, and the Defense of Marriage Act and how the sameness/difference dichotomy which creates them deprives us of meaningful, realistic discourse (and, hence, meaningful and realistic policy) in the area of gay and lesbian marriage.

III. THE *BAEHR* MINIMUM: "SAME-SEX" MARRIAGES AND THE JUDICIAL SAMENESS SALVO

A. Act I: A Love Story

Ninia Baehr and Genora Dancel are two people in love with each other who both happen to be women. They met in June 1990, through Ninia's mother, who worked with Genora at a television station in Honolulu. According to reports from friends, the attraction was immediate, intense, and mutual. Genora and Ninia dated for several months, developing and nurturing their relationship, and in September both of them realized their commitment to each other. Genora popped the question; Ninia said yes.[78]

Because Ninia Baehr and Genora Dancel are two people in love with each other who both happen to be women, the state of Hawaii refused to grant them a marriage license.[79] After much soul searching, the couple filed suit[80] on May 1, 1991, in Hawaii state court, seeking declaratory and injunctive relief under the Hawaii Constitution's equal protection, due process, and privacy provisions against the unconstitutional interpretation and application of Hawaii matrimonial law

78. This much-abbreviated story of Genora and Ninia's courtship is derived from WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 1-4 (1996).

79. Genora and Ninia filed for their marriage license on December 17, 1990. After waiting for an advisory opinion from the Attorney General of Hawaii, the Hawaii Department of Health denied their application on April 21, 1991, on the basis that they could not contract a legal marriage under Hawaii law as a same-sex couple. *See id.* at 4.

80. Two other same-sex couples filed suit as well. At the time suit was filed, Antoinette Pregil and Tammy Rodrigues had lived together for nine years while raising Antoinette's daughter from a previous relationship, and Joe Melilio and Patrick Lagon had a 13-year relationship. *See id.*

to deny same-sex couples marriage licenses.[81] Defendant John Lewin, Director of the Department of Health of the State of Hawaii, moved for dismissal, arguing that Genora and Ninia had failed to state a claim under Hawaii law,[82] and the trial court granted the motion and dismissed the case.[83] Genora and Ninia then appealed the dismissal to the Hawaii Supreme Court.[84]

B. Act II: Baehr v. Lewin

In *Baehr v. Lewin*, the Hawaii Supreme Court reversed and vacated the trial court's dismissal of Genora and Ninia's lawsuit and remanded for further proceedings.[85] The very narrow procedural holding of the case was relatively innocuous; the court simply found that the plaintiffs' pleadings stated a claim under Hawaii law which prohibited the trial court's dismissal.[86] The expansive substantive analysis of Hawaii equal protection law underlying the procedural holding, however, has served as fuel for the constitutional and political fire surrounding the debate over gay and lesbian marriage rights.[87]

In *Lewin*, the Hawaii Supreme Court found that Ninia and Genora's complaint stated a claim for relief under the equal protection provisions of the Hawaii Constitution.[88] Unlike the U.S. Constitution, which does not explicitly provide for protection against gender discrimination,[89] Article I, Section 5 of the Hawaii Constitution provides that "[n]o person shall . . . be denied the equal protection of the laws . . . or be discriminated against in the exercise [of her civil rights] because of race, religion, *sex*, or ancestry."[90] Article I, Section 3 of the Hawaii Constitution, Hawaii's

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81. *See* Baehr v. Lewin, 852 P.2d 44, 48-50 (Haw. 1993), *remanded sub nom.* Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *order aff'd*, 950 P.2d 1234 (1997). To symbolize their commitment to one another, Ninia and Genora moved in together the day they filed suit. *See* ESKRIDGE, *supra* note 78, at 4.

82. *See Lewin*, 852 P.2d at 50-52.

83. *See id.* at 52.

84. *See id*.

85. *See id*. at 68.

86. *See id*. at 54-55.

87. *See* Reske, *supra* note 18, at 33.

88. *See Lewin*, 852 P.2d at 67. The court also examined Genora and Ninia's claims under the Hawaii Constitution's privacy provision. *See* HAW. CONST. art. I, § 6 ("The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest."). However, relying on federal Constitutional due process analysis of the fundamental right to marry, the court refused to find that Hawaii's right to privacy provision includes a fundamental right to same-sex marriage. *See Lewin*, 852 P.2d at 55-57.

89. *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 332-35 (Kermit L. Hall et al. eds. 1992) (discussing development of protection against gender discrimination under the Equal Protection Clause) [hereinafter OXFORD COMPANION].

90. HAW. CONST. art. I, § 5 (emphasis added).

version of the ill-fated federal Equal Rights Amendment,[91] further prohibits Hawaii's abridgment or denial of "[e]quality of rights under the law . . . *on account of sex*."[92] The court noted that the institution of marriage is considered "one of the basic civil rights of man,"[93] rising to the level of a "civil right" protected by Hawaii's equal protection provision.[94] The court then found that the Hawaii statute regulating access to marriage "by its plain language . . . restricts the marital relation to a male and a female."[95] According to the court, Hawaii's "regulation of access to the status of married persons" to only those of the opposite sex "gives rise to the question whether the applicant [same-sex] couples have been denied the equal protection of the laws."[96] In other words, Hawaii's restriction of the marriage status to opposite-sex couples may rise to the level of unconstitutional discrimination against Ninia and Genora not because they are both homosexual,[97] but because they are both women.[98] In fact, the Hawaii court specifically noted that "same-sex" marriage need not be homosexual marriage,[99] and that for purposes of their constitutional review of equal protection, questions of "whether homosexuality constitutes 'an immutable trait' . . . [are] immaterial."[100]

The court then, in a case of first impression in Hawaii, sought to determine the proper standard of review[101] under Article I, Section 3 of

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91. The Equal Rights Amendment provided that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Proposed Amendment to the Constitution of the United States, H.R.J. Res. 208, 92d Cong. 1st Sess., 86 Stat. 1523 (1972). For a discussion of the ERA's purpose, see Barbara A. Brown et. al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971).

92. HAW. CONST. art. I, § 3 (emphasis added).

93. *Lewin*, 852 P.2d at 56 (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1936)).

94. *See id.* at 60.

95. *Id.* Although the statute does not explicitly prohibit same-sex marriages, statutory language implies marriage may only be contracted between a man and a woman. *See* HAW. REV. STAT. § 572-1(3) (1985) ("[t]he man does not at the time have any lawful wife living and . . . the woman does not at the time have any lawful husband living."). Further, the court noted that both parties stipulated that the statute as applied by the Hawaii Department of Health "denies same-sex couples access to the marital status." *See Lewin*, 852 P.2d at 60.

96. *Id.*

97. In fact, the court explicitly rejected this line of reasoning, noting that its analysis under the equal protection provision of the Hawaii constitution rendered this line of reasoning unnecessary. *See id.* at 53 n.14 ("[I]t is irrelevant, for purposes of the constitutional analysis germane to this case, whether homosexuality constitutes 'an immutable trait' because it is immaterial whether the plaintiffs, or any of them, are homosexuals.").

98. The couple is denied the status of marriage because they are not of the opposite sex as required by the statute.

99. *See Lewin*, 852 P.2d at 51 n.11.

100. *See id.* at 53 n.14.

101. For a discussion of the treble-tiered standard of review used by the Supreme Court in analyzing Equal Protection Clause cases, *see generally* 2 ROTUNDA, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.3 (1986 & Supp. 1991).

the Hawaii constitution for legislative enactments which establish sex-based classifications. After observing that "[l]egislative action, whatever its motivation, cannot sanitize constitutional violations,"[102] the court recognized that at least some heightened standard of review was warranted when examining legislation containing sex-based classifications.[103] The court thus rejected application of the least restrictive "rational basis" test, which is used when examining legislation not involving a fundamental right or a suspect classification.[104]

Acknowledging the "longstanding principle that [the] court is free to accord greater protections to Hawaii's citizens under the state constitution than are recognized under the United States Constitution,"[105] the court analogized Article I, Section 3—the Hawaii "ERA"—to the defunct federal ERA, and determined that Justice Powell's concurrence in *Frontiero v. Richardson*[106] strongly implied that passage of the federal ERA "would have subjected statutory sex-based classifications to 'strict' judicial scrutiny."[107] Since Hawaii had adopted an equal rights amendment to its constitution, the court reasoned, Powell's reasoning in *Frontiero* should apply.[108] Accordingly, the court held "that sex is a 'suspect category' for purposes of equal protection analysis under . . . the Hawaii Constitution,"[109] and that the Hawaii matrimonial law challenged by Ninia and Genora "is subject to the 'strict scrutiny' test."[110] The court noted that under Hawaii law, application of strict judicial scrutiny requires that the law be "presumed . . . unconstitutional unless the state shows compelling state interests which justify such classifications"[111] and shows that the law is "narrowly drawn to avoid unnecessary abridgment[s] of constitutional rights."[112] Finally, the court vacated the circuit court's order of dismissal and remanded for further proceedings, noting that the

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102. *Lewin*, 852 P.2d at 60 n.20.

103. *See id.* at 65 n.31 (citing Hawaii v. Tookes, 699 P.2d 983, 988 (Haw. 1985)).

104. *See id.*

105. *Id*. at 65-66.

106. 411 U.S. 677 (1973). Justice Powell, the ubiquitous swing vote on the Burger Court, joined a plurality of four to strike a federal law awarding salary supplements to married military men but not to married military women, but refused to apply strict scrutiny. Powell believed that passage of the Equal Rights Amendment, awaiting ratification by six states, would require strict scrutiny and wished to defer to the political process. *See id.* at 691-92 (Powell, J., concurring).

107. *Lewin*, 852 P.2d at 67.

108. *See id*.

109. *Id.*

110. *Id*.

111. *Id.* at 64 (quoting Holdman v. Olim, 581 P.2d 1164, 1167 (Haw. 1978) (internal citations and quotations omitted)).

112. *Id*. at 64 (quoting Nagle v. Board of Educ., 629 P.2d 109, 111 (Haw. 1981)).

defendant carries the burden of overcoming the strong presumption of unconstitutionality.[113]

C. Act III: Baehr v. Miike

On remand, the State of Hawaii argued that five governmental interests supported its construction and application of Hawaii's marriage law: the protection of the health and welfare of children; encouragement of procreation within marriage; ensuring sister-state recognition of Hawaii marriages; protection of Hawaii's governmental resources; and protection of its citizens from "the reasonably foreseeable effects of State approval of same-sex marriage[s]."[114] In what was either a stroke of very bad lawyering or a total abandonment of its position, however, the state failed to present evidence on four of the five government interests it forwarded.[115] As to the fifth interest, protection of the health and welfare of children, the state presented four expert witnesses in child psychology and family demographics.[116] Though three of the experts[117] testified that in several respects the optimal environment for a child's development is that of an intact, traditional opposite-sex marriage, on cross examination, all admitted that sexual orientation does not make a parent unfit, that gays and lesbians are capable of the same level of successful parenting as heterosexuals, and that same-sex couples can provide the same nurturing, caring environment needed by children as heterosexual couples.[118] Plaintiffs also presented four expert witnesses who testified similarly regarding gay and lesbian parenting ability.[119]

The trial court found that Hawaii had not met the burden of proof established by the Hawaii Supreme Court in *Lewin*.[120] Specifically, the trial court held that although the state had shown possible adverse effects on children raised by same-sex couples, the state had not established a causal connection between same-sex marriages and adverse effects on the health and well-being of Hawaii's children.[121] In fact, the state's experts indicated same-sex marriage may have positive effects on children raised

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113. *See id.* at 68.

114. Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *3 (Haw. Cir. Ct. Dec. 3, 1996), *order aff'd*, 950 P.2d 1234 (1997).

115. *See id.* at *16.

116. *See id.* at *4-9.

117. The Court discounted the testimony of one of the experts, Dr. Williams, presented by the State. *See id.* at *8.

118. *See id.* at *4-10.

119. *See id.* at *10-16.

120. *See id.* at *21.

121. *See id.* at *18.

by same-sex couples.[122] Even if the state had shown that same-sex marriage would adversely effect the health and welfare of Hawaii's children, the court noted that the state failed to produce evidence that the statute was "narrowly tailored to avoid unnecessary abridgements of constitutional rights."[123] Accordingly, the trial court held Hawaii's marriage statute unconstitutional on its face and as applied and enjoined the State of Hawaii and its agents from withholding marriage licenses from same-sex couples.[124]

D. Act IV: The Sameness Salvo, and Why it Matters

Prior to *Lewin* and *Miike*, Genora and Ninia's story had been, for Genora and Ninia and others similarly situated, a familiar story of love and commitment often told in private circles but seldom heard by American legal culture. Same-sex relationships were historically provided little or no legal protection or recognition.[125] At best, some municipalities had enacted domestic partnership registration laws,[126] and several progressive public and private employers provided benefits to their employees' domestic partners.[127] However, previous same-sex legal challenges to state marriage regulation statutes had failed,[128] and attempts to broaden coverage of federal benefits to include same-sex relationships had proved similarly futile.[129]

Lewin and *Miike*, however, represented a significant threat to that legal landscape. At the very least, the Hawaii Supreme Court's innovative interpretation of the Hawaii Constitution's equal protection

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122. *See id.* at *8.

123. *Id*. at *21.

124. *See id.* at *22. However, Judge Chang also entered a stay of entry of judgment pending appeal, so Genora and Ninia will not be able to get a marriage license until the Hawaii Supreme Court reviews the trial court's decision on the merits. A decision is expected later this year. Meanwhile, the Hawaii legislature has been busy attempting to mitigate the impacts of the *Lewin* and *Miike* decisions. *See* H.R. 1461, 19th Leg. (Hi. 1997); S. 36, 19th Leg. (Hi. 1997) (proposed amendments to the Hawaii Constitution which prohibit same-sex marriage).

125. *See Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1508 (1989) (discussing the current and historical legal status of gays and lesbians in America) [hereinafter *Developments*].

126. *See, e.g.*, D.C. CODE ANN. § 36-1402 (1996); SAN FRANCISCO, CAL., ADMIN. CODE §§ 62.1-62.8 (1991); *see generally* Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164 (1992) (critiquing current domestic partner statutes).

127. *See* Bowman & Cornish, *supra* note 126, at 1188-96.

128. All of the challenges failed, regardless of whether based on state statutory interpretation, equal protection, or due process arguments. *See Developments*, *supra* note 125, at 1605-11.

129. *See, e.g.,* McConnell v. Nooner, 547 F.2d 54 (8th Cir. 1976) (holding that a Minnesota veteran could not receive increased spouse education benefits for his same-sex partner due to Minnesota's explicit prohibition of same-sex marriage).

clause signaled a new, and likely more successful, litigation strategy available to civil rights groups ready to start fresh in gay-friendly states with a history of expansive state constitutional interpretation.[130] Moreover, the tenor of the court's opinion in *Lewin* indicated that any later review would be stringent and that Genora and Ninia would prevail on appeal of the merits.[131] *Lewin* and *Miike* embody the possibility that prohibition of same-sex marriage will fail under Hawaii's state constitutional jurisprudence and that other states' prohibitions will follow suit.[132]

Genora and Ninia's success in Hawaii has implications for the nation as well. The Full Faith and Credit Clause of the United States Constitution provides that "[f]ull Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[133] Theoretically, at least, the Full Faith and Credit Clause could provide a national vehicle for legitimizing marriages contracted in Hawaii by same-sex couples in other states, even if those states refused to allow such marriages to be contracted within their borders.[134] Further, federal benefits triggered by marriage historically have relied solely on state law determinations of such status.[135] Hawaiian recognition of same-sex marriage would provide gay and lesbian couples a heretofore unexplored avenue for receiving federal benefits.

However, the most significant impact of *Lewin* and *Miike* will be cultural, not legal. The courts in *Lewin* and *Miike* rely heavily on what I style "the sameness salvo," an approach which attempts to legitimize the provocative legal and social concept of same-sex marriage by adopting the legal framework of formal equality initially used by civil rights litigation groups in the areas of race and sex, while quietly sidestepping the issue of sexual orientation. Under this framework, sexual orientation is legally reconstructed as a distinction without a difference. In using formal equality's tricks of the trade, the courts' analyses refuse to recognize any material experiential difference between homosexuals and heterosexuals. Though this reconfiguration of sexual orientation in the

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130. *See Not All is Lost; Gays in America will Prevail in Their Quest for Equal Rights*, PITTS. POST-GAZETTE, Sept. 16, 1996, at A10.

131. *See* Peter Canellos & Ken Kobayashi, *Ruling Stops Possible Influx of Gays*, BOSTON GLOBE, Dec. 5, 1996, at A27.

132. *See* Mike McKee, *Gay Marriages Face Serious Obstacles*, AMER. LAWYER, December 1996, at 28.

133. U.S. CONST. art. IV, § 1, cl. 1.

134. *See* EUGENE SCOLES AND PETER HAY, CONFLICT OF LAWS § 24.20 (2d ed. 1992) (discussing the limited public policy exception to the Full Faith and Credit Clause).

135. *See* HOMER H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 2.1-2.4 (2d ed. 1988).

image of race and sex may seem initially successful in a legal sense, in the long run, formal equality's failure to acknowledge gay and lesbian difference will actually hinder the gay and lesbian rights movement.

Lewin and *Miike* establish the basis for the sameness salvo in two ways. First, *Lewin* construed the denial of marriage licenses to same-sex couples in Hawaii to be a result of sex discrimination while at the same time unequivocally rejecting sexual orientation as the defining referent for same-sex couples. For the Hawaii Supreme Court, Genora and Ninia's sexual orientation was irrelevant; the court instead saw Genora and Ninia simply as two women who, for whatever reason, sought a marriage license. Several convenient legal fictions followed. First, *Lewin* reconstructed the potentially explosive issue of same-sex marriage as a far more familiar and less threatening type of discrimination. By characterizing prohibitions of same-sex marriage as sex discrimination (i.e., denial of a marriage license based on one of the individuals' sex), the court deflected some of the inevitable controversy surrounding the issue by avoiding reference to the "same-sex" (read: gay or lesbian) relationship which it sought to legitimize. The court in *Lewin* could also technically eschew judicial activism, since it was recognizing no "new" rights for gays and lesbians, such as a fundamental interest in same-sex marriage subject to due process constraints.[136] Most importantly, though, by construing the issue as one of sex discrimination, the court in *Lewin* practically ensured that same-sex marriage would be treated as an issue of formal equality. Hawaii's constitutional provision prohibiting discrimination on the basis of sex allowed the court to apply the more stringent constitutional analysis of strict scrutiny to alleged sex-based discrimination, even though federal constitutional analysis requires only intermediate scrutiny,[137] ostensibly because of women's "difference."[138] Strict scrutiny has historically been used to enforce the primary tenet of formal equality, which states like persons should be treated alike. In circumstances where "difference" is used as a subterfuge for invidious discrimination on the basis of race, alienage, and color.[139] The *Lewin* court therefore effectively equated sex-based distinctions (which may or may not be based on a "real" difference such as pregnancy) with distinctions based on purely facile differences of skin color and heritage.

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136. *See* Kevin Zambrowicz, Comment, *"To Love and Honor All the Days of Your Life": A Constitutional Right to Same-Sex Marriage*, 43 CATH. U. L. REV. 907 (1994).

137. This may have changed with Justice Ginsburg's recent opinion in *United States v. Virginia*, 518 U.S. 515 (1996). One commentator has argued that her use of the "exceedingly persuasive" standard there should be likened to a "hermeneutical journey." *See* Backer, *supra* note 15, at 369.

138. *See* ROTUNDA, *supra* note 101, at 326.

139. *See* OXFORD COMPANION, *supra* note 89, at 845.

In *Miike*, however, the trial court examined the state's proffered interest in prohibiting same-sex marriage—alleged harm to children—not on the basis of sex, but on the basis of sexual orientation. The experts proffered by both the plaintiffs and the state presumed at least that same-sex couples would usually, if not always, be gay and lesbian couples. Further, in its findings of fact and law, the trial court itself implicitly acknowledged that gay and lesbian couples would likely be the class primarily impacted by prohibition of same-sex marriages. The court found that "[t]he sexual orientation of parents is not in and of itself an indicator of parental fitness."[140] The trial court's analysis of sex-based discrimination alleged in the denial of marriage licenses to same-sex couples, in effect, used sex as a proxy for sexual orientation. "Sex" became "same-sex," which in turn was interpreted by the court and the litigants as "gay and lesbian," for purposes of examining the state's interest in prohibiting same-sex marriage. Rather than analyzing Hawaii's governmental interests in prohibiting an individual from marrying another individual of the same sex, the court and the litigants instead (perhaps inadvertently) realigned the analysis and examined whether sexual orientation could properly serve as a proxy for the government's asserted interest in protecting children from poor parenting, which it clearly could not do.

Hence, the sameness salvo. With a little judicial slight of hand, the *Lewin* and *Miike* courts simultaneously ignored differences based on sexual orientation by making them legally irrelevant to the construct of same-sex marriage and assumed sexual orientation as the factual referent which defines that construct. Sexual orientation, as it applies to same-sex marriage, is a distinction without a difference, much like race was for the couple prohibited from marrying by Virginia's miscegenation laws in *Loving v. Virginia*.[141] The Hawaii courts are not alone in their use of the sameness salvo to reconstruct sexual orientation discrimination as sex discrimination. Several circuits are currently wrangling with sameness in determining whether same-sex sexual harassment constitutes "sex discrimination" cognizable under Title VII of the Civil Rights Act of 1964.[142]

As a litigation tactic, gay and lesbian rights groups' use of sameness has obvious benefits and advantages. It allows gay and lesbian rights

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140. Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *17 (Haw. Cir. Ct. Dec. 3, 1996), *order aff'd*, 950 P.2d 1234 (1997).

141. 388 U.S. 1 (1967) (striking Virginia miscegenation laws as unconstitutional under the Equal Protection Clause).

142. *See* John Hechinger, *Same Sex Abuse A Twist for Courts*, TULSA WORLD, April 13, 1997, at A13.

groups to pick up the mantle of the now-legitimated civil rights movements of the 1960s and '70s, with all their concomitant moral and political overtones. It also provides gays and lesbians access to the power of legal culture through language; sameness theory allows "different" groups to use legitimating language like "rights," "autonomy," and "equality," language which is heard and understood by mainstream legal culture.[143] Most importantly, it allows judicial and political actors to justify their actions within a legal framework understood by both legal professionals and laypersons.

Legal sameness, however, comes only at a price. Though gays and lesbians may now benefit from the sameness salvo, they will, like their predecessors, discover the traps lurking beneath the benefits of essentialist characterization of homosexuality as without difference. First, though the sameness strategy works well initially in litigation by recognizing and confirming individual similarities which cross boundaries of sex, race, and sexual orientation, at some point legal recognition of individuals' sameness fails to appreciate group differences, whether biological, social, or cultural, which may more significantly cause discriminatory harm to some members of the group.[144] Differences which do matter are then rejected or ignored as valid bases for laws or policies which seek to level the playing field for those group members who suffer discrimination. For example, liberal feminism's use of the sameness strategy worked well in ensuring equal treatment in areas such as the administration of estates,[145] jury service,[146] property ownership,[147] and other areas in which women's "difference" was based on antiquated or stereotyped notions of "woman's place."[148] After liberal feminism secured women access to the public sphere, however, sameness' double edge was used against women. Sameness theory allowed legal actors either to ignore or minimize women's biological differences from men, most notably in the areas of reproductive rights and pregnancy. The best example of this phenomenon is the Supreme Court's 1974 decision in *Gelduldig v. Aiello*,[149] where a six-member majority held that a state employee benefit package which

143. *See* Lacey, *supra* note 34, at 789.

144. I say "some" because I do not believe that all members of a group are equally impacted.

145. *See* Reed v. Reed, 404 U.S. 71 (1971).

146. *See* Taylor v. Louisiana, 419 U.S. 522 (1975).

147. *See* Kirchberg v. Feenstra, 450 U.S. 455 (1981).

148. This strategy was also used to curb restrictive policies which were based on stereotypes of "man's place." *See, e.g.,* Craig v. Boren, 429 U.S. 190 (1976) (holding a state statute denying the sale of 3.2 percent beer to 18 to 20-year-old males yet allowing its sale to 18 to 20-year-old females based on gender stereotypes was unconstitutional gender-based discrimination).

149. 417 U.S. 484 (1974).

failed to provide maternity benefits was not discrimination on the basis of sex. Justice Stewart asserted that such a denial did not discriminate between men and women, but between "pregnant and non-pregnant persons."[150] Commentators have also argued that the Supreme Court's tortured reproductive rights jurisprudence fails fully to recognize that the biological burdens and benefits of its decisions fall predominantly on women.[151] Sameness theory also provides legal actors an avenue for denying the existence of social or cultural differences which may lead to discrimination or oppression. For example, Joan Williams has noted that the structure of American wage labor presumes a childless "ideal worker" and therefore fails to recognize the predominant role childcare plays in many working women's lives.[152] Similarly, the pervasive, historical oppression of African Americans led to socially constructed differences which limited educational and job opportunities for many African Americans.[153] However, recent judicial and legislative actors have used sameness arguments to rationalize legal efforts to curb affirmative action programs aimed at eradicating and remediating those socially created differences.[154]

Legal culture's indifference to difference has similarly begun to manifest itself in the burgeoning body of gay and lesbian law. For example, Justice Scalia's dissenting opinion in *Romer v. Evans*[155] hints at the ways in which "sameness" can be used to remove social or cultural differences which might negatively impact gays and lesbians. In *Evans*, Scalia argued that Colorado's Amendment 2, which prohibited legal action at any state governmental level that would provide gays, lesbians, or bisexuals protection from discrimination,[156] prohibits *special* treatment of homosexuals and nothing more.[157] According to Scalia, "general laws and policies that prohibit arbitrary discrimination" adequately protect gays and lesbians in Colorado, and gays and lesbians are not denied equal protection if they are required to submit to more difficult political processes than others to receive "preferential treatment."[158] Scalia uses a "municipal contracts" example to make this point; where a state law

150. *Id*. at 496-97.

151. *See* Frances Olsen, Comment, *Unraveling Compromise*, 103 HARV. L. REV. 105 (1989).

152. *See* Williams, *supra* note 45, at 831-33.

153. *See generally* BERNARD R. BOXILL, BLACKS AND SOCIAL JUSTICE (1984).

154. *See, e.g*., Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Miller v. Johnson, 515 U.S. 900 (1995).

155. 116 S. Ct. 1620 (1996).

156. *See* text of Amendment, *supra* note 14.

157. *See Evans*, 116 S. Ct. at 1629 (Scalia, J., dissenting).

158. *See id*. at 1630 (Scalia, J., dissenting).

prohibits awards of municipal contracts to relatives of city politicians, those relatives must seek redress at the state level, while non-relatives may receive contracts merely by persuading the city.[159] Scalia's analysis is grounded heavily in sameness theory at its most extreme. For purposes of equal protection analysis, sexual orientation simply becomes political orientation;[160] because "real" difference does not exist, access to extra political "protection" is unneeded and may be restricted. Justice Scalia's use of sameness to suppress difference has also been used with great success by proponents of the Defense of Marriage Act.[161] One Representative argued:

> There have been many people who have spoken already this evening who have said, this is about equal rights, or this is about discrimination. Let me just say first of all that this is not about equal rights. We have equal rights. Homosexuals have the same rights as I do. They have the ability to marry right now, today. However, when they get married, they must marry a person of the opposite sex, the same as me. That is the same right that I have. Now, I would also say that, just like a homosexual, I do not have the right to marry somebody of the same sex. It is the same for them as it is for me. There is no disparate between [sic] this rights issue.[162]

The use of sameness theory in gay and lesbian rights law not only allows legal actors to ignore negative, socially constructed difference which legitimates discrimination against gays and lesbians, but also minimizes positive expectational differences gays and lesbians may have regarding marriage and family. In twentieth-century America, the construct of family "is in a constant state of redefinition,"[163] and the legal and social contours of marriage have shifted significantly in the last fifty

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159. *See id*. at 1631 (Scalia, J., dissenting).

160. This is evident in Scalia's discussion of gay and lesbian political power:

> [B]ecause those who engage in homosexual conduct tend to reside in disproportional numbers in certain communities, have high disposable income, and of course care about homosexual-rights issues more that the public at large, they possess political power much greater than their numbers, both locally and statewide . . . . I do not mean to be critical of their legislative successes; homosexuals are as entitled to use the legal system for their moral sentiments as are the rest of society. But they are subject to being countered by lawful, democratic countermeasures as well.

Id. at 1634 (Scalia, J., dissenting) (citations omitted). Larry Backer has noted that Scalia's dissent emits "a strange whiff of the European Jew-baiting tracts of another age, refurbished, of course, for use against a different kind of 'Jew.'" Backer, *supra* note 15, at 379.

161. Difference theory was used just as successfully, often by the same people, with no sense of contradiction. *See infra* text accompanying notes 169-200. Joan Williams noted this phenomenon occurred in the early women's movement as well. *See* Williams, *supra* note 45, at 798-801.

162. 142 CONG. REC. H7443 (daily ed. July 11, 1996) (statement of Rep. Largent).

163. *Defending Marriage and Family Values*, SAN FRANCISCO CHRONICLE, May 13, 1996, at A18. *See also* Moore v. City of E. Cleveland, 431 U.S. 494 (1977).

years.[164] Many commentators have pegged these changes in marital structure as the predominant cause of a perceived deterioration of American culture and values,[165] arguing that marriage has become a disposable, convenience-driven relationship.[166] Some argue that the extension of marriage benefits to gays and lesbians would further cheapen the institution.[167] Consider, however, another perspective, one which I share, described so eloquently by Richard Mohr:

> The sanctifications that descend instantly through custom and ritual on current marriages, descend gradually over and through time on gay ones—and in a way they are better for it. For the sacred values and loyal intimacies contained in a gay marriage are products of the relation itself, are truly the couple's own. Marriages are patens for value. In this, though, they vary like patinas. Customary heterosexual marriages with their ceremonial trappings are like copper dunked in sulfates and chlorides—you get quick results, occasionally lasting, occasionally not tacky. Gay marriages, in contrast, are like the development of a patina on wood. The warming, the enriching, the surface that is depth, the depth that is sheen are a result of necessary age. The passage of time and a use that is patient tendance, jointly and solely, produce it. And so, after a decade together, we feel and to many puzzled others appear more married than the married.[168]

IV. DEFERENCE TO DIFFERENCE: THE DEFENSE OF MARRIAGE ACT

The political rhetoric surrounding the Defense of Marriage Act of 1996[169] and its focus on gay and lesbian difference serves as an almost perfect foil to the judicial focus on gay and lesbian sameness in *Lewin* and *Miike*. The political actors who encouraged passage of DOMA successfully argued that gay and lesbian difference provides a legitimate reason for allowing states to refuse to recognize same-sex marriages contracted in other states, and the legislative history of DOMA indicates that in enacting DOMA Congress used "difference" to construct an essential "queer"—radical, promiscuous, incapable of parenting and morally bankrupt—based on prevalent misperceptions and stereotypes of gays and lesbians. Much as the sameness salvo will limit legal and

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164. *See generally* JUDITH AREEN, CASES AND MATERIALS ON FAMILY LAW 120-217 (3d ed. 1992) (discussing changes in the traditional marriage model).

165. *See generally* ROBERT BORK, SLOUCHING TOWARD GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE (1996).

166. *See* Lawrence Criner, *Redrawing the Marriage Chart*, WASH. TIMES, Dec. 17, 1996, at A17.

167. *See id.*

168. RICHARD MOHR, GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW 18 (1988).

169. Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7, 28 U.S.C. § 1738c (1996)).

political decision-making which protects gays and lesbians from discrimination based on relevant social and cultural difference, the use of difference theory will mask legitimate similarities that exist between gays, lesbians and heterosexuals by allowing decisionmakers to rely on false assumptions and construct universal theories about what encompasses gay and lesbian existence.

DOMA was introduced into Congress by Presidential candidate Bob Dole. Despite controversy over Congress' interpretation of its own power to enact such legislation under the Full Faith and Credit Clause of the Constitution,[170] as well as concerns that federal legislation in family law matters would unduly trammel states' sovereignty,[171] DOMA easily passed both houses of Congress and was signed into law in September 1996. As such, it was one of the few widely bipartisan measures enacted by the 104th Congress.[172] DOMA's dual purposes were to "define[ ] the words 'marriage' and 'spouse' for purposes of Federal law and allow[ ] each state to decide for itself with respect to same-sex marriages."[173] Though DOMA's stated goals were ostensibly "limited in scope and based on common sense,"[174] the Representatives and Senators who encouraged its passage massaged the societal subconscious, portraying gays and lesbians as epistemologically, biologically, and morally different from heterosexuals. In so doing, Congress legitimized DOMA by tapping into society's hidden (and not so hidden) fears, misconceptions, and caricatures of gays and lesbians and characterizing them as differences.

First, DOMA supporters sought generally to characterize gays and lesbians as political radicals, using rhetoric which sadly echoes the paranoia of McCarthyism.[175] Several legislators referred to opponents of the bill—whether gay, lesbian, or straight—as "the homosexual lobby,"[176] "the homosexual movement,"[177] or even "homosexual extremists."[178] Gays and lesbians seeking marriage were characterized by Steve Largent as "a very radical element," with a homosexual agenda "that is in the

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170. *See* 142 CONG. REC. S5931-01 (daily ed. June 6, 1996) (statements of Sen. Kennedy).

171. *See id.*

172. Another bipartisan measure, The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996), suffered from the same essentialism as did DOMA. For a discussion, see Linda McClain, *"Irresponsible" Reproduction*, 47 HASTINGS L.J. 339, 345-58 (1996).

173. 142 CONG. REC. S4869 (daily ed. May 8, 1996) (statement of Sen. Nickles).

174. *Id.*

175. For a discussion of McCarthy era hysteria, see generally DAVID OSHINSKY, A CONSPIRACY SO IMMENSE: THE WORLD OF JOE MCCARTHY (1983).

176. 142 CONG. REC. S10068-01 (daily ed. June 6, 1996) (statement of Sen. Helms).

177. 142 CONG. REC. H7501 (daily ed. July 12, 1996) (statement of Rep. Hyde).

178. 142 CONG. REC. H7275 (daily ed. July 11, 1996) (statement of Rep. Barr).

process of redefining what marriage is."[179] This element was so radical, in fact, that "[n]ot even the very liberal socialist economies of Europe" have allowed it.[180] This conspiratorial "homosexual extremist agenda" is nothing less than "a sneak attack on society" which seeks to "encod[e] this aberrant behavior in legal form before society itself has decided it should be legal."[181] They are part of a revolution, "a deliberate, coldly calculated power move to confront the basic social institutions on which our country . . . was founded."[182] Civil rights groups who seek to enforce valid same-sex marriages contracted in Hawaii in sister states "are bent on completely eradicating the concept of marriage as all civilizations have known it,"[183] using a "profoundly undemocratic . . . strategy."[184]

Second, DOMA's proponents portray gays and lesbians as incapable of reproduction, child care, and parenting. One of the four governmental interests[185] the committee report advanced to support DOMA, "defending and nurturing the institution of traditional, heterosexual marriage,"[186] incorporated the notion that the federal government has a "deep and abiding interest in encouraging responsible procreation and child rearing."[187] According to the Committee, "[w]ere it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship."[188] Because it is an "inescapable fact that only two people . . . only a man and a woman, can beget a child,"[189] marriage should be restricted to opposite-sex couples because "[m]arriage brings children into the world."[190] Senator Robert Byrd noted,

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179. 142 CONG. REC. H7443 (daily ed. July 11, 1996) (statement of Rep. Largent). William Bennett also argued that "[i]t is exceedingly imprudent to conduct a radical, untested and inherently flawed social experiment on an institution that is the keystone in the arch of civilization." William J. Bennett, . . . *But Not a Very Good Idea Either*, WASH. POST, May 21, 1996, at A19.

180. 142 CONG. REC. H7275 (daily ed. July 11, 1996) (statement of Rep. Barr).

181. 142 CONG. REC. S10110 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd).

182. 142 CONG. REC. H7444 (daily ed. July 11, 1996) (statement of Rep. Barr).

183. 142 CONG. REC. H7445 (daily ed. July 11, 1996) (statement of Rep. Barr).

184. 142 CONG. REC. H7441 (daily ed. July 11, 1996) (statement of Rep. Canady).

185. The other three governmental interests advanced in the committee report were "defending traditional notions of morality; protecting state sovereignty and democratic self governance; and preserving scarce governmental resources." *See* H.R. REP. NO. 664, at 12 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2911.

186. *Id.* at 22.

187. *Id.* at 23.

188. *Id.* at 24.

189. *Id.* at 22.

190. 142 CONG. REC. S10121 (daily ed. Sept. 10, 1996) (statement of Sen. Ashcroft).

> [t]o insist that male-male or female-female relationships must have the same status as the marriage relationship is more than unwise, it is patently absurd.
>
> Out of such relationships children do not result. Of course, children do not always result from marriages as we have traditionally known them. But out of same-sex relationships no children can result. Out of such relationships emotional bonding oftentimes does not take place, and many such relationships do not result in the establishment of "families" as society universally interprets that term.[191]

The parade of horribles which would result from recognizing same-sex marriage includes the notion that "[h]omosexual couples will . . . have equal claim with heterosexual couples in adopting children, forcing us (in law at least) to deny what we already know to be true: that it is far better for a child to be raised by a mother and a father than by, say, two male homosexuals."[192]

Finally, DOMA's legislative history paints a picture of gay and lesbian immorality, drawing from stereotypes of gays and lesbians as promiscuous and selfish. The debate over same-sex marriage fans "[t]he flames of hedonism, the flames of narcissism, the flames of self-centered morality"[193] and undermines the institution of marriage with "trendy moral relativism."[194] In fact, it was argued that even if same-sex marriage were allowed, the institution must be tailored to meet the special needs of gay and lesbian relationships; "a homosexual marriage contract [must] entail a greater understanding of the need for 'extramarital outlets.'"[195] Moreover, gay marriages are simply unnecessary. Since the "incidents" of gay and lesbian relationships can be legally protected through wills, powers of attorney, and contractual agreements, "asking the rest of the country to recognize such marriages does nothing that the law cannot currently do, it is simply asking for special privileges."[196] Ultimately, same-sex marriages would inevitably compromise the "sanctity of marriage" by undermining "a foundation of our society."[197]

The "queer" caricature which emerges from DOMA's legislative history—an affected, flamboyant, effeminate, promiscuous gay male,

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191. 142 CONG. REC. S10109 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd).

192. 142 CONG. REC. H7495 (daily ed. July 12, 1996) (statement of Rep. Smith) (quoting William J. Bennett, . . . *But Not a Very Good Idea Either*, WASH. POST, May 21, 1996, at A19).

193. 142 CONG. REC. H7482 (daily ed. July 12, 1996) (statement of Rep. Barr).

194. 142 CONG. REC. S10114 (daily ed. Sept. 10, 1996) (statement of Sen. Coats).

195. 142 CONG. REC. H7495 (daily ed. July 12, 1996) (statement of Rep. Smith) (quoting William J. Bennett, . . . *But Not a Very Good Idea Either*, WASH. POST, May 21, 1996, at A19). In fact, gay rights activist and law professor William Eskridge has argued that same-sex marriage would, in fact, "civilize" gays and lesbians. *See generally* ESKRIDGE, *supra* note 78, at 62-66.

196. 142 CONG. REC. H7495 (daily ed. July 12, 1996) (statement of Rep. Lipinski).

197. *Id.*

probably upper-middle class and white,[198] who is politically active in a gay leftist or radical group[199]—is at once unmistakable and unreliable. He pairs up nicely with the "welfare queen" caricature embodied in the Personal Responsibility Act of 1996.[200] For most Americans, the pair represent all that is wrong with America—greed, amorality, and irresponsibility—in a way conveniently removed from average America's common existence. In other words, they are different, but not real. Therein lies the rub. Defending differences based on stereotypes—especially ones not particularly accurate—leads to uninformed, unreasoned, and uninspired policymaking with unimaginable impacts on real people.

V. (IN)CONCLUSION

Whether the progression was strategical or natural, national discourse surrounding the gay and lesbian marriage movement in the last few years seems to have gravitated toward the sameness/difference construct which preoccupied early feminism. However successful strategically, pervasive problems with essentialism led modern feminists to move away from such rigid categorization. The Defense of Marriage Act and *Lewin* and *Miike* simply illustrate that the limitations of the sameness/difference debate apply as fully to sexual orientation as they do to sex because they fail to fully recognize the fluidity of sexual orientation and how it informs interactions with the state and others. The actors who must sort out the economic, social, cultural, and political fallout surrounding gay and lesbian marriage would do well by America if they kept that in mind during the next battle of this culture war.

198. *See* CRUIKSHANK, *supra* note 2, at 171-74 (discussing the marginalization of lesbians and gays of color in the media).

199. *See id*. at 175-77.

200. *See supra* note 169.