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Taking the InterSEXional Imperative Seriously: Sexual Orientation and Marriage Reform

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TAKING THE INTERSEXIONAL IMPERATIVE SERIOUSLY: SEXUAL ORIENTATION AND MARRIAGE REFORM

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I. INTRODUCTION

When we think about the construction of heterosexuality, we are always, if only implicitly, thinking too about the construction of alternative sexualities and of sexuality itself. The articles in this symposium by Professors Sterett and Ertman enrich our thinking about this fundamental inquiry in important ways. Professor Sterett, with her nuanced and textured historical analysis of the emergence of pension and other benefits, draws our attention to how the legal creation, regulation, and justification of state-sponsored benefits helped to shape and reinforce normative conceptions of gender and sexual orientation.[1] Professor Ertman, with her bold proposal for rectifying the longstanding, gendered economic inequalities associated with divorce, suggests that altering the terms on which marital relationships are conducted and severed might be part of *re*-constructing heterosexuality in significant ways.[2]

As I thought about these two articles, and particularly as I thought about them in juxtaposition to one another, they raised for me a question inspired by the idea of "interSEXionality" that is the organizing topic of this symposium. I take the intersexionality imperative, if we can speak of one, to include at least the notion that in assessing proposed legal interventions or reforms, we should consider the likely *intersexional effects*, if you will, of such proposals. How are particular legal strategies likely to affect not only the explicit problem to which they are immediately addressed, but the wider range of problems that are implicated by the complex links between and among related areas of concern? What, for example, might Professor Ertman's suggestion of a move to a regime of premarital security agreements mean for the construction of alternative—that is, non-dominant—sexualities?[3] This is a subject that Ertman herself addresses in considering how queer theorists might receive her proposal.[4]

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* Professor of Law, University of Michigan. Thanks to Juliet Brodie for her comments on an earlier draft, and to the participants in the InterSEXionality Symposium for many thought-provoking discussions.

1. *See* Susan Sterett, *Husbands & Wives, Dangerousness & Dependence: Public Pensions in the 1860s–1920s*, 75 DENV. U. L. REV. 1181 (1998).

2. *See* Martha M. Ertman, *Reconstructing Marriage: An InterSEXional Approach*, 75 DENV. U. L. REV. 1215 (1998) [hereinafter Ertman, *Reconstructing Marriage*]. For a more extended exploration of Ertman's proposal, see Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998).

3. *See* Ertman, *Reconstucting Marriage*, *supra* note 2, at 1216–17, 1219–26.

4. *See id.* at 1228–34.

In thinking about difficult questions like these, I want to consider more generally the problem of how to conceptualize and predict the intersexional effects of proposed legal reforms. This problem is, I think, part of a large and difficult set of questions for progressive legal scholars: How will particular strategies be received, understood, and shaped in the diffuse, collective social processes that give meaning to these strategies over time? Is it possible to maintain progressive "ownership" of particular strategies once they become part of these collective processes and thus become subject to *appropriation* by diverse forces and to *domestication* in ways that are sometimes hard to predict or control?

Professor Sterett's article provides a rich point of conceptual departure from which to pursue these questions, illuminating as it does how the legal device of the pension, and its doctrinal grounding, emerged within, and functioned to reinforce, a system of starkly gendered relations.[5] By tracing the ways in which pension benefits were justified and grounded in naturalized conceptions of masculinity and femininity, the article exposes important links between legal and cultural forces.[6] With this framework in mind, I will probe potential intersexional effects of, first, Professor Ertman's proposal for premarital security agreements, and second, some contemporary advocacy for same-sex marriage. My focus in terms of same-sex marriage will be on an intersection suggested by the Sterett and Ertman articles: the nexus between sexuality, gender, and poverty. I will explore the intersexional implications of some defenses of same-sex marriage for poor women and, in particular, poor women who are single mothers.

II. THE PREMARITAL SECURITY AGREEMENT REGIME AND ASSESSING THE INTERSEXIONAL EFFECTS OF PROPOSED LEGAL REFORMS

Professor Ertman proposes to import the commercial law device of security agreements into the family law realm and to reconceive primary homemakers (usually women) as creditors and primary wage-earners (usually men) as debtors.[7] The move to a regime of premarital security agreements is, of course, motivated in the first instance by gender concerns, and more particularly by concerns for the impoverishing effect of divorce on women who have worked extensively or exclusively in the home, rather than the market. Ertman makes a strong case for how the effects of such agreements might ameliorate the economic inequities she identifies, and how, surprisingly, her proposal might even generate an ideologically diverse coalition of legal economists and feminists of varying stripes.[8]

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5. *See* Sterett, *supra* note 1.
6. *See id.*
7. *See* Ertman, *Reconstructing Marriage*, *supra* note 2, at 1216–17, 1219–26.
8. *See id.* at 1225–26.

I want to focus on the capacity of premarital security agreements to affect the nature and contours of gender relations, and in turn to participate in reshaping not only dominant conceptions of heterosexuality, but of alternative sexualities as well. How should we think about the capacity of the Ertman legal proposal to affect this broader range of social meanings and practices? On this point, the proposal strikes me as quite paradoxical in having the potential both to reinforce a deeply gendered status quo that supports heterosexual normativity *and* to open some dramatically liberatory paths away from that status quo.

The road to retrenchment lies, I fear, in the incentive structure created by the proposal. By attempting to ameliorate the economic inequalities that fall on homemakers, the proposal may *also* produce an economic incentive for women to remain or become full or part-time homemakers, with primary child care responsibilities and all that goes along with that. Making it financially more attractive to adopt that role may well reinforce the gendered status quo that is the subject of Professor Sterett's historical analysis—the status quo that sends more men into the market (Sterett's world of "danger")[9] and keeps more women in the home (Sterett's world of "dependency").[10] Reinforcing those gendered patterns, in turn, may well entrench cultural norms of femininity and masculinity—the very norms that Professor Sterett traces in her analysis of the gendered justification of early pension benefits. Doing so, moreover, might well shore up traditional gender scripts in ways that are distinctly inhospitable to the gender transgressions posed by non-heterosexuals.

Professor Ertman anticipates these issues in her article. She points out that her proposal is gender-neutral, and so might be thought to give men an incentive to abandon the market in favor of the home.[11] But while the legal proposal is gender-neutral, the world is not; indeed, just this fact is what moves Professor Ertman in the first instance. Absent cultural change to accompany legal change—a point I will discuss further—formal equality measures in a world of substantive inequality tend to reproduce the underlying inequalities, and to be shaped and driven by existing social dynamics.[12] Under current social conditions, in other words, premarital security agreements standing alone are more likely to track than to disrupt the gendered status quo.

Professor Ertman also argues that the additional "exit options"[13] that the premarital security interest will create may well empower women financially, and as a result, perhaps even culturally.[14] Here, though, I

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9. *See* Sterett, *supra* note 1, at 1187–93.

10. *See id.* at 1198–1204.

11. *See* Ertman, *Reconstructing Marriage*, *supra* note 2, at 1230–31.

12. For further discussion of this point, see Jane S. Schacter, *Skepticism, Culture and the Gay Civil Rights Debate in a Post-Civil Rights Era*, 110 HARV. L. REV. 684, 721 (1997).

13. Ertman, *Reconstructing Marriage*, *supra* note 2, at 1229.

14. *Id.* at 1229–31.

think there is an important point to be made about the predictive enterprise I am suggesting. When we try to assess the intersexional effects of legal reforms, we need to think beyond the specific policy results that particular proposals can induce, such as giving women new financial advantages. We also need to consider self-consciously the cultural meaning that reforms are likely to have—that is, the larger public understandings that are likely to attach to measures like a premarital security agreement. Particularly because it may be that only a relatively small or demographically privileged group would actually use premarital security agreements,[15] the ways that these new agreements come to be publicly framed and perceived might prove to be more significant than any concrete effects that such agreements may produce for those who enter into them. And here there is risk, for it seems to me that the measure might well come to be understood to reflect, although it is surely not motivated by, a social commitment to gendered role division in heterosexual marriage. Indeed, Professor Ertman acknowledges this risk, yet argues that even a failed reform can be preferable to a bad status quo by creating the possibility of future change.[16] I am not so sure. Retrenchment can be pretty bleak.

There is, however, another way to think about how premarital security agreements, if operationalized, might come to be culturally understood, and here is where the paradox that I see arises. Perhaps the path charted by this proposal might be one that does not reinforce, but rather contributes to dislodging, the gendered status quo. What I find among the most conceptually appealing aspects of the proposal is the very act of importing commercial law into the realm of marriage, a realm that is conventionally regarded as sanctified and somehow above the nasty business of commerce. Reconceiving husbands and wives in the language of debtors and creditors, and inserting Article 9 security agreements into the cultural domain traditionally inhabited by vows and valentines, has the capacity to jolt and to challenge conventional understandings about what marriage *is*, what it *does*. Professor Ertman's proposal might thus contribute to the project—vital in my view—of demystifying marriage by reconceiving committed heterosexual partnerships in the frank and unadorned vocabulary of commercial exchange.[17]

Ertman's idea strikes me as one important part of a larger project of distinguishing the legal rights, benefits, and status of marriage, on the one hand, from the complex constellation of symbols, rituals, traditions, and various moral, religious, and social trappings of marriage, on the other hand. These two elements are conventionally, but unconvincingly,

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15. Ertman recognizes this potential limitation. *See id.* at 1249–50.

16. *Id.* at 1234.

17. For a historical analysis of the regulation of heterosexuality and a comprehensive argument in favor of applying a bargaining framework to the politics of heterosexuality, see LINDA R. HIRSHMAN & JANE E. LARSON, HARD BARGAINS: THE POLITICS OF SEX (1998).

presented as an undifferentiated whole. The sober scrutiny of marriage that is inherent in a proposal that emphasizes the commercial qualities and potentialities of marriage offers one way to press that point and to begin to break apart the contested meanings of marriage as an institution. Reconceiving and reconstructing marriage in this way, moreover, can contribute to creating a world that includes and enables what I think of as a genuine pluralism of affiliative structures. I use this term to describe a world in which marriage might coexist with a flexible domestic partnership structure that can accommodate partnerships of different sorts, established under different conditions, with widely different aspirations and conceptions of the good in mind.[18]

Which of these two paths—retrenchment or progress—could we expect a codified Ertman proposal to go down? It is hard to say, and I do not think this paradoxical set of potential intersexional consequences is at all unique to Ertman's proposal. This uncertainty will frequently arise where progressive legal reforms are concerned, which is just what makes this sort of inquiry complex. The basic dilemma is that the progressive roots and motivations of a particular legal reform might not be the forces that frame and determine that reform's meaning once it is operative. Worse still, *ex ante* predictions of this kind are elusive and difficult.

I do not suggest that we can eliminate uncertainty of this kind, but there a few ways to address and perhaps to ameliorate it. First, we should simply *think* about these questions directly. That is, we should ask the intersexional questions—as Professor Ertman laudably does in her contribution to this symposium—and should embrace and specifically consider the possibility that paradoxical consequences may flow from well-intentioned interventions. Launching this inquiry means making deliberative, though surely imperfect, judgments about how best to steer proposals in their intended direction. Second, we should recognize that legal strategies alone are often unlikely to be autonomous sources of deep social change, and have to be paired with cultural and other strategies, and conceptualized in terms of the dynamic, mutually constitutive relationship between legal and social forces.[19] All of this suggests to me that as we consider what road a premarital security agreement regime might take us down, we should think about accompanying strategies that can influence the outcome. For example, expressly situating the proposal within a package of comprehensive strategies aimed squarely at reconceiving the cultural meaning of marriage, or deliberately designing the proposal so that it might be used by unmarried partners as well, reflect two ideas of this kind.

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18. Indeed, a robust pluralism of affiliative structures would also allow for *non-affiliation*, and would rethink fundamentally the linkage of important rights and benefits like health insurance coverage with long-term interpersonal commitment. *See* Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, 6 OUT/LOOK: NAT'L LESBIAN & GAY Q. 9, 16–17 (1989).

19. This point is explored at greater length in Schacter, *supra* note 12, at 719–23.

III. INTERSEXIONAL EFFECTS OF CONTEMPORARY SAME-SEX MARRIAGE ADVOCACY

We can extend this kind of analysis to an issue suggested, though not addressed, in the panel articles—same-sex marriage advocacy. Professor Sterett's historical analysis of early welfare state programs, and the conceptions of gender and sexuality embedded within them, invites us to think about similar issues in the context of the contemporary welfare state.[20] One way to conceptualize this inquiry would be to ask a question parallel to Sterett's historical question: How do the legal structures that today define and govern welfare benefits participate in constructing gender and sexuality?[21] Although I will touch on that question, I want to take a somewhat different perspective here, one that is consistent with my theme of considering the intersexional effects of particular strategies and legal interventions.

I will focus on contemporary advocacy for same-sex marriage rights and explore some of the possible intersexional effects of that advocacy on issues relating specifically to poor women in the welfare state today.[22] In doing so, I suggest that there are some highly problematic intersexional dimensions here, ones that should influence the course of future advocacy. I do not, in doing so, seek to join here the larger debate among proponents of gay equality about the wisdom of seeking same-sex marriage rights. That debate has been ably engaged by, among others, Bill Eskridge,[23] Paula Ettlebrick,[24] Nan Hunter,[25] Darren Hutchinson,[26] Nancy

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20. *See* Sterett, *supra* note 1.

21. *See generally* Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274. Fineman argues that the welfare system, with its goal of eliminating single motherhood, favors, and pushes individuals into, a traditional nuclear family structure, with the father as financial provider and mother as homemaker. *Id.* at 277–93; *see id.* at 276 ("[T]he ideology of patriarchy is the most instrumental force in the creation and acceptance of discourses about Mothers in our society.").

22. *Cf.* Ertman, *Reconstructing Marriage*, *supra* note 2, at 1248 (recognizing the potential of PSA's to "exacerbate rather than alleviate the marginalization of poor people and many women of color").

23. WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 84–85 (1996) (arguing that claims made by gay "marriage critics are too speculative to overcome the presumption of equality").

24. Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL'Y 107, 114 (1996) (arguing that gay and lesbian rights advocates should be cautious in arguing for same-sex marriage and should pursue "more inclusive social and legal policies that would bestow respect and benefits upon all who assume the responsibility and functions of family-whether they are married or not"); *see also* Ettelbrick, *supra* note 18.

25. Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 12 (1991) (arguing that "legalization of lesbian and gay marriage and the adoption of domestic partnership provisions are incomplete unless the other option also exists, and that they need to be analyzed as part of the feminist inquiry into how both private and public law reinforce power imbalance in family life").

26. Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 586–602 (1996) (arguing that many same-sex marriage advocates essentialize the gay/lesbian experience, ignoring vital racial and class differences among members of the gay and lesbian community).

Polikoff,[27] Tom Stoddard,[28] and Andrew Sullivan.[29] My focus will be much more targeted.

It will break no new ground to recognize that it has been a consistent strategy of so-called "welfare reformers" to brutally stigmatize single mothers—that subgroup of mothers who, as Martha Fineman has pointed out, must be marked as "single" to separate them from unmodified "mothers," who by definition are to be taken as married.[30] In contemporary political discourse, it passes without much controversy to blame single mothers, especially poor ones, for a wide array of social ills, including, most ironically, poverty itself. Indeed, as Fineman's work has shown, single mothers are routinely identified as both the cause and the result of poverty, and inhabit a category that is itself imbued with a strong dose of moral blame.[31]

Although this long-running rhetorical strategy has powerfully shaped contemporary discourse, the phenomenon is hardly limited to rhetoric. Increasingly, the pressure for single mothers to marry is finding its way into the law. Consider, for example, state experiments with so-called "bridefare," which create financial incentives to marry.[32] Moreover, the 1996 federal welfare reform bill, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996,[33] enshrines this view of single mothers both in its legislative findings and within the law itself. Con-

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27. Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1549–50 (1993) (arguing that advocacy of lesbian and gay marriage will "require a rhetorical strategy that emphasizes similarities between our relationships and heterosexual marriages, values long-term monogamous coupling above all other relationships, and denies the potential of lesbian and gay marriage to transform the gendered nature of marriage for all people").

28. Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, 6 OUT/LOOK: NAT'L LESBIAN & GAY Q. 9, 9 (1989) (arguing that, despite the historically oppressive structures of the marriage construct, gay rights advocates should seek legal recognition of same-sex marriages because the economic advantages and legal rights that marriage confers upon individuals will futher both equal rights and the transformation of the current institution of marriage).

29. ANDREW SULLIVAN, VIRTUALLY NORMAL 178–79 (1995) ("Marriage is not simply a private contract; it is a social and public cognition of a private commitment. As such, it is the highest public recognition of personal integrity. Denying it to homosexuals is the must public affront possible to their public equality.").

30. Fineman, *supra* note 21, at 291.

31. MARTHA ALBERSTON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 106–18 (1995). *See generally* Linda J. Lacey, *As American As Parenthood and Apple Pie: Neutered Mothers, Breadwinning Fathers, and Welfare Rhetoric*, 82 CORNELL L. REV. 79, 79 & n.1 (1996) (reviewing FINEMAN, *supra*, and DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM (1995)) ("Rhetoric about the dangers that single mothers pose to society has reached a fever pitch in the last decade. Critics blame single mothers for poverty, crime, drug addiction, and the breakdown of western culture as we know it.").

32. *See* N.J. STAT. ANN. §§ 44:10-3.4 to 3.7 (West 1993) (repealed 1997) (providing that children whose parents marry shall have their benefits continued); *see also* Julie Kosterlitz, *The Marriage Penalty*, 24 NAT'L J. 1454, 1455–56 (1992) (discussing a similar proposal in Wisconsin).

33. Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of the U.S.C.).

sider, for example, these legislative findings that appear in the congressional preamble to the welfare reform law:

> "Marriage is the foundation of a successful society."
>
> "Marriage is an essential institution of a successful society which promotes the interests of children."
>
> "The negative consequences of an out-of-wedlock birth on the mother, the child, the family, and society are well documented . . . ."
>
> "The negative consequences of raising children in single-parent homes are well documented . . . ."[34]

Beyond making these specific findings, Congress in 1996 enacted a block grant system, affording states considerable latitude in creating their own welfare systems, but requiring that federal funds be used in ways that further the stated purposes of the law—including, as set forth in the statute, to "encourage the formation and maintenance of two-parent families."[35]

At the very time that welfare reformers unrelentingly hammer poor women for not marrying, and at the very time that marriage is so aggressively pressed in law and in political rhetoric as a panacea for poverty and a magical route to deliverance for poor women, the debate over same-sex marriage rages. I number myself firmly among those who wish that the same-sex marriage debate had not been joined at this particular moment in history—a moment when the forces of so-called family values wield considerable power, as the passage of the Defense of Marriage Act[36] and its many state law analogues[37] painfully reflect. In my view, however, once the same-sex marriage debate *was* joined, advocates of sexual equality were left with little choice but to oppose current marriage law, which imposes a formal, legal inequality on lesbians and gay men. Even still, advocates and academics *do* have crucial choices to make about what strategies and theories to pursue in advocacy.

I am particularly concerned with strategies that valorize and romanticize marriage, as my earlier discussion might suggest that I would be. In

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34. These congressional findings are among those made in connection with the Temporary Assistance for Needy Families program. The findings appear in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 101, 110 Stat. 2105, 2110 (codified at 42 U.S.C. § 601 note (Supp. II 1996) (Congressional Findings)), *reprinted in* JULIE A. NICE & LOUISE G. TRUBEK, POVERTY LAW: THEORY AND PRACTICE 619–20 (1997).

35. 42 U.S.C. § 601(a)(4) (Supp. II 1996).

36. The Defense of Marriage Act denies federal recognition to same-sex marriages and legislatively authorizes states to deny recognition to same-sex marriages that may be performed in other states. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. II 1996), and 28 U.S.C. § 1738C (Supp. II 1996)).

37. State statutory analogues to this federal law generally deny recognition to any same-sex marriage that may be performed in another state. For an overview of the Defense of Marriage Act and cognate state laws, see Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921 (1998).

a general sense, I fear that strategies like these will undermine the real pluralism of affiliative structures that I think we should seek.[38] More specifically, I fear that these strategies draw same-sex marriage advocates—unintentionally, to be sure—into the lamentable larger dynamics that sustain contemporary single-mother bashing.[39] Various advocates today argue, for example, that marriage has a uniquely "civilizing" capacity,[40] that marriage marks a uniquely "deep" commitment to society and by the partners to one another,[41] and that marriage should be pursued for the "social recognition" that it brings.[42] These sorts of arguments can fuel—in ways that can be as real as they are unintended—the stigmatization and relentless condemnation of poor single mothers. After all, to characterize marriage as civilizing is to imply the uncivilized character of those outside the institution. To posit marriage as marking a unique form of commitment seems inescapably to devalue other family arrangements. And, to crave the social recognition that marriage brings is to accept at face value that very social recognition, rather than to question and resist its far-reaching effects.

While arguments like these may be shrewd when measured against the near-term goal of winning more popular support for gay marriage rights in the current political climate, they are troubling in light of their pernicious intersexional effects. By validating the conventional wisdom that posits marriage as society's "very foundation," and by pressing the good, socially acceptable behavior of many marriage-aspiring sexual minorities, these strategies become complicitous in the dominant discourse that makes marriage a compulsory part of citizenship, and that penalizes—harshly, as contemporary welfare reform measures suggest—many who are unmarried.

Here again, there is complexity and uncertainty in attempting to measure the intersexional effects of a legal strategy. The problems I point out may be either less or more severe than I have suggested. The problems may be less severe because I am underestimating the intrinsically radical potential of same-sex marriage—whatever advocacy strategy is used—to destabilize gender and convention, and in turn, to transform the

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38. *Cf.* Hutchinson, *supra* note 26, at 583–636 (arguing that pro-marriage strategies deployed by gay rights proponents work to erase and obscure the experiences and needs of gays and lesbians who are poor or of color).

39. By stressing this aspect of the problem, I do not mean to erase other ways in which advocacy for same-sex marriage may create undesirable effects, such as by creating hierarchies within the gay and lesbian community that disfavor those who may choose not to marry. *See* Ettelbrick, *supra* note 18, at 16 ("Ironically, gay marriage, instead of liberating gay sex and sexuality, would further outlaw all gay and lesbian sex which is not performed in a marital context.").

40. ESKRIDGE, *supra* note 23, at 8–13.

41. SULLIVAN, *supra* note 29, at 182.

42. Evan Wolfson, *Same-Sex Marriages: PRO—Two Sides Debate Issue Before Congress and the Courts*, DALLAS MORNING NEWS, June 23, 1996, at 1J.

institution of marriage[43] into something that cannot be so readily used to subordinate poor women. (Perhaps this might explain why the same Congress that passed welfare reform, after all, also passed the Defense of Marriage Act). Or it may be more severe than I think because my focus on particular advocacy strategies may be too marginal. Given the current context, perhaps *any* social demand for entry into the institution of marriage will inevitably serve to buttress the power of the institution itself and so to enable and encourage its reactionary political uses. The details of how the marriage claim is framed may simply be too nuanced and subtle for the crude collective politics of meaning that help to shape public understandings.

True, there are no easy or irrefutable ways to gauge intersexional effects like these. But, again, we ought to ask the intersexional question and craft arguments and strategies with intersexional considerations in mind. In the domain of the marriage struggle, that means disclaiming strategies that valorize marriage and pursuing strategies that are, instead, explicitly rooted in a vision of real pluralism and justice, broadly construed. This means accepting a responsibility to participate self-consciously in constructing and re-constructing heterosexuality and alternative sexualities with careful attention to the broad and diverse range of interests affected by these processes of construction.

43. *See generally* Hunter, *supra* note 25 (arguing that the legalization of gay and lesbian marriage will potentially destabilize the gender-based definition of marriage, and thus have effects beyond the gay and lesbian communities).