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Recommended Citation

Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236 (2006).

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THE POLITICS OF SAME-SEX MARRIAGE POLITICS

KATHERINE M. FRANKE*



In this Essay I would like to share some reflections on the politics of same-sex marriage politics. In a very short period of time, this issue has moved to the center of the gay and lesbian rights movement as well as larger mainstream political and legal debates. Some have even argued that this issue affected, if not determined, the outcome of the 2004 presidential election. This, I believe, is rather an overstatement, but I must concede that the issue has gained traction in ways that most of us would not have predicted five years ago. The states of Vermont and Connecticut have enacted Civil Union laws for same-sex couples, the Commonwealth of Massachusetts now allows both same and different sex couples to marry, and, in the last year, trial courts have found unconstitutional the exclusion of same-sex couples from the institution of marriage in New York and California. Spain has now joined some of its fellow EU members in the Rhine Delta by allowing same-sex couples to marry, and the Constitutional

Court of South Africa found that the South African Constitution requires that same-sex couples be permitted to marry on terms equal to those made available to different sex couples.¹ At the same time, Governor Schwarzenegger vetoed the same-sex marriage law in California, courts in Arizona and Indiana rejected constitutional challenges to their marriage laws, an intermediate appellate court in New York reversed a trial court finding that same-sex couples should be permitted to marry, and referenda barring same-sex marriage swept the country in 2004 and 2005 and will, no doubt, continue to do so in 2006. Forty-two states have enacted “little DOMAs,”² limiting the institution of marriage to one man and one woman. This issue, like so many others in American politics at the present moment, is highly polarized—rarely garnering moderate positions.

I would like to reflect on this dynamic political, moral, and legal moment—which, I fear, may have shifted again by the time you finish reading this Essay—by offering some thoughts about how and why this particular issue has emerged as the highest of priorities in the gay community, and what might be the costs of such a strategic choice. Just two years ago, in sweeping language, the U.S. Supreme Court found laws that criminalized same-sex sex unconstitutional in *Lawrence v. Texas*. This decision has been widely referred to in the lesbian and gay legal community as “our *Brown*,” referring to the landmark 1954 desegregation decision *Brown v. Board of Education*. By this, of course, it is meant that *Lawrence* would usher in a civil rights revolution for gay men and lesbians in a fashion equivalent to the civil rights movement inaugurated by *Brown*.

In an Essay published in 2004, I offered a more modest appraisal of the promise of *Lawrence* than that advanced by the leaders of the major gay rights organizations in New York and Washington.³ I also voiced concern about the direction that the gay community was taking in its infatuation

* Professor of Law, Columbia University. I presented earlier versions of this Essay at NYU Law School’s Review of Law and Social Change colloquium on *Continuing the Civil Rights Movement: Lesbian, Gay, Bisexual and Transgender Equality*; Yale Law School’s symposium on *Breaking with Tradition: New Frontiers for Same-Sex Marriage*; the Feminist Debates series at Rice University; the Feminism and Law Workshop at the Faculty of Law of the University of Toronto; and the 10/10 lunch group at Columbia Law School. At each of these venues I received extremely thoughtful comments and engagements with the essay. All of the members of these variously assembled groups, of course, should be excused from any negative associations that might attach to the arguments I make herein.

¹ Minister of Home Affairs v. Fourie, CCT 60/04 (Dec. 1, 2005).

² The Defense of Marriage Act, 28 U.S.C. § 1738C (2005), sometimes referred to as “DOMA,” bars the federal recognition of same-sex marriages by any of the states and invites states to refuse to give full faith and credit to same-sex marriages entered into in another state.

³ Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004).

with domesticity and respectability, as well as the dangers inherent in this particular paradigm shift in the way the state regulated same-sex sex. In this Essay I would like to elaborate on some of the ideas I gestured toward in that Essay, particularly in light of developments in the last year or so.

As a political and a legal matter, decriminalization lands one in both an interesting and, for some, uncomfortable social position. In important respects, gay people's relationship to the state at this moment shares some similarities with the position of freed men and women in the nineteenth century in the period between the ratification of the Thirteenth and Fourteenth Amendments. Black people were no longer enslaved or enslavable, yet they did not enjoy robust civil and political rights either. They were not citizens or full civil and political subjects, rather they were freed-people, not free people. It took the 1866 Civil Rights Act and ultimately the Fourteenth Amendment to the Constitution to transform Black people into African-Americans. The middle ground they lived in during the period between emancipation and citizenship I have come to call "freed-dom."

Gay men and lesbians find themselves in a similar civil and political middle ground now as well. Decriminalization merely disables a form of public regulation of private adult activity, it is nothing more than the undoing of delegitimization; indeed, it neither sanctions nor suggests any alternative form of legitimization. So too, it does not render, determine, or require a particular form of political legibility. It merely signals a public tolerance of same-sex sexual behavior, so long as it takes place in private, and between two consenting adults in a relationship. By steps from *Bowers* to *Lawrence*, lesbian and gay people have sought to reposition themselves in the American polity from a liminal location saturated by perversion, to membership in this political community as equals and as peers.

Of course there was an intermediary step between *Bowers* and *Lawrence*. In *Romer v. Evans*, the Supreme Court, over the predictably vehement objections of Justice Scalia, invalidated a Colorado referendum that prohibited state or local governments from extending civil rights protections to persons on the basis of sexual orientation. The Court based this holding on the normative assertion that it was illegitimate to enact laws that are based in nothing more than a dislike of a class of people. In a sense the Court used this as an opportunity to rearticulate an anti-caste principle.

Romer and *Lawrence* taken together shifted the treatment of us by them from the domain of criminalization, shunning, and shaming to tolerance. These cases stand for the proposition, among other things, that majoritarian revulsion of this minority cannot form the legitimate basis of our regulation by civil or criminal law.

Yet, as political scientist Wendy Brown argues in her forthcoming book on tolerance,⁴ being tolerated is a liberal conceit that entails a set of dilemmas that may help us understand the complicated politics of same-sex marriage. Tolerance within liberalism works so long as that thing about you to be tolerated remains both private and individualized—that is to say, so long as it does not make a political claim. And, of course, that is exactly what the demand for recognition of same-sex marriage amounts to—a claim against the political, although articulated in the legal vernacular of rights. Justice Kennedy went to great lengths in his opinion in *Lawrence* to immunize the decision from the political—casting it again and again as a dispute about private conduct that entailed nothing with respect to political recognition of same-sex sex or same-sex coupling. This inoculation, I suspect, has failed miserably.

In the end, Justice Scalia was right—*Lawrence* emboldened, inspired, and indeed enabled the political claim that the state could no longer refuse to recognize same-sex marriages. We should note, however, that the shift from decriminalization to recognition of same-sex partnerships requires more, or indeed something else than, an argument based on tolerance. Those who advocate for same-sex marriage are not asking that the majority bracket the disgust they hold for us so long as our sex is privatized and individualized. Rather, this is a public argument of a collective nature—we want to be included in “We the People.”

What’s wrong with that? Well, just as the argument from tolerance comes at a price, so too does this one. As I have argued elsewhere, the rights-bearing subject of the lesbian rights movement has now become “the couple”—a We. It is a domesticated couple, and it is a couple that seeks a particular location within a genealogical kinship grid that sutures the couple to the nation. The project of inclusion in We the People presupposes, not necessarily, but in this particular movement, a certain kind of citizen-subject who becomes politically legible by and through a particular form of intimate affiliation. Of course, the citizen-subjects who have signed up for this form of enfranchisement are called upon to enact a peculiar set of public performances: lining up in pairs outside of City Hall the moment the Mayor deems the marriage registry open to homo business; placing your wedding announcement in the *New York Times*; posing model homo families—our perfect plaintiffs—before the media. I must confess an unease with what feels like the deployment of children as props that attest to our normalcy, a repudiation of our perversion. To my mind this sort of enfranchisement swerves dangerously in the direction of a kind of franchise. The creation of new gay publics outside City Hall, on the pages of the *New York Times*, and on the six o’clock news are not exactly the gay publics the drag queens at Stonewall had in mind.

⁴ WENDY BROWN, *REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE* (forthcoming 2006).

It's a tired argument by now that the problem with these staged spectacles of homo kinship is that they are boring, though of course they are. How can it be that in such a short period of time the spectacularity of gayness has become so dull? Consider Ellen DeGeneres—only a few short years ago a trail-blazer as the first out lesbian character on television whose very being was regarded as a threat to all things descent and christian, now a cute and innocuous daytime talk show host whose lesbianism is less her signature than are her sneakers. Perhaps this is best understood as the consequence of an increasingly successful civil rights movement—as the claims of the movement gain greater acceptance in the larger society those claims become less alarming. Or maybe it is the other way around—diminished alarm motivates political possibility. More radical critics would argue that the same-sex marriage movement has accelerated and privileged the more assimilationist aspects of the gay rights struggle.⁵

What we are witnessing in the gay community, I would argue, is a radical substitution or transformation of the nature of homosexual desire. Into the psychic space created by decriminalization has rushed a desire for governance, a desire for recognition—recognition by legal and state authority. The *de jure* refusal to all gay people to satisfy this desire has formed the basis of the new civil rights claims made on behalf of “the community.” Take, for instance, the complaint filed in the case challenging New York’s marriage law. Lambda Legal—the preeminent gay and lesbian rights legal organization—argued on behalf of the five same-sex couples who sought to be married that the marriage law denied Lauren Abrams and Donna Freeman-Tweed’s right of “their families to have the recognition . . . that heterosexuals have. They want to be able to say to their children, ‘Your parents are married.’”⁶ Plaintiffs Douglas Robinson and Michael Elsasser, a male couple who have been together for seventeen years and have two sons, “want the public recognition of their commitment . . . that comes with legal marriage.”⁷ Mary Jo Kennedy and Jo-Ann Shain “want to express their love and commitment through civil marriage Their daughter, too, wants to see her mothers marry and for their loving relationship to be accorded the same respect and recognition as those of her friends’ married parents.”⁸

The complaint in this case is interesting for the primacy it gives to the harm of non-recognition; indeed, non-recognition lies at the core of the

⁵ See, e.g., MICHAEL WARNER, *THE TROUBLE WITH NORMAL* (1999).

⁶ First Amended Complaint at 5, *Hernandez v. Robles*, 794 N.Y.S.2d 579 (N.Y. Sup. Ct. 2004) (No. 103434/2004), available at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/278.pdf.

⁷ *Id.* at 6.

⁸ *Id.* at 6-7.

discriminatory harm at stake in this and almost all the other marriage cases. Notice that in two short years the central civil rights injury articulated by the gay community has shifted from one of mis-recognition, i.e., the regulation and legal categorization of same-sex sex as criminal, to a claim of non-recognition. Justice Albie Sachs, writing for the South African Constitutional Court in the *Fourie* case, described it as “the tangible damage to same-sex couples . . . obliged to live in a state of legal blankness.”⁹ Virtually overnight we have gone from hiding in the bushes in parks or in bathrooms at rest areas desperately trying to avoid the law, to standing in town squares and on courthouse steps desperately waiving our hands in the air trying to get law’s attention.

Could it be that we are suffering what we might call a “Moynihan moment?”¹⁰ Sectors of our community have argued that our unmarriagability inflicts a kind of harm on our children in terms that echo the manner in which familial pathology and illegitimacy were thought to cause injury to African-American children in the Moynihan Report. The Human Rights Campaign’s report, *The Cost of Marriage Inequality to Children of Same-Sex Parents*, does just this, arguing that “until all states grant equal marriage to same-sex couples, the children in these families will continue to be deprived of the security of being recognized as a ‘legal family.’”¹¹ So, too, in a brief submitted in the case challenging New Jersey’s ban on same-sex marriage, the American and New Jersey Psychological Associations argued that

marriage can be expected to benefit the children of gay and lesbian couples by reducing the stigma currently associated with those children’s status. Such stigma can derive from various sources. When same-sex partners cannot marry, their biological children are born “out-of-wedlock,” conferring a status that historically has been stigmatized as “illegitimacy” and “bastardy.” Although the social stigma attached to illegitimacy has declined in many parts of society, being born to unmarried

⁹ Minister of Home Affairs v. Fourie, CCT 60/04 ¶ 72 (Dec. 1, 2005).

¹⁰ See Daniel Patrick Moynihan, *The Negro Family: The Case for National Action*, in THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY (Lee Rainwater & William L. Yancey eds., 1967) [hereinafter Moynihan Report]. The Moynihan Report was written by Daniel Patrick Moynihan when he was an assistant secretary of labor in the Johnson administration. He argued that the most fundamental problem facing the Black community in the United States was the “tangle of pathology” produced by the community’s low rates of long-term marriages and high rates of promiscuity, illegitimacy, and matriarchal, female-headed households.

¹¹ LISA BENNETT & GARY J. GATES, THE COST OF MARRIAGE INEQUALITY TO CHILDREN AND THEIR SAME-SEX PARENTS: A HUMAN RIGHTS CAMPAIGN FOUNDATION REPORT 13 (2004), available at http://www.hrc.org/Content/ContentGroups/Publications1/kids_doc_final.pdf.

parents is still widely considered undesirable. As a result, children of parents who are not married may be stigmatized by others, such as peers or school staff members. This stigma of illegitimacy will not be visited upon the children of same-sex couples when those couples can legally marry.¹²

Nancy Polikoff, long a sceptic of the revolutionary potential of same-sex marriage,¹³ has recently written a very thoughtful critique of the intersecting arguments made by both proponents and opponents of same-sex marriage who “piggyback on the polarizing and politically charged assertion that children do best when their parents are married to persuade the public and the courts that lesbian and gay couples be allowed to marry.”¹⁴ Polikoff rightly observes that

[w]hile advocates for lesbian and gay parents once saw themselves as part of a larger movement to promote respect, nondiscrimination, and recognition of diverse family forms, some now appear to embrace a privileged position for marriage. They thus abandon a longstanding commitment to defining and evaluating families based on function rather than form, distancing themselves from single-parent and divorced families, extended families, and other stigmatized childrearing units.¹⁵

The Moynihan-esque flavor of some of the arguments made by the proponents of same-sex marriage is troubling for additional reasons as well. While the zone of the non-married parent is portrayed as a site of pathology, stigma, and injury to children, marriage is figured as the ideal social formation in which responsible reproduction can and should take place—unfortunately, in increasingly racialized terms. While “our” side is arguing

¹² Brief for American Psychological Association and New Jersey Psychological Association as Amici Curiae in Support of Plaintiffs-Appellants at 51-52, *Lewis v. Harris*, 875 A.2d 259 (N.J. Super. Ct. 2005) (No. A-2244-03T5), available at http://www.lambdalegal.org/binarydata/LAMBDA_PDF/pdf/320.pdf. William Eskridge made a similar argument in *The Relational Case for Same-Sex Marriage*, in JUST MARRIAGE 60 (Mary Lyndon Shanley ed., 2004) (“To put the matter more positively, by denying gay men and lesbians the right to marry, the state is foregoing an opportunity to reinforce the stability of the two-parent household for the children of those relationships.”).

¹³ See, e.g., Nancy 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 (1993); Nancy D. Polikoff, *Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201 (2003); Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step In The Right Direction*, 2004 U. CHI. LEGAL F. 353 (2004).

¹⁴ Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 901, 901 (forthcoming 2006).

¹⁵ *Id.* at 918.

how harmful it is to children of lesbigay parents that their parents cannot marry, “their” side claims, quite often successfully, that the structure, responsibilities, and boundaries of marriage render it the proper, if not divine, site for the bearing and rearing of children. A recent New York intermediate appellate court so held in *Hernandez v. Robles*:¹⁶

The legislative policy rationale is that society and government have a strong interest in fostering heterosexual marriage as the social institution that best forges a linkage between sex, procreation and child rearing. It systematically regulates heterosexual behavior, brings order to the resulting procreation and ensures a stable family structure for the rearing, education and socialization of children (*Goodridge*, 440 Mass. at 381, 798 N.E.2d at 995 [Cordy, J., dissenting]). Marriage promotes sharing of resources between men, women and the children that they procreate; provides a basis for the legal and factual assumption that a man is the father of his wife’s child via the legal presumption of paternity plus the marital expectations of monogamy and fidelity; and creates and develops a relationship between parents and child based on real, everyday ties. It is based on the presumption that the optimal situation for child rearing is having both biological parents present in a committed, socially esteemed relationship It sets up heterosexual marriage as the cultural, social and legal ideal in an effort to discourage unmarried childbearing and to encourage sufficient marital childbearing to sustain the population and society; the entire society, even those who do not marry, depend on a healthy marriage culture for this latter, critical, but presently undervalued, benefit.¹⁷

An Arizona appeals court made similar findings in *Standhardt v. Superior Court*,¹⁸ as did an Indiana appeals court in *Morrison v. Sadler*, which found that the State

could legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sponsored relationship and to discourage unplanned, out-of-wedlock births resulting from “casual” intercourse. . . . [E]ven where an opposite-sex couple enters into a marriage with no intention of having children, “accidents” do happen, or persons often change their minds about wanting to have children. The

¹⁶ *Hernandez v. Robles*, 2005 N.Y. Slip Op. 09436 (N.Y. App. Div. 1st Dep’t Dec. 8, 2005) (No. 103434/04).

¹⁷ *Id.* (second citation omitted).

¹⁸ 77 P.3d 451, 463-64 (Ariz. Ct. App. 2003).

institution of marriage not only encourages opposite-sex couples to form a relatively stable environment for the 'natural' procreation of children in the first place, but it also encourages them to stay together and raise a child or children together if there is a "change in plans."¹⁹

This is what the Indiana court termed "responsible procreation." Same-sex couples, on the other hand, do have children, but never by mistake. The effort and planning that goes into conception or adoption for gay couples assures that they are being responsible when they decide to parent. So, gay couples do not need the governance structure of marriage in order to exercise "responsible procreation" because they cannot procreate by accident—nature and the planning it requires renders them more responsible.

Not far behind the natalism adopted by these courts is a racist ideology unashamedly articulated by Maggie Gallagher in papers she has submitted in the same-sex marriage cases.²⁰ Her argument runs like this: low fertility rates among Europeans and people of European descent threaten the continued viability of these cultures. Society needs an institution that will encourage white people to have children. Marriage is that institution. Low fertility rates are linked to the movement away from marriage. Thus, if white people in developed countries are not to become extinct, they must marry and have children.²¹

Surely the *Lawrence* decision need not have inaugurated a politics of, or desire for, recognition in the gay community—but curiously it has, and it did so immediately. What I lament is a failure of the movement's leaders to appreciate the creative political possibilities that the middle ground between criminalization and assimilation might have offered up. Leo Bersani has expressed sadness at the thought that homosexuals would quickly and easily settle for an intersubjectivity cleansed of all fantasmatic curiosity.²² We have, for now, though I hope not permanently, lost the opportunity to explore the possibilities of a "lawless homosexuality." What would that be? How would it know itself? How would we know ourselves? What have been the costs of refusing the political and psychic uncertainty

¹⁹ 821 N.E.2d 15, 24-25 (Ind. Ct. App. 2005).

²⁰ Maggie Gallagher is the President of the Institute for Marriage and Public Policy whose motto is "strengthening marriage for a new generation."

²¹ See e.g., Declaration of Maggie Gallagher in Support of CCF's Motion for Summary Judgment, *Thomasson v. Newsom*, No. 04-428794 (Super. Ct. San Francisco Mar. 11, 2004).

²² See LEO BERSANI, *HOMOS* (1995).

of refusing to immediately articulate and legally nail down what it means to be gay? What will happen to homo desire and homo sex when they run through the particular circuitry of fantasy sutured to marriage? What kinds of fantasmatic curiosities will become foreclosed or will wither—particularly as our curiosity get channeled, indeed, tamed, in the direction of the familiar, the safe, and the respectable—the nuclear family. Let me be clear; I am not saying that the nuclear family is, as a matter of fact, always familiar, safe, and comfortable, although it certainly is respectable; but, it is all these things on a fantasmatic level. Finally, what kind of sexual publics and what forms of sociability might be made possible by a homosexuality that strategically sidesteps robust legal recognition and regulation?

What renders the problem of non-recognition a kind of harm rather than an interesting opportunity is a particular combination of identity and desire—an identification with a form of normative kinship and more importantly an identification with the state. I find it rather astonishing that the core value of gay and lesbian politics would transform so quickly into a powerful desire for recognition by and identification with the state. That this transformation would be accomplished in such short order after our relationship to the state was one of mutual contempt, distrust, and fear renders it all the more hard to metabolize. I have watched with both awe and fear how in a few years the lesbian subject has transformed from being constituted by an antagonistic relationship to law to a desperate plea for law's embrace. This transformation has manifest itself in a strategic, if not ideological, exchange of civil rights arguments based in privacy for those who assert a right to public recognition, legibility, and presence. Making reference to one of the most common formulations of the privacy principle in United States constitutional jurisprudence,²³ Justice Sachs wrote in the *Fourie* judgment that "what the applicants in this matter seek is not the right to be left alone, but the right to be acknowledged as equals and to be embraced with dignity by the law."²⁴ Are private or public identities the only moves left to us? While I must confess no small measure of nostalgia for the fantasmatic possibilities that were enabled by being an outlaw in the 1970s and 1980s—something my current queer students cannot and do not

²³ In *Olmstead v. United States*, 277 U.S. 438, 478 (1928), Justice Brandeis famously identified a privacy principle in the constitution:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men.

Id.

²⁴ Minister of Home Affairs v. *Fourie*, CCT 60/04 ¶ 77 (Dec. 1, 2005).

know—my sense of alienation from the contemporary infatuation with the state cannot be explained only by reference to that nostalgia.

I think it is also important to consider how the shift from tolerance to recognition is, in fundamental ways, a governance project—governance in the sense that we seek to be included within a community of the governed on terms equal to others in that political community, but governance in another sense—a kind of governance of the self that is entailed in being subject to law. When we petition the state to recognize us, that recognition demands a form of address—in this case that form is one of kinship. The way the project has been set up, to be governed by the state not as abject criminals, but as citizen-subjects, presupposes the internalization of a set of norms of self-governance—self-governance within the couple and governance of the couple by the state. This is how the subject of gay rights political discourse has emerged as a couple. Hand in hand we approach the state arguing for inclusion in “We the People.” You see this in the legal papers filed in the marriage cases: they make a demand to be governed by the rights and responsibilities of marriage laws—duties of support, monogamy, fidelity, longevity—‘til death do us part. These cases articulate a yearning to be governed by and within the surveillance of the state. Yet the facts of the cases make clear that these parties have undertaken a form of extra-legal governance for some time. They have been together for five, ten, twenty years, have supported each other through sickness and health, good times and bad, have assumed joint responsibility for the rearing of children—all in the shadow of law. Indeed, the legal papers in the cases narrate and attest to the degree to which these are couples who have performed an idealized form of self-governance extra-legally that, so the claim goes, entitles them to the rights of respect and recognition that legal marriage confers. For the plaintiffs in these cases, there is an added value to governance within marriage that the same form of governance in law’s shadow somehow lacks.

This form of recognition the community now craves exacts a dear price. As lesbian people are herded into a particular form of sociability—a narrow conception of family—we have lost an interest in, if not now disavow, other forms of sociality that a generation ago we celebrated. The queer critique of the liberal individual sought to explore new modes of affect and sociality. We had a thick account of stranger sociability, of intimacy, of desire, and of ways in which the political “I” would not presuppose a domestic and domesticated affiliation with a “You,” thereby collapsing into a “We.” To my ear, the loss of the concept of “me” into a conjugal, domesticated “we” at times echoes a longing for a kind of contemporary coverture, whereby one or both previously individuated subjects are dissolved into a joint legal and economic unit by and through the institution of marriage. In a sense, it is the state’s refusal to extend the privilege of legal merger to same-sex couples, and the insistence that we remain separate and individuated individuals, that gets figured as the injury

of the denial of same-sex marriage. Not every advocate of same-sex marriage insists on this kind of coverture qua civil right, but enough of the arguments in this domain emit such an odor that it gives me great pause.²⁵

The cost of substituting a desire for governance by the state for other forms of desire is evident in many sectors of the lesbian community and is not merely an academic concern, but rather one of life and death. I live in New York City, where the discovery of a single case of virulent new HIV was announced by the City's Health Department in the last year. Both the virus and those who carry it are portrayed as resistant to treatment. The story we are told is that the gay man who carried this virus used crystal meth and then had indiscriminate unsafe sex. This man was putting the whole community at risk by his irresponsibility. The executive director of Gay Men's Health Crisis, the largest and oldest HIV treatment and advocacy organization in the country, joined the outcry endorsing aggressive forms of public health interventions that only a few years ago were politically unthinkable and implausible. She argued that we are beyond the first days of the AIDS epidemic. We now know that we are part of a community that must take care of one another, and that we owe one another a duty of care not to misbehave. In essence, the argument reduces to: these are bad gays, and their bad behavior has caused a dangerous mutation of the virus, and their bad behavior violates a community norm.

What she is arguing is that our community has evolved along with the HIV virus. We are now interconnected to one another in a kinship grid—and that grid imposes reciprocal responsibilities on us all. But of course this problem is much more complicated. As I listen to how this new crisis has unfolded in New York, I get the sense that the community no longer has a vocabulary that can address a public health problem as something other than a problem of kinship. We have no ready analysis that takes as one of its premises the value and meaning of stranger sociability, of sex outside of kinship, or of promiscuity. There is no evidence offered that crystal meth or promiscuous sex have caused the mutation of the virus. We have a single case of a single man who liked sex and liked lots of it. Yet kinship is not a rich enough political value or reliable enough public health variable to adequately address the failure to engage in protected sex.

But this is where we are politically. Make no mistake, this problem at this moment is a political, not a legal problem. Our overwhelming investment in the politics of kinship has resulted in the atrophying of an ability to critically and creatively think sexuality outside the domestic couple. We have lost that vocabulary, and as a result all we have to fall back on is the vilification of our new Patient Zero for his violation of the norms of today's gay community—characterized by reciprocal duties and self-governance.

²⁵ I must thank Jeannine DeLombard for suggesting the analogy to coverture.

The final concern that I want to highlight in this Essay relates to the manner in which the politics of same-sex marriage figures in larger national and international politics. I actually do not think that gay marriage won the election for George Bush, but what it did do was distract our attention away from other issues of much greater concern—Abu Ghraib, Guantanamo, and the war in Iraq, to name only a few. The “national debate” about morals cut off national discussion about increasing the security state, sexuality as weapons of war, and the militarization of foreign policy. In similar fashion, Terry Schaivo was used to articulate a “culture of life” in the face of a kind of necropolitics and the implementation of a radical—if not permanent—state of exception in the Schmittian sense.

I lament how the gay and lesbian community fails to link up to these larger political issues and rather passively allows the same-sex marriage debate to be used as a distraction. All the while installing a new form of homo desire—a desire for a relationship to the nation, for recognition by the nation. Not only has the gay community acquired a desire for the state, but, as Judith Butler puts it, the push for marriage articulates a desire for the state’s desire in the form of state-sanctioned desire. In a period of rising United States nationalism and its more even evil twin imperialism, I find it quite troubling that a formally radical movement of outlaws and outsiders would succumb so quickly and entirely to becoming what the former New Jersey Governor Jim McGreevey called himself: “Gay Americans.”