

This is an excerpt from Elizabeth Brake, *Minimizing Marriage*, forthcoming with Oxford University Press in March 2012. Please contact me for permission to cite (brake@ucalgary.ca).

Introduction: Marriage and Philosophy

Marriage is philosophically undertheorized. This is not because it lacks philosophical interest. For the moral philosopher, it raises key issues of the possibilities of interpersonal moral obligations and their bounds—not to mention the question of a good human life. Secular moralists often assume that marriage morally transforms a relationship, yet contemporary philosophers have paid little attention to the question of how such a transformation could be effected. For the political philosopher, the question of how—or whether—society and the state should organize sex, love, and intimacy is urgent, but recent attention has focused mainly on a set of narrow questions surrounding marriage law: same-sex marriage, or not; polygamy, or not, abolition, or not. A greater variety of reconfigurations should at least be contemplated.

This book attempts to shed some philosophical light on these questions. It has three main theses. The first is that marriage should be demoralized—that it does not have a *sui generis* moral status or a transformative moral power. The second is that the great social and legal importance accorded marriage and marriage-like relationships is unjustified, and that this privilege harms, sometimes unjustly, those not oriented towards monogamous, central relationships. Those harmed include members of multiple significant overlapping friendships such as adult care networks or urban tribes, the asexual and solitudinous, and the polyamorous. The third thesis is that a truly politically liberal law of marriage would expand the legal category of marriage in surprising ways, minimizing special restrictions on entry, exit, and what transpires between.

These arguments target features of marriage seldom interrogated—its central and dyadic relationship, its association with romance, its one-size-fits-all legal structure. Marriage is so pervasive that many of its features are accepted without question. Some aspects are glaringly foregrounded, while its fundamental structure disappears into the background. Debates over same-sex marriage make headlines, weddings are big business, and marriage promotion is U.S. policy. But is there good reason for marriage to be structured as it is—monogamous, central, permanent (or aspiring to permanence), with its dense bundle of legal rights and responsibilities? Is such an arrangement really part of the good life, and should it be privileged in the just society? From a secular perspective, does it have any moral significance? Are marriages morally distinct from otherwise similar unmarried relationships? Religious doctrines give theological answers to some of these questions. But the value of marriage is affirmed in countless secular contexts that provide no such ready answers. Philosophy has something to contribute to making visible assumptions about marriage, as a social and legal institution.

The starting-point of this study is the widely held belief that marriage has a *sui generis* moral significance, one that otherwise similar unmarried relationships lack. In the United States, this value is written into the Social Security Act and taught in schools, and a politician who openly questioned its value could give up hope of election. Many people who do not hold religious views or believe that marriage is the only permissible context for sex nevertheless associate marriage with a special moral status and with goods like stability, love, and trust. Some defenders of same-sex marriage proclaim its moral value just as forcefully as their “traditionalist” opponents. (Many features of so-called traditional marriage are historically variable or recently constructed, hence the quotation marks.) Belief in the moral value of marriage bridges political and religious chasms. Such belief invites philosophical articulation and

assessment. In turn, this examination will raise philosophical issues of wider application. What can we promise, and under what circumstances are we released from our promises? What is commitment, and is it valuable? Are there any involuntary special obligations (obligations to particular others not derived from our general moral duties), and if so, how do we acquire them?

This investigation brings the tools of moral philosophy to bear on claims that marriage has a special moral significance. Analysis of this kind can be complicated by familiarity. Many of us are married or have good friends who are, or, at least, have been touched by a wedding ceremony. Or we may move in circles where marriage is considered an aberration. Either way, marriage may appear beyond the pale of serious philosophical discussion. To some, its value is self-evident. To others, what is self-evident is its obsolescence. But such presumptions should be examined with the same careful and open-minded analysis brought to other philosophical topics.

Part One will articulate and assess secular accounts of the moral significance of marriage. It reviews morally salient features commonly attributed to marriage: promise, commitment, basic human goods, virtues, and care. It concludes by *de-moralizing* marriage: Marriage is neither necessary nor sufficient for the goods often associated with it, it creates no *sui generis* moral status, and it produces harms and injustices that must be weighed against its goods. While there may be special goods in caring relationships, they do not depend on marriage—and, indeed, the special value attributed to marriage has penalized caring relationships that fail to fit the marital norm. The discussion assumes a broad moral framework, one that accommodates talk of obligations and of virtues, of care and of justice.

There are three salient secular elements of marriage that may carry special moral significance: the contractual exchange of rights and responsibilities in legal marriage, social recognition of the marital relationship, and the ideal relationship type associated with marriage

(for example, a loving, trusting, and caring relationship). The first two—contract and social recognition—attach to legal and social institutions of marriage, enduring impersonal structures that define roles, rights, and responsibilities for the particular relationships that enter them. The third feature, though, concerns the relationship itself, the ongoing daily interaction between particular parties. Drawing on this distinction, there are two distinct ways in which a unique moral significance could attach to marriage. First, entry into the social or legal institutional structure, through the wedding vows or the exchange of legal rights, could morally transform the relationship. Chapters 1 and 3 address arguments that the institution itself has transformative power. Second, it could be that the ideal type of relationship is valuable and that the institution of marriage has an instrumental value in promoting it. Chapters 2 and 4 address this possibility.

Entry into marriage commonly takes place through an exchange of vows. It might thus be thought that this voluntary undertaking of obligations works a moral transformation, and so, in Chapter 1, I begin by examining the marriage promise. What is this promise? Under what conditions might one be excused from it? The answers to these questions have implications for the morality of divorce, as well as sexual exclusivity and other marital obligations. Here I emphasize the diversity of marriages, arguing that the promise made in marriage depends on spouses' intentions—but not all intentions are promises. A vow sometimes taken as central to marriage—to love, honor, and cherish—is not a possible object of promise at all. Likewise, promises to take on spousal roles presuppose a robust and shared understanding of the moral content of that role—something many modern spouses may lack. Many wedding vows are thus not promises but failed attempts at promising. This casts doubt upon the idea that the distinctive moral significance of marriage is promissory. This is compatible with the de-moralization of

marriage, but not sufficient for it, as rival views of marriage hold that its moral content is not promissory at all.

Marriage is often said to involve commitment, as distinct from promise. Chapter 2 begins by clarifying this concept. Commitment, as an internal psychological disposition, is not created in the wedding ceremony: One may publicly profess commitment without actually having it, and being committed requires a temporal duration longer than a wedding. Rather than creating commitments, marriage provides a social form for their expression and provokes pressure to keep them. But does this make marriage valuable? Institutions that encourage keeping commitments are only as valuable as the objects of commitment—or as the alleged virtue of committedness. Are marital commitments rational, or good, for the parties involved? The marriage commitment is good for spouses when it helps them—like tying Ulysses to the mast—protect their best interests against fleeting desires. But as a general defense of marriage, the claim that such commitment is always in spouses' best interests relies on problematic essentialism about the human good. Other defenses of marriage argue that marriage is socially valuable because it teaches spouses the virtue of committedness. But this value must be qualified: Commitment to injustice or vice is no virtue. As John Stuart Mill warned, unequal marriages can be schools of injustice.

Perhaps, however, marriage does essentially involve a commitment to something valuable—to basic human goods, to respect, or to flourishing. In Chapter 3, I examine three of the most influential defenses of marriage; each holds that marriage is the sole permissible context for sexual activity and the unique context for achieving certain related goods. Kant held that marriage morally transforms sexual objectification, permitting otherwise impermissible moral risks, and thereby making procreation morally possible. Natural law accounts argue that basic

human goods of procreation and marital friendship can only be attained through marriage. Roger Scruton argues that marriage enables virtuous erotic love, which is an essential contributor to human flourishing. These three accounts, which attribute to marriage a unique transformative role, share a single failing: Entry into a legal institution does not effect, nor is it required for, the psychological transformation that virtues and respect require. Marriage is neither necessary nor sufficient for virtues or respectful attitudes. Basic goods, respect, and virtues can exist outside marriage, as in unmarried relationships. Furthermore, unqualified attributions of value to marriage fail to recognize the variability of real marriages, and they ignore their vices.

But while this calls into question unqualified attributions of value to the institution, some marriages are caring, and interpersonal care might be thought valuable. Chapter 4 takes up the question of whether marriage is valuable because it promotes caring relationships. At a critical distance from care ethics, I argue that care is motivationally and epistemologically valuable, but only in the context of rights and justice. Just and caring relationships have some value, and this value should be recognized wherever it appears. But the special priority accorded marriage and marriage-like relationships marginalizes other forms of caring relationships. To the extent that it sustains “amatonormativity”—the focus on marital and amorous love relationships as special sites of value—marriage undermines other forms of care. For example, the assumption that the most valuable relationships must be marital or amorous devalues friendships. Thus, I argue, marriage and the associated pressures of amatonormativity can threaten care. On the other hand, I argue that contract and bargaining, which are often seen as opposed to care, are not so opposed. In Part Two, I will develop a proposal for marriage reform that supports care and allows contractual individualization while avoiding amatonormativity.

Part One is a work in moral philosophy, Part Two in political philosophy. Marriage has significant legal ramifications, which make it a matter of justice. It entitles spouses to benefits, it constructs and protects spousal privacy, it limits exit options, and, in some jurisdictions, it brings exemptions from sexual battery charges. Its legal effects can be life-saving or fatal: entitlement to health insurance—or legal access rights for an abusive spouse. It also carries a rich symbolism of adulthood, full citizenship, and moral respectability. These wide-ranging implications are why access to it is so contentious, whether one thinks that single mothers should be urged in, lesbians, gays, and polygamists kept out, or that the state should cease to recognize marriage entirely.

In Part Two, I develop a liberal feminist marriage law proposal that eschews amatonormativity. Given the weight of critiques of marriage, and the costs of legislating it, the fundamental question is whether there is any good political reason for legal recognition of marriage, and if so, what form of marriage law would respect the many views of the good found in a diverse liberal society. Feminist, queer, and antiracist criticisms of marriage and monogamy support the disestablishment of monogamous amatonormative marriage—a conclusion that, I argue, political liberals must share. My proposal, “minimal marriage,” is a legal framework that supports monogamous relationships as well as the rich diversity of adult care networks that do not fit the amatonormative mold.

Chapter 5 begins to build this case by introducing various critiques of marriage law as unjust. Theorists of oppression note that marriage law has historically oppressed women and (in the United States and Canada) people of color and argue that it continues to perpetuate the oppression of women, gays and lesbians, and minority racial and ethnic groups. Social pressures to marry, Simone de Beauvoir argued in her 1949 work, *The Second Sex*, make women aspire to be wives at the cost of other aspirations. Gender-structured marriage, Susan Moller Okin argued

in her 1989 work, *Justice, Gender, and the Family*, makes wives economically vulnerable. Marriage, Claudia Card has more recently argued, distributes benefits such as health care unjustly and can facilitate abuse and violence; in addition, far from serving gay and lesbian liberation, same-sex marriage would encourage assimilation to a heteronormative ideal of monogamy. And as Patricia Hill Collins has argued, marriage law has served racist ends and functioned as an important symbol of racial hierarchy; U.S. marriage promotion continues to be racially inflected in ways that devalue practices found in African-American communities. Such critiques will be crucial to my politically liberal argument for marriage reform because they demonstrate that the amatonormative marriage ideal conflicts with many other ideals. But they also draw attention to grave injustices that such reform must address. I will argue, though, that marriage is not essentially unjust; it can be restructured in ways that address such injustices rather than perpetuating them.

Politically, theoretical commitments do not predict views on marriage. Liberals are not unanimous on marriage law. Some defend “traditional” marriage as supporting state stability or as a prepolitical institution not subject to liberal principles. Others argue that freedom of contract requires contractualizing marriage, assimilating it completely to the contract paradigm. Still other liberals argue that liberal principles require extending marriage to same-sex marriage or polygamy. Chapter 6 continues the argument for marriage reform by reviewing liberal debates over same-sex marriage to show what they have often missed. Liberal defenses of same-sex marriage have not followed the implications of their own reasoning far enough. Attempts within liberalism to produce a rationale for restricting legal marriage to different-sex partners have failed, but so have attempts to produce a rationale for restricting it to monogamous or amatonormative relationships. While child welfare is sometimes given as a reason for restricting

marriage, the empirical evidence needed to sustain heterosexual privilege is lacking, and many children are reared outside marriages altogether. On these and other grounds, I argue for separating legal marriage and parenting frameworks. But this may seem to cede the point to marriage contractualists by depriving marriage of any rationale. In the absence of such a rationale, considerations of fairness and efficiency seem to support the abolition of legal marriage.

Chapter 7 takes up the challenges of the preceding chapters by providing a strong rationale for a reformed marriage law. Political liberalism requires the disestablishment of monogamous amatonormative marriage. Under the constraints of public reason, a liberal state must refrain from basing law, in matters of great import, solely on a comprehensive moral, religious, or philosophical doctrine; but only such doctrine could furnish reason for restricting marriage to male-female couples, or to romantic love dyads. Restrictions on marriage should thus be minimized. But public reason can provide a strong, neutral rationale for minimal marriage: Care is a primary good, in the terminology of Rawlsian liberalism, making legal frameworks for adult care networks not only consistent with neutrality and public reason, but required as a matter of fundamental justice. Thus, my argument opposes the wholesale abolition of marriage. Instead, it gives reason for “minimal marriage,” a legal framework that avoids amatonormativity, supporting caring relationships including “traditional,” polygamous, and same-sex marriages as well as “Boston marriages,” friendships, and urban tribes. This proposal allows individuals to select from a greatly reduced set of the rights and responsibilities currently exchanged in marriage and to assign them to whomever they want, so long as the purpose is to support a caring relationship.

The argument of Chapter 7 is ideal-theoretical: It describes marriage law in an ideal liberal egalitarian society. But we do not inhabit such a society. Implementing minimal marriage in our society could lead to injustice. Chapter 8 takes up the problem of implementing ideal theory in a nonideal world. It addresses concerns that minimal marriage would worsen the lot of the vulnerable, especially women, by eliminating antipoverty marriage promotion, mandatory alimony and property division protecting the economically dependent, and permitting gender-structured polygyny. Liberals could consistently support transitional restrictions on marriage law, but liberalism can, and should, also address such problems through legal vehicles other than marriage, especially through education and default rules of financial fairness. Although implementing ideal theory poses transitional problems, it also gives us a distanced and fairer perspective from which to criticize the current state. Actual marriage law has perpetuated patriarchy, heterosexism, and amatonormative discrimination, in ways which familiarity obscures; ideal theory shows us what would be needed for a truly just law of marriage.

It might be thought that marriage law reform is meritorious but not urgent. But there is a serious impetus to this study. U.S. marriage law is unjust and harmful. This should not be taken lightly by anyone who cares about justice. Lack of access to health care or a basic standard of living because one is excluded from marriage or chooses to boycott it is no light matter, nor is the inability (in certain jurisdictions) to press sexual battery charges against one's spouse. U.S. marriage promotion, with its abstinence-until-marriage education, also impedes the developing sexual autonomy of young adults. Stigmatizing unmarried sex leads to ignorance and shame, conditions that lead to disease, abortion, and teenage pregnancy, and silence about sexual abuse and rape.

Social pressures surrounding marriage can also harm. Marriage is big business—the wedding industry claims to be worth well over \$100 billion annually—and marriage marketers peddle dangerous illusions. The promotion of gendered marriage norms reinforces the patriarchal family and encourages women to make themselves economically dependent. It also marginalizes the unpartnered, the polyamorous, the celibate, urban tribes and care networks, lovers who cannot marry or choose not to, and those who are “just good friends.” Marriage is not private; it is an exclusionary social institution, a signpost in the social world. A wedding ring announces a person’s self-description. It signals how to approach the wearer and demands a certain respect. Like race, class, and sex, marital status is a fundamental category in social interaction. Like race, class, and sex, it can be the basis of unjustified discrimination. And, at least insofar as the state reinforces such discrimination, it is a matter of justice calling for reform and rectification.

Marriage is so widespread as to be invisible. Many of us accept it as we find it, including the central role it plays in our lives and imaginations, the way it shapes our understandings of licit and illicit sex, public and private spheres, and the desirability of dependency. These understandings feed into female and child poverty, domestic violence, rape culture, and threats to reproductive rights. Rethinking marriage is an urgent matter of justice. Marriage reform may be a matter of life and death—for victims of intimate violence, of homophobic hate crimes, of death by lack of health care.

The matter has a personal urgency, too. The topics of this book are something almost every thinking person must consider—at least, every thinking person who is married, contemplating marriage, or needs to RSVP to a wedding invitation. What does marriage entail morally? What obligations does it impose? What are its goods? Can spouses by their own

volition guard against the injustices of marriage? Are calls to boycott marriage and wedding ceremonies merited? Should one marry?

Before proceeding, a note on terminology. I avoid the terms *heterosexual* and *homosexual* because they can mislead. There is no guarantee as to the sexual orientation of married individuals; men and women of same-sex or bisexual orientation can enter different-sex marriages. Applying the term *heterosexual* to different-sex marriages, while it correctly describes the marriages, misleadingly implies that the participants are oriented to, and only to, the other sex. The terminology thereby tends to make bisexuals, and those in the closet, invisible. The term *different-sex*, while awkward, reminds us by its unfamiliarity that it is the biological sex, not the sexual orientation, of spouses that is at issue. As applied to persons, the terms *homosexual* and *heterosexual* lend themselves to stereotyping, conflating certain activities or patterns of desire with types of persons; activities and desires do not exhaust identities. And persons can engage in same-sex activities or even seek same-sex marriage without being exclusively oriented towards their own sex.¹

Multiple Marriages: Marriage in History, Culture, Law

Marriage is many-faceted. It comprises legal, social, cultural, and religious institutions that vary by jurisdiction, culture, and theological doctrine. Its meaning, purpose, and scope are disputed. There is debate as to whether it is a natural biological unit (the two-parent reproductive family); divinely ordained; merely a conventional legal status designation or economic unit; or a tool of sexism, heterosexism, and capitalism; whether, in short, it is about children, religion, money, oppression—or, of course, love.

¹ I use “heterosexual” only in contexts of critiques of heterosexism or heterosexual privilege.

In considering whether marriage has a fixed essence or definition, the historical and cross-cultural diversity of marital practices cannot be overstated. Structurally, it includes polygamy (both polyandry and polygyny) and polygynandry (multiple men with multiple women) as well as monogamy. Nomadic tribal bride exchange and arranged dynastic marriages must be set beside 1950s male-breadwinner unions and 1960s group marriages. In many cultures, extramarital sex has been the norm—including communal sex, spouse-swapping, and sexual double standards. Standards for divorce have ranged from a simple announcement (saying “I divorce you” three times) to a papal annulment or British Act of Parliament. Some cultures have seen the ideal marital relationship as reserved, others as intimate and amorous; some have seen it as hierarchical, others as an equal partnership. Marriage includes passionate elopements as well as proxy marriages, in which Japanese or Korean picture brides, chosen by photograph, would marry proxies of their husbands in the home country, before immigrating to join their husbands. While most marriage institutions have been different-sex, marital or marriage-like same-sex relationships have been recognized. John Boswell documents same-sex unions in the Greco-Roman era and (controversially) in medieval Europe, Chinese historians report similar practices, and some Native American tribes, with fluid concepts of gender, allowed males to marry each other. Some rare societies have not been organized around sexual partners at all. In “husband-visitor societies” mother and child lived apart from the father or “husband.” For instance, the Na, in China, had no marriage practice. Na women lived with their brothers; their male sexual partners were not integrated into the family.²

² On diverse marital practices, see Coontz, *Marriage*, and Fisher, *Anatomy*, Chapters 3 and 4. On proxy marriages, see Cott, *Public Vows*, pp. 151–155. On same-sex marriages, see Boswell, *Same-Sex Unions*, and James McGough, “Deviant Marriage Patterns in Chinese Society,” in

The features usually associated with marriage today are historically contingent. While contemporary “traditionalists” promote monogamous marriage, in the longer historical view, polygyny, not monogamy, has been dominant—and has existed within the Judeo-Christian tradition, a fact for which both Augustine and Aquinas apologize.³ Nor has marriage always been a matter of legal or religious regulation. In Europe, prior to the sixteenth century, people “considered mutual intent or the blessing of a parent sufficient to solemnize a marriage.” Within Christianity, the Church did not call for priestly officiation until 1215, when, to prevent clandestine marriages, it decided to require a dowry, banns, and a church ceremony; governments did not require legal registration of marriages until much later (1753, in England).⁴ In the pre-Civil War United States, although laws concerning marriage existed, informal or “self-marriage” and self-divorce (without official authorization), sometimes followed by remarriage, were widespread, as states lacked the resources to oversee domestic life, and many communities tolerated informal alliances and partings.⁵

Strangest, perhaps, to contemporary sensibilities, marriage has historically been more in the service of domestic economies than domesticated love, facilitating property transmission, resource and labor sharing, and kinship bonds. For rich and poor alike, its rationale was money

Sullivan, *Same-Sex Marriage*, pp. 24–28. On the Na, see Coontz, *Marriage*, pp. 32–33; cf.

Eekelaar, *Family Law*, p. 1.

³ Augustine, “On Marriage and Concupiscence,” Book I, Chapters 9 and 10, in *Anti-Pelagian Writings*; Aquinas, *Summa*, Supplement, Question 65.

⁴ Coontz, *Marriage*, pp. 106–7.

⁵ See Cott, *Public Vows*, Chapter 2.

and survival, not love. Arranged marriage practices reflect this economic rationale: Guardians of minors in medieval England could arrange their infant wards' marriages and even sell such marriages for profit. Indeed, some ancient Greeks and Romans, Christians, and Muslims discouraged "excessive" love in marriage. The "love revolution" in marriage dates to the eighteenth century, as economic conditions made young people more independent. From the beginning, the idea of marrying for personal happiness met with resistance as thinkers foresaw that expectations of marital fulfillment would undermine marital stability. Thus, Hegel wrote that arranged marriage is the most ethical form of marriage, because it subordinates spouses' desires to the institution, rather than predicating marriage on the instability of passionate love.⁶

Like love-based marriage, the male-breadwinner marriage, in which the wife makes no economic contribution, is relatively recent. In Europe, before the Industrial Revolution, wives' participation in most domestic economies was vital. The ideal of the unemployed middle-class wife, whose domestic efforts contributed to her family's comfort and pleasure, not survival, became widespread only with post-Industrial prosperity. But this ideal did not and does not reflect the experience of the many married women who worked outside the home. The ideal is not only classist, it is also ethnocentric: Among Native Americans, for instance, women were generally responsible for farming. The disparity between the reality of female physical labor and the angel-in-the-house ideology is illustrated by former slave Sojourner Truth's famous response to the claim that women were too weak to vote: "I have ploughed, and planted, and gathered into

⁶ Hegel, *Right*, §162, pp. 201–202. On medieval England, see Walker, "Widow and Ward"; see Coontz, *Marriage*, pp. 17–18 on excessive love, and Chapter 9 on the love revolution; cf.

Shorter, *The Making of the Modern Family*.

barns and no man could head me! And ain't I a woman?"⁷ The ideal of the homemaking wife, which emerged along with love-based marriage, was accompanied by an increased emphasis on sexual difference—especially the idea that women were naturally domestic.⁸

Law and custom enforced women's restriction to the domestic sphere that was supposedly natural for them. John Stuart Mill noted the incongruity of this, asking why, if domesticity was natural to women, they should have to be compelled into it. Barring women from education, government, and the professions would "force women into marriage by closing all other doors against them. . . . It is not a sign of one's thinking the boon one offers very attractive, when one allows only Hobson's choice, 'that or none.'"⁹ Yet the persistent belief in gender difference underwrote married women's exclusion from civil equality—not to mention workplaces. Well into the twentieth century, marriage deprived wives of full human rights, first in coverture (in which a wife's legal personality was "covered" by that of her husband) and later in spousal rape exemptions and professional bars for married women. Legislatures also imposed gendered standards—"head and master laws." Not until the 1970s, in the United States, did consistent gender-neutrality in legal rights and responsibilities take hold.¹⁰

⁷ Her speech at the 1851 Ohio Woman's Rights Convention is excerpted in Davis, *Women, Race*, p. 61. On Native American practices, see Cott, *Public Vows*, pp. 25–26.

⁸ Coontz, *Marriage*, Chapters 9 and 10; Okin, "Women and the Making of the Sentimental Family."

⁹ Mill, *Subjection*, p. 29.

¹⁰ On coverture, see Chapter 5.i in the present volume.

The changing law of coverture exemplifies how, far from recognizing one unvarying form of marriage, the modern state has constructed and reconstructed the institution. Divorce is another example. The state does not only regulate obligations within marriage, it also regulates exit from it. In the United States, for much of the period of state regulation of marriage, exit was difficult: In the mid-nineteenth century, divorce was prohibited in some states, and in others only permitted on fault-based grounds such as adultery, cruelty, drunkenness, or desertion (often with gendered double standards, as in the United Kingdom). Connecticut, following Maine, liberalized its divorce law in 1849, permitting divorce due to “any such misconduct as permanently destroys the happiness of the petitioner and defeats the purpose of the marriage relation.”¹¹ But these laws were overturned by the 1880s, and divorce law continued to be restrictive until the “no-fault revolution” of the 1970s, since which all fifty states have adopted no-fault divorce.

The United States has also rewritten marriage law in ways that reflect changing phases of racial oppression. Enslaved African-Americans could not legally marry, and informally married slave couples were torn apart—a salient fact in African-American experience. Toni Morrison writes of “the different history of black women in this country—a history in which marriage was discouraged, impossible, or illegal; in which birthing children was required, but ‘having’ them, being responsible for them—being, in other words, their parent—was as out of the question as freedom.”¹² After the Civil War, formerly enslaved African-Americans gained the right to marry, and the Freedmen’s Bureau began to promote—and enforce—monogamous marriage, fining and

¹¹ Shively, “Introduction,” in Andrews, *Love, Marriage*, p. 1. See also Friedman, “Rights,” p. 654; and Cott, *Public Vows*, pp. 47–52.

¹² Morrison, *Beloved*, pp. xvi–xvii. See also Cott, *Public Vows*, pp. 33–35.

arresting the bigamous or unmarried cohabitants. At the same time, now that formerly enslaved African-Americans had the right to marry, antimiscegenation laws, banning marriage between whites and African-Americans (and, in some states, between whites and Asians) proliferated. Interracial marriage bans did not prevent actual miscegenation so much as they prevented women of color and their children from gaining the entitlements of marriage. In 1967, the U.S. Supreme Court struck down interracial marriage bans as unconstitutional in *Loving v. Virginia*. Some states ignored the Court. Alabama, for example, retained a (mostly unenforced) interracial marriage ban in its state constitution until 2000.¹³

In the United States as elsewhere, the state has restricted the number and sex of spouses, as well as restricting entry by race. Christian monogamy was written into U.S. law and enforced, in the face of the perceived Mormon threat, through an extended nineteenth-century campaign against polygamy, which included removing voting rights from polygamous men. As of 2004, polygamy was criminalized in forty-nine states, and laws against bigamy still included *extramarital* bigamous cohabitation in five U.S. states.¹⁴ More recently, the sex of spouses has preoccupied judges and legislators: some U.S. states, and Canada, have recognized same-sex marriage, but many states have passed legislation explicitly barring it. And, in 1996, the U.S. federal legislature passed the Defense of Marriage Act, defining marriage, for federal purposes, as different-sex, and exempting states from recognizing same-sex marriages performed in other

¹³ See Cott, *Public Vows*, pp. 81–93 (on the Freedmen’s Bureau) and pp. 98–102 (on the post–Civil War proliferation of marriage bans). See also Wallenstein, *Tell the Court*. For racism and Canadian marriage law, see Dua, “Beyond Diversity.”

¹⁴ On the history, see Cott, *Public Vows*, Chapter 5. On law, see Emens, “Monogamy’s Law,” fns. 51 and 158.

states. Despite the controversy over same-sex marriage, it has, according to Andrew Sullivan, provoked less opposition than interracial marriage in its time: “In 1968 . . . a Gallup poll found that some 72 percent of Americans still disapproved of [interracial] marriages. . . . It wasn’t until 1991 that a majority existed to approve them—by a narrow margin. . . . The polls show that hostility to same-sex marriage in 2004 is markedly less profound than hostility to interracial marriage was in 1968.”¹⁵ In considering controversial marriage reforms, it is worth remembering how controversial past reforms, which now seem familiar, were at the time.

At the same time as the state has narrowly restricted entry to marriage, marriage law has simultaneously been used to mark several invidious distinctions, penalizing those excluded from entry and compelling sexually active people into legitimized monogamy. Illegitimate children, defined as children born outside marriage, suffered legal inheritance bars, separation from their mothers, and ostracism. This legal distinction formed the basis for social exclusion: Women who gave birth illegitimately were disowned by respectable families and employers. In the United States, legal discrimination against “illegitimate” children continued until the 1970s. Law has also enforced marital monogamy by criminalizing sex outside of it. Fornication, defined as sex outside marriage, and unmarried cohabitation were at one time criminal in all fifty states; in 2004, at least 10 states still penalized fornication and twenty-three states criminalized adultery.¹⁶

¹⁵ Sullivan, *Same-Sex Marriage*, pp. xxv–xxvi.

¹⁶ On illegitimacy, see Teichman, *Illegitimacy*, Chapter 8; and Shultz, “Contractual Ordering of Marriage,” pp. 228–9. On criminal law, see Emens, “Monogamy’s Law,” fns. 49 and 50; see also Posner and Silbaugh, *A Guide to America’s Sex Laws*, Chapters 7 and 8. The Supreme Court’s 2003 ruling in *Lawrence v. Texas* presumably renders fornication laws unconstitutional.

While marital nonconformity has been penalized in criminal law, with the scope of prohibitions and enforcement varying historically, marriage itself offers significant financial incentives and other tangible benefits. This brings us to the current state of marriage law, and the guiding questions of this book. Marriage now triggers over 1100 “benefits, rights, and privileges” in U.S. federal law.¹⁷ According to legal scholar Mary Anne Case, its “principal legal function” is to designate spouses for third-party benefit claims.¹⁸ Spouses have rights “to be on each others’ health, disability, life insurance, and pension plans,” to special tax and immigration status, and to survivor, Social Security, and veterans’ benefits, and they are designated next-of-kin “in case of death, medical emergency, or mental incapacity.”¹⁹ One question of this book will be on what grounds, if any, such entitlements can be politically justified.

Marriage can also bring disadvantages. Financially, a high-earning spouse can disqualify the other from federal loan programs, housing assistance, or Medicaid, and spouses are liable for each other’s debts. Spouses cannot be considered one another’s employees, exempting them from labor law protections in jointly-run small businesses. Divorce burdens exit, especially in

¹⁷ At the end of 2003, reported by the General Accounting Office. Dayna K. Shaw, Associate General Counsel, in a letter of January 23, 2004 to Bill Frist. The letter accompanies the 2004 GAO report, labeled “GAO-04-353R Defense of Marriage Act.” See also Enclosure I, “Categories of Laws Involving Marital Status,” in a letter of January 31, 1997 by Barry R. Bedrick, Associate General Counsel, GAO, to Henry J. Hyde. The letter accompanies the 1997 GAO report, labeled “GAO/OGC-97-16 Defense of Marriage Act.”

¹⁸ Case, “Marriage Licenses,” pp. 1781, 1783.

¹⁹ Dean, “Gay Marriage,” p. 112.

covenant marriage and in the case of active military personnel, who can defer divorce proceedings. Most gravely, spouses have legal rights of access to each other's person and home and in some jurisdictions are exempt from sexual battery charges.²⁰ Thus, marriage may legally facilitate abuse. In addition, the social practice of gender-structured marriage causes economic vulnerability for women. A further question of this book is how far restructuring marriage can eliminate unjust burdens and protect the vulnerable.

Ironically, in light of the sexism, racism, and heterosexism of marriage law, there is a long, and continuing, legal tradition of associating marriage with morality. The U.S. Supreme Court opined in 1888 that marriage is “an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization or progress.”²¹ In recent years, the United States has pursued marriage promotion with moralistic overtones. The 1996 U.S. Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), a welfare reform bill, found that “Marriage is the foundation of a successful society” and that “Marriage is an essential institution of a successful society which promotes the interests of children.”²² The act authorized \$300 million annually for

²⁰ E.g. Kansas Code § 21–3517; Ohio Code §§ 2907.03. See Card, “Against Marriage.” The 2003 Service Members Civil Relief Act allows the divorce deferral.

²¹ *Maynard v. Hill*, 125 U.S. 190, 211 (1888). See Metz, *Untying the Knot*, Chapter 4. See Freeman and Lyon, *Cohabitation*, pp. 184–9, for comparable statements in British law.

²² PRWORA, Title I, Section 101, Findings. Other findings (3–10) concern successful parenthood, collection of child support, increases in children receiving aid, increases in out-of-wedlock pregnancies, and negative consequences of out-of-wedlock pregnancy.

marriage promotion through state commissions and proclamations, tax policies and cash assistance, Medicaid, media campaigns, social work, and marriage education. Riding this wave, legislation to abolish no-fault divorce has recently been introduced in several state legislatures, and three states (Arizona, Arkansas, and Louisiana) have introduced the option of covenant marriage, which constrains divorce. Perhaps the most significant marriage promotion tool is federally funded abstinence-until-marriage education, by the terms of which schools “cannot teach anything that contradicts an abstinence-until-marriage message.” This message is “that a mutually faithful, monogamous relationship in the context of marriage is *the expected standard of sexual activity*” and that “sexual activity outside the context of marriage is likely to have harmful psychological and physical effects.”²³

U.S. public discourse on marriage is embroiled in claims about morality, the good for society—and the good life for the private individual. Marriage has been upheld, as in *Loving v. Virginia*, as “essential to the orderly pursuit of happiness by free men. Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”²⁴ The persistent attraction of marriage as the threshold to adulthood and happiness is exploited—and fostered—

²³ *Social Security Act*, Section 510 of Title V (my emphasis). See also Section 912 of the Personal Responsibility and Work Opportunity Reconciliation Act (H.R. 3734, 1996).

Description of marriage promotion policies in this and the preceding paragraph is drawn from “State Policies to Promote Marriage,” a 2002 report prepared for the U.S. Department of Health and Human Services. Available from the U.S. Department of Health and Social Services, or available online: <http://aspe.hhs.gov/hsp/marriage02f/>.

²⁴ *Loving v. Virginia*, 388 U.S. 1 (1967).

by the “wedding-industrial complex.”²⁵ It is because marriage is seen as a private and public transformation, a gateway to unique fulfillment, that it is an occasion for elaborate celebration. Such a view of marriage is sometimes, but not always, based in religious views, so it cannot be explained as a religious belief. Nor can it be explained simply as a celebration of love, or of particular lovers, because it is the translation of love into a specific institutional form that gives the ceremony its meaning. Marriage retains, in a secular age, sacramental connotations, and, in an individualistic age, it retains the aspect of communal sanction. This book sets out to determine whether there is any justification for this special status accorded marriage, either as a significant moral transformation or as a gateway to virtue and happiness.

With its predefined terms, marriage is awkwardly positioned between legal contract—which is paradigmatically self-determined—and legal status—a communally defined category standardized and imposed impersonally, as in feudal and caste societies. Marriage law is shaped by, and engages, an accretion of social expectations; it establishes socially defined roles. A relationship without this legal and social recognition is not marriage, although it may resemble marriage in every other respect and even be granted the other legal entitlements of marriage. But it lacks the public standing and social recognition, the status, of marriage. Does this make any important difference? I expect some readers will think “of course not” immediately. But not only social conservatives disagree: Arguments for same-sex marriage often depend on the point that “civil union” is not marriage.²⁶ This book attempts to articulate philosophically what that difference does—and does not—entail.

²⁵ A phrase found in Kipnis, *Against Love*, and Kingston, *Meaning*.

²⁶ Cruz, “Just Don’t”; Kaplan, “Intimacy and Equality”; Wedgwood, “Fundamental Argument”; Scott, “World without Marriage.”

Marriage in the History of Philosophy

Historical discussions of marriage set the agenda for contemporary debate, raising themes that resonate in law and philosophy today: the role of marriage as the bedrock of society and the appropriate context for sex and child-rearing, the nature of gendered spousal roles and their compatibility with equality and freedom, and the place of love in—or outside—marriage. These themes persist through historical works which reflect changing understandings of marriage as primarily an economic or procreative unit, a religious sacrament, a contractual association, or a love-based or companionate relationship.²⁷

Contemporary views that marriage is the basis for a stable society originate with Aristotle's response to his teacher Plato's marriage reform proposal (384–322 BCE). In *The Republic*, Plato (427–347 BCE) had proposed that “all the women [and children] should be common to all the men.” Plato argued that because private affections would detract from the unity of the state, sex and reproduction must be organized so that each Guardian would regard any other citizen “as related to him, as brother or sister, father or mother, son or daughter, grandparent or grandchild.”²⁸ To this end, Guardians were to engage in temporary, state-arranged marriages; these would allow Guardians to satisfy their sex drives and the state to pursue eugenic policy through the selection of mating couples. After each marriage festival, mated pairs would separate, and resulting children would be reared in state-run nurseries, so that biological ties between parents and children, or between siblings, would be unknown. Plato reasoned that

²⁷ This section roughly follows the order of presentation in the history section of my *Stanford Encyclopedia* entry, “Marriage and Domestic Partnership.”

²⁸ Plato, *The Republic*, pp. 168, 178.

private families, like private property, produced partiality and undermined attachment to the state; by abolishing the family, he thought, the state could redirect the Guardians' familial love to the state as a whole. Aristotle, however, rejected Plato's family state for a state of families. He argued that abolishing the family would also abolish familial affection, which necessarily attaches to particular others, not to the greater community. According to Aristotle, marriage and the family were of crucial importance to the state: As "the state is made up of households, before speaking of the state we must speak of the management of the household." Not only did families constitute the state, the family was productive in ways that sustained it: It produced future citizens, and virtuous wives enabled their husbands to participate in public life through skilful domestic management.²⁹ The view, inherited from Aristotle *via* Hegel, that marriage supports the state by producing virtuous citizens will be among the defenses of marriage interrogated below (Chapter 2.iv).

The Greek philosophers focused on marriage as a political and economic unit; indeed, Plato's *Symposium* addressed sex and erotic love as a topic completely independent of marriage. But early Christian philosophers of marriage introduced a stern sexual morality that understood marriage as the only legitimate context for sex. In St. Augustine (354–430), we find a condemnation of sex outside marriage and lust within it; in *The City of God*, he explains that lust is a reminder of original sin, which originated with Adam and Eve's disobedience—as evidenced by the failure of the sexual organs to comply with the commands of the will. Without original sin, in paradise, the sexual organs might have obeyed the will as the hands and feet do. Within

²⁹ Plato, *The Republic*, pp. 157–181 (or Book V, in this edition); Aristotle, *Complete Works*, *Politics*, Book I; quote from I.3 (1253b1); see Blustein, *Parents and Children*, pp. 31–46, for discussion.

this moral theology, the purpose for which the marital sexual act is done determines whether it is virtuous or vicious. Using marital sex solely to satisfy lust is sinful; sex performed for the goods of marriage—procreation and spousal companionship in chastity and fidelity—is not. St. Thomas Aquinas (ca. 1225–1274) reached similar conclusions, emphasizing the good of mutual fidelity as a relationship between spouses, including “the partnership of a common life” and payment of the “marriage debt” (the obligation to engage in sex).³⁰ In the natural law tradition of Aquinas, contemporary natural lawyers such as John Finnis and Rolf George defend marriage as the unique context for basic human goods related to sex (see Chapter 4.ii below).

The emerging medieval courtly love tradition, in counterpoint, suggested (perhaps ironically) that if marriage was marked by duty and chastity, then erotic love must be pursued outside marriage, in adulterous affairs such as the celebrated legend of Guinevere and Lancelot. In *On Love* (ca. 1185), the twelfth-century chaplain Andreas Capellanus presented the rules of courtship and dispensed advice for the lovelorn. The first of his “Rules of Love” is “Marriage does not constitute a proper excuse for not loving”—for not loving someone other than one’s spouse, that is. In one of the fictional dialogues embedded in the text, an attempted seducer, twisting the logic of Christian sexual morality, tries to persuade a married woman that erotic love cannot exist within marriage because a married couple who enjoy one another “beyond affection for their offspring or discharge of obligations” commit a sin, “for as we are taught by apostolic law a lover who shows eagerness towards his own wife is accounted an adulterer.” The judge to

³⁰ On original sin, see Augustine, *City of God*, Book 14, Chapters 23–24. On lust in marriage and the goods of marriage, see Augustine, “On Marriage and Desire,” Book I, Chapters 5, 8, 9, 10, 14–18, in *Answer to the Pelagians, II*; see also Augustine, “The Excellence of Marriage,” in *Marriage and Virginit*y. See Aquinas, *Summa*, Supplement 49, 1, “Of the Marriage Goods.”

whom they appeal settles the dispute in the seducer's favor: "love cannot extend its sway over a married couple. Lovers bestow all they have on each other freely, and without the compulsion of any consideration of necessity, whereas married partners are forced to comply with each other's desires as an obligation." Love's spontaneity, freedom, and uncertainty, as well as its secrecy (Rule 13: "Love does not usually survive being noised abroad"), are contrasted with the stability and duteness of marriage.³¹

Related juxtapositions of love and marriage, still located within a Christian tradition, emerge in the letters between the medieval nun Héloïse (ca. 1100–1163) and her former lover and husband, the philosopher and monk Peter Abelard (1079–1142). Héloïse exalted their love above marriage, suggesting that, for women, marriage cheapened love with pecuniary motivations. She wrote: "I never sought anything in you except yourself; I wanted simply you, nothing of yours. I looked for no marriage bond, no marriage portion, as it was not my own pleasures and wishes I sought to gratify, as you well know, but yours. The name of wife may seem more sacred or more binding, but sweeter for me will always be the word friend (*amica*), or, if you will permit me, that of concubine or whore." She adds that a woman marrying for money or position would "prostitute herself to a richer man, if she could," impugning the dominant understanding of marriage as an economic venture.³² For Héloïse, marriage as an economic necessity was incompatible with love. These medievals sound another recurrent theme

³¹ Capellanus, *On Love*, pp. 283, 151, 157, 283; in the Introduction, P. G. Walsh stresses that there is controversy as to how far *On Love*, and contemporaneous troubadours' tributes to adultery, portrayed actual mores as opposed to wishful thinking. For criticism of the widespread claim that the troubadours invented passionate love, see Fisher, *Anatomy*, pp. 49–51.

³² Abelard and Heloise, *Letters*, pp. 51–52.

in the philosophy of marriage, the alleged conflict between passionate or erotic love and duty. We will pick this thread up again with the nineteenth-century free lovers.

For the ancients and medievals, marriage was unproblematically structured hierarchically by gender; the perceived natural order was a model for institutional arrangements, and unchosen characteristics such as sex were seen as a fitting basis for the assignment of social roles. The authority of the father within the family was as well-founded as that of the hereditary monarch within the sovereign realm. But as doctrines of the equal rights of man and of contract, or free consent, as the basis of political authority emerged, the unequal and involuntary content of the marriage contract posed theoretical problems, even if contract theorists tried to sweep the inconsistencies under the metaphorical rug. Social contract theorist Thomas Hobbes (1588–1679) had the intellectual honesty to acknowledge that his argument for the rough equality of human beings applied to women as well as to men. He wrote in *Leviathan* (1651): “[W]hereas some have attributed the dominion to the man only, as being of the more excellent sex, they misreckon in it. For there is not always that difference of strength or prudence between the man and the woman as that the right can be determined without war.” Such equality—that of every person’s posing a threat to every other—underlies the social contract that is the basis of political authority, in which men empower a sovereign to protect their rights. Although their equality, in this sense, would seem to imply that women would enter the contract as equals, Hobbes complacently explained that law tends to favor husbands in marriage, ceding them authority, “because for the most part Commonwealths have been erected by the fathers, not by the mothers of families.” But in light of their equality, this explanation is inadequate—if women posed an

equal threat to men, they should have entered the social contract on equal terms.³³ The same reasoning that implied all men were roughly equal also implied that women were roughly equal, and marital hierarchy became difficult to justify.

The problem arose in a different form for another social contract theorist, John Locke (1632–1704). Locke explicitly argued that consent, not natural hierarchy, was the basis of authority in the state as in the family, yet he cited men’s natural ability as grounds for their authority in marriage. While he described marriage as a “voluntary compact,” he also held that within it, “the rule . . . naturally falls to the man’s share as the abler and the stronger.” But Locke had argued that all men had equal rights, despite differences in intelligence, strength, and ability; thus, natural differences between men and women, like those between men, should not, in his view, license subjugation.³⁴ As Locke’s contemporary critic, the protofeminist Mary Astell (1666–1731), asked, “If *all Men are born free*, how is it that all women are born slaves? as they must be if the being subjected to the *inconstant, uncertain, unknown, arbitrary Will* of Men, be the *perfect Condition of Slavery*?”³⁵ Locke’s and Hobbes’s difficulties prefigure those of later liberals, who would relegate the family to the private sphere, excluding it from justice, at the risk of inconsistency. The main argument of Part Two, in this vein, charges that liberals have failed to apply principles of justice consistently to marriage, and that this has resulted in injustice.

³³ Hobbes, *Leviathan*, Chapter XX, p. 152. See discussion in Okin, *Women in Western Political Thought*, pp. 197–199; Pateman, *Sexual Contract*, pp. 44–50.

³⁴ Locke, *Two Treatises*, §77, 82; see Okin, *Women in Western Political Thought*, p. 197.

³⁵ Astell, “Reflections upon Marriage,” published 1700, in *Political Writings*, pp. 1–80; p. 18.

In the defense of marriage offered by Immanuel Kant (1724–1804), Augustinian sexual morality and social contract theory converge. Kant saw sex as inherently objectifying and so in conflict with the respect demanded by morality. Marriage, in his view, morally ameliorated sex through an equal contractual exchange of rights of possession, which permitted otherwise impermissible treatment. Even in marriage, only procreative sex was virtuous.³⁶ Kant’s account is notable for attempting to explain how marriage morally transforms the relation between spouses, altering the moral structure of the relationship. While it has been derided as reducing marriage to an exchange of rights for sexual use, it is important for its conjecture that juridical rights can establish conditions for mutual respect and morally structure intimate relationships.³⁷ It makes a distinctive philosophical contribution in attempting to explain how entry into the legal institution is morally significant; however, in Chapter 3.i I will use Kant’s own distinction between justice and virtue to argue that any such attempt faces insuperable problems.

In his 1821 *Philosophy of Right*, G.W.F. Hegel (1770–1831) dismissed as “disgraceful” Kant’s view that the moral nature of marriage is essentially contractual. Unlike Kant, whose account of the moral role of marriage focused on the external institutional structure of rights, Hegel focused on the internal psychology of the marriage relation. According to Hegel, spouses enter the marriage contract only to transcend it in a relationship of ethical union, which is opposed to the individualistic bargaining of contract. Spouses think of themselves as part of a

³⁶ Kant *Metaphysics of Morals*, pp. 426–432, 494–496, 548–550, or Ak 6:276–84, 358–61, 424–26.

³⁷ The derision includes a satirical poem by Brecht; see Brecht, “On Kant’s Definition of Marriage in *The Metaphysic of Ethics*,” *Poems*. See Herman, “Could it be worth thinking about Kant on sex and marriage?” for the defense.

unit, not as individuals: “[T]he substantial basis of family relationships is . . . the surrender of personality.” The ethical content of marriage “consists in the consciousness of this union as a substantial end, and hence in love, trust, and the sharing of the whole of individual existence.”³⁸

While it might be thought that this account obviates the need for legal marriage, Hegel rejected his contemporary Friedrich von Schlegel’s free love arguments that marriage inhibited passionate love. Hegel called this the argument of a scoundrel (it does resemble Capellanus’s seducer!) and, like Kant, defended the necessity of marriage: Ethical love could exist only through the public assumption of spousal roles. Ethical love, Hegel held, was superior to mere passionate love: “Marriage should not be disrupted by passion, for the latter is subordinate to it.”³⁹ Like Aristotle, Hegel integrates his account of marriage with his theory of the state: Ethical union prepares citizens for membership in the state while simultaneously providing a way for individuals to satisfy their sexual drives. In this way, marriage reconciles desire and duty, and contributes to a harmonious social whole (the function of ethical life, on Hegel’s view). Hegel’s idea that marriage and the state transcend individual self-interest, and preclude contractual bargaining, has inspired modern communitarian critiques of liberalism—and of contractual bargaining within the family—to which I respond in Chapter 4.iv.

Part One of this book will investigate issues raised by Hegel: the moral significance of the social recognition of marriage, and how—or whether—marriage incorporates passionate love. It will also take up feminist and free love criticisms of marriage. Five years before the publication of Kant’s account of marriage in *The Metaphysics of Morals*, Mary Wollstonecraft (1759–1798), in her 1792 *Vindication of the Rights of Women*, criticized marriage as commonly

³⁸ Hegel, *Right*, §75, p. 105; §40, p. 71; §163, p. 202.

³⁹ Hegel, *Right*, §163A, p. 203; Hegel is attacking Schlegel, author of *Lucinde* (1799).

no more than “legal prostitution.”⁴⁰ As John Stuart Mill (1806–1873) and Harriet Taylor (1807–1858) argued, society, by denying women independent ways to make a living, constrained their choice to marry, and once married, wives lost their legal rights under coverture. Mill compared women’s legal status within marriage to slavery, noting that two factors made women’s subordination more entrenched: slavery only served the interests of a few, but women’s subordination served “the whole male sex.” Moreover, women lived in intimacy with their “masters” and had powerful incentives to please them.⁴¹ Feminist criticisms of marriage, discussed in Chapter 5.i, continue to focus on the contribution of gender-structured domestic relations to women’s inequality.

One question such critiques pose is how far marriage, with its deeply patriarchal history, can be reformed. Mary Wollstonecraft, John Stuart Mill, and Harriet Taylor argued that women’s equality would improve marriage. They advocated an ideal of marital friendship based on the model of classical friendship, in which spouses know each other intimately and “care about the good in and for one another.”⁴² Women’s subordination impeded this ideal. Wollstonecraft pointed out that a relationship with a subordinate could not be truly satisfying, and Mill argued that women’s emancipation would lead to equality of minds and tastes in marriage, enabling a mutually enriching friendship. However, more than a hundred years after the publication of Mill’s *Subjection of Women*, feminists were still comparing the legal institution of marriage to

⁴⁰ Wollstonecraft, *Vindications*, pp. 176, 286; fn. 1 on p. 176 notes that Defoe had also used the phrase in his *Conjugal Lewdness; or, Matrimonial Whoredom* (1727).

⁴¹ Mill, *Subjection*, p. 11.

⁴² Abbey and Den Uyl, “The Chief Inducement?” p. 39.

slavery. Despite intervening reforms, we might ask if these advocates of marital friendship were overly optimistic: How far can marriage outgrow its patriarchal past?

For free lovers, the impediments to equality posed by women's economic dependence and unequal legal status in marriage were reasons to reject the institution. Free lovers also rejected marriage on the grounds that legal compulsion was incompatible with love, which must be given freely, and not out of economic or legal necessity. The American free love and women's rights advocate, Stephen Pearl Andrews (1812–1886), argued that sexual relations were debased by the husband's legal power: "Let the idea be completely repudiated from the man's mind that woman . . . could, by possibility, belong to him, or was to be true to him, or owed him anything, farther than as she might choose to bestow herself."⁴³ Emma Goldman (1869–1940) wrote that "[e]very love relation should by its very nature remain an absolutely private affair. Neither the State, the Church, morality, or people should meddle with it." Goldman's critique of marriage extended to its exclusivity, suggesting that marriage, as a form of private property, leads to possessiveness and jealousy. Voltairine de Cleyre (1866–1912) went further by arguing that monogamous "free unions" as well as marriage limit individual growth and self-sufficiency by encouraging mutual dependency.⁴⁴

Feminist critique of marriage also formed part of the "Communist Manifesto," in which Karl Marx (1818–1883) promised that the abolition of the private, bourgeois family would

⁴³ Andrews, *Love, Marriage*, p. 70. On the free love movement in practice, see Cott, *Public Vows*, pp. 68–72.

⁴⁴ Goldman, "Jealousy," p. 215; de Cleyre, "They Who Marry Do Ill," in *Reader*, pp. 11–20.

liberate women from male ownership, ending their status “as mere instruments of production.”⁴⁵ Friedrich Engels (1820–1895) argued in his 1891 *Origin of the Family, Private Property, and the State* that, historically, marriage had created the conditions for private property, including property in women. The ancient transition from matriarchy to marking descent through paternal bloodlines was the “*world historical defeat of the female sex.*” The shift to monogamy followed closely: “[T]he origin of monogamy . . . was not in any way the fruit of individual sex love, with which it had nothing whatever to do . . . [but was the effect of] economic conditions—on the victory of private property over primitive, natural communal property.” Monogamous marriage allowed men to control reproduction and facilitated private property arrangements, “the express purpose being to produce children of undisputed paternity . . . [who are] to come into their father’s property as his natural heirs.”⁴⁶ These charges illuminate the free lovers’s complaint that marriage is not a good vehicle for passionate love: In their view, the institution is about property, including property in one’s spouse, not love.

In light of such critiques, suspicion arises that the belief in the moral value of marriage is merely ideological, a tool of patriarchal capitalism. How, indeed, could the exclusive, possessive, legal institution of marriage foster the goods of love and care associated with it? To what extent does its subordination of individual desire to duty and the perceived common good threaten the good of individuals? And in light of its origins in force and the legal subordination of women, can any marriage law be just? We can now embark on answering these questions.

⁴⁵ Marx, “Communist Manifesto,” pp. 157–186 in *Writings*, p. 173.

⁴⁶ Engels, *Origin*, pp. 120, 128, 125.

Bibliography

- Abbey, Ruth, and Douglas Den Uyl. "The Chief Inducement? The Idea of Marriage as Friendship." *Journal of Applied Philosophy* 18, no. 1 (2001): 37–52.
- Abelard and Heloise. *The Letters of Abelard and Heloise*, trans. Betty Radice, ed. M. T. Clanchy. London: Penguin, 2003.
- Ackerman, Bruce. *Social Justice in the Liberal State*. New Haven, Yale University Press, 1980.
- Almond, Brenda. *The Fragmenting Family*. Oxford: Oxford University Press, 2006.
- Alstott, Anne. *No Exit: What Parents Owe their Children and What Society Owes Parents*. Oxford: Oxford University Press, 2004.
- Altman, Micah, and Phillip A. Klinker. "Measuring the Difference between White Voting and Polling on Interracial Marriage." *Du Bois Review* 3, no. 2 (2006): 299–315.
- Amato, Paul R., Laura Spencer Loomis, and Alan Booth. "Parental Divorce, Marital Conflict, and Offspring Well-Being during Early Adulthood." *Social Forces* 73, no. 3 (1995): 895–915.
- Anderson, Scott. "Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution." *Ethics* 112, no. 4 (2002): 748–780.
- Andrews, Stephen Pearl. *Love, Marriage, and Divorce, and the Sovereignty of the Individual*, ed. Charles Shively. Weston, MA: M&S Press, 1975.
- Anscombe, Elizabeth. *Ethics, Religion, and Politics: Collected Philosophical Papers* vol. 3. Oxford: Blackwell, 1981.
- Aquinas, Thomas. *Summa Theologiae*, trans. English Dominicans. New York: Christian Classics, 1981.
- Archard, David. *Children: Rights and Childhood*. London: Routledge, 1993.

- . *Children, Family and the State*. Burlington, VT: Ashgate, 2003.
- Aristotle. *The Complete Works of Aristotle: The Revised Oxford Translation*, ed. Jonathan Barnes. Princeton, NJ: Princeton University Press, 1984.
- Arneson, Richard. "The Meaning of Marriage: State Efforts to Facilitate Friendship, Love, and Childrearing." *San Diego Law Review* 42 (2005): 979–1001.
- Astell, Mary. *Political Writings*, ed. Patricia Springborg. Cambridge: Cambridge University Press, 1996.
- Augustine. *The City of God*, trans. Philip Levine. Cambridge: Harvard University Press, 1966.
- . 1998, *Answer to the Pelagians, II: Marriage and Desire, Answer to the Two Letters of the Pelagians, Answer to Julian*, vol. I/24, trans. Roland J. Teske, ed. John E. Rotelle. Hyde Park, NY: New City Press.
- . 1999, *Marriage and Virginity: The Excellence of Marriage, Holy Virginity, The Excellence of Widowhood, Adulterous Marriages, Contenance*, vol. I/9, trans. Ray Kearney, ed. David Hunter, John E. Rotelle, Hyde Park, NY: New City Press.
- Barnhart, J. E., and Mary Ann Barnhart. "Marital Faithfulness and Unfaithfulness." *Journal of Social Philosophy* 4 (1973): 10–15.
- Baum, Bruce. "Feminism, Liberalism, and Cultural Pluralism: J. S. Mill on Mormon Polygyny." *Journal of Political Philosophy* 5, no. 3 (1997): 230–253.
- Baumeister, R. F., and M. R. Leary. "The need to belong: Desire for interpersonal attachments as a fundamental human motivation." *Psychological Bulletin* 117 (1995): 497–529.
- Bayles, Michael. "Marriage, Love, and Procreation." In *Philosophy and Sex*, 3rd ed., ed. Robert Baker, Kathleen Wininger, and Frederick Elliston, 116–129. Amherst, NY: Prometheus Books, 1998.

Beauvoir, Simone de. *The Second Sex*, ed., trans. H. M. Parshley. New York: Vintage Books, 1989.

Becker, Gary. *A Treatise on the Family*, enlarged ed. Cambridge: Harvard University Press, 1993.

Benhabib, Seyla. *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics*. New York: Routledge, 1992.

Bennett, Christopher. "Liberalism, Autonomy, and Conjugal Love." *Res Publica* 9 (2003): 285–301.

—. "Autonomy and Conjugal Love: A Reply to Golash." *Res Publica* 12 (2006): 191–201.

Bennice, Jennifer, and Patricia Resick. "Marital Rape: History, Research, and Practice." *Trauma, Violence, and Abuse* 4, no. 3 (2003): 228–246.

Beyer, Jason A. "Public Dilemmas and Gay Marriage: Contra Jordan." *Journal of Social Philosophy* 33, no. 1 (2002): 9–16.

Blackstone, Sir William. *Commentaries on the Laws of England*. Oxford: Clarendon Press, 1765–1769.

Bloom, Allan. *The Closing of the American Mind*. New York: Penguin, 1987.

Blustein, Jeffrey. *Parents and Children: The Ethics of the Family*. Oxford: Oxford University Press, 1982.

Bolte, Angela. "Do Wedding Dresses Come in Lavender? The Prospects and Implications of Same-Sex Marriage." *Social Theory and Practice* 24, no. 1 (1998): 111–131.

Boonin, David. "Same-Sex Marriage and the Argument from Public Disagreement." *Journal of Social Philosophy* 30, no. 2 (1999): 251–259.

- Bos, Henny M. W., and Frank van Balen. "Children in planned lesbian families: Stigmatisation, psychological adjustment and protective factors." *Culture, Health & Sexuality* 10, no. 3 (2008): 221–236.
- Boswell, John. *Same-Sex Unions in Premodern Europe*. New York: Vintage Books, 1994.
- Bowden, Peta. *Caring: Gender-Sensitive Ethics*. New York: Routledge, 1997.
- Brake, Elizabeth. "Rawls and Feminism: What Should Feminists Make of Liberal Neutrality?" *Journal of Moral Philosophy* 1, 3 (2004): 295–312.
- . "Justice and Virtue in Kant's Account of Marriage." *Kantian Review* 9 (2005): 58–94.
- . "Marriage, Morality, and Institutional Value." *Ethical Theory and Moral Practice* 10, no. 3 (2007): 243–254.
- . "Marriage and Domestic Partnership." *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Spring 2010. <http://plato.stanford.edu/archives/spr2010/entries/marriage/>.
- . "Minimal Marriage: What Political Liberalism Implies for Marriage Law." *Ethics* 120, no. 2 (2010): 302–337.
- . "Review of Tamara Metz, *Untying the Knot*." *Philosophy in Review* 30, no. 6 (2010): 418–421.
- . "Is Divorce Promise-Breaking?" *Ethical Theory and Moral Practice* 14 (2011): 23–39.
- Brecht, Bertolt. *Poems 1913–1956*, rev. ed., ed. John Willett, Ralph Manheim, Erich Fried. New York: Methuen, 1987.
- Brewer, Talbot. "Two Kinds of Commitments (And Two Kinds of Social Groups)." *Philosophy and Phenomenological Research* 66, 3 (2003): 554–583.
- Brighouse, Harry, and Adam Swift. "Parents' Rights and the Value of the Family." *Ethics* 117 (2006): 80–108.

- Brooks, Thom. "The Problem with Polygamy." *Philosophical Topics* 37, no. 2 (2009): 109–122.
- Buccola, Nicholas. "Finding Room for Same-Sex Marriage: Toward a More Inclusive Understanding of a Cultural Institution." *Journal of Social Philosophy* 36, 3 (2005): 331–343.
- Butler, Judith. "Is Kinship Always Already Heterosexual?" *differences: A Journal of Feminist Cultural Studies* 13, no. 1 (2002): 14–44.
- Cable, George Washington. *Old Creole Days*. Gretna, LA: Pelican, 2001.
- Cagen, Sasha. *Quirkyalone*. New York: HarperCollins, 2006.
- Calhoun, Cheshire. *Feminism, the Family, and the Politics of the Closet: Lesbian and Gay Displacement*. Oxford: Oxford University Press, 2003.
- . "Who's Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy." *San Diego Law Review* 42 (2005): 1023–1042.
- . "What Good Is Commitment?" *Ethics* 119, no. 4 (2009): 613–641.
- . "Commentary on Elizabeth Brake's 'Minimal Marriage: What Political Liberalism Implies for Marriage Law.'" June 1, 2010. <http://peasoup.typepad.com/peasoup/2010/06/ethics-discussions-at-pea-soup-elizabeth-brakes-minimal-marriage-what-political-liberalism-implies-f-1.html> (accessed June 18, 2011).
- Capellanus, Andreas. *Andreas Capellanus on Love*, ed. and trans. P. G. Walsh. London: Duckworth, 1982.
- Carbone, June. "The Limits of Contract in Family Law: An Analysis of Surrogate Motherhood." *Logos* 9 (1988): 147–160.
- Card, Claudia. "Against Marriage and Motherhood." *Hypatia* 11, 3 (1996): 1–23.

- . “Gay Divorce: Thoughts on the Legal Regulation of Marriage.” *Hypatia* 22, no. 1 (2007): 24–38.
- Carver, Raymond. *What We Talk about When We Talk about Love*. New York: Vintage, 1989.
- Case, Mary Anne. “Marriage Licenses.” *Minnesota Law Review* 89 (2004–2005): 1758–1797.
- Cave, Eric M. “Marital Pluralism: Making Marriage Safer for Love.” *Journal of Social Philosophy* 34, no. 3 (2003): 331–347.
- . “Harm Prevention and the Benefits of Marriage.” *Journal of Social Philosophy* 35, no. 2 (2004): 233–243.
- Cavell, Stanley. *Pursuits of Happiness: The Hollywood Comedy of Remarriage*. Cambridge: Harvard University Press, 1981.
- . *Must We Mean What We Say?*, updated ed. New York: Cambridge University Press, 2002.
- Cleyre, Voltairine de. *The Voltairine de Cleyre Reader*, ed. A. J. Brigati. Oakland, CA: AK Press, 2004.
- Collins, Patricia Hill. *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment*. New York: Routledge, 1991.
- . “It’s All in the Family: Intersections of Gender, Race, and Nation.” *Hypatia* 13, no. 3 (1998): 62–82.
- Coontz, Stephanie. *Marriage: A History*. London: Penguin, 2006.
- Cornell, Drucilla. *At the Heart of Freedom: Feminism, Sex, and Equality*. Princeton, NJ: Princeton University Press, 1998.
- Corvino, John. “Homosexuality and the PIB Argument.” *Ethics* 115 (2005): 501–534.
- Cott, Nancy. *Public Vows: A History of Marriage and the Nation*. Cambridge: Harvard University Press, 2000.

- Cronan, Sheila. "Marriage." In *Radical Feminism*, ed. Anne Koedt, Ellen Levine, Anita Rapone, 213–221. New York: Quadrangle, 1973.
- Cruz, David B. "'Just don't call it marriage': the First Amendment and marriage as an expressive resource." *Southern California Law Review* 74, no. 4 (2001): 925–1026.
- Cudd, Ann. "Rational Choice Theory and the Lessons of Feminism." In *A Mind of One's Own*, 2nd ed., ed. Louise Antony and Charlotte Witt, 398–417. Oxford: Westview Press, 2001.
- . *Analyzing Oppression*. New York: Oxford University Press, 2006.
- Davis, Angela Y. *Women, Race & Class*. New York: Vintage Books, 1983.
- Dean, Craig. "Gay Marriage: A Civil Right." *Journal of Homosexuality* 27, nos. 3–4 (1994): 111–115.
- Deigh, John. "Promises under Fire." *Ethics* 112 (2002): 483–506.
- Den Otter, Ronald. "Review of Tamara Metz, *Untying the Knot*." *New Political Science* 33, no. 1 (2011): 131–134.
- Denis, Lara. "From Friendship to Marriage: Revising Kant." *Philosophy and Phenomenological Research* 63, no. 1 (2001): 1–28.
- DePaulo, Bella. *Singled Out: How Singles are Stereotyped, Stigmatized, and Ignored, and Still Live Happily Ever After*. New York: St. Martin's Press, 2006.
- Devlin, Patrick. *The Enforcement of Morals*. Oxford: Oxford University Press, 1965.
- Dillon, Robin S. "Self-Respect: Moral, Emotional, Political." *Ethics* 107, no. 2 (1997): 226–249.
- Doppelt, Gerald. "The Place of Self-Respect in a Theory of Justice." *Inquiry* 52, no. 2 (2009): 127–154.

- Dua, Enakshi. "Beyond Diversity: Exploring the Ways in Which the Discourse of Race Has Shaped the Institution of the Nuclear Family." In *Scratching the Surface*, ed. Enakshi Dua and Angela Robertson, 237–259. Toronto: Women's Press, 1991.
- Durose, Matthew R., et al. *Bureau of Justice Statistics, Family Violence Statistics: Including Statistics on Strangers and Acquaintances*. U.S. Department of Justice, NCJ 207846, 2005.
- Dworkin, Andrea. *Pornography: Men Possessing Women*. New York: E.P. Dutton, 1989.
- Dworkin, Ronald. *A Matter of Principle*. Cambridge: Harvard University Press, 1985.
- Eekelaar, John. *Family Law and Personal Life*. Oxford: Oxford University Press, 2006.
- Ehrenreich, Barbara. *Nickel and Dimed*. New York: Metropolitan Books, 2001.
- Eliot, T.S. *The Waste Land and Other Poems*. Peterborough: Broadview, 2011.
- Elster, Jon. *Ulysses and the Sirens*, rev. ed. Cambridge: Cambridge University Press, 1984.
- . *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints*. Cambridge: Cambridge University Press, 2002.
- Emens, Elizabeth F. "Monogamy's Law: Compulsory Monogamy and Polyamorous Existence." *New York University Review of Law and Social Change* 29 (2004): 277–376.
- Engels, Friedrich. *The Origin of the Family, Private Property, and the State*, ed. Eleanor Burke Leacock. New York: International, 1972.
- Eskow, Lisa R. "The Ultimate Weapon? Demythologizing Spousal Rape and Reconceptualizing Its Prosecution." *Stanford Law Review* 48, no. 3 (1996): 677–709.
- Ettelbrick, Paula. "Since When Is Marriage a Path to Liberation?" *Out/look: National Lesbian and Gay Quarterly* 6, no. 9 (1989): 14–17.

- Eyal, Nir. “‘Perhaps the most important primary good’: self-respect and Rawls’ principles of justice.” *Politics, Philosophy & Economics* 4, no. 2 (2005): 195–219.
- Ferguson, Ann. “Gay Marriage: An American and Feminist Dilemma.” *Hypatia: A Journal of Feminist Philosophy* 22, no. 1 (2007): 39–57.
- Fineman, Martha. *The Neutered Mother, The Sexual Family, and Other Twentieth Century Tragedies*. New York: Routledge, 1995.
- . *The Autonomy Myth: A Theory of Dependency*. New York: New Press, 2004.
- Finnis, John. “Law, Morality, and ‘Sexual Orientation.’” *Notre Dame Law Review* 69 (1994): 1049–1076.
- . “The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations.” *American Journal of Jurisprudence* 42 (1997): 97–134.
- Firestone, Shulamith. *The Dialectic of Sex: The Case for Feminist Revolution*. New York: William Morrow, 1970.
- Fisher, Helen. *Anatomy of Love: The Natural History of Monogamy, Adultery, and Divorce*. New York: W. W. Norton and Company, 1992.
- FitzGibbon, Scott. “Marriage and the good of obligation.” *American Journal of Jurisprudence* 47 (2002): 41–69.
- Ford, Richard. *The Sportswriter*. New York: Vintage, 1986. Forster, E. M. *Howard’s End*, ed. Alistair Duckworth. Boston: Bedford Books, 1997. Freeman, Elizabeth. *The Wedding Complex: Forms of Belonging in Modern American Culture*. Durham, NC: Duke University Press, 2002.
- Freeman, M. D. A. “Not Such a Queer Idea: Is There a Case for Same Sex Marriages?” *Journal of Applied Philosophy* 16, no. 1 (1999): 1–17.

- Freeman, Michael, and Christina Lyon. *Cohabitation without Marriage*. Aldershot: Gower Publishing Company Limited, 1983.
- Friedman, Lawrence. "Rights of Passage: Divorce Law in Historical Perspective." *Oregon Law Review* 63, no. 4 (1984): 649–669.
- Friedman, Marilyn. "Beyond Caring: The De-Moralization of Gender." In *Science, Morality, and Feminist Theory*, ed. Marsha Hanen and Kai Nielsen, *Canadian Journal of Philosophy* Supp. Vol. 13 (1987): 87–110.
- Frye, Marilyn. *The Politics of Reality: Essays in Feminist Theory*. Trumansburg, NY: Crossing Press, 1983.
- Galston, William. *Liberal Purposes*. Cambridge: Cambridge University Press, 1991.
- Garrett, Jeremy. "History, Tradition, and the Normative Foundations of Civil Marriage." *The Monist* 91, nos. 3–4 (2008): 446–474.
- . "Why the Old Sexual Morality of the New Natural Law Undermines Traditional Marriage." *Social Theory and Practice* 34, 4 (2008): 591–622.
- Garrison, Marsha. "Promoting Cooperative Parenting: Programs and Prospects." *Journal of Law and Family Studies* 9 (2007): 265–279.
- George, Robert. "'Same-Sex Marriage' and 'Moral Neutrality.'" In *Homosexuality and American Public Life*, ed. Christopher Wolfe, 141–153. Dallas: Spence, 2000.
- Gilligan, Carol. *In a Different Voice*. Cambridge: Harvard University Press, 1993.
- Golash, Deirdre. "Marriage, Autonomy, and the State: Reply to Christopher Bennett." *Res Publica* 12 (2006): 179–190.
- Goldman, Alan. "Plain Sex." *Philosophy and Public Affairs* 6, no. 3 (1977): 267–287.

- Goldman, Emma. "Jealousy: Causes and a Possible Cure." In *Red Emma Speaks: An Emma Goldman Reader*, ed. Alix Kates Shulman, 214–221. Amherst, NY: Humanity Books, 1998.
- Grisez, Germain. *The Way of the Lord Jesus*, vol. 2, *Living a Christian Life*. Quincy, IL: Franciscan Press, 1993.
- Halwani, Raja. *Virtuous Liaisons*. Peru, IL: Open Court, 2003.
- Hampton, Jean. "Feminist Contractarianism." In *A Mind of One's Own*, ed. Louise Antony and Charlotte Witt, 227–256. Oxford: Westview Press, 1993.
- Hartley, Christie, and Lori Watson. "Political Liberalism, Marriage and the Family." *Law and Philosophy*, Online First, 6 September 2011.
- Hegel, G. W. F. *Elements of the Philosophy of Right*, ed. Allen W. Wood, trans. H. B. Nisbet. Cambridge: Cambridge University Press, 1995.
- Held, Virginia. "Non-Contractual Society: A Feminist View." In *Science, Morality, and Feminist Theory*, ed. Marsha Hanen and Kai Nielsen, *Canadian Journal of Philosophy Supp.* Vol. 13 (1987): 111–37.
- . *The Ethics of Care: Personal, Political, and Global*. Oxford: Oxford University Press, 2006.
- Herman, Barbara. "Could it be worth thinking about Kant on sex and marriage?" In *A Mind of One's Own*, ed. Louise Antony and Charlotte Witt, 49–67. Oxford: Westview Press, 1993.
- Hoagland, Sarah Lucia. "Heterosexualism and White Supremacy." *Hypatia* 22, no. 1 (2007): 166–185.
- Hobbes, Thomas. *Leviathan*, ed. Michael Oakeshott. New York: Simon and Schuster, 1962.
- hooks, bell. *Feminist Theory: From Margin to Center*. Boston: South End Press, 1984.

- Hume, David. *An Enquiry Concerning the Principles of Morals*. London: Millar, 1751.
- Jaggar, Alison. "Love and Knowledge: Emotion in Feminist Epistemology." *Inquiry: An Interdisciplinary Journal of Philosophy* 32 (1989): 151–76.
- James, Henry. *The Bostonians*. New York: Thomas Crowell, 1979.
- . *The Ambassadors*. New York: Penguin, 1986.
- . *The Portrait of A Lady*, Second Edition ed. New York: Norton, 1995.
- Jordan, Jeff. "Is It Wrong to Discriminate on the Basis of Homosexuality?" *Journal of Social Philosophy* 26, no. 1 (1995): 39–52.
- Kant, Immanuel, *Observations on the Feeling of the Beautiful and Sublime*, trans. John T. Goldthwait. Berkeley: University of California Press, 1960.
- . "Conjectural Beginning of Human History." In *On History*, ed. Lewis White Beck, 53–68. Indianapolis, Ind.: Bobbs-Merrill, 1963.
- . *Anthropology from a Pragmatic Point of View*, trans. Mary Gregor. The Hague: Martinus Nijhoff, 1974.
- Groundwork of the Metaphysics of Morals*, trans. Mary Gregor. In *Practical Philosophy*, ed. Mary Gregor, 37–108. Cambridge: Cambridge University Press, 1996.
- . *The Metaphysics of Morals*, trans. Mary Gregor. In *Practical Philosophy*, ed. Mary Gregor, 355–588. Cambridge: Cambridge University Press, 1996.
- . *Lectures on Ethics*, trans. Peter Heath, ed. Peter Heath and J. B. Schneewind. Cambridge: Cambridge University Press, 2001.
- Kaplan, Morris B. "Intimacy and Equality: The Question of Lesbian and Gay Marriage." *Philosophical Forum* 25, no. 4 (1994): 333–360.

- Kekes, John. "‘Ought Implies Can’ and Two Kinds of Morality." *Philosophical Quarterly* 34, no. 137 (1984): 459–467.
- Kierkegaard, Søren. *Either/Or*, trans. Howard V. Hong and Edna H. Hong. Princeton, NJ: Princeton University Press, 1987.
- Kingston, Anne. *The Meaning of Wife*. Toronto: HarperCollins, 2004.
- Kipnis, Laura. *Against Love: A Polemic*. New York: Pantheon Books, 2003.
- Kittay, Eva. *Love’s Labor*. New York: Routledge, 1999.
- Kleingeld, Pauline. "Just Love? Marriage and the Question of Justice." *Social Theory and Practice* 24, no. 2 (1998): 261–281.
- Kymlicka, Will. "Liberal Individualism and Liberal Neutrality." *Ethics* 99, no. 4 (1989): 883–905.
- . "Rethinking the Family." *Philosophy and Public Affairs* 20, no. 1 (1991): 77–97.
- LaFollette, Hugh. "Licensing Parents." *Philosophy and Public Affairs* 9, no. 2 (1980): 182–197.
- Landau, Iddo. "An Argument for Marriage." *Philosophy* 79 (2004): 475–481.
- Levey, Ann. "Liberalism, Adaptive Preferences, and Gender Equality." *Hypatia* 20, no. 4 (2005): 127–143.
- Liao, S. Matthew. "The Idea of a Duty to Love." *The Journal of Value Inquiry* 40 (2006): 1–22.
- Locke, John. *Two Treatises of Government*, ed. Peter Laslett. Cambridge: Cambridge University Press, 1988.
- Lloyd, S. A. "Family Justice and Social Justice." *Pacific Philosophical Quarterly* 75 (1994): 353–371.
- Macedo, Stephen. "Homosexuality and the Conservative Mind." *Georgetown Law Journal* 84 (1995): 261–300.

- MacIntyre, Alasdair. *After Virtue*. London: Duckworth, 1985.
- MacKinnon, Catharine A. *Feminism Unmodified: Discourses on Life and Law*. Cambridge: Harvard University Press, 1987.
- . *Toward a Feminist Theory of the State*. Cambridge: Harvard University Press, 1989.
- Mahoney, Jon. "Liberalism and the Polygamy Question." *Social Philosophy Today* 23 (2008): 161–174.
- Mahony, Rhona. *Kidding Ourselves: Breadwinning, Babies, and Bargaining Power*. New York: Basic Books, 1995.
- Maine, Sir Henry. *Ancient Law*. London: J. M. Dent and Sons, 1917.
- March, Andrew. "Is There a Right to Polygamy? Marriage, Equality, and Subsidizing Families in Liberal Political Justification." *Journal of Moral Philosophy* 8 (2011): 246–272.
- Marquis, Don. "What's Wrong with Adultery?" In *What's Wrong?* ed. Graham Oddie and David Boonin, 231–238. New York: Oxford University Press, 2005.
- Martin, Mike W. "Love's Constancy." *Philosophy* 68, no. 263 (1993): 63–77.
- . "Adultery and Fidelity." *Journal of Social Philosophy* 25, no. 3 (1994): 76–91.
- Marx, Karl. *Selected Writings*, ed. Lawrence Simon. Indianapolis: Hackett, 1994.
- Maushart, Susan. *Wifework: What Marriage Really Means for Women*. New York: Bloomsbury, 2001.
- May, Simon. "Liberal Feminism and the Ethics of Polygamy." In *Exploding the Nuclear Family Ideal: For Better or Worse?*, ed. S. Chan and D. Cutas. London: Bloomsbury Academic, forthcoming 2012.
- Mayo, David J. and Martin Gunderson. "The Right to Same-Sex Marriage: A Critique of the Leftist Critique." *Journal of Social Philosophy* 31, no. 3 (2000): 326–337.

- McMurtry, John. "Monogamy: A Critique." *The Monist* 56 (1972): 587–599.
- McNaughton, David. *Moral Vision: An Introduction to Ethics*. Oxford: Basil Blackwell, 1988.
- Mead, Rebecca. *One Perfect Day: The Selling of the American Wedding*. New York: Penguin, 2007.
- Mendus, Susan. "Marital Faithfulness." *Philosophy* 59 (1984): 243–252.
- Mercier, Adèle. *Affidavit* for the petitioners to Ontario Superior Court of Justice in *Halpern et al. and Canada (Attorney General)*, Court files 684/00, 30/2001, Nov.
http://www.ub.es/grc_logos/people/amercier/proof3.htm (accessed June 18, 2011).
- . "On the Nature of Marriage: Somerville on Same-Sex Marriage." *The Monist* 91, no. 3–4 (2008): 407–421.
- Metz, Tamara. *Untying the Knot: Marriage, the State, and the Case for their Divorce*. Princeton, NJ: Princeton University Press, 2010.
- Mill, John Stuart. *On Liberty*, ed. Gertrude Himmelfarb. London: Penguin, 1985.
- . *The Subjection of Women*, ed. Susan Moller Okin. Indianapolis: Hackett, 1988.
- Mills, Charles. "'Ideal Theory' as Ideology." *Hypatia* 20, no. 3 (2005): 165–184.
- Minow, Martha, and Mary Lyndon Shanley. "Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law." *Hypatia* 11, no. 1 (1996): 4–29.
- Mohr, Richard D. *The Long Arc of Justice: Lesbian and Gay Marriage, Equality, and Rights*. New York: Columbia University Press, 2005.
- Moller, Dan. "An Argument Against Marriage." *Philosophy* 78, 1 (2003): 79–91.
- . "The Marriage Commitment—Reply to Landau." *Philosophy* 80 (2005): 279–284.
- Morrison, Toni. *Beloved*. New York: Alfred A. Knopf, 2004.

- Morse, Jennifer Roback. "Why Unilateral Divorce Has No Place in a Free Society." In *The Meaning of Marriage*, ed. Robert P. George and Jean Bethke Elshtain, 74–99. Dallas: Spence, 2006.
- Munoz-Dardé, Veronique. "John Rawls, Justice *in* the Family, and Justice *of* the Family." *Philosophical Quarterly* 48, no. 192 (1998): 335–352.
- Nagel, Thomas. "Rawls on Justice." *Philosophical Review* 82, no. 2 (1973): 220–234.
- Nielson, Joyce, Walden, Glenda, and Kunkel, Charlotte. "Gendered Heteronormativity: Empirical Illustrations in Everyday Life." *Sociological Quarterly* 41, no. 2 (2000): 283–396.
- Nietzsche, Friedrich. *On the Genealogy of Morality: A Polemic*, trans. Maudemarie Clark, Alan Swensen. Indianapolis: Hackett Publishing, 1998.
- Noddings, Nel. *Caring: A Feminine Approach to Ethics and Moral Education*. London: UCLA Press, 1984.
- Norton, Caroline. *Selected Writings of Caroline Norton*, ed. James O. Hoge and Jane Marcus. Delmar, NY: Scholars' Facsimiles and Reprints, 1978.
- Nozick, Robert. *Anarchy, State, and Utopia*. New York: Basic Books, 1974.
- Nussbaum, Martha. *Love's Knowledge*. Oxford: Oxford University Press, 1990.
- . *Sex and Social Justice*. Oxford: Oxford University Press, 1999.
- . "A Right to Marry." *California Law Review* 98, no. 3 (2010): 667–696.
- Nussbaum, Martha, and David M. Estlund, eds. *Sex, Preference, and Family: Essays on Law and Nature*. Oxford: Oxford University Press, 1998.
- Okin, Susan Moller. *Women in Western Political Thought*. Princeton: Princeton University Press, 1979.

- . “Women and the Making of the Sentimental Family.” *Philosophy and Public Affairs* 11, 1 (1982): 65–88.
- . *Justice, Gender, and the Family*. New York: Basic Books, 1989.
- . “Political Liberalism, Justice, and Gender.” *Ethics* 105 (1994): 23–43.
- Parsons, Kate. “Subverting the Fellowship of the Wedding Ring.” *Journal of Social Philosophy* 39, 3 (2008): 393–410.
- Pateman, Carole. *The Sexual Contract*. Cambridge: Polity Press, 1988.
- Perlman, Daniel. “The Best of Times, the Worst of Times: The Place of Close Relationships in Psychology and Our Daily Lives.” *Canadian Psychology* 48, no. 1 (2007): 7–18.
- Plato. *The Republic*, trans. Desmond Lee. New York: Penguin, 1955.
- Posner, Richard, and Katharine Silbaugh. Chicago: University of Chicago Press, 1996.
- Rajczi, Alex. “A Populist Argument for Same-Sex Marriage.” *The Monist* 91, nos. 3–4 (2008): 475–505.
- Rawls, John. *A Theory of Justice*. Cambridge: Harvard University Press, 1971.
- . *Political Liberalism*. New York: Columbia University Press, 1993.
- . “The Idea of Public Reason Revisited.” *The University of Chicago Law Review* 64, no. 3 (1997): 765–807.
- . *A Theory of Justice*, rev. ed. Cambridge: Harvard University Press, 1999.
- Raz, Joseph. *The Morality of Freedom*. Oxford: Oxford University Press, 1986.
- Rich, Adrienne. “Compulsory Heterosexuality and Lesbian Existence.” *Signs: Journal of Women in Culture and Society* 5 (1980): 631–660.
- Robson, R. “A Mere Switch or a Fundamental Change? Theorizing Transgender Marriage.” *Hypatia* 22, no. 1 (2007): 58–70.

- Ruddick, Sara. *Maternal Thinking*. London: The Women's Press, 1990.
- Russell, Bertrand. *Marriage and Morals*. New York: Bantam Books, 1959.
- Russell, Diana. *Rape in Marriage*. New York: Macmillan Press, 1990.
- Sachs, Albie, and Joan Hoff Wilson. *Sexism and the Law*. Oxford: Martin Robertson, 1978.
- Sandel, Michael. *Liberalism and the Limits of Justice*. Cambridge: Cambridge University Press, 1982.
- Sartre, Jean-Paul. "The Humanism of Existentialism." In *Essays in Existentialism*, ed. Wade Baskin, 31–62. New York: Citadel Press, 1947.
- . *Being and Nothingness*, trans. Hazel E. Barnes. New York: Philosophical Library, 1956.
- Scanlon, T. M. *What We Owe to Each Other*. Cambridge, MA: Belknap Press, 1998.
- Schaff, Kory. "Kant, Political Liberalism, and the Ethics of Same-Sex Relations." *Journal of Social Philosophy* 32, no. 3 (2001): 446–462.
- . "Equal Protection and Same-Sex Marriage." *Journal of Social Philosophy* 35, no. 1 (2004): 133–147.
- Schelling, Thomas. *The Strategy of Conflict*. Cambridge: Harvard University Press, 1960.
- Schlegel, Friedrich von . *Friedrich Schlegel's "Lucinde" and the Fragments*, trans. and ed. Peter Firchow. Minneapolis: University of Minnesota Press, 1971.
- Schwartz, Adina. "Moral Neutrality and Primary Goods." *Ethics* 83, no. 4 (1973): 294–307.
- Scott, Elizabeth. "A World without Marriage." *Family Law Quarterly* 41 (2007): 537–566.
- Scruton, Roger. *Sexual Desire*. London: The Free Press, 1986.
- Searle, John. *Expression and Meaning*. Cambridge: Cambridge University Press, 1979.
- Shanley, Mary Lyndon, et al. *Just Marriage*. Oxford: Oxford University Press, 2004.

- Sher, George. *Beyond Neutrality: Perfectionism and Politics*. Cambridge: Cambridge University Press, 1997.
- Shiffrin, Seana. "Race, Labor, and the Fair Equality of Opportunity Principle." *Fordham Law Review* 72 (2004): 1643–1675.
- Shorter, Edward. *The Making of the Modern Family*. London: Collins, 1976.
- Shrage, Laurie. *Moral Dilemmas of Feminism*. New York: Routledge, 1994.
- Shultz, Marjorie. "Contractual Ordering of Marriage: A New Model for State Policy." *California Law Review* 70, no. 2 (1982): 204–334.
- Singer, Irving. *The Nature of Love*, vol. 1, *Plato to Luther*, 2nd ed. Chicago: University of Chicago Press, 1984.
- Soble, Alan. *The Structure of Love*. New Haven: Yale University Press, 1990.
- Stark, Barbara. "Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law." *California Law Review* 89, no. 5 (2001): 1479–1548.
- Steinbock, Bonnie. "Adultery." *QQ: Report from the Center for Philosophy and Public Policy* 6, no. 1 (1986): 12–14.
- Stern, Robert. "Does 'Ought' Imply 'Can'? And Did Kant Think It Does?" *Utilitas* 16, no. 1 (2004): 42–61.
- Stivers, Andrew, and Andrew Valls. "Same-sex marriage and the regulation of language." *Politics, Philosophy and Economics* 6, no.2 (2007): 237–253.
- Sullivan, Andrew. *Same-Sex Marriage: Pro and Con*, rev. ed. New York: Vintage, 2004.
- Sunstein, Cass, and Richard Thaler. "Privatizing Marriage." *The Monist* 91, nos. 3–4 (2008): 377–387.
- Taylor, Gabriele. "Love." *Proceedings of the Aristotelian Society* 76 (1975–1976): 147–164.

Teichman, Jenny. *Illegitimacy*. Ithaca, NY: Cornell University Press, 1982.

Tjaden, Patricia, and Nancy Thoennes. "Extent, Nature, and Consequence of Intimate Partner Violence." Findings from the National Violence Against Women Survey, published by the U. S. Department of Justice, NCJ 183781, 2000.

Tomasi, John. "Individual Rights and Community Virtues." *Ethics* 101 (1991): 521–536.

Torcello, Lawrence. "Is the State Endorsement of Any Marriage Justifiable? Same-Sex Marriage, Civil Unions, and the Marriage Privatization Model." *Public Affairs Quarterly* 22, 1 (2008): 43–61.

Trainor, Brian. "The State, Marriage and Divorce." *Journal of Applied Philosophy* 9, no. 2 (1992): 135–148.

Vanderheiden, Steve. "Why the State Should Stay Out of the Wedding Chapel." *Public Affairs Quarterly* 13, no. 2 (1999): 175–190.

van Hooft, Stan. "Obligation, Character, and Commitment." *Philosophy* 63, no. 245 (1988): 345–362.

—. "Commitment and the Bond of Love." *Australasian Journal of Philosophy* 74, no. 3 (1996): 454–466.

Vodrasta, Stanley. "Against Blackstone and the Concept of Marriage as Contract." *Modern Schoolman* 81 (2004): 97–120.

Waldron, Jeremy. "When Justice Replaces Affection: The Need for Rights." *Harvard Journal of Law and Public Policy* 11, no. 3 (1988): 625–647.

—. "Autonomy and Perfectionism in Raz's *Morality of Freedom*." *Southern California Law Review* 62 (1988–1989): 1097–1152.

- Walker, John D. "Liberalism, Consent, and the Problem of Adaptive Preferences." *Social Theory and Practice* 21, no. 3 (1995): 457–471.
- Walker, Sue Sheridan. "Widow and Ward: The Feudal Law of Child Custody in Medieval England." In *Women in Medieval Society*, ed. Susan Mosler Stuard, 158–172. Philadelphia: University of Pennsylvania Press, 1976.
- Wall, Steven. "Neutrality and Responsibility." *The Journal of Philosophy* 98, 8 (2001): 389–410.
- Wallenstein, Peter. *Tell the Court I love My Wife: Race, Marriage, and Law: An American History*. New York: Palgrave Macmillan, 2002.
- Warner, Michael. "Introduction: Fear of a Queer Planet." *Social Text* 29 (1991): 3–17.
- . "Response to Martha Nussbaum." *California Law Review* 98, no. 3 (2010): 721–729.
- Watters, Ethan. *Urban Tribes: Are Friends the New Family?* New York: Bloomsbury, 2003.
- Wax, Amy. "Traditionalism, Pluralism, and Same-Sex Marriage." *Rutgers Law Review* 59, no. 2 (2006–2007): 377–412.
- Wedgwood, Ralph. "The Fundamental Argument for Same-Sex Marriage." *Journal of Political Philosophy* 7, no. 3 (1999): 225–242.
- Weisbrod, Carol. "The Way We Live Now: A Discussion of Contracts and Domestic Arrangements." *Utah Law Review* 2 (1994): 777–815.
- Weiss, Penny. "Feminism and Communitarianism." In *Feminism and Community*, ed. Penny Weiss and Marilyn Friedman, 161–186. Philadelphia: Temple University Press, 1995.
- Weitzman, Lenore. *The Marriage Contract*. New York: Macmillan, 1981.
- Wellington, Adrian Alex. "Why Liberals Should Support Same Sex Marriage." *Journal of Social Philosophy* 26, no. 3 (1995): 5–32.
- Williams, Bernard. *Moral Luck*. Cambridge: Cambridge University Press, 1981.

Wilson, John. "Can One Promise to Love Another?" *Philosophy* 64 (1989): 557–563.

Wollstonecraft, Mary. *The Vindications: The Rights of Men, The Rights of Woman*, ed. D.L.

Macdonald and Kathleen Scherf. Peterborough, Ont.: Broadview, 1997.

Young, Iris Marion. "Mothers, Citizenship, and Independence: A Critique of Pure Family

Values." *Ethics* 105 (1995): 535–556.