Homosexuality's Horizon

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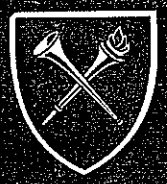
Emory Law Journal (vol. 54, Summer 2005)

Public Law and Legal Theory
Working Paper Series
No. 52

Center for Interdisciplinary Law and Policy Studies
Working Paper Series
No. 33

February 2006



EMORY LAW JOURNAL

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Reprinted from Emory Law Journal
Volume 54, No. 3, Summer 2005

VOLUME 54 **SUMMER 2005** **NUMBER 3**

HOMOSEXUALITY'S HORIZON[†]

Marc Spindelman[*]

For C.K.

It is only for the sake of those without hope that hope is given to us.

—Walter Benjamin

INTRODUCTION

For some time, the right to marry has defined homosexuality's horizon. Once, very recently, a political and legal impossibility, officially a *reductio ad absurdum*, marriage has become the lesbian and gay communities' main programmatic obsession. No longer is it extraordinary to think, with Andrew Sullivan, that the lesbian and gay civil rights project could be at an end when full marriage rights, now the embodiment of the lesbian and gay communities' common hopes and aspirations for public recognition of our shared humanity, have, finally, been achieved.[1] Look into the political distance: There's nothing beyond marriage for lesbians and gay men as far as the eye can see.[2]

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[1] When Sullivan made the point, he put it in terms of full participation in the military and full access to marriage. *See generally* ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY (1995).

[2] Transgender rights are widely, if not universally, supposed to be the next frontier of lesbian and gay rights, hence the newish designation of them as "LGBT rights." This revised description of the rights project lends itself to the conventional understanding of trans-rights as beyond lesbian and gay rights as such, hence not reducible to them, even if (increasingly) seen as worth pursuing under the same political identity banner. Not everyone shares these perspectives. One convenient, if slightly outdated, map of this complex terrain comes in MICHELANGELO SIGNORILE, *Transgender Nation* (1996), *reprinted in* HITTING HARD 19 (2005).

No single text more perfectly coalesces the lesbian and gay communities' shared enthusiasm for this vision,[3] along with the energized determination to realize it, than the Massachusetts Supreme Judicial Court's decision in *Goodridge v. Department of Public Health*,[4] or more exactly, the leading opinion in it Chief Justice Margaret Marshall wrote, affirming lesbians' and gay men's constitutional right to marry. Conspicuously absent from this historic decision are the caveats, exceptions, and stuttering future limitations that have regularly been laced into even the most pro-lesbian and pro-gay rights opinions to forestall the predictable criticism that same-sex marriage must surely follow as a matter of logic or course.[5] (Oh, no.) *Goodridge*, which openly avows the rule other courts have assiduously shunned—that the

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[3] Dissenters do exist, but they've largely been shuttled to the margins of the same-sex marriage debates among lesbians and gay men, including academics. Over a decade ago, Nancy Polikoff insightfully predicted they would be. Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1549 (1993) ("The danger is that the underlying critique of the institution [of marriage] . . . becomes not only secondary but marginalized, even silenced."). Susan Appleton has recently commented on some of the consequences of this marginalization within the larger public debates over same-sex marriage, where "gender talk," as she calls it, has been noticeable above all for its absence. Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 97 (2005). Actual dissents on the lesbian-feminist side of the ledger appear, for example, in Polikoff, *supra*, and Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, 6 OUTLOOK: NAT'L LESBIAN & GAY Q. 9 (1989). Weighing in on the gay-liberationist, queer-theoretic side, are, among others, MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 41–147 (1999), and Janet Halley, *Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate*, *in* LEGAL RECOGNITIONS OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 97 (Robert Wintemute & Mads Andenæs eds., 2001).

[4] 798 N.E.2d 941 (Mass. 2003). In *Goodridge*, Marshall technically writes only for herself and Justices Ireland and Cowin, making her opinion formally only a plurality. Justice Greaney's separate concurrence, which reflects the crucial fourth vote to overturn the Commonwealth's marriage law, is grounded in sex equality principles. *Id.* at 970, 971 (Greaney, J., concurring) ("Because our marriage statutes intend, and state, the ordinary understanding that marriage under our law consists of only a union between a man and a woman, they create a statutory classification based on the sex of the two people who wish to marry.") (citing Baehr v. Lewin, 852 P.2d 44, 51–52 (Haw. 1993) (plurality opinion), and Baker v. State, 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part)). It thus might be thought the controlling opinion in the case; certainly, a strong argument could be made it is. Curiously, this possibility has been widely ignored. Given the position of lesbian-feminist, sex equality arguments against marriage in the same-sex marriage debates, see *supra* note 3, this isn't entirely surprising. For present purposes, I follow the pack, which significantly seems to include the Supreme Judicial Court itself, see, for example, *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 567–68 (Mass. 2004), and treat Marshall's opinion as the opinion for the *Goodridge* court. I leave the project of centering *Goodridge* on Greaney's concurrence for another day.

[5] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (explaining that *Lawrence* doesn't "involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter"); *id.* at 604–05 (Scalia, J., dissenting) (ridiculing the idea that the majority's reasoning doesn't apply and won't lead to same-sex marriage: "This case 'does not involve' the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.").

State cannot make lesbians and gay men second-class citizens by denying them full access to marriage on its ordinary terms[6]—proves it's not so scary after all to recognize that we are truly heterosexuals' equals. On its own, *Goodridge* thus moves us closer than we were before to the endgame of the current lesbian and gay rights litigation strategy: the right to marry, as *Goodridge* understands it, recognized, hence protected, as a black-letter rule of federal constitutional law.[7]

As if this weren't enough to guarantee *Goodridge* a venerable place in the hearts and minds of lesbians and gay men, not to mention our history books, there were the immediate attacks on *Goodridge*, regarded by some as a kind of gay-rights bashing, directed ultimately at lesbians and gay men themselves, that, following Arthur Miller's curious lead,[8] sought to cut back on *Goodridge* by proffering a "civil union" compromise: not marriage, but almost; everything *but* the name. Together, Marshall's court, joined by those who supported its decision, standing firm and to a chorus—literally (I heard it)—of "We Shall Not Be Moved," rejected anything short of the full and equal marriage rights *Goodridge* so clearly seemed to promise. And, Marshall explained, did. The proposed compromise, writes Marshall in an Advisory Opinion to the

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[6] 798 N.E.2d at 948, 968–969 (announcing this conclusion); *see also Opinions of the Justices to the Senate*, 802 N.E.2d at 567–68 (confirming that it is *Goodridge*'s holding). *Goodridge* is the first judicial opinion by a court of final resort in the United States that flatly requires same-sex marriage be permitted under state law. Not even *Baehr v. Lewin*, 852 P.2d 44, 67–68 (Haw. 1993), or *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999), did. *Goodridge* thus represents—or, is—the high watermark of pro-same-sex marriage decisions, to date, becoming a model for other courts that have issued similar rulings. *See, e.g.*, *In re* Coordination Proceeding, Marriage Cases, 2005 WL 583129 (Cal. Super. Ct. Mar. 14, 2005); Hernandez v. Robles, 794 N.Y.S.2d 579, 601 (N.Y. Sup. Ct. 2005); Li v. State, 2004 WL 1258167 (Or. Ct. App. Apr. 20, 2004), *rev'd*, 110 P.3d 91 (Or. 2005); Castle v. Washington, 2004 WL 1985215 (Wash. Super. Ct. Sept. 7, 2004); Anderson v. King County, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004); People v. Greenleaf, 780 N.Y.S.2d 899 (N.Y. Just. Ct. 2004). To be clear, this isn't to say all the criticisms I identify in these pages as flowing from *Goodridge* necessarily and similarly flow from all same-sex marriage decisions that have arrived in its wake. Then again, it's not necessarily to insist that they don't, either. The project of comprehensively examining those other decisions, with an eye to ascertaining whether, and if so, how, and to what extent, they do and don't share *Goodridge*'s shortcomings is one I leave for another day.

[7] *See, e.g.*, Mary L. Bonauto, Goodridge *in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 43 (2005) (*Goodridge* "is a paradigm of a reasoned decision rather than a conclusory one. If asked, there is no reason why a federal court applying federal standards could not reach the same conclusions.") (footnote omitted).

[8] *See* Pam Belluck, *Marriage by Gays Gains Big Victory in Massachusetts*, N.Y. TIMES, Nov. 19, 2003, at A1 ("Arthur Miller, a Harvard law professor, said he thought given the closeness of the court decision, there might be room for the legislature 'to create a relationship that might not necessarily be called marriage but allows for the recognition of property passage and joint ownership and insurance and even child custody.'"); *see also* Bonauto, *supra* note 7, at 44–48 (recounting developments between the Supreme Judicial Court's decision in *Goodridge* and its *Opinions of the Justices to the Senate*).

Massachusetts Senate[9] (referred to, following *Brown v. Board of Education*'s lead,[10] as *Goodridge II*, while giving new meaning to its mandate of "all deliberate speed"[11]), "does nothing to 'preserve' the civil marriage law, only its constitutional infirmity."[12] For the court, she continues:

> This is not a matter of social policy but of constitutional interpretation. As the court concluded in *Goodridge*, the traditional, historic nature and meaning of civil marriage in Massachusetts is as a wholly secular and dynamic legal institution, the governmental aim of which is to encourage stable adult relationships for the good of the individual and of the community. . . . The very nature and purpose of civil marriage, the court concluded, renders unconstitutional any attempt to ban all same-sex couples, *as* same-sex couples, from entering into civil marriage.
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> . . . Because the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate [them] to a different status. The holding in *Goodridge*, by which we are bound, is that group classifications based on unsupportable distinctions, such as that embodied in the proposed bill, are invalid under the Massachusetts Constitution. The history of our nation has demonstrated that separate is seldom, if ever, equal.[13]

A small irony: Hardly a lesbian or gay reader of *Goodridge II*, like of *Goodridge* itself, could possibly *not* be moved.

While the reception *Goodridge* has received among lesbian and gay publics is thus easy to appreciate, much more difficult to understand—and totally unnoticed until now—is what *Goodridge* looks like to people concerned with sexual abuse, sexual violence, and the sex inequality they reflect and foster. From the standpoint of these concerns, it looks as though Marshall's opinion in *Goodridge*—far from being all bright cloud and silver lining—may pose new dangers for victims of same-sex sexual abuse both in marriage and beyond it that they didn't face before.

Briefly stated, the concerns about *Goodridge* arise from its resounding and resoundingly simplistic affirmation of marriage's presumptive goodness, which operates in the case as a predicate for extending lesbians and gay men

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[9] *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004).

[10] Brown v. Bd. of Educ., 347 U.S. 483 (1954); Brown v. Bd. of Educ., 349 U.S. 294 (1955) [hereinafter *Brown II*].

[11] *Brown II*, 349 U.S. at 301.

[12] *Opinions of the Justices to the Senate*, 802 N.E.2d at 569.

[13] *Id.* (citations and footnote omitted).

the same marriage rights heterosexuals already receive. In the social and legal world, this same picture of marriage—or one very much like it—has consistently served as a touchstone for covering the sexual injuries that male sexual privilege, one facet of the ideology of male dominance, produces, chiefly at women's expense. (If marriage is like *this*, then *that* couldn't have happened; therefore, she's lying.) Lending legitimacy to the erasure of cross-sex sexual abuse by approving the vision of marriage that can and has grounded it, *Goodridge*'s extension of marriage rights to lesbians and gay men also raises the possibility that it has effectively enlarged the sex-relational terrain on which male sexual privilege—a social, not a biological force—is free to roam. It places married lesbians and gay men who are sexually violated in the same position that married women who are, traditionally have been in: struggling against the very ideals of marriage itself to gain the credibility required to get their injuries to be socially, hence legally, visible. Recognizing the details of this sketch, along with its extensions, including how it may impact unmarried lesbian and gay victims of sexual abuse and how its dynamics can operate to regulate sexual injury on the level of social identity, remain to be filled in, I begin at the beginning, with an analysis of Justice Marshall's opinion in *Goodridge*, to trace the textual dimensions of the perils it courts.

I. *GOODRIDGE*'S "LIKE-STRAIGHT" LOGIC

Following a pattern visible and (at last) successful in other recent lesbian and gay rights litigation efforts, lawyers for the lesbian and gay plaintiffs in *Goodridge* argued for same-sex marriage rights on both liberty and equality grounds.[14] Broadly uniting these formally distinct doctrinal claims was a remarkably uncomplicated proposition: Lesbians and gay men are just like heterosexuals. Elaborating, lesbian and gay rights advocates maintained that lesbians and gay men deserve the same rights and privileges heterosexuals receive, including the right to marry, and for just the same reasons. As Mary Bonauto, speaking for the lesbian and gay plaintiffs in the case, put it as she began her oral arguments before the Supreme Judicial Court:

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[14] For a discussion of these arguments and their role in *Lawrence v. Texas*, see Marc Spindelman, *Surviving* Lawrence v. Texas, 102 MICH. L. REV. 1615 (2004). Gay activist Larry Kramer reminds us in his way that this is part of a larger political strategy: "We've been so concerned about showing the world a united front, . . . we feel the need to say that everything gay people do is good . . . ." LARRY KRAMER, THE TRAGEDY OF TODAY'S GAYS 82 (2005). He continues: "[T]his simply isn't so. We must have an honest discussion amongst ourselves about what's harming us and what's helping us as a people." *Id.*

> The Plaintiffs stand before this court seeking nothing more and nothing less than the same respect under our laws and Constitution as all other people [read: heterosexuals] enjoy. The same "liberty right" to marry the person of their choice and the same "equal right" to marry on the same terms applied to other people.[15]

The normative power of this idea, of course, derives from the presumptive goodness of heterosexuality—a sexual status that is socially sacrosanct and legally, including constitutionally, protected, as the right-to-marry and constitutional marriage rights decisions, as well as the vast network of laws normalizing marriage, on both the federal and state level, amply show.

As a litigation tactic at least, the strategy paid off. "Like-straight" reasoning drives Marshall's *Goodridge* opinion start to end. Analytically, the curtain goes up with an attempt by the lesbian and gay rights advocates to put their like-straight argument to work on the statutory interpretation level, at center stage.[16] The marriage statute at issue in *Goodridge*, they pointed out, didn't expressly bar same-sex marriage. That prohibition was law-in-inaction: the refusal by state officials to deliver marriage licenses to the plaintiffs in the case, because the law didn't affirmatively recognize same-sex marriages. Seeing and suggesting a way for the court to acknowledge the merits of their like-straight claim while postponing a declaration on its constitutional validity until it was necessary, lesbian and gay rights advocates proposed that the court could simply read the Commonwealth's marriage law to permit otherwise "qualified" same-sex couples to marry.[17] Nobody involved in the case questioned whether they were, except in one sense: They weren't choosing to marry a partner of the opposite sex.[18]

Goodridge wastes no time brushing the idea aside. The legislature, everyone knows, or should, the court explains, didn't intend to permit same-sex marriage when enacting the Commonwealth's marriage law. Invoking the "ordinary" or "quotidian" meaning of marriage,[19] *Goodridge* tells us that it's presently defined for purposes of state law as "[t]he legal union of one man and woman as husband and wife."[20] This, *Goodridge* adds, shoring up the

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[15] Unofficial Transcript of Oral Argument at 1 (Mar. 4, 2003), Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

[16] *Goodridge*, 798 N.E.2d at 952.

[17] *Id.*

[18] *See id.* at 950 & n.5 (affirming this).

[19] *Id.* at 952–53.

[20] *Id.* at 952 (quoting BLACK'S LAW DICTIONARY 986 (7th ed. 1999)).

point, also happens to be the common law definition of marriage, *jus gentium*, the common law of nations, steady (in its view) across space and time.[21] To venture otherwise, according to *Goodridge*, ignores the Commonwealth's incest prohibition, which (curiously enough, at least at this moment in the opinion[22]) focuses its opprobrium on cross-sex marriages within specified degrees of relations. Marriage, as the legislature has set it up, is heterosexually defined: on its own, it doesn't allow that homosexuals and heterosexuals are alike. The *Goodridge* court, dealing fairly, does not pretend otherwise. The stakes here, including judicial economy of decision, are too high to play games.[23]

Hence, no sooner does *Goodridge* bow to the legislature's heterosexual definition of marriage than it finds independent reasons to reject it, gaining the interpretive traction it needs to, in the court's authority to define "marriage" as a *constitutional* concept. On that level, *Goodridge* accepts the suggestion, rejected on statutory interpretation grounds, that "qualified" lesbian and gay couples are just like "qualified" heterosexual couples under law, thus equally entitled on liberty and equality grounds to exercise the right to marry that the Commonwealth had already recognized for heterosexuals.[24] It's about time.

Goodridge delivers this conclusion in installments, but everything follows from its conceptual down payment: a definition of marriage that has built into it the idea that lesbians and gay men, hence their relations, are just like heterosexuals, and theirs. Exchanging the classic definition's presumption that heterosexuality and homosexuality are unalike for one that implicitly negates it, *Goodridge* declares the institution of marriage is fundamentally about relationships.

Goodridge introduces this vision of civil marriage as early as its opening paragraph: "Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings

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[21] *Id.* (citing, *inter alia*, Commonwealth v. Lane, 113 Mass. 458, 462–463 (1873) ("When the statutes are silent, questions of the validity of marriages are to be determined by the jus gentium, the common law of nations")). According to some authorities, the definition of marriage hasn't been quite so steady across space and time. *See, e.g.*, JOHN BOSWELL, SAME-SEX UNIONS IN PRE-MODERN EUROPE (1994).

[22] This changes later on in light of *Goodridge*'s holding, as do the Commonwealth's bigamy rules, both of which are "gender-neutralized" by the court's decision in the case. *See id.* at 969 n.34. Additional thoughts on what gender-neutralization has and has not meant in the context of rape laws is found in Spindelman, *supra* note 14, at 1643–45 & n.133.

[23] *Accord* Hernandez v. Robles, 794 N.Y.S.2d 579, 588–89 (N.Y. Sup. Ct. 2005) (with *Goodridge*, deferring to the legislature's intent to define marriage in cross-sex terms).

[24] *Goodridge*, 798 N.E.2d at 968–69.

stability to society."[25] It is—notice—"two individuals" who are necessary to make a marriage, not a man and a woman. What matters is the dynamic between them, how they are supposed to relate to each other: They give each other an exclusive commitment that "nurtures love and mutual support." In case we missed it, *Goodridge* reiterates this relational definition of marriage again and again—more times, certainly, than strictly required to register its conceptually easy point, though perhaps just as many as the initially stunned reader needs fully to take it in: The court *means* this.[26] Bookending the opinion is thus a parting reminder of where it begins, treated in *Goodridge II* as a holding: "We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others."[27]

Once marriage is drained of its cross-sex sex requirement, constitutionally-defined, instead, as an exclusive relationship between two individuals, it must, of course, be open to those capable of satisfying its remaining terms of regulated engagement. And, as the plaintiffs in the case attest, or *Goodridge* attests through its description of them, lesbians and gay men can, and like heterosexuals, do.[28] Lesbians and gay men are able to develop and sustain the exclusive, nurturing, and mutually supportive relationships that make marriage what, for *Goodridge*, constitutionally, it is. Hence, the social and legal privileges and benefits of marriage, along with its obligations, are to be extended to same-sex couples on equal terms, *Goodridge* declares—unless, that is, the Commonwealth can show some good, constitutionally adequate reason why they should not be.

Not surprisingly, *Goodridge* concludes it can't. The Commonwealth's justifications for the traditional ban on same-sex marriage crumble under the weight of the court's analytic gaze, variously resting as they do on the discreditable and, finally, discredited foundation that heterosexuality and homosexuality are, basically, unalike, hence can properly be treated differently

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[25] *Id.* at 948 (emphasis added).

[26] *See, e.g., id.* at 949, 954–55, 957, 958, 959, 961, 962, 964, 965, 967, 968, 969 (advancing a relational definition of marriage).

[27] *Id.* at 969; *see also* Opinions of the Justices to the Senate, 802 N.E.2d 565, 568 (Mass. 2004) ("In response to the plaintiffs' specific request for relief, the court preserved the marriage licensing statute, but refined the common-law definition of civil marriage to mean 'the voluntary union of two persons as spouses, to the exclusion of all others.'") (quoting *Goodridge*, 798 N.E.2d at 969)).

[28] *Goodridge*, 798 N.E.2d at 949 (describing the plaintiffs in the case as being in, thus capable of, committed, long-term, monogamous relationships). *Compare id.*, *with* Brief for Plaintiffs-Appellants at 2–8, *Goodridge*, 798 N.E.2d 941 (No. SJC-08860). *Cf. Goodridge*, 798 N.E.2d at 962 (referring to "the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and [hence] . . . are not worthy of respect") (footnote omitted).

at law. Observe, for example, how *Goodridge* discharges the suggestion that the same-sex marriage ban is rational, because marriage is about procreation, the best and strongest argument the Commonwealth had in its arsenal. "This is incorrect,"[29] the opinion declares. It proceeds:

> Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family. [The Commonwealth's marriage law] contains no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus. Fertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married. People who cannot stir from their deathbed may marry. While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the *sine qua non* of civil marriage.[30]

So far, the court contents itself to reiterate the point that marriage cannot be about—be *for*—procreation when it's about what the court has said it is: relationships, "the exclusive and permanent commitment of the marriage partners to one another[.]"[31] But this reasoning, which in its way interestingly tracks a position that, once upon a time, both Justice John Marshall Harlan (dissenting in *Poe v. Ullman*[32]) and Justice William O. Douglas (opining for the Court in *Griswold v. Connecticut*[33]) embraced, that married couples' sexual intimacies, including their procreative consequences, are special to the degree of being sacred, hence properly beyond the State's reach on the constitutional level,[34] merely serves as the predicate for the court's ultimate, like-straight observation that:

> The "marriage is procreation" argument singles out the one unbridgeable difference between same-sex and cross-sex couples,

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[29] *Goodridge*, 798 N.E.2d at 961.

[30] *Id.* (footnotes omitted).

[31] *Id.*

[32] 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

[33] 381 U.S. 479 (1965) (majority opinion).

[34] *Id.* at 485–86; *Poe*, 367 U.S. at 545–55 (Harlan, J., dissenting); *see also* Reply Brief of Plaintiffs-Appellants at 8, 9, *Goodridge*, 798 N.E.2d 941 (No. SJC-08860) (offering that the State is constitutionally "barred" from linking marriage and procreation, because "individuals are constitutionally guaranteed an ability to marry without reference to procreation, and to procreate without reference to marriage[,]" and citing, *inter alia*, *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), and *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978), in support of the proposition).

> and transforms that difference into the essence of legal marriage. . . . In so doing, the State's action confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect.[35]

Which of course they aren't—and are. The Commonwealth's other justifications for limiting marriage to heterosexuals fare no better,[36] and ultimately for the very same reason: They fail to acknowledge that homosexuality and heterosexuality are alike.[37]

Because *Goodridge* formally eliminates marriage's traditional cross-sex sex requirement, being so bold as (even) to venture that that requirement hasn't meant marriage must be hetero*sexual*,[38] it's easy to suppose it has gotten rid of

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[35] *Goodridge*, 798 N.E.2d at 962 (footnote omitted).

[36] *Id.* at 962–68. As the court concludes its analysis of the various justifications proffered to defend the Commonwealth's same-sex marriage ban, it observes that the Commonwealth "has failed to identify any relevant characteristic that would justify shutting the door to civil marriage to someone who wishes to marry a person of the same sex." *Id.* at 968. And, it adds:

> The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual . . . . Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.

Id. (footnote omitted).

[37] *See* Reply Brief of Plaintiffs-Appellants at 4, *Goodridge*, 798 N.E.2d 941 (No. SJC-08860) ("By defining marriage to exclude gay people, the Defendants must argue that the purpose of marriage is the production and caretaking of children born solely of a particular heterosexual sexual act. This claim—*central to the entire defense of this case*—cannot even begin to bear the enormous weight Defendants place upon it.") (emphasis added).

[38] No requirement exists, *Goodridge* says, that cross-sex sex take place or even that it be possible. Think of the man on his deathbed who cannot "stir," much less engage in intercourse, but who is, *Goodridge* reminds us, still legally entitled to marry so long as he shall live. *Goodridge*, 798 N.E.2d at 961 (citing MASS. GEN. LAWS ch. 207, § 28A (2003)). Indeed, there's a case to be made that, constitutionally, it couldn't be otherwise. *See supra* notes 32–34 and accompanying text. Then again, there's ample authority, even in the Commonwealth of Massachusetts, that would seem to support the proposition that sexuality, including sexual capacity and functioning, is a precondition for marriage, its absence, a reason for it to be considered voidable, if not void. *See, e.g.*, *Goodridge*, 798 N.E.2d at 961 n.22. As the court explains:

> Our marriage law does recognize that the inability to participate in intimate relations may have a bearing on one of the central expectations of marriage. Since the earliest days of the Commonwealth, the divorce statutes have permitted (but not required) a spouse to choose to divorce his or her impotent mate. While infertility is not a ground to void or terminate a

marriage's heterosexual determinants root, stem, and all. The court's opinion virtually invites such thinking when it casts itself as but the latest judicial decision to wade into the equality stream that, in the last century, has been relied on to cleanse marriage of its other inequalities, chiefly those of race (think miscegenation) and sex (think coverture and the old sex-differentiated obligations of marriage and their particular burdens on women).[39] Other flaws of the parallels aside, *Goodridge* nominally (and on its own self-understanding) only removes marriage's cross-sex sex requirement.[40] Politically tectonic, to be sure, this move is conceptually thin: borrowing Don Herzog's terminology, deep, but narrow.[41] Without more, to give the pertinent illustration, the opinion does nothing to confront, much less abjure, the *grundnorms* of marriage, understood as an exclusively heterosexual institution. Marriage's heteronormative roots—hence heteronormativity as such—thus remain unchallenged in *Goodridge*, intact, ready and able to serve as the substantive engine that propels its like-straight reasoning.[42] What's more, it does.

> marriage, impotency (the inability to engage in sexual intercourse) is, at the election of the disaffected spouse.

Id. (citations omitted); *see also, e.g.*, Brief for Monroe Inker and Charles Kinregan as Amici Curiae Supporting Appellants at 12–13, 21, *Goodridge*, 798 N.E.2d 941 (No. SJC-08860) (observing that "sexual intimacy[,]" being at "the heart of the marital contract," renders impotence, at least under certain circumstances, "a ground for [voiding a] marriage" in Massachusetts); Reply Brief of Plaintiffs-Appellants at 6, *Goodridge*, 798 N.E.2d 941 (No. SJC-08860) ("'Impotence,' or other terms for sexual incapacity, has never prevented a Massachusetts couple from validly marrying and remaining married if they so choose. Physical incapacity for a particular act has rendered marriages 'voidable' at the instance [sic] of an aggrieved party, not *void ab initio* even when both parties wish to be married.") (citing Brief of Plaintiffs-Appellants at 83–85, *Goodridge*, 798 N.E.2d 941 (No. SJC-08860)). *Cf. also, e.g.*, *In re* Coordination Proceeding, Marriage Cases, 2005 WL 583129, at *6–8 (Cal. Sup. Mar. 14, 2005) (procreative capacity isn't required to enter into marriage, though lies about it may be grounds for voiding one)).

[39] *Goodridge*, 798 N.E.2d at 966–67 (relying on these examples to demonstrate that "[t]he history of constitutional law 'is the story of the extension of constitutional rights and protections to people once ignored or excluded'") (citation omitted).

[40] *Id.* at 969.

[41] CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 283 (1999) (crediting Don Herzog with "the distinction between narrow and shallow decisions").

[42] Amy Brandzel strikes a related chord in the context of a discussion of the fight for same-sex marriage, including *Goodridge*. As she writes:

> While the fight for same-sex-marriage rights has dented some elements of heteronormativity, it has reified and bolstered it on the whole by asserting, over and over, that marriage is good, gays are normal, and "we" are like "you." For heteronormativity is the presumption and promotion not simply of heterosexuality but of a particular type of heterosexual couple. . . . Moreover, advocacy for same-sex-marriage rights . . . has reproduced the myth of universal citizenship as a great equalizer.

Amy Brandzel, *Queering Citizenship? Same-sex Marriage and the State*, 11 GLQ: J. LESBIAN & GAY STUD.

One catches a glimpse of heteronormativity's operation in any number of places in *Goodridge*. The most vital for the success of the constitutional project it undertakes is its seamless production of marriage as an institution of human, hence social, flourishing, hence public good, that, as a result, deserves the constitutional recognition *Goodridge* accords it.[43] Describing why marriage is good for individuals, for example, *Goodridge* dips into marriage's deep and deeply heteronormative romance tradition, including a range of judicial decisions, particularly Supreme Court decisions, dealing with the right to marry,[44] understood at the time in its classic, heterosexual form, to portray the institution in only its happiest, most idealized terms.[45] Marriage, in this sense, is "an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects,"[46] "a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family,"[47] which "fulfills yearnings for security, safe haven, and connection that express our common humanity."[48] From this, it's but a small step to the position *Goodridge* substantively adopts, that: "Without question,

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171, 196 (2005).

[43] According to the plaintiffs' main brief in *Goodridge*, no prior decision by the Supreme Judicial Court had recognized the right to marry as such. Brief of Plaintiffs-Appellants at 33, *Goodridge*, 798 N.E.2d 941 (No. SJC-08860) ("No reported state case has applied the *Loving-Zablocki-Turner* framework because, to plaintiffs' knowledge, there has been no recent challenge to the application of the Commonwealth's marriage statutes."). *But see id.* at 33 n.16 ("This Court acknowledged in passing the right of a convicted and paroled child abuser to marry in *Comm. v. LaPointe*, 435 Mass. 455, 461 (2001).").

[44] *See, e.g.*, *Goodridge*, 798 N.E.2d at 954–55 (quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965)); *id.* at 957 (citing and parenthetically quoting Loving v. Virginia, 388 U.S. 1, 12 (1967), quoting, in turn, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)); *id.* (quoting Zablocki v. Redhail, 434 U.S. 374, 384 (1978), and citing and parenthetically quoting *Loving*, 388 U.S. at 12); *id.* at 957 n.14 (quoting *Zablocki*, 434 U.S. at 383, 387); *id.* at 957 n.15 (quoting *Loving*, 388 U.S. at 12, and Perez v. Sharp, 32 Cal. 2d 711, 714 (1948)); *id.* at 958 (discussing *Loving* and *Perez*); *id.* at 966 (citing Turner v. Safley, 482 U.S. 78 (1987), and *Loving* and *Perez*).

[45] In doing so, the court follows the plaintiffs' cue. *See, e.g.*, Brief of Plaintiffs-Appellants at 26, *Goodridge*, 798 N.E. 2d 941 (No. SJC-08860) ("'[T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.'") (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984)); *id.* at 29 (quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965), and then offering that "[t]he profound mutual love, respect, commitment and intimacy that define the marital relationship are essential for human dignity and happiness and are valuable to society as a whole").

[46] *Goodridge*, 798 N.E.2d at 955 (quoting *Griswold*, 381 U.S. at 486) (internal quotation mark omitted).

[47] *Id.* at 954.

[48] *Id.* at 955. To be sure, these aren't all legally enforceable norms—though the point shouldn't be overstated. Courts can't—and don't—enjoin love. But this is the vision of marriage, with its heterosexualized bliss, that leads the court to recognize a right to it for heterosexuals and homosexuals alike.

civil marriage enhances the 'welfare of the community[,]'"[49] hence "is a 'social institution of the highest importance.'"[50] Within *Goodridge*, marriage's capacity to produce these felicitous effects is so powerful that not recognizing it at law would be to woo untold dangers. Although the State could, in theory, abolish civil marriage altogether (presumably because the Commonwealth's constitution guarantees negative rights, hence brooks no affirmative demand on state recognition even for marriage *ex nihilo*), it couldn't, having provided for it for so long, derecognize it without "chaotic consequences."[51] What exactly these consequences are and why they would be so chaotic, *Goodridge* doesn't say. But having elsewhere leveraged civil marriage's heteronormativity to identify social stability and order as the principal social goods it generates,[52] it's plain that, in context, knowing the consequences will be "chaotic" is all we need to know, to know they ought to be avoided.[53]

Any lingering doubt whether *Goodridge* relies on heterosexuality's norms and values to underwrite its holding should be dispelled by considering, among its other textual features, the reassurances it offers its jittery, straight readers that they've lost nothing they treasure because of its extension of marriage rights to lesbians and gay men on like-straight terms:

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[49] *Id.* at 954.

[50] *Id.* (quoting French v. McAnarney, 195 N.E. 714, 715 (Mass. 1935)).

[51] *Id.* at 957 n.14; *see also id.* at 969 ("Eliminating civil marriage would be wholly inconsistent with the Legislature's deep commitment to fostering stable families and *would dismantle a vital organizing principle of our society.*") (emphasis added). Compare these passages with *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934), and especially *id.* at 429 n.8.

[52] *See, e.g.*, *Goodridge*, 798 N.E.2d at 948, 954. Principal, but not the only ones. *Goodridge* also suggests that stability and order matter for purposes of ensuring the orderly protection and distribution of property rights, and of parental, or conversely, children's, rights. *Id.* at 954. Moreover, according to *Goodridge*, preserving marriage checks claims that would otherwise be made on the public fisc, and helps the Commonwealth identify its citizens, which also has the felicitous effect of enabling countless epidemiologists and demographers to do their jobs. *Id.*

[53] See *supra* note 52 and accompanying text for some of the social goods that would be undermined by derecognizing civil marriage, and text accompanying notes 46–48 for some of the individual goods that would likewise be threatened by it. *Goodridge* tries to avoid the chaos it notes would follow from eliminating marriage. Remedying the Commonwealth's unconstitutional definition of marriage, *Goodridge*, rather than throwing us headlong toward anomie as by knocking the marriage statute down, extends same-sex couples marriage rights. *Goodridge*, 798 N.E.2d at 969. In doing so, it, again, tacitly embraces the heteronormativity of the existing regime: Given the legislature's solicitude for (heterosexual) marriage, *Goodridge* observes, it would undoubtedly prefer the preservation and extension of marriage rights to the alternative of voiding them altogether. *Id.* Which seems fair enough, except that the legislature, as events showed, would have preferred not to have had to make the choice at all. *See, e.g.*, Opinions of the Justices to the Senate, 802 N.E.2d 565, 566–69 (Mass. 2004) (describing legislative developments in Massachusetts following the court's original *Goodridge* decision, including legislative efforts to avoid its mandate to extend the right to marry to same-sex couples); Bonauto, *supra* note 7, at 44–60 (tracing the same basic developments on a longer time-line). Too bad.

> Here, the plaintiffs seek only to be married, not to undermine the institution of marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gatekeeping provisions of the marriage licensing law. Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage. . . . If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.[54]

Translated: Assimilation being the highest form of flattery, authorizing same-sex marriage legitimates the way we (heterosexuals) have structured our lives, our rights, and humanity—including what human flourishing itself means ("the enduring place of marriage in our laws and in the human spirit").[55] So much—so far—for the hype that lesbians and gay men will transform the institution of marriage,[56] rather than the other way around.[57] I gather that that transformation comes—if it comes at all—later on. Let's hope it does.

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[54] *Goodridge*, 798 N.E.2d at 965.

[55] *Id.* In this sense, *Goodridge* may extend the conceptual shift from civil rights to human rights Kenji Yoshino sees in the Supreme Court decision in *Lawrence v. Texas*. Kenji Yoshino, Panel Discussion at the Georgetown Journal of Gender and Law Symposium: Sex, Gender and Crime: The Politics of the State as Protector and Punisher (Mar. 17, 2005) (panel on "Living with *Lawrence*").

[56] It's become commonplace to hear it said, for instance, that same-sex marriage will alter its gendered meaning. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 61 (1996) (Nan Hunter's "argument is that 'legalizing lesbian and gay marriage would have enormous potential to destabilize the gendered definition of marriage.' . . . By this logic, marriage for gays is not an end in and of itself so much as a means to impel a general redefinition of masculinity and femininity.") (citation omitted) (quoting Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 L. & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 9, 12 (1991)); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men, and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 598 (1994) ("[Sylvia] Law's main point, that same-sex couples getting married can powerfully challenge gender roles and thus destabilize sexism, is clearly true. . . . Our marriages will indeed present a challenge to anti-feminist marriages and the subordination of women."); Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, 6 OUTLOOK: NAT'L LESBIAN & GAY Q. 9, 13 (1989) ("[E]nlarging [marriage] to embrace same-sex couples would necessarily transform it into something new. . . . Extending the right to marry to gay people—that is, abolishing the traditional gender requirements of marriage—can be one of the means, perhaps the principal one, through which the institution divests itself of the sexist trappings of the past.").

[57] Nancy Polikoff doubts this idea, too:

> Everything in our political history suggests that a concerted effort to achieve the legalization of lesbian and gay marriage will valorize the current institution of marriage. Just as Professor Eskridge was propelled towards a litigation strategy that accepted marriage—even grossly hierarchical, gendered marriage—as a good, any effort to legitimize lesbian and gay marriage

II. *GOODRIDGE*'S ("LIKE-STRAIGHT") LAW

Anyone seriously dedicated to equality between the sexes must acknowledge what an historic breakthrough *Goodridge* is for lesbian and gay rights. The elimination of discrimination against lesbians and gay men, integral to sexual hierarchy and the position of men and women within it, is indispensable to sexual equality's realization. As an affirmation of lesbian and gay rights, sex equality theorists thus have reason to be pleased about the conclusion *Goodridge* reaches: that the Commonwealth's prohibition against same-sex marriage, entirely dependent on gender-based and gender-differentiated rules of entry, if not marriage itself, is unsupported by any constitutionally-adequate—and for that matter, any rational—justification, and so must give way. I, for one, certainly am.

But there's more to a judicial decision than an evaluation of its ostensible ends.[58] To look beyond its bottom line, *Goodridge*'s like-straight reasoning—especially its uncritical solicitude for marriage and the way it has been heteronormatively structured and defined—raises some unmistakable warning signs.

To explain, I begin with the tendency of all moral heuristics—like the constitutional vision of marriage *Goodridge* approves, as productive of individual, hence social, hence public good—to affirm themselves and the worldview from which they flow.[59] For a simple illustration, consider the old, though hardly unfamiliar, notion that homosexuality is morally wrong on the individual, hence social, level, hence that homosexual sex itself is a social harm. Endorsing this analytically imperfect reason-chain in *Bowers v. Hardwick*, Justice Byron White deemed "facetious" the suggestion that same-

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would work to persuade the heterosexual mainstream that lesbians and gay men seek to emulate heterosexual marriage as currently constituted.

Polikoff, *supra* note 3, at 1541 (footnote omitted).

[58] *See infra* note 63.

[59] *See, e.g.*, Matt Bai, *The Framing Wars*, N.Y. TIMES MAG., July 17, 2005, at 38, 40, 41–44. A Nietzschean iteration of the idea, suggesting what it can mean when divorced from rules of ethics, restraint, and law, is presented in Ron Suskind, *Without a Doubt*, N.Y. TIMES MAG., Oct. 17, 2004, at 46, 51 (quoting an unnamed "senior advisor" to President George W. Bush rejecting the beliefs of "'the reality-based community,' which he defined as people who 'believe that solutions emerge from your judicious study of discernible reality. . . . That's not the way the world really works anymore,' he continued. 'We're an empire now, and when we act, we create our own reality. And while you're studying that reality—judiciously, as you will—we'll act again, creating other new realities, which you can study too, and that's how things will sort out. We're history's actors . . . and you, all of you, will be left to just study what we do.'").

sex sexual intimacies deserved protection on a par with decisions involving marriage, family, and procreation.[60] From his perspective, the differential treatment made perfect sense: Same-sex sexual intimacies bore no relation to those obvious public goods to which they were being likened.[61] Thus, it was entirely rational for the State to proscribe homosexual sodomy through the criminal law, treating those who engaged in it—or would—as moral, hence legal, outlaws. Too bad he was wrong.

The point would amount to nothing more than idle, academic observation about how moral heuristics operate, except that, when they emanate from some legal, hence cultural, authority, they do more than do the work they do, of tending to reaffirm their own worldviews, abstractly. Plugged into the outlets and networks of legal, including judicial—which is to say, State—authority, taken up by, and circulated through, other conduits of power high and low, moral heuristics can be—and are—world-shaping, reality-creating, devices. Decisions and actions by both State and private actors, for instance, that took full advantage of the homophobic open season on lesbians and gay men that *Hardwick*—with its moral, hence legal, disapproval of homosexuality—announced, many of which, when challenged by the game, were ultimately blessed by the judiciary in *Hardwick*'s name, taught us as much, if they taught us nothing else.[62] They should have.

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[60] Bowers v. Hardwick, 478 U.S. 186, 194 (1986).

[61] *See id.* at 190–91 ("[W]e think . . . that none of the rights announced in [the Court's earlier privacy] cases bears any resemblance to the claimed constitutional right . . . of sodomy . . . asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . ."). For critical engagements with this view, see, for example, Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237 (1996), and Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521 (1989).

[62] The legal cases they brought—or that were brought in their name—challenging the discrimination they suffered, culturally underwritten by, and determined to be legally protected according to, *Hardwick*'s homophobic logic, position us to recall their names. Abbreviated, a conventional list includes: Sharon Bottoms, *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995); Ernest Dillon, *Dillon v. Frank*, 1992 WL 5436 (6th Cir. Jan. 15, 1992); Matthew Limon, *Kansas v. Limon*, 41 P.3d 303 (Kan. App. 2002), *vacated*, *Limon v. Kansas*, 539 U.S. 955 (2003), *aff'd*, *Kansas v. Limon*, 83 P.3d 229 (Kan. App. 2004), *overruled by Kansas v. Limon*, 2005 WL 2675039 (Kan. Oct. 21, 2005); Steven Lofton, *Lofton v. Secretary of Department of Children and Family Services*, 358 F.3d 804 (11th Cir. 2004); Robin Shahar, *Shahar v. Bowers*, 114 F.3d 1097 (1997) (en banc); Joseph Steffan, *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc); and Perry Watkins, *Watkins v. U.S. Army* 875 F.2d 699 (9th Cir. 1989). Others, who for various reasons couldn't afford to speak out publicly against their injuries, remain anonymous. But their suffering, too, remains to be counted as part of *Hardwick*'s documented collateral damage. No doubt some thought, or hoped, that increasing the costs of being homosexual, thinking it was a behavioral choice, would encourage vacillators to pursue the heterosexual good life instead.

Expecting the moral heuristic the *Goodridge* court installs to frame its constitutional conclusion will be no different,[63] hence to gain a handle on its possible reality-shaping effects, particularly for victims of same-sex sexual abuse, a fuller rendering of the world it imagines is in order.

Goodridge figures a world of social equals, unmeaningfully differentiated by gender or sexual orientation, who, individually and collectively, but always freely, choose to define themselves through marriage.[64] Marriage is thus an institution comprised of equals who agree to make and sustain an exclusive, mutual commitment to one another.[65] Intimacies in marriage—including sexual intimacies—express and foster love and mutual support, growth, flourishing, and the realization of human potential.[66] In this sense, *Goodridge* is of an extended piece with Justice Anthony Kennedy's opinion for the Supreme Court in *Lawrence v. Texas*,[67] which, likewise, imagines women and men are equal before—as in, literally, in the social world, prior to—the law, hence in sex, in all its cross-sex and same-sex combinations, hence that sexuality, epitomized by sex in marriage, while individualized and highly personal, is a reflection of the meaning of relationships "more enduring,"[68] intimacy, defined.

In *Goodridge*, as *Lawrence* before it, constitutionally cognizable inequalities, hence the inequalities that judges who operate with a constitutional warrant are permitted to take notice of, are produced by the State

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[63] Again, I am focusing on the effects of the moral reasoning that takes the *Goodridge* court to its conclusion (see text accompanying note 58), rather than strictly on that conclusion itself, thus same-sex marriage standing alone, thinking that the underlying modes of institutional justification (can) have an important bearing on an institution's social meaning, thus its consequences. How and what, exactly, same-sex marriage will "normalize," for example, may depend significantly on the moral program relied on to configure and stand it up. Judging from the many predictions that have been ventured about what will and won't follow from same-sex marriage that have been made without any (explicit) reference to its underlying institutional justification, the point is as easy to overlook in practice as in theory it is to make and understand.

[64] When they do. The vision, affirmed in various ways throughout the opinion, see, for example, *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 969 (Mass. 2003) ("We construe civil marriage to mean the *voluntary* union of two persons as spouses, to the exclusion of all others.") (emphasis added), appears to be constitutionally-grounded. *See, e.g., id.* at 950 n.7 ("'All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; . . . in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.'") (quoting MASS. CONST. pt 1, art. I, *amended by* MASS. CONST. amend. art. CVI).

[65] *See, e.g., id.* at 969.

[66] See, for example, *id.* at 948, 954–55, for language like this.

[67] Lawrence v. Texas, 539 U.S. 558 (2003). For more on the social theory of sexual relations at work in *Lawrence*, see Spindelman, *supra* note 14, at 1648–49.

[68] *Lawrence*, 539 U.S. at 567.

through law.[69] Unlike *Lawrence*, which locates sexuality-inequalities in sodomy laws' criminalization of sexual intimacy,[70] particularly those sodomy laws that differentiated between same-sex and cross-sex intimacies,[71] *Goodridge* digs deeper until it hits what is often said to be the foundation of society itself,[72] to engage them as epiphenomena of the same-sex marriage ban, a fountainhead of lesbians' and gay men's second-class citizenship status.[73] Being truly just like heterosexuals, though, or so the idea goes, they really aren't and shouldn't be treated otherwise, a mistake that sex-differentiated and race-differentiated classifications in marriage once made, respectively, about women and people of color.

To state it mildly, empirical investigations into the conditions of sex inequality suggest a radically different picture of marriage. They indicate that the institution of civil marriage is hardly as blissfully unproblematic—or as normatively entitled, because linearly productive of individual, hence social, hence public good—as *Goodridge* makes it seem. These investigations have demonstrated, for instance, that marriage, defined by its heteronormativity, itself largely produced and controlled by the ideology of male supremacy, has been a dangerous place for women.[74] Their separate existence, hence

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[69] Assumed throughout the decision, concrete evidence of its operation can be found by consulting, in particular, *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 948–49 (Mass. 2003) (describing the challenge presented in the case as being to state law and its limitation of marriage to same-sex couples), or *id.* at 969 ("[P]laintiffs request only a declaration that their exclusion and the exclusion of other qualified same-sex couples from access to civil marriage violates Massachusetts law. We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.").

[70] *See, e.g.*, *Lawrence*, 539 U.S. at 575, 577–79.

[71] *See, e.g.*, *id.* at 575; *id.* at 579–585 (O'Connor, J., concurring in the judgment) (locating the inequality in the criminalization of same-sex, but not cross-sex, intimacies, while leaving open a decision on the question whether the state can criminalize all (consensual) sexual intimacy even-handedly); *see also id.* at 570–71 (majority opinion) (recognizing the novelty of differentiation between same-sex and cross-sex sodomy for purposes of criminal prohibition).

[72] The notion recurs in any number of marriage rights decisions, classically including *Maynard v. Hill*, 125 U.S. 190, 205 (1888), *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), *Loving v. Virginia*, 388 U.S. 1, 12 (1967), and *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

[73] *See, e.g.*, *Goodridge*, 798 N.E.2d at 948–49 (suggesting the link between the Commonwealth's marriage ban and lesbian and gay men's second-class citizenship status); *id.* at 968 (same, on the grounds that "the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual") (footnote omitted)).

[74] *See generally, e.g.*, Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1372 (2000); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996). *Cf., e.g.*, ANDREA DWORKIN, RIGHT-WING WOMEN 57–58 (1983) (quoting Victoria Woodhull on "marital rape and compulsory intercourse as the purpose, meaning, and method of marriage"); CATHARINE A. MACKINNON, SEX EQUALITY 715–65 (2001) (collecting sources).

existence, in marriage, once formally erased as such at law,[75] has never been fully and universally equal to men's, thanks in no small part to the blind eye the legal system has turned—and continues to turn—to the systematic abuse women, as women, have suffered inside it, much of it centered on the control and expropriation of their sexuality through the social practices of rape, sexual assault, forced prostitution, forced pregnancy, forced abortions, domestic violence, and domestic sexual hectoring, to mention a few.[76]

Widening the analytic perspective, sex equality theorists discovered that the sexual abuses at home in the legally recognized "unitary family"[77] entailed, among other things, childhood sexual abuse of various stripes, perpetrated against girls and boys chiefly by heterosexual men, and extended even more broadly outward throughout the remainder of the social world, where a wide range of heterosexual sexual relations were identifiable, above all, for the various ways they reflected and perpetuated a male supremacist version of sexual inequality: violence and force practiced and imposed sexually, as sex.[78] Sex equality theory thus understood sexuality, itself structured along hierarchical and gendered lines of dominance and subordination, to be what empirical investigations proved: an important "dynamic of the inequality of the sexes" that, in Sandra Bartky's terms, perpetuated "the system of male supremacy."[79]

Following these insights, sex equality theorists have more recently begun to investigate the ways in which male dominance also constructs and

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[75] For useful commentary on this history, including feminist efforts to give women standing against male violence under law, see Siegel, *supra* note 74, and Hasday, *supra* note 74.

[76] On forced prostitution, see, for example, ANDREA DWORKIN, *Letter from a War Zone* (1986), *reprinted in* LETTERS FROM A WAR ZONE 308, 312–13, 319 (1989); ANDREA DWORKIN, *Violence Against Women: It Breaks the Heart, Also the Bones* (1984), *reprinted in id.* at 172, 181; Andrea Dworkin, *Prostitution and Male Supremacy*, 1 MICH. J. GENDER L. 1, 9 (1993). On forced pregnancy, see, for example, DWORKIN, *supra* note 74, at 56–62, 71–105; ROBIN WEST, CARING FOR JUSTICE 94–178 (1996); Catharine A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5 (1994). On pregnancy and its relation to abortion, see generally, for example, DWORKIN, *supra* note 74, at 71–105. On forced abortion, see, for example, MACKINNON, *supra* note 74, at 1194. And on domestic violence, see generally, for example, ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING (2000). *See also* CLARE DALTON & ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND THE LAW (2001). By "domestic sexual hectoring," a topic that seems largely, if not entirely, to have escaped sustained legal academic attention, I mean approximately the persistent and persistently unwanted sexualization of domestic life in a manner that creates a rough equivalent of a hostile work environment on the home front.

[77] I am borrowing this term from *Michael H. v. Gerald D.*, 491 U.S. 110, 123 & n.3 (1989) (plurality opinion of Scalia, J.).

[78] *See, e.g.*, CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 130 (1989).

[79] SANDRA LEE BARTKY, FEMININITY AND DOMINATION: STUDIES IN THE PHENOMENOLOGY OF OPPRESSION 51 (1992).

normativizes what is socially known as the homophobic abuse perpetrated against those who identify (or are identified) as lesbians and gay men—violence that has been desexualized in deference to perpetrators who have, for the most part, been publicly identified as heterosexuals, even when seeking to cloak themselves, for example, in the gay panic defense,[80] hence raising questions about their sexual *desiderata*, hence sexual identities, hence public understandings of their crimes (is it inter-community or intra-community violence?).

At one of sex equality theory's current theoretical borders sits a question posed by *Goodridge* in its way: What do male supremacy and its heteronormativity, with their documented relation to the production and denial of a range of sexual abuses in marriage and beyond it, mean for victims of same-sex sexual violence within the lesbian and gay communities? In terms of *Goodridge* itself, What will its approval of marriage for same-sex couples on heteronormatively-driven, like-straight moral terms mean for lesbians and gay men injured through same-sex sex abuse?

An initial answer is suggested by the violent—and total—erasure of the realities of cross-sex sexual abuse, hence its injuries and its victims, within the moral vision of marriage *Goodridge* adduces. Following its like-straight logic, why should the realities of sexual violence in same-sex relationships be any different? Within *Goodridge*'s utopian description of marriage, which mentions neither, it isn't.

From a sex equality perspective, *Goodridge*'s dematerialization of cross-sex and same-sex sexual violence appears to be a consequence of its male-dominant, heteronormative substratum, concretized in its assumption, itself backed by the Commonwealth's constitution,[81] that men and women are already socially equal. Presuming the imperative to eradicate sex inequality away this way, including sex inequality in marriage, pretermits sexuality's central role in reflecting and reinforcing it. It takes the position that there is no inequality there for sexuality to reflect or reinforce. The patina of intimacy apparently dissolves the hierarchies of the social world. And why not? They do say love heals all wounds.

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[80] *See, e.g.*, Spindelman, *supra* note 14, at 1634 n.98. *Cf.* Marc Spindelman, *Sex Equality Panic*, 13 COLUM. J. GENDER & L. 1 (2004) (critically analyzing, then rejecting, the queer theoretic contention that sexual harassment law, particularly after the Supreme Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), allowing for same-sex sexual harassment under Title VII, like its sex equality theory underpinnings, is homophobic).

[81] *See, e.g.*, MASS. CONST. pt 1, art. I, *amended by* MASS. CONST. amend. art. CVI.

When sex inequality exists, according to *Goodridge*'s logic, it is the result of state action, not its lack, certainly not sexuality, including its abuses, hence is cured by simply rolling back legal measures that draw lines along lines of sex. Even then, retracting the State's regulatory claws does nothing to capture or address the needs of victims of sexual abuse injured in sex-specific ways—as women and men, straight and gay—through sex. Worse, by linking sex equality's advancement to the State's forced retreat from the social field, *Goodridge* primes calls for state intervention to deal with the sex-based realities of sexual violence as such to be misdescribed as sex-*inequality* promoting measures, hence opposed (however perversely) in equality's name.[82] Substantively, this is equality defined from a male supremacist perspective: the equal right to be abused through sex, chiefly sex with men, safeguarded by the constitution, overseen by the court, hence vouchsafed by the State. With Charles Baudelaire, one wishes to say: to each his chimera.[83]

In line with this view, including its problematic exclusion of sex inequality—hence sexual abuse—from its moral grid, *Goodridge* is free to treat sexuality as such as it does: as intimacy engaged in by gender equals, expressive of loving equality and exclusive, mutual commitment, which furthers the realization of individual and shared human potential; in short, as intimacy that's happily freighted with all the thick, layered richness of the choice to marry that precedes it. Hence, *Goodridge*'s insistence that the Commonwealth's "laws of civil marriage do not privilege heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family."[84] Intimacy is intimacy, irrespective of sex or sexual orientation, or the resulting bodily configurations,

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[82] *Cf.* Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 501 (1981) (Stevens, J., dissenting) (rejecting a sex-differentiated statutory rape scheme, according to which only males, but not females, could be held criminally liable, in part, on the ground that it impermissibly rested on stereotypical notions about male-female sexual relations, including assumptions about the role of male sexual aggression in bringing them about). By far, the best discussion of this case in the law review literature remains Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984).

[83] CHARLES BAUDELAIRE, *To Every Man His Chimera*, *in* PARIS SPLEEN 8 (Louise Varèse trans., 1970). For a version of the original, see CHARLES BAUDELAIRE, *Chacun Sa Chimère*, *in* 3 *OEUVRES COMPLÈTES* 18 (Yves Florenne ed., 1966).

[84] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003). To similar effect is *Goodridge*'s perspective on, and approval of, the message of *Lawrence v. Texas*, 539 U.S. 558 (2003), in which the Supreme Court, it writes, "affirmed that the core concept of common human dignity protected by the Fourteenth Amendment . . . precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner." *Goodridge*, 798 N.E.2d at 948 (citing *Lawrence*, 539 U.S. at 579). Here, too, sex expresses intimacy, with all the baggage that that term carries.

sexual capacities included.[85] Sexuality has no independent relation to abuse in *Goodridge*; it can't and still be intimacy entitled to its rightful place in *Goodridge*'s moral encomium to marriage. *Ex hypothesi*, intimacy, marital intimacy above all, measures non-violation.

Against this backdrop, it's utterly unremarkable that, even though it itself creates the perfect moment in which to do so, *Goodridge* shuns any reference to *Commonwealth v. Chretien*, the 1981 decision in which the Supreme Judicial Court first squarely held that husbands surpass the prerogatives of marriage, hence formally enjoy no legal immunity, when they rape their wives, a poignant case-law reminder (if any were needed) that sexuality, as intimacy, can be the very measure of violation, not the reverse.[86] *Goodridge*, after all, goes out of its way to explain that eliminating marriage's traditionally sex-unequal terms did not—just as it itself would not—spell an end to civil marriage.[87] The common law system of marriage, *Goodridge* remarks, was "exceptionally harsh" for those "women who became wives."[88] (And not only them.) But that was then, this is now: "[S]ince at least the middle of the Nineteenth Century," *Goodridge* continues, "both the courts and the legislature have acted to ameliorate the harshness of the common-law regime."[89]

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[85] *Goodridge*, 798 N.E.2d at 959 ("Whether and whom to marry, how to express sexual intimacy, and whether and how to establish a family—these are among the most basic of every individual's liberty and due process rights." (citations to a range of the U.S. Supreme Court's privacy decisions, including *Lawrence v. Texas*, which follow, omitted)); *id.* at 961 ("Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family."); *see also supra* note 38 and accompanying text.

[86] 417 N.E.2d 1203, 1207–09 (Mass. 1981). Then again, Chretien and his wife were estranged and soon to be finally divorced. *Id.* at 1205 (noting twice that a divorce judgment nisi "had been entered before" what the court itself described as "the act of forced intercourse" took place), 1209–10 (rejecting the defendant's argument he lacked fair warning his acts were criminal, because common law precedent had established marital rape immunity didn't apply to "forcible, nonconsensual sexual intercourse between spouses following the entry of a divorce judgment nisi"). In this sense, the facts of the case make the marital rape it involved look somewhat more like the legal system's paradigmatic image of rape than it otherwise might have, meaning: a case involving a woman raped by a man she did not know, often differently-raced, see, for example, SUSAN ESTRICH, REAL RAPE 8 (1987), Martha Chamallas, *Lucky: The Sequel*, 80 IND. L.J. 441, 454–60 (2005) (reviewing ALICE SEBOLD, LUCKY (1999)), and compare DWORKIN, *supra* note 74, at 92 (discussing the racial politics of rape-recognition "[i]n the sexual-liberation movement of the sixties"), hence rape that should be dealt with even though its perpetrator was formally still married to his victim.

[87] *Goodridge*, 798 N.E.2d at 967 (tracing some developments in the changing status of women in marriage and noting that "[m]arriage has survived all these transformations and we have no doubt that marriage will continue to be a vibrant and revered institution."); *see also, e.g.*, *id.* at 969 (noting that "[h]ere, no one argues that striking down the marriage laws is an appropriate form of relief").

[88] *Id.* at 967.

[89] *Id.* Interesting choice of word, "ameliorate," which suggests Marshall is aware, as of course on some level she undoubtedly must be, that sex inequality in the world, hence sex inequality in marriage, hasn't been eliminated, even though its realities never make their way into her opinion's moral account of marriage. If

Exemplifying the project is the court's turn-of-the-twentieth-century refusal "to apply the common law rule that the wife's legal residence was that of her husband to defeat her claim to a municipal 'settlement of paupers,'"[90] and its judgment some seventy years later, "abrogat[ing] the common-law doctrine immunizing a husband against certain [civil] suits because the common-law rule was predicated on 'antediluvian assumptions concerning the role and status of women in marriage and society.'"[91] Further to the point, *Goodridge* might have observed, "So, too, our decision in *Chretien*, as a matter of criminal law. To recognize marital rape as a legal concept, we departed from tradition, with its sex-based marital immunity rules, but *Chretien*, as you can see, didn't bring marriage to its knees either, as our decision today affirming marriage rights itself proves."[92]

Remembering the tendency of moral heuristics to affirm themselves and the worldviews from which they emerge, what does *Goodridge*'s failure to cite or discuss *Chretien* and to extend its nonimmunity rules to same-sex couples for the benefit of victims of sexual abuse in same-sex marriages mean? Maximally, it indicates *Goodridge* has overruled *Chretien sub silentio*, or, somewhat more modestly, thrown it into doubt, either way, because its abuse-pattern clashes so hideously with the moral furniture *Goodridge* installs. While, with Justice Benjamin Cardozo, a moral principle, no less than any other kind, may tend to "expand itself to the limits of its logic,"[93] this view of *Chretien*'s continuing vitality in *Goodridge*'s wake, well, seems wrong. It strains imagination to the point of breaking to believe a decision as soulful as *Goodridge*, and as in touch with human dignity and human flourishing as it is,

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only they would have. Remarkably, the plaintiffs in *Goodridge* proposed that "lawmakers have rid marriage of its gender-based aspects," Brief of Plaintiffs-Appellants at 47 n.24, *Goodridge*, 798 N.E.2d 941 (No. SJC-08860) ("As the Historians' Brief demonstrates, lawmakers have rid marriage of its gender-based aspects[.]"), suggesting in yet another way that their sex equality argument for same-sex marriage rights, see *id.* at 55–63 (making it), was more formal than substantive.

[90] *Goodridge*, 798 N.E.2d at 967 (citing Bradford v. Worcester, 69 N.E. 310, 311 (Mass. 1904)).

[91] *Id.* (citing Lewis v. Lewis, 351 N.E.2d 526, 528 (Mass. 1976)). Unmentioned by the court is the precise limitation in *Lewis*, as well as its accompanying reason: "Conduct, tortuous between two strangers, may not be tortuous between spouses because of the mutual concessions implied in the marital relationship. For this reason we limit our holding today to claims arising out of motor vehicle accidents." *Lewis*, 351 N.E.2d at 532. *But see* Nogueira v. Nogueira, 444 N.E.2d 940, 941–42 (Mass. 1983) (commenting on the trend in Massachusetts to narrow the traditional interspousal immunity doctrine, and citing and quoting, *inter alia*, from *Lewis*, *supra*, and also "cf."ing *Chretien*).

[92] A similar opportunity is presented by the court's discussion of the privileges of marriage. *See, e.g.*, *Goodridge*, 798 N.E.2d, at 955–57.

[93] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1921).

could possibly regard sexual violence in marriage with a blind and heartless eye. Right?[94]

Much more likely, by far, it seems, is that *Goodridge* will, in some future case, be reconciled to *Chretien*, with its recognition of the possibility of marital rape under law, should a perpetrator of it dare to call the question. But how? Moral heuristics, to note another of their common features, are typically supple enough to abide some challenges at their margins. With slight modification, *Goodridge*'s moral framework could absorb *Chretien*'s rule as a counterpoint to its own, treating it as a limited state of exception to its own worldview in cases of violent sexual tumult,[95] even after having extended the benefit of its protections to all married persons, lesbians and gay men among them. Indeed, were the *Goodridge* court to draw back this way from the factually-unsupportable and unsupported implications of its moral account of marriage, it might very well reinforce, rather than undermine, it, hence enhance, rather than dissipate, its own moral authority. One could ask, How much more proof is needed that *Goodridge*'s story of marriage is fundamentally sound than that *Chretien* has yielded but a teeny-tiny palmful of reported marital-rape cases in the years since it was handed down?[96] Citing the harmonious relations of

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[94] No matter that *Goodridge* likewise ignores the sexual violence involved—or alleged to have been involved—in a number of cases it actually does cite, including (to take what may be the most prominent example) *Commonwealth v. Balthazar*, 318 N.E.2d 478, 479, 481 & n.4 (Mass. 1974) (cited in *Goodridge*, 798 N.E.2d at 967, 986), the Supreme Judicial Court's own decision decriminalizing consensual sodomy, which "did not raise any significant factual dispute concerning [the absence of] consent." *Balthazar*, 318 N.E.2d at 481 n.4.

[95] In this sense, *Commonwealth v. Chretien*, 417 N.E.2d 1203 (Mass. 1981), might be a kind of *petit iustitium*, a suspension of the ordinary law of marriage in extreme cases. For Giorgio Agamben's interesting discussion of the role of the *iustitium* in Roman law, literally, he writes, a "standstill" or "suspension of the law" in cases of social tumult, see GIORGIO AGAMBEN, STATE OF EXCEPTION 41 (Kevin Attell trans., 2005); *see id.* at 41–51 (discussing the *iustitium* as a formal legal concept).

[96] Research to date has uncovered three: *Commonwealth v. Johnson*, 799 N.E.2d 118 (Mass. App. Ct. 2003); *Commonwealth v. Vasquez*, 542 N.E.2d 296 (Mass. App. Ct. 1989); and *Commonwealth v. Doherty*, 503 N.E.2d 644 (Mass. 1987). *See also* Commonwealth v. Suong, 2003 WL 22319049, *1 & n.1 (Mass. App. Ct. Oct. 9, 2003) (defendant found guilty of multiple crimes, including rape); Commonwealth v. Fuller, 2000 WL 1699840, *2 (Mass. App. Ct. Nov. 10, 2000) ("In any event, the jury . . . acquitted the defendant on the aggravated rape charge, convicting him only on the lesser-included charge of indecent assault and battery."). By contrast, one report, published in 2000, reporting data from publicly-funded rape crisis centers, indicates that between 1988 and 1995, there were 2576 reported cases of intimate partner sexual assault in Massachusetts, "intimate partners" including marital and non-marital relationships of cross-sex and same-sex couples. JEANNE HATHAWAY, MASS. DEP'T OF PUB. HEALTH, INTIMATE PARTNER VIOLENCE IN MASSACHUSETTS: DATA SOURCES AND STATISTICS THROUGH 1995, at 12 (2000). Of these, "where sex of the victim and offender(s) is known, 98% of the victims were female and 99% of the offenders were male (single and multiple males combined)." *Id.* at 13 n.* (italics removed). A national study of intimate partner violence, published the same year:

same-sex couples in the case, and, more generally, the lack of evidence suggesting that problems of same-sex marriage will be significantly, or any, different, one could continue, Why should widening *Chretien*'s scope be expected to alter its *m.o.*? Lo, marriage, punctuated with rare counter-examples recognized by the legal system, itself capable of temporarily suspending the wall of protections it has otherwise thrown up around, to guard, marital intimacies, produces individual, hence social, hence public good. Tweaked to admit of the possibility of sexual abuse in marriage under law, *Goodridge*'s moral framework is saved. *Goodridge* poses no dangers for victims of same-sex sexual abuse. *Q.E.D.*

Or is it?

Instructive in this regard is the Supreme Court's opinion in *Lawrence v. Texas*, which establishes a broad right to sexual intimacy between consenting adults on the view that sexuality, as intimacy, deserves constitutional protection even outside of marriage.[97] *Lawrence* reaches this conclusion, in part, through an analogy that, following others, themselves following Kenneth Karst,[98] it posits exists between same-sex sexuality, on the one hand, and the

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> estimates [that] approximately 1.5 million women and 834,732 men are raped and/or physically assaulted by an intimate partner annually in the United States. Because many victims are victimized more than once, the number of intimate partner victimizations exceeds the number of intimate partner victims annually. Thus, approximately 4.8 million intimate partner rapes and physical assaults are perpetrated against U.S. women annually, and approximately 2.9 million intimate partner physical assaults are committed against U.S. men annually.

PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE, FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY iii (2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/181867.pdf. Methodological limitations and certain other wrinkles aside, Tjaden and Thoennes go on later to observe that "same-sex cohabitants reported significantly more intimate partner violence than did opposite-sex cohabitants. Among women, 39.2 percent of the same-sex cohabitants and 21.7 percent of the opposite-sex cohabitants reported being raped, physically assaulted, and/or stalked by a marital/cohabiting partner at some time in their lifetime. Among men, the comparable figures are 23.1 percent and 7.4 percent." *Id.* at 30. This stands in some contrast to the results from other studies, described correctly as "studies of small, unrepresentative samples of gay and lesbian couples" that "suggest that same-sex couples are about as violent as heterosexual couples." *Id.* at 29 (footnote omitted); *see also id.* at 31 n.1 (collecting sources).

97 539 U.S. 558, 578 (2003).

98 Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 662 (1980) ("If marriage and the traditional family are the archetypal associations protected by the emergent freedom of intimate association, it is easy to see how the principle of equality presses for extension of that freedom to other relationships."); *id.* at 682 ("By now it will be obvious that the freedom of intimate associations extends to homosexual associations as it does to heterosexual ones."); *id.* at 685 ("The chief importance of the freedom of intimate association as an organizing principle in the area of homosexual relationships is that it lets us see how closely homosexual associations resemble marriage and other heterosexual associations.").

intimacies enjoyed between husbands and wives, on the other. In the course of explaining why it rejects the notion guiding *Bowers v. Hardwick*,[99] that the right Michael Hardwick claimed was simply the right to engage in homosexual sodomy, for example, the *Lawrence* Court tells us that to suggest as Justice White's *Hardwick* opinion did, "that the issue in [*Hardwick*] was simply the right to engage in certain sexual conduct demeans the claim [that Hardwick] put forward, just as it would demean a married couple were it to be said that marriage is simply about the right to have sexual intercourse."[100] As well, reaffirming *Griswold v. Connecticut*,[101] hence the constitutional protections it accorded marital intimacy as such, along with the doctrinal progeny that extended its rule, *Lawrence* accords sexuality outside of marriage—for unmarried heterosexual and unmarried homosexual couples—the same basic protection it receives *in* marriage because it is marriage-like: presumptively good in just the way that *Goodridge* would later describe,[102] because intimate.

Unlike *Goodridge*, *Lawrence* contains an exception to its own rule on sexual intimacy that addresses sexual injury in terms. *Lawrence* explains that its "general rule" that neither the State nor its courts are to "attempt[] . . . to define the meaning of [personal] relationship[s] or to set their boundaries"[103] is subject to limited circumstances in which the State's intrusions into the sexual arena will not be deemed "unwarranted"[104]: when there is, in the Court's words, "injury to a person or abuse of an institution the law protects."[105] But these are—and are to remain—exceptions to the "general rule" that the State is not to superintend sex. Thus, to police its boundaries, the Court, in harmony with its vision of sexuality as intimacy, hence productive of goods for individuals (if not also for society itself, precisely the way *Goodridge* holds marriage does), erects a rich and deep presumption that sex is consensual unless the State can—and does—prove otherwise.

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[99] 478 U.S. 186 (1986).

[100] *Lawrence*, 539 U.S. at 567; *cf.* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 195 (2005) (quoting from Justice Kennedy's "draft opinion" in *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 520–21 (1990), which described "the family" as "society's most intimate association").

[101] 381 U.S. 479 (1965).

[102] And as lesbian and gay rights advocates in *Lawrence* itself did. *See* Spindelman, *supra* note 14, at 1619–21.

[103] *Lawrence*, 539 U.S. at 567. The relationship-based, hence intimacy-assuming, description of the rule seems significant here to its formulation.

[104] *Id.* at 562.

[105] *Id.* at 567.

The analytic frame that Kennedy develops to generate *Lawrence*'s right to sexual intimacy, including its presumption that sex was consented-to if it happened, is so powerful that, when it comes to the same-sex sex act actually before the Court, it produces facts not established through the ordinary modes of legal proof, hence not in the record: The sex between the defendants, John Lawrence and Tyrone Garner, the Court says (and says repeatedly) was consensual and relationship-based.[106] Protecting it as part of its newly-announced right also implies it was intimate. Just so, all that's actually factually known based on the record is that the two men engaged in anal sex in Lawrence's rented digs.[107]

From a sex equality perspective, as I've explained elsewhere in detail,[108] *Lawrence*'s position that sex, because intimate, is consensual, unless and until the State proves otherwise, particularly when combined with the lack of cultural awareness, even (or especially) in the legal, hence constitutional, culture, of the problems of same-sex sexual abuse among lesbians and gay men, evident in *Lawrence*'s inexplicable (and unexplained) declaration that the relationship that Lawrence and Garner had could not have been sexually abusive,[109] turns the constitutional screw against lesbian and gay victims of sexual abuse, closeting the full extent, including the sex-inequality determinants, of their collective injuries. By individuating sexuality and sexual injury, while simultaneously bracketing the inequalities and force that often typify sex under current sex-unequal conditions, *Lawrence* threatens to convert sexual violence—or a good portion of it—into sex that, *as intimacy*, is beyond the State's regulatory reach.[110]

On one level, the dangers for victims of same-sex sexual abuse outside of marriage that emerge from *Lawrence* are thus traceable to its willingness to see same-sex sexuality through a substantively heteronormative like-straight prism, epitomized by marital intimacies, and to grant it protections on those

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106 *See, e.g., id.* at 565, 578.

107 *Id.* at 562–63; *see also* Spindelman, *supra* note 14, at 1649–50 & nn.155–57.

108 See generally Spindelman, *supra* note 14, but especially at 1633–67.

109 *Lawrence*, 539 U.S. at 578 (venturing that *Lawrence* "does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused"). I parse this language closely in Spindelman, *supra* note 14, at 1659–67.

110 As Robin West has put it in a different, but related context: "Within such [a regime of] presumed consensuality[,] . . . claims of [sexual] injury are quite naturally going to be made invisible (because they are incoherent), or if somehow visible, they are disbelieved, or if believed, they are trivialized. Simply: it couldn't have happened; if it did [he] asked for it; and if [he] didn't ask for it, it's just not a big deal anyway." Robin West, *Law's Nobility*, 17 YALE J.L. & FEMINISM (forthcoming 2005) (manuscript at 43, on file with author). No big deal anyway for the perpetrators of the abuse. For victims, it is.

grounds. Within this construction of sexual intimacy rights, survivors of same-sex sexual violation—to get their injuries to register legally as injuries, particularly as injuries that reflect and reinforce sex inequality—must confront, then topple, the culturally-salient and now constitutionally-enforced presumption that they are, because inflicted sexually, what male supremacy would have us believe: intimate, hence relationship-based, hence consented-to, hence harm-free. Again, this is the burden survivors of same-sex sexual violence confront under *Lawrence*—a decision that merely draws *an analogy* between same-sex sexuality and (cross-sex) marital intimacies.

Returning to *Goodridge*, What is to happen when *Lawrence*'s analogy becomes identity—when, that is, same-sex relationships receive protections not because they are *like* marital relations, but because that is what they *are*? The expectation is that when they attempt to obtain legal redress for what they've endured, survivors of same-sex sex abuse in marriage will find that to the old obstacles they faced—the social, hence legal, nonexistence of their injuries—a new one has been added. As married women who are sexually injured have struggled against heteronormativity's male dominance within marriage, so, too, lesbians and gay men now will. To overcome it, they must upend it in the form *Goodridge* gives it: the full, load-bearing weight of the putative goodness of marriage itself, seen and understood as *Goodridge* sees and understands it, the cornerstone of civil society and social stability. If so, how much sexual violence will need to be proved to have happened before that wall will budge from its foundations? How much more than in a case of sexual injury caused by a perpetrator who's not married to his victims? Will a single act of rape be enough or will multiple rapes be required? Must rape be accompanied by an "external" display of coercive force, say, a knife, a hammer, or a gun, to counter the idea that sexual violence that takes place in a relationship of gender equals must have been wanted if it took place, because it could otherwise easily have been stopped?[111] Must violence actually be used? How about consented-to, but unwanted, sex, as in, for example, sex given to stave off non-sexual, but physical, domestic abuse? (This happens.) What about sex that takes place when a spouse is in an alcohol or drug-induced stupor or sleep the perpetrator brought about? (This does, too.) How about domestic sexual hectoring that makes home life insufferably hostile? For sex abuse to be seen, must a couple already be on their way out marriage's door?[112]

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[111] On this view, same-sex couples are often thought to be unlike heterosexual couples, in which women, differently gendered than men, hence the men they're in relationships with, can be violated.

[112] As they were in *Chretien*. Commonwealth v. Chretien, 417 N.E.2d 1203, 1205, 1209–10 (Mass. 1981);

Whatever the answers ultimately turn out to be, already much more is needed in light of *Goodridge* than simply reaffirming *Chretien* and expanding its scope, which, however symbolically significant, does nothing more, without more, than remove one layer of immunity perpetrators don't need to have anyway to have the pleasures of marital sex abuse without legal consequence. From a victims' perspective, to propose it does, particularly without addressing the ideological determinants of those immunities, along with their social and political effects, sounds like an unfunny joke. It starts: Hey, what's stopping you from proving you were sexually violated? And ends: Look, Sisyphus, all you do is roll this rock up that hill.[113]

In this light, what to many people, including lesbians and gay men and a number of our heterosexual allies, looks like increasingly good news—the movement from *Hardwick*'s anti-gay moral disapproval of homosexuality to *Lawrence*'s reversal of it, along with its own assimilation of homosexuality to a heterosexualized marriage norm, to *Goodridge*'s recent perfection of the assimilationism—is to others, chiefly those concerned with stopping sexuality's abuse, a decidedly mixed bag: increasing recognition of the goodness of same-sex relationships through assimilation to a model of marriage that carries male supremacy's brief for perpetrators, not victims, of (marital) sex abuse.[114]

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see supra note 86. *Cf.* MACKINNON, *supra* note 74, at 862 (noting that the same has held true in a number of other marital rape cases).

[113] Capturing the impulse to affirm that sexual injury in marriage may be legally recognized while doing nothing to ensure it is, or to acknowledge how it hasn't been, is the New York State Supreme Court's decision in *Hernandez v. Robles*, 794 N.Y.S.2d 579 (N.Y. Sup. Ct. 2005), which repeatedly refers to the state's legal treatment of marital rape, and in particular the New York State Court of Appeals' decision in *People v. Liberta*, 64 N.Y.2d 152 (1984), eliminating the marital rape exception as a matter of law, see, for example, *Hernandez*, 794 N.Y.S.2d at 597 (praising the rule of *Liberta*, described as having "rejected anachronistic views about the subservient role of a woman relative to her husband as the rational basis for the marital rape exception"); *id.* at 602 & n.31 (discussing the "'marital exemption' to the crime of rape[,]" and, along the way, explaining that its elimination "upset[] a long history and tradition" of recognizing it at law); and *id.* at 608 n.40 (discussing the remedy in *Liberta*, and venturing that it gender-neutralized the state's "forcible rape" statute, making it applicable "to all persons"), while simultaneously and uncritically building on the authority of the New York State Court of Appeals' decision in *People v. Onofre*, 51 N.Y.2d 476 (1980) (see *Hernandez*, 794 N.Y.S.2d at 594–95, 597), a case involving sexual inequality that I discuss in some detail in Spindelman, *supra* note 14, at 1637–39. My own view of what the gender-neutralization of rape law, including New York's, has meant is somewhat at odds with *Hernandez*'s. *See* Spindelman, *supra* note 14, at 1643–45 & n.133.

[114] Both the institutional and (where different) the relational contexts of sexuality have tended to obscure sex abuse. In the case of same-sex sexual violence, it has been invisible—or when not invisible, regarded as unproblematic—when it takes place in schools, including boarding schools, churches, fraternities, and even bathhouses, but decreasingly so. It remains largely out of sight in the military itself, no doubt, in part, on the view that the expulsion of lesbians and gay servicemen from the armed forces eliminates its would-be

Lesbians and gay men who gain social status on these terms may thus come increasingly to be divided among themselves as male dominance has divided women from men: into those whose human flourishing is diminished by their forced availability for others' sexual use and violation, and the others, whose freedom is constituted in significant measure by the sexual prerogatives the legal system, through its unwillingness to end the injuries they can inflict through sex if only they choose, effectively accords them, if not quite so notoriously, because formally, as it used to. Either way, because taking sexual violence seriously as the widespread problem of sex inequality it is, including in marriage, threatens to unravel the moral story that anchors *Goodridge* at its core, simultaneously exposing the ideological forces that define it, one anticipates that it will be sustained--if it is to be sustained at all—by insisting on, and perhaps even tightening, its strictures, to the detriment of those who are violated through same-sex sex, as well as their cross-sex counterparts, for whom this is old truth.

These concerns about *Goodridge* remain largely speculative for now.[115] But the very possibility they will be materialized, crediting the normative force of marriage's promise and the continuing non-existence of same-sex sex abuse

perpetrators, as if they could not be straight. *Cf.* Kendall Thomas, *Shower/Closet*, 20 ASSEMBLAGE 80 (1993). Prisons, as Susan Estrich observed some years ago, Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1089 n.1 (1986), are the main exception here, the one institutional context where the realities of adult same-sex sexual abuse have been, and are, socially legible—and (at times even) read. *E.g.*, RICHARD A. POSNER, SEX AND REASON 383 (1992) ("rape of either men or women by women is exceedingly rare, as is male homosexual rape *outside of prisons*") (emphasis added) (citing, as sole source of authority for this proposition, PAUL H. GEBHARD ET AL., SEX OFFENDERS: AN ANALYSIS OF TYPES 791 (1965)); *id.* at 394 ("resort to force in male homosexual encounters" is "infrequen[t]"). But even as to prison rape, much of it is covered up, ignored, or erased through various tactics, including the common refrain that it was wanted because the inmate who was violated self-identified, or was identified by others, as gay. *See, e.g.*, Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Indifference,"* 92 J. CRIM. L. & CRIMINOLOGY 127, 145 & n.94 (2001) (referring to evidence that "[h]omosexual or bisexual inmates often report that prison officials refuse to investigate their claims seriously because the officials presume that any sex that these inmates engage in is consensual.") (citing PETER L. NACCI & THOMAS R. KANE, SEX AND SEXUAL AGGRESSION IN FEDERAL PRISONS 16 (1982)); *accord* Wendy Kaufman, *All Things Considered: Profile: Federal Efforts to Define and End Prison Rape* (NPR radio broadcast Oct. 29, 2003) (quoting Association of State Correctional Administrators' President Reginald Wilkinson saying about rape in prison (while apparently confusing it with bad sex): "We're not naïve enough to say it doesn't exist from time to time. Typically, when it does exist, it's a consensual sex act and typically one that's gone bad."). A deeply disturbing illustration of how far the legal system will still go to derealize the facts of sexual violence, including its injuries, even in the prison setting, appears in Adam Liptak, *Inmate Was Considered "Property" of Gang, Witness Tells Jury in Prison Rape Lawsuit*, N.Y. TIMES, Sept. 25, 2005, at A14, Mike Ward, *Prison Sex Case Hinges on Credibility; Officials Say There's No Proof of Ex-Con's Claims He Was Raped*, AUSTIN AM. STATESMAN, Oct. 8, 2005, at A1, and Mike Ward, *Inmate's Case Raises Profile of Prison Rapes*, AUSTIN AM. STATESMAN, Oct. 24, 2005, at A1.

[115] Largely, but not entirely. *See infra* text accompanying notes 123–133 (discussing Ohio's "Issue 1").

as a social practice that's recognized as such, should trigger a close look at the ways in which *Goodridge*'s heuristic, with its heteronormative and male supremacist code, hence its power and impulse to keep sexual abuse in marriage from being acknowledged as the pervasive sex equality problem it is, is operationalized on the ground, and not just in the Commonwealth of Massachusetts, to see if it affirms itself in the ways it can—and may.

At a broad level, there are multiple pathways that will need to be scrutinized: constitutional law and common law doctrines of family privacy, for example, lead the list, followed by various rules of criminal procedure, including rules allocating burdens of proof and disproof, legal presumptions, credibility determinations, and evidentiary rules. These are but some of the legal devices that can be taken up by defense lawyers, prosecutors, courts, and legislators alike in service of the idealized vision of marriage reflected in *Goodridge*, to keep the problem of sex-based violence in it from being recognized as—from becoming—legally real, hence socially acknowledged and stoppable as such.

And the problems aren't limited to sexual injury in marriage. Though *Goodridge* assures us that unmarried couples can properly be treated differently than married couples on a theory of presumed consent[116]—you're choosing not to get marriage benefits if you don't marry (talk about pressure to find a husband, hell, even *a date*)—existing constitutional rules on the federal level, as *Lawrence* recently reminded us, limit the State's ability to create special rules for marriage and married couples when it comes to sexuality, hence sexual injury. For those who fetishize the citation, *Lawrence* put a few back, front and center: *Griswold v. Connecticut*,[117] *Eisenstadt v. Baird*,[118] *Roe v. Wade*,[119] and *Casey v. Planned Parenthood*,[120] not to forget *Lawrence*

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116 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 958 (Mass. 2003) ("Individuals who have the choice to marry each other and nevertheless choose not to may properly be denied the legal benefits of marriage.") (citations omitted); *accord* Zablocki v. Redhail, 434 U.S. 374, 403 (1978) (Stevens, J., concurring in the judgment) (allowing the propriety of marital status distinctions in a range of cases). *But see* Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) (disapproving such distinctions in the arena of sexual choice), *followed by* Lawrence v. Texas, 539 U.S. 558, 577–78 (2003). Some will, no doubt, see this as evidence for the view that *Goodridge* will "solidif[y] the differential treatment of the married and the unmarried[,]" Nancy D. Polikoff, *Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201, 203 (2003), a point on which both feminist and queer marriage skeptics seem to agree. *See, e.g.*, Halley, *supra* note 3, at 100 (same as Polikoff, but using different conceptual language to make the point).

117 381 U.S. 479 (1965).

118 405 U.S. 438 (1972).

119 410 U.S. 113 (1973).

120 505 U.S. 833 (1992).

itself.[121] In light of these decisions and the principle of sexual liberation for which they now collectively stand, one might well expect that the problems *Goodridge*'s heuristic may generate for victims of same-sex sexual abuse in marriage—a denser, hence heavier, and more basic, version of the problems that emerge from *Lawrence*'s right to sexual intimacy—will, reversing course, follow the same trajectory the right to privacy itself once did: starting with marriage in *Griswold* and then expanding outward to unmarried couples, which at last includes lesbians and gay men.[122]

Though still early in the day, one manifestation of just these concerns for unmarried couples has already appeared in, of all places, Ohio, where, in reaction to *Goodridge*, the good citizens of the state enacted a sweeping constitutional measure, popularly known as Issue 1, which sought to shore up heterosexuality's monopoly on marriage and its corner on public goodness.[123] It did so, in part, by creating a special legal status for heterosexual marriage, and, in part, by precluding state recognition of other relationships—cross-sex or same-sex—that were simply marriage-like. By its terms, Issue 1 provides that:

> Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.[124]

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121 539 U.S. 558 (2003).

122 From Andrea Dworkin, this converging explanation:

> The society's opposition to rape is fake because the society's commitment to forced sex is real: marriage defines the normal uses to which women should be put, and marriage institutionalizes forced intercourse. Consent then logically becomes mere passive acquiescence; and passive compliance does become the standard of female participation in intercourse. Because passive acquiescence is the standard in normal intercourse, it becomes proof of consent in rape. Because force is sanctioned to effect intercourse in marriage, it becomes common sexual practice, so that its use in sex does not signify, prove, or even—especially to men—suggest rape. Forced intercourse in marriage, being both normal and state-sanctioned, provides the basis for the wider practice of forced sex, tacitly accepted most of the time. . . . There is the conceit that the married woman is the most protected of all women: if force is right with her, with whom can it be wrong? [I]f a man does to another woman what he does to his wife, it may be adultery but how can it be rape when in fact it is simply—from his point of view—plain old sex?

DWORKIN, note 74, at 85–86.

123 Issue I, originally a proposed constitutional amendment to Ohio's Constitution, became, when passed, Article XV, section 11 of Ohio's Constitution.

124 *Id.*

Issue 1 has recently been thrown into the center of an emerging constitutional vortex by lawyers representing perpetrators of male-on-female domestic abuse, who have argued that Ohio's domestic violence law, which currently presupposes a marriage-like, which is to say, a domestic, relationship between unmarried heterosexuals, violates Issue 1's mandate. On this view, the only people for whom the domestic violence law can operate in its present form are a man and his lawfully wedded wife.[125]

To date, at least seven trial courts have credited this position,[126] relying on it to strike down the State's domestic violence regime in cases involving cross-sex domestic abuse, over what initially sounded to many of us (including me) like howls of protest from the traditional moralists who sold Issue 1 to the Ohio public: They didn't intend this.[127] And truly, what kind of moral person

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[125] No joy, but I did predict this would happen. Carrie Spencer, *Experts: Issue One Impact to be Felt More in Homes than Workplaces*, ASSOCIATED PRESS NEWSWIRE, Nov. 3, 2004 ("Attorneys for unmarried clients charged with domestic violence 'will trot out Issue 1 in service of their defense,' [Spindelman] said."); *Experts: Civil Union Ban's Impact to Be Felt More in Homes than Workplaces: Economic Effect Impossible to Predict, They Say*, GAY & LESBIAN TIMES, Nov. 11, 2004, *available at* http://www.gaylesbiantimes.com/?id=3831&issue=881.

[126] The leading opinions are *Ohio v. Burk*, No. CR 462510 (Ct. of C.P., Cuyahoga County, Ohio filed Mar. 23, 2005) (Judge Stuart A. Friedman), and *City of Cleveland v. Voies*, No. 2005 CRB 002653 (Mun. Ct., Cleveland, Ohio filed Mar. 23, 2005) (Judge Lauren C. Moore). The same conclusion has been reached elsewhere: *Gough v. Triner*, No. 2005 DR 00041 (Ct. of C.P., Columbiana County filed Apr. 4, 2005) (Mag. Coleen Hall Daily); *Ohio v. Carswell*, No. 05CR22077 (Ct. of C.P., Warren County, Ohio filed Apr. 12, 2005) (Judge Neal B. Bronson); *Ohio v. Peterson*, No. 2004 CR 873 (Ct. of C.P., Green County, Ohio filed Apr. 18, 2005) (Judge J. Timothy Campbell); *Ohio v. Dixon*, No. 2005 CR 0091 (Ct. of C.P., Green County, Ohio filed Apr. 26, 2005) (Judge Stephen A. Wolaver); *Ohio v. Steineman*, No. 3005 CR 0068 (Ct. of C.P., Green County, Ohio filed Apr. 26, 2005) (Judge Stephen A. Wolaver); and *Ohio v. Renner*, No. CRB 05 00288 (Mun. Ct. Chillicothe, Ohio filed Apr. 29, 2005) (Judge John B. Street). By contrast, a number of lower courts have dismissed similar challenges. Of these, *City of Cleveland v. Knipp*, No. 2004 CRB 039103 (Mun. Ct. Cleveland, Cuyahoga County, Ohio filed Mar. 10, 2005) (Judge Ronald B. Adrine), *Ohio v. Rodgers*, No. 05CR-269 (Ct. of C.P., Franklin County, Ohio filed Mar. 29, 2005) (Judge Richard A. Frye), *Ohio v. McIntosh*, No. 2004 CR 04712 (Ct. of C.P., Montgomery County, Ohio filed Apr. 18, 2005) (Judge Michael L. Tucker), and *Bloomfield v. Stearns*, No. 2005-DV-12 (Ct. of C.P., Hancock County, Ohio filed Mar. 24, 2005) (Mag. Karen E. Elliott), may be the most thorough. Either way, *Hufford v. Clark*, No. DV 0500206 (Ct. C.P., Div. of Dom. Rel., Hamilton County, Ohio filed Apr. 12, 2005) (Admin. Judge Ronald A. Panioto), *Ohio v. Danley*, No. 05 CRB00356 (Mun. Ct., Fairborn, Ohio filed May 25, 2005) (Judge Catherine M. Barber), and *Ohio v. Jenkins*, No. B-0502848 (Ct. of C.P., Hamilton County, Ohio filed July 12, 2005) (Judge Mark R. Schweikert), ultimately wind up occupying the same ground. In another, unreported case, Judge Kathleen Sutula of the Court of Common Pleas of Cuyahoga County, Ohio, denied a defendant's motion to dismiss domestic violence charges without addressing the merits of the motion's constitutional argument. Jim Nichols, *Judge Pushes Changes to Domestic Violence Law*, PLAIN DEALER, Feb. 12, 2005, at B1. Judge Stuart A. Friedman similarly avoided rendering a constitutional judgment in *Ohio v. Forte* (Ct. of C.P., Cuyahoga County, Ohio filed Feb. 11, 2005), before ruling on the merits in *Burk*, *supra*, as did Judge Dennis J. Langer in *Ohio v. Brown*, No. 2004-CR-04436 (Ct. of C.P., Montgomery County, Ohio filed Mar. 11, 2005).

[127] *See, e.g.*, Jim Nichols, *Claim: Unwed Abuse Victims Left Unprotected Under Issue 1*, PLAIN DEALER,

could? Except that in the space of a few short months, making an apparent *volte-face* in court papers they filed, they confessed that, come to think of it, they did.[128]

And no wonder. The courts' judgments in these cases, in addition to giving Issue 1 broad effect,[129] square with the moral schedule animating it. Eliminating domestic violence protections that unmarried victims of intimate partner abuse, including (more recently) same-sex partner abuse, receive, constructs these relations as lawless, the violence that punctuates them without redress, the wages of sin, eminently avoidable through marriage,[130] where domestic violence—if it can be proved to have happened—is formally not tolerated under law. In this sense, judicial interpretations of Issue 1 limiting domestic violence protections to victims married to their abusers effectuate its project of regularizing, hence incentivizing, marriage, which becomes a unique social relation, capable of being policed for domestic abuse, to stop it, hence safe. Borrowing from *Goodridge*, as modified by *Chretien*, one might propose that punishing domestic violence in marriage is itself proof that marriage is properly regarded as morally sanctified. Legally safeguarded, the rights of those who are domestically violated in marriage will be vindicated. Again,

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Jan. 15, 2005, at A1 ("Phil Burress, a leader in the drive to pass Issue 1, said the claim that it would undermine parts of the domestic-violence law 'on its face is absolutely absurd.' He dismissed the prospect of that as an unintended consequence as 'a lot of hypotheticals.'"); M.R. Kropko, *Gay Wedding Ban Tested*, CINCINNATI POST, Feb. 4, 2005, at A1 ("Phil Burress . . . said the amendment was never intended to change the state's domestic violence law. . . . 'We would fix the law and make sure the penalty for domestic violence is the same against everyone. It's a crime. Physical abuse is illegal, period. I don't see how you can beat up someone living with you and get away with it,' Burress said."); *see also* Brian Albrecht, *Issue 1 Conflicts with Domestic Abuse Law, Judge Says: Marriage Amendment Makes Portion of Law Unconstitutional, He Rules*, PLAIN DEALER, Mar. 24, 2005, at A1 ("Phil Burress of Cincinnati, a leader in the drive to pass Issue 1, said the domestic violence law needs to be amended 'to bring about equal treatment,' and noted that legislation to that effect has been introduced by Rep. Jim Raussen, a Cincinnati Republican. 'There's nothing wrong with the constitutional amendment,' he added. 'If there's any law contrary to the constitutional amendment, we will fix it.'"); Bruce Cadwallader, *It's Still Domestic Violence: Gay-Marriage Ban Has No Effect on Law, Judge Rules*, COLUMBUS DISPATCH, Mar. 26, 2005, at A1 ("'These (domestic-violence) crimes should have the same penalty whether you're married or not' . . . . State Rep. Jim Raussen . . . said he is willing to add the provisions to a bill he already has filed. The bill deals with bail guidelines in domestic-violence cases.").

[128] Extravagantly, they took their stand in a case upholding Ohio's domestic violence rules against constitutional challenge based on Issue 1, urging reversal in it. *See* Brief for Citizens for Community Values as *Amici Curiae*, Urging Reversal, Ohio v. McIntosh, No. 2004 CR 04712 (Ct. of C.P., Montgomery County, Ohio filed Apr. 18, 2005).

[129] *So* broad, one might say, Issue 1 is reminiscent of the constitutional amendment struck down by the Supreme Court in *Romer v. Evans*, 517 U.S. 620 (1996), on those very grounds.

[130] Indeed, it would hardly be an unprecedented leap from this moralism to the view that, because avoidable through marriage, the violence was, broadly speaking, consented to, hence properly beyond the law's reach.

Will they be as a matter of fact?

The thought that they might not be offers perspective on the so-far hollow promises that Phil Burress, *the* leading proponent, now defender, of Issue 1, has made, to fight to re-establish statutory protections against domestic violence for its unmarried victims should courts continue to rely on that Amendment, as he now (apparently) wishes them to, to deny them the law's protections.[131] Inexplicable as a simple one-to-one reflection of the moral landscape that backgrounds Issue 1—that marriage is morally unique, hence should be treated as such at law[132]—the promises make sense if it's supposed that that same landscape will frame the enforcement of a reformed anti-domestic violence regime. Relied on that way, hence proceeding from one of its corollaries—that extra-marital relationships, because sexually-based, are morally wrong, hence harmful per se, both for the individuals in them and for society at large—it could easily give rise to a distributional pattern of abuse that would spotlight the hazards of these relations.

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[131] *See supra* note 127 (collecting some sources); *see also, e.g.*, Alan Johnson, *Bill Would End Domestic-Violence Loophole: Issue 1 Created Disparity in Law for the Unmarried*, COLUMBUS DISPATCH, Apr. 20, 2005, at C1:

> In the legal wake of State Issue 1, Ohio domestic-violence laws should be changed to eliminate a loophole that leaves some unmarried people vulnerable to abuse, state Rep. William J. Healy II [D-Canton] says.
>
> House Bill 161 . . . would make what seems like a simple change: removing language defining "spouse" or "a person living as a spouse" and replacing it with "any person who is residing with the offender."
>
> Phil Burress, the prime architect of State Issue 1 . . . said he supports the change to "fix a bad law."
>
> "It's certainly not something wrong with Issue 1," Burress said.
>
> The lawyer hired by Burress' group, Citizens for Community Values of Cincinnati, to write Issue 1 came up with the same language as in Healy's bill, Burress said.
>
> "We realized this was not fair, and it was treating someone who was married more harshly than someone who was not. We believe that any woman who is abused, regardless of if she is married or not, should be able to get help."
>
> Healy . . . did not consult with Burress on his legislation.

House Bill 161 has not yet been passed. Nor has anyone yet offered a persuasive account of how this legislative proposal will solve the constitutional problems that Issue 1 has created—or solve it without creating new ones. This isn't for lack of trying. *See, e.g.*, Brief for Citizens for Community Values as *Amici Curiae*, Urging Reversal, Ohio v. McIntosh, No. 2004 CR 04712 (Ct. of C.P., Montgomery County, Ohio filed Apr. 18, 2005).

[132] Though this is one way it has been explained. *See, e.g.*, Brief for Citizens for Community Values as *Amici Curiae*, Urging Reversal at 10, Ohio v. McIntosh, No. 2004 CR 04712 (Ct. of C.P., Montgomery County, Ohio filed Apr. 18, 2005).

Whether the Issue 1 defenses that perpetrators of domestic violence have mounted are or are not ultimately upheld on appeal,[133] that they have been placed on the table at all is one effect of *Goodridge*'s failure to confront the heteronormative and male supremacist dimensions of marriage. Had it done so, hence considered its own relation to sex inequality, it might have helped reconfigure the opposition mounted to defend it in the face of the politics of tradition that predictably defined the backlash against it—backslash that, needless to say, included Issue 1. It should have. If absolutely nothing else, the strange twists and turns *Goodridge* has already begun to take as it moves in time's stream indicate it may take a very broad lens and a willingness to look in some uncomfortable places to get a full and accurate picture of what the validation of *Goodridge*'s moral heuristic entails.

A. Identity Rules: Sexuality Cleansing

So far, I have largely focused on the conventional legal pathways *Goodridge*'s moral vision of marriage, with its heteronormative and male supremacist determinants, may follow, and how it may thus give rise to a new set of legal barriers that lesbian and gay victims of same-sex sex abuse, both in marriage and beyond it, will have to confront. Serious as these concerns are, they don't exhaust the field of peril. To see why, consider what *Goodridge* may do to regulate—or more exactly, deregulate—same-sex sexual injury on the social, hence individual, identity level.

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[133] At least one court of appeals decision has signaled an unwillingness to accept a constitutional challenge to Ohio's domestic violence law based on Issue 1. Ohio v. Newell, No. 2004CA00264 (Oh. Ct. App., 5th App. Dist. filed May 31, 2005). The *Newell* opinion seems to rely on timing as the reason for dismissing the defendant's constitutional challenge in the case: "[T]he amendment was not in effect at the time of commission of the offense or when appellant was tried for the same and is, therefore, not applicable." *Id.* at 10 (footnote omitted). Indeed, in a footnote, the court takes pains to distinguish *Ohio v. Rodgers*, No. 05CR-269 (Ct. of C.P., Franklin County, Ohio filed Mar. 29, 2005) (Judge Richard A. Frye), and *Ohio v. Burk*, No. CR 462510 (Ct. of C.P., Cuyahoga County, Ohio filed Mar. 23, 2005) (Judge Stuart A. Friedman), the "two cases [the court was] aware of . . . discussing such an amendment," on just those grounds: "In both [*Rodgers* and *Burk*], the offense of domestic violence was committed *after* the amendment[']s effective date." *Id.* at n.3 (citations omitted). Then, oddly, and in what might well be construed either as dicta, or an additional (or rather, an alternate) holding, the court of appeals adds that it "agree[s] . . . that the Defense of Marriage Amendment [Issue 1] has no application to criminal statutes in general or the domestic violence statute in particular." *Id.* at 10–11.

At least since Michel Foucault,[134] social identities have been understood as effects of power,[135] largely on a classic model of sovereign authority that imagines name-giving to be the Sovereign's prerogative. Explaining his concept of "interpellation," or "hailing," for instance, Louis Althusser provides what has become a standard illustration of Foucault's insight.[136] The scene he sets involves a policeman, officer of the Sovereign's law, who calls after someone on the street, "Hey, you there!,"[137] and the someone who, so hailed, responds, and in doing so becomes, in Althusser's term, "a subject."[138] Socially named from above, he is given an identity by an act of power whose ultimate source is none less than the Sovereign's own.

Recently, Janet Halley, drawing on a Foucauldian notion of micropower to analyze Althusser's sequence, has proposed that, in "assum[ing] that the interpellative call will always come from above, from a high center of power[,]"[139] it overlooks the ways that hails can erupt from below, particularly from within social identity movements, what she herself prefers to call

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134 *See* MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOL. I: AN INTRODUCTION (Robert Hurley trans., 1990) [hereinafter FOUCAULT, HISTORY OF SEXUALITY]; *see also, e.g.*, 1 MICHEL FOUCAULT, ETHICS: SUBJECTIVITY AND TRUTH, ESSENTIAL WORKS OF MICHEL FOUCAULT 1954–1984, at 116 (Paul Rabinow ed., 1997) [hereinafter FOUCAULT, ETHICS] (describing identity as "a game[,] . . . a procedure to have relations, social and sexual[,]" and distinguishing that understanding of it, according to which, he allowed, it could be "useful," from an existential (or essentialized) account of it, which, he thought, was not). Although Foucault often gets credit for the insight, others—including a number of UnitedStatesean feminists—independently saw that sexuality, hence sex, hence sexual identity, were effects of social power around the same time Foucault was working on his *History of Sexuality*. The idea can be found at work, for instance, in ANDREA DWORKIN, WOMAN HATING 183 (1974), and MACKINNON, *supra* note 78, at 1–12. *See also* MACKINNON, *supra* note 78, at xiv (describing the analysis that informs those pages as "written in 1971–72, revised in 1975, and published in *Signs* in 1982")).

135 *Compare* Judith Butler, *Imitation and Gender Insubordination*, *in* INSIDE/OUT 13, 13–14 (Diana Fuss ed., 1991) ("[I]dentity categories tend to be instruments of regulatory regimes, whether as the normalizing categories of oppressive structures or as the rallying points for a liberatory contestation of that very oppression."), *with* DWORKIN, *supra* note 134, at 183 ("Sex as the power dynamic between men and women, its primary form sadomasochism, is what we know now. Sex as community between humans, our shared humanity, is the world we must build."), *and id.* at 184–85 ("That is not to say that 'men' and 'women' should not fuck. Any sexual coming together which is genuinely pansexual and role-free, even if between men and women as we generally think of them (i.e., the biological images we have of them), is authentic and androgynous. Specifically, androgynous fucking requires the destruction of all conventional role-playing, of genital sexuality as the primary focus and value, of couple formations, and of the personality structures of dominant-active ('male') and submissive-passive ('female').") (emphasis removed).

136 LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, *in* LENIN AND PHILOSOPHY AND OTHER ESSAYS 118 (Ben Brewster trans., 2001).

137 *Id.*

138 *Id.*

139 Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 115, 118 (David Kairys ed., 3d ed. 1998). "Always" may be too strong a word.

"resistant social movements."[140] Easily imagined as mutually exclusive conceptualizations of power's functioning, top-down and bottom-up identity-formation projects can, in practice, converge the way they do in *Goodridge*, becoming co-constitutive, hence mutually reinforcing.[141]

In the relevant top-down sense, for instance, *Goodridge*'s moral heuristic of marriage spawns a novel set of social meanings for lesbian and gay identities. Merely locating these identities squarely at the center of the moral matrix it configures, which predicates granting lesbians and gay men full standing within the moral community, gives us, in identity terms, lesbians and gay men as moral citizen, heterosexuals' equals. This, in turn, allows it to be said that same-sex love and intimacy are just like their cross-sex counterparts, hence individually and socially good as a matter of public morality, hence law. Out

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[140] *Id.* In the course of describing Althusser's mistake, Halley, possibly taking a play, again, from Foucault, who notoriously professed to have no theory-room for ideology as a force that organizes the operation of social power, see, for example MICHEL FOUCAULT, *Truth and Power*, *in* 3 POWER: ESSENTIAL WORKS OF FOUCAULT 1954–1984, at 111, 119 (James D. Faubion ed., Robert Hurley et al. trans., 2000) (describing "[t]he notion of ideology" as "difficult to make use of," and then elaborating his reasons), detaches interpellation from what, in Althusser's theory of it, are its ideology-determinants. In Althusser's own words:

> As a first formulation I shall say: *all ideology hails or interpellates concrete individuals as concrete subjects*, by the functioning of the category of the subject. . . .
>
> . . . I shall then suggest that ideology "acts" or "functions" in such a way that it 'recruits' subjects among the individuals (it recruits them all) or "transforms" the individuals into subjects (it transforms them all) by that very precise operation which I have called *interpellation* or hailing, and which can be imagined along the lines of the most commonplace everyday police (or other) hailing: "Hey, you there!"
>
> . . . The existence of ideology and the hailing or interpellation of individuals as subjects are one and the same thing.

ALTHUSSER, *supra* note 136, at 117–18 (footnote omitted). My own position on the importance of attending to ideology when analyzing social power's movement, including its productive effects, as should be clear no later than my discussion of the important role the ideology of male dominance plays in the imperative to produce lesbian and gay identities as sexually harm-free, see *infra* text accompanying notes 142–155, tends more toward Althusser's (at least in *id.*) than Foucault's.

[141] Michel Foucault himself, unlike many of his "readers," didn't miss the relation:

> No "local center," no "pattern of transformation" could function if, through a series of sequences, it did not eventually enter into an over-all strategy. And inversely, no strategy could achieve comprehensive effects if it did not gain support from precise and tenuous relations serving, not as its point of application or final outcome, but as its prop and anchor point. There is no discontinuity between them, as if one were dealing with two different levels (one microscopic and the other macroscopic); but neither is there homogeneity (as if the one were only the enlarged projection or the miniaturization of the other); rather, one must conceive of the double conditioning of a strategy by the specificity of possible tactics, and of tactics by the strategic envelope that makes them work.

FOUCAULT, HISTORY OF SEXUALITY, *supra* note 134, at 99–100.

of this configuration, in identity terms, again, we have lesbians and gay men as capable of committed, exclusive, lasting, and loving relationships, hence capable of intimacy and human flourishing, hence entitled to equal dignity and respect as first-class persons with constitutional rights. Together, these social meanings, which track *Goodridge*'s like-straight logic, including its heterosexualized moral tale, refuse, hence eliminate, any substantive distinction between heterosexuality and homosexuality.

But this isn't all. Beyond the particular salutary meanings for lesbian and gay identities *Goodridge* supplies from above are the realities of same-sex sex abuse lesbians and gay men experience. In this sense, homosexuality is just like heterosexuality, too. Stated affirmatively, *Goodridge*'s moral heuristic of marriage, which disregards cross-sex and same-sex sexual abuse in line with the male dominance that determines its heteronormative underpinnings, promotes through negation a shared social identity for lesbians and gay men that mirrors male supremacy's understanding of heterosexuality's own, really heterosexual men's: To be lesbian or gay is to be sexually nonviolating, inviolable, and unviolated.[142]

This immaculate conception of lesbian and gay identities, deeply ideologically driven, to be sure, is in at least one sense a hugely welcome relief from what, only recently, were the fully vibrant tropes that emerged from a patriarchal moralistic tradition that regarded homosexuality as sinful, unnatural, not to mention contagious, and that, as a result, treated gay men, in particular, as dirty, corrupt, molesters of innocent children (certainly, when cleansed of original sin), feral sexual predators whose insatiable sexual appetites caused them to stalk the byways of the night as only sexual monsters could, and who thus needed to be subdued.[143] But after all that's been said,

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[142] *Cf.* Lewis A. Kirshner, *The Man Who Didn't Exist: The Case of Louis Althusser*, 60 AM. IMAGO 211, 225–26 (2003) ("In his master's thesis, [Althusser] cited Freud, notably for his account of negation. A positive content can present itself, Althusser wrote, in the form of an absence or a negative[.]") (citing Louis Althusser's 1947 master's thesis, *Du contenu dans la pensée de G.W.F. Hegel*); JACQUES DERRIDA, *Before the Law*, *in* ACTS OF LITERATURE 181, 211–12 (Derek Attridge ed., 1992) ("Neither identity nor non-identity is natural, but rather the effect of a juridical performative.").

[143] George Chauncey offers some historical context for these tropes, tracing them to the McCarthy era, in GEORGE CHAUNCEY, WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY 18–20 (2005). For other moments in which they've since prominently resurfaced, including Anita Bryant's homophobic campaign of the late 1970s, see also *id.* at 38–39, 46–47. The libel has been used to smear lesbian women, as well. *See also* DWORKIN, *supra* note 74, at 32 ("Right-wing women consistently spoke to me about lesbians as if lesbians were rapists, certified committers of sexual assault against women and girls . . . . To them, the lesbian was inherently monstrous, experienced almost as a demonic sexual force hovering closer and closer. She was the dangerous intruder, encroaching, threatening by her very presence a sexual

Goodridge's constitution of lesbian and gay male identities as autonomous of sexual violation[144] makes them, in their immaculateness, cleansed identities, scrubbed clean not only of the homophobic lies (the good news), but also of a certain truth (not so good): that sex, even, or especially, sex in relationships, same-sex and cross-sex both, can—and, at times, does—cause harm. This crusty fact remains buried under *Goodridge*'s fiction that sex in marriage is consistently an expression of all the good things that marriage is: love, mutuality, support, care, concern, which, because normatively good, are definitionally incapable of producing harm.

Significantly, the felt imperative in *Goodridge* to make lesbians and gay men be sexually squeaky-clean as part of the justificatory dimension of the project that accords them marriage rights—serves an important rehabilitative function—and not just for homosexuality, but for *heterosexuality*, as well. Gone in a flash is what had seemed the indelible bloodstain on heterosexual manhood's hands, first brought fully to light by those brave women who dared exercise their own sovereign authority to name their experiences of heterosexual sexual abuse, speaking out against it as a social practice with individualized dimensions to bring it to a halt, for all women. In the course of loosening heterosexuality's traditional stranglehold on marriage, *Goodridge* burnishes it, restoring it its good name, making it clear (if it wasn't already) that the legal judgment it reflects is, in fact, heterosexually driven.

In fairness, the lesbian and gay identities affirmed by *Goodridge* aren't entirely original to it. They emerged from below, from within the lesbian and gay communities themselves, served up in the *Goodridge* litigation by their legal representatives, as identities that already existed in the social world and simply called out for judicial recognition.[145] "These couples before you, these

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order that cannot bear scrutiny or withstand challenge."). Compare this description to the description of Lilith, as recounted in ORIT KAMIR, EVERY BREATH YOU TAKE: STALKING NARRATIVES AND THE LAW 19–48 (2000).

[144] *Cf.* Christopher Hitchens, *'Malraux': One Man's Fate*, N.Y. TIMES SUNDAY BOOK REV., Apr. 10, 2005, at 32 (reviewing OLIVIER TODD, MALRAUX: A LIFE (Joseph West trans., 2005)).

[145] Mary Bonauto, the lead attorney for Gay & Lesbian Advocates & Defenders ("GLAD") in *Goodridge*, acknowledges nearly as much where she writes that:

> Where the plaintiffs are the heart and soul of the case, the job of plaintiff selection is critical. Deciding among the many potential couples is at least as much a function of the lawyer's gut as a function of objective measures. If we applied a litmus test, it centered more on the core strength of the individuals and couples than anything else. . . . I asked the potential plaintiffs the obvious: how did they meet and commit, and how long had they been together? Why marriage and not some other legal protection? What kinds of problems had they faced from being denied marriage? Had it affected their children? What kinds of stresses had they endured as a couple?
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> Often, I met people in their homes, assuming that the media would be interviewing them

plaintiffs, are like this, like you," they said, tacitly averring that sexual violence doesn't tarnish this upstanding class. If *Goodridge* noticeably reads as a Taylorite "recognition" project,[146] designed to confer legal, hence social, respect on individuals with pre-existing social identities, this is why.

But it isn't the entire explanation. After all, although these cleansed same-sex sexual identities did spring, fully formed, from the lesbian and gay communities, they weren't, strictly speaking, organic in the sense of being unaffected, much less uncontaminated, by sovereign power, and the pro-hierarchy ideologies, including male supremacy, that condition it. To the contrary, these identities were clearly tooled with a vision of a heterosexual sovereign in mind, adjusted to fit what he might want as a condition of hailing the lesbian and gay communities the way they wanted to be.[147] The hope in delivering the *Goodridge* court these cleansed same-sex sexual identities without prior official commission was that, presented this way, same-sex couples might prove acceptable in its sight, hence stir the angels of the sympathetic heterosexuals who wielded its levers of high institutionalized sovereign power into action: to confer the right to marry on lesbians and gay men. Victorious, we got the hail we sought.

Now, the thought that this strategy, hardly anything new, would eventually pay dividends helps explain why lesbian and gay rights advocates have, over the years, so persistently avoided their own communities' problems with sexual abuse, particularly in their litigation efforts,[148] and why, and not just in *Goodridge*, they have elected to create and perpetuate these phantasmatic, sexually purified visions of lesbians and gay men. Unfortunately, somewhere

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> there and wanting to know what that would look like. I knew they would get their "fifteen minutes" of fame, but that could not be part of their motivation for joining, nor could they have anything particularly embarrassing in their backgrounds.
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> . . .
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> Their job as plaintiffs was simply to be themselves. . . . A Washington State trial court judge recently remarked that the plaintiffs in that marriage case were "handpicked" and questioned whether it was fair to decide a case with "parties who may rise above the median in so many respects." While LGBT people as a whole have the same warts as non-LGBT people, my experience over many years is that the plaintiffs in these cases are ordinary people with what would be considered fairly ordinary aspirations . . . .

Bonauto, *supra* note 7, at 31–32 (quoting Andersen v. King County, 2004 WL 1738447, at *12 (Wash. Sup. Ct. Aug. 4, 2004)).

146 *See* Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25 (Amy Gutmann ed., 1994).

147 *See, e.g.*, *supra* note 145.

148 *See, e.g.*, *id.*

along the way—where is not yet quite clear—the heterosexist, hence sexist, determinants of this strategy, which worked to preclude serious talk of the realities of sexual violence, particularly male-on-female sexual abuse, began to fade away. The result? Lesbian and gay identities that bore no whiff of sexual abuse came increasingly, if mistakenly, to be thought of as sexual-reality-corresponding, a reflection of who lesbians and gay men "really" are, and what our relationships and our sex "really" are like, in short, a collective, hence individual, ontology, rather than what, in fact, they often were: unreal. Lost in the struggle for equality for lesbians and gay men was that the disavowal of sexual abuse between and among them was only ever a tactic, never a truth. Sadly, Foucault never got this far.[149]

An important reason this strategy has remained largely unnoticed and virtually unchallenged within the lesbian and gay communities, though not a full account of it, is historical: Lesbian and gay male sexual identities were formed in outlawry, precipitating (among other things) a deep identification, a sense of community even, with others whom the law treated as criminals, or would-be criminals, because of their sex, including perpetrators of sexual abuse.[150] This identification, its precise genealogy presently aside (a project for another day), combined with the libertarian impulse it triggers to decriminalize sexuality, hence to wrest same-sex sex from sovereign control, hence to liberate lesbians and gay men as such from it, has structured the calls one hears to maintain the silence surrounding the communities' problems with sexual violence. It's about time to ask: To whom does this loyalty run, and why? What is the justification for it other than "strategy"? Is there one? As background social norms change to become increasingly open to lesbians and gay men, what is to be said for it? Why isn't closeting lesbian and gay victims of sexual abuse more and more widely being seen as an act of breaking, rather than affirming, faith? It is.

To avoid confusion, none of this is to complain simply that *Goodridge* is an exercise of sovereign power that produces—or reproduces—social meanings (new or otherwise) for lesbian and gay male identities and is problematic,

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[149] Not that he couldn't have, see, for example FOUCAULT, ETHICS, *supra* note 134, at 143 ("As for the political goals of the homosexual movement, . . . there is the question of freedom of sexual choice which must be faced. I say 'freedom of sexual *choice*' and not 'freedom of sexual *acts*' because there are sexual acts . . . which should not be permitted whether they involve a man and a woman or two men. I don't think we should have as our objective some sort of absolute freedom or total liberty of sexual action."), only that he didn't. *Cf.* Spindelman, *supra* note 80, at 7 & n.14, 42 & n.157 (dealing with Foucault's dictum about how rape should be treated under law, and feminist reactions to it).

[150] *See, e.g.*, Spindelman, *supra* note 14, at 1635–40 (discussing two prominent examples).

because content-laden identities are regulatory, or that content-laden sexual identities, such as these, are, more specifically, sexually regulatory, hence bad.[151] Rather, the point is to observe critically that among the meanings *Goodridge* delivers is one that, formed by negation, unacceptably regulates the lives of lesbian and gay victims of sexual violence, who are injured through their sexuality, as sexuality is socially defined. It is also to highlight that *Goodridge*'s validation of the idea that lesbian and gay identities entail the absence of sex abuse—much like that old horror story that women in marriage were unrapeable, certainly as women—is based on a lie.

Like many other lies, this one is not without its effects—one, on the community level, that looks like the old agenda-setting problem, too familiar to warrant extensive comment, except to note, for now, that one recent description of the so-called gay agenda, a "unity statement," signed onto by various lesbian and gay civil rights organizations contains (guess what) no reference to the need to acknowledge and address, much less to end, the communities' problems of sexual violence as such in its list of major goals.[152]

No less significantly, and because so often overlooked, perhaps more so, the lie has troublesome effects for those lesbians and gay men who are sexually violated. Social identities, as others have explained, yield subjects with subjectivities—meaning: individuals who are socially authorized to know and to experience themselves in the world in certain ways, as people who belong to, and owe allegiance to, certain identity groups. In this sense, constructing lesbian and gay identities as sexually harm-free gives lesbians and gay men who are sexually violated through same-sex sex no socially authorized terms with which to negotiate their experiences of violation. Worse, the terms of engagement it does provide hold their injuries are non-existent. It bids them left unknown. The identity-based logic is ineluctable: If what was done to them was done to them by another lesbian or gay man, it couldn't have been sexual violence, because lesbians and gay men don't perpetrate it. Hence, if it happened, it is nothing, or nothing other than pure sense, sheer experience, aesthetics applied to sex, borrowing from Susan Sontag, "an erotics of art"

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151 That, in case you missed it, would be a queer theoretic complaint. *See, e.g.*, Butler, *supra* note 135, at 13–14 ("[I]dentity categories tend to be instruments of regulatory regimes whether as the normalizing categories of oppressive structures or as the rallying points for a liberatory contestation of that very oppression"); Janet Halley, *Sexuality Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 183, 194 (Catharine A. MacKinnon & Reva Siegel eds., 2003) (describing queer theory as "anti-identarian"). For some other problems with this complaint from a sex equality perspective (beyond those I'm discussing here), see Spindelman, *supra* note 80, at 23 n.73.

152 *See Unity Statement from National Gay Groups*, WASH. BLADE, Jan. 14, 2005, at 10.

sans art.[153] Continuing with this logic, if the sex abuse isn't nothing, is something, if, that is, it means something to its victims, then *they* are nothing, certainly not lesbian or gay, because as such, they cannot have been sexually violated. Ultimately, in light of the social meanings associated with their identities, lesbian and gay victims of same-sex sex abuse must choose: forswear their sexual identities, hence who they are socially, or disaffirm what was done to them, sexually. Those who have come to grips with having same-sex sexual desires only after years of internal struggle—struggles that can make sexual identity *feel* like who one authentically *is*, rather than a choice—may not even perceive they have, hence have, this option. Its very structure as a social fact leads them not to.[154]

Against this background, it's no wonder that some adult gay men will, when they feel it's safe to do so, privately report that they've had sex they didn't want, including sex against their will, but shrink from naming what happened to them violation or rape. The reason why isn't that it's not, but rather that they can't afford it to be, the price of it being that being what it presently is. Who in their community wants to listen to this? Believe it? Acknowledge the injuries? Do something about them? What about the legal system? Gay male victims of same-sex sexual abuse can see how seriously what is culturally regarded as the most heinous kind of same-sex sexual violence—adult men's sex abuse of boys—is treated by the courts, particularly when perpetrators are backed by high forms of non-sovereign social power, say, institutions or accumulated wealth, or both. (Not very.[155]) They also see

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[153] SUSAN SONTAG, *Against Interpretation* (1964), *reprinted in* AGAINST INTERPRETATION, AND OTHER ESSAYS 14 (1966). For some suggestion that gay male sexuality may have been—or was—an inspiration for Sontag's view of aesthetics, hence art interpretation, see her *Notes on "Camp"* (1964), *reprinted in id.* at 275, 275–92.

[154] *Accord* K. Anthony Appiah, *Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 149, 163 (Amy Gutmann ed., 1994) ("Between the politics of [non]recognition and the politics of compulsion, there is no bright line."). Appiah elaborates his views on identity in KWAME ANTHONY APPIAH, THE ETHICS OF IDENTITY (2004).

[155] Consider, for example, a few of the findings from a report commissioned by the American Bishop's Conference to look into the priest sex abuse scandal that has rocked the Catholic Church, especially in the United States. It found that, "[o]verall, 9.1% of priests [accused of child sex abuse] were charged with a criminal offense[,]" and that of those, "a majority . . . [overall, 6 percent] were convicted." JOHN JAY COLL. OF CRIMINAL JUSTICE, THE NATURE AND SCOPE OF THE PROBLEM OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES 60, 61 (2004), *available at* http://www.usccb.org/nrb/johnjaystudy/. *But see* Agostino Bono, *John Jay Study Reveals Extent of Abuse Problem*, CATHOLIC NEWS SERVICE, http://www.americancatholic.org/News/ClergySexAbuse/ (last visited Nov. 14, 2005) (indicating that the John Jay report found that "[r]egarding action by civil authorities, the study said that '3 percent of all priests against whom allegations were made were convicted . . . .'"). Additionally, the report found that "about 2% [of the priests accused of sex abuse] received prison sentences." JOHN JAY COLL. OF CRIMINAL JUSTICE, *supra*, at 10;

what the legal system does to women who maintain they were sexually violated. Being adult men, whose injuries were inflicted sexually, the circumstances surrounding their violation are readily mistaken in (some) gay male circles, though elsewhere, as well, for a classic gay sex scene, as seen from a perpetrator's perspective, in which a victim's sexual use and violation are what he most desperately craves.

Gay men who have been sexually violated, clear about what was done to them, thus fairly expect to be faced with questions from other gay men if they should speak out against their abuse as abuse. Not uncommonly, when they do, they are. Assuming only one perpetrator: Was it "hot"? Was he cute? What did he do? Did he hurt you? Why didn't you stop it? Did you try? Did he come? Did you? If so—and that does sometimes happen, but not because the sex that was forced was consented-to, or wanted, or otherwise enjoyed—imagine the smiling surreply. Compared to the misunderstanding and the perpetrator-identifications from those within the gay community, many gay male survivors make what, in the context of their lives, is an eminently rational choice, legitimated, hence normalized, by *Goodridge*: It is much, much easier not to think of the violation as violation, or if that cannot be helped, to write it off as sex that's gone wrong, as "bad sex," but sex for which they, not those who forced it, are ultimately responsible.

Regrettably, *Goodridge*, far from telling them otherwise, commands their individual, hence collective, quiet to prop up the moralizing image it offers of same-sex relationships as all good, all happy. The formal legal, including doctrinal, pathways it may follow aside, *Goodridge*'s moral heuristic of marriage may thus also validate itself on the social identity level, operating as a form of sexuality regulation by blotting out same-sex sexual violation as an identity-group, hence individual, problem. Indeed, it may very well already have begun to achieve a certain success in this endeavor on the ground, though evidence of it being largely found in the void, measured through the absence of claims from lesbians and gay men that they've been sexually violated, makes it difficult to tell—for now.

Still, the closet door *Goodridge* shuts with tools provided by the leadership of lesbian and gay communities will, sooner or later, begin to creak open. When it does, we will hear the voices of those on whose backs lesbian and gay rights, including the right to marry—homosexuality's horizon—have been

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see also, e.g., John M. Broder & Nick Madigan, *Jackson Cleared After 14-Week Child Molesting Trial*, N.Y. TIMES, June 14, 2005, at A1.

being achieved, demanding an account. The question is, What will you say when they ask of us all, as they will: "Where were you?"