

## CONTRACT SPORTS

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This symposium issue on Re-Orienting Law and Sexuality explores the topic in innovative ways, mining commonalities among sex work, sexual orientation marginalization, and sexual speech. My work fits into this discussion in that I explore ways that the private law of commerce can be imported to the private law of domestic relations to remedy family law's inadequacy and inequality. Existing domestic relations law posits heterosexual marriage as naturally superior to other forms of intimate affiliation, rendering the others (such as cohabitation, same-sex sexuality, and polyamory) unnatural and inferior. As such, it fails to recognize many intimate affiliations.<sup>2</sup>

Two examples of bridging the divide between private business law and private family law that I discuss in this essay are cohabitation contracts and Premarital Security Agreements. Cohabitation contracts use contract doctrine to recognize relationships that judges otherwise would likely ignore or vilify. Premarital Security Agreements (PSAs) are the centerpiece of my proposal for importing the debtor-creditor law of Article 9 of the Uniform Commercial Code to marriage doctrine. As described below, I have contended that primary homemakers extend credit to their primary wage-earning spouses, and that they therefore should be seen as creditors, and thus able to exercise creditor rights such as the self-help right of repossession enjoyed by secured creditors.<sup>3</sup> This work is part of an antistubordination literature that includes feminist legal theory, critical race theory, and queer legal theory. It builds on those theories' contributions by questioning their conventional focus on public law, instead asking what tools private law offers to counter subordination.

What follows is a lightly edited text of my remarks at the conference, sketching the contours of a case for private business law's potential to help us reimagine the legal construct of family. Because contract is the metaphor underlying all business models, and because, as I shall shortly explain, I think that the music played at sporting events sets an appropriate tone of discussion regarding the contest over

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<sup>2</sup>One example of the changing demographics of intimate affiliation is the fact that fully one third of births in the U.S. each year are to unmarried mothers. Tamar Lewin, *Fears for Children's Well-Being Complicate Debate Over Marriage*, N.Y. TIMES, Nov. 4, 2000. For further discussion of the patchwork of legal doctrines governing various affiliations, see Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. CIV. RTS. & CIV. LIB. L. REV. 79 (2001).

<sup>3</sup>Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998). The "special rights" enjoyed by Article 9 secured creditors can be analogized to the special rights for gay people that Karen Engle ably defends in this symposium. Karen Engle, *Legislating Special Rights*, 48 CLEV. ST. L. REV. 43 (2000).

whose intimate affiliations count as “family,” my approach can be aptly described as contract sports.

As our topic today is reorienting law and sexuality, it seems that we really need a new theme song. Those who have been “out” for a few years have doubtless noticed that one song is played at every parade, march, party, and other gay event: Sister Sledge’s song *We Are Family*.<sup>4</sup> This song suggests that same sex couples can create legitimate families. Its perennial popularity reflects the gay community’s efforts to win social legitimacy as families. This goal could be achieved in two ways, either by successfully arguing that gay families are as natural as heterosexual ones, or by attacking the very idea that some families are natural while others are unnatural.<sup>5</sup> I have noticed in the panels today a theme of denaturalizing the family as a part of reorienting law and sexuality. In that same vein I would like to suggest that we pick a new theme song to accompany the efforts of sexually marginalized people to denaturalize the family. The song I suggest is Queen’s *We Are the Champions*.<sup>6</sup>

As a song played at virtually every sporting event graced by a sound system, *We Are the Champions* is familiar to everyone. Another benefit is that the very title suggests an offensive rather than defensive posture, declaring victory rather than arguing for inclusion. Rather than asserting a right to inclusion in the family as it stands, an add-and-stir approach suggesting that legal recognition of same-sex relationships will not significantly alter the family, the song recognizes an adversarial posture towards a legal system that is fundamentally hostile to our very humanity, challenging us to fashion some sort of new regime that includes gay people and other marginalized groups. Moreover, the group’s name, Queen, suggests affiliation with the gay community. The fact that a group of men who call themselves Queen sing this extraordinarily butch song (“we are the champions/ no time for losers/ we are the champions of the world”),<sup>7</sup> which is played in the extraordinarily butch environment of athletic contests, references the contingency of gender identity by aligning nelly queens with brute physical strength. Imagine crowing at a gay pride march, “we are the champions, no time for losers, we are the champions of the world.”

If *We are the Champions* is adopted as the new gay theme song, two questions must be addressed: who are “we,” and what does it mean to be a champion. One way to answer these questions is by adopting a “queer” posture. *Queer* is a post-modern term of art adopted by queer theorists.<sup>8</sup> Related to, but separate from the

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<sup>4</sup>Sister Sledge, *We are Family*, MILLENNIUM DISCO PARTY (2000).

<sup>5</sup>The second approach challenges the naturalized model of family to suggest that it should be replaced by some other model, such as a functionalist model that recognizes various intimate affiliations based on the needs of the participants rather than a judgment that some relationships, deemed natural, get premiere rights and responsibilities, while others, deemed unnatural or less natural, receive either obloquy or lesser rights and responsibilities than the relationships deemed natural. This essay focuses on this approach. For further discussion, see Ertman, *supra* note 2.

<sup>6</sup>Queen, *We Are the Champions*, QUEEN’S GREATEST HITS (1992).

<sup>7</sup>*Id.*

<sup>8</sup>Lisa Duggan, *Making It Perfectly Queer*, in *SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE* 155 (Lisa Duggan and Nan Hunter eds., 1995).

term gay, the term queer affects a significant theoretical change that explicitly rejects the relevance of conduct and status in determining identity. Just as orange juice is no longer only for breakfast, as Anita Bryant said in the 1970s, queer sexual orientation is no longer only for those who engage in (or desire to engage in) same-sex sexuality.

According to queer theory, the delineations between gay and straight are fundamentally contingent: people come and go from each category during their lives, and membership can be determined by a number of potentially conflicting criteria, including conduct, desire and non-conformity to conventional gender roles. Thus, being queer is not based on what you do, nor is it based on how you were born. What defines a person as queer is what she or he believes. If one believes that subordination is bad, if one opposes homophobia, if one opposes racism, if one opposes sexism, then one is queer. I am not alone in defining a sexual orientation based on epistemological opposition to subordination.<sup>9</sup> At the end of the movie *In and Out*<sup>10</sup> the high school teacher played by Kevin Kline might lose his job because he comes out as gay. The defining moment is when one by one, all of his friends, students, and colleagues, proclaim that they are also gay. One can read this moment in the film as the osmosis of high theory into popular culture. We know that many or most of the characters who come out as gay in order to defend the gay teacher are involved in or desire only opposite-sex sexual contact. But they are not coming out as people who desire or engage in same-sex contact. Instead, they come out as opponents to subordination on the basis of marginalized sexuality, making the marginalized position majoritarian merely by altering the definition of gay from conduct or status to belief.

Under this theory, the queers are those who oppose subordination. Building on the insights of critical legal studies, critical race theory, and feminist legal theory, queer legal theory seeks to intervene in subordination on the basis of sex, gender, race, class and sexual orientation. If “we are the champions,” queer is one way to understand who “we” are.

The next question turns on the issue of champions. Those of us opposed to subordination might feel uncomfortable trumpeting “we are the champions, no time for losers, we are the champions of the world,”<sup>11</sup> as this declaration seems inconsistent with equality. Few anti-subordination advocates would want to divide the world into champions and losers. I would like to suggest, however, that there might exist something akin to an anti-subordination champion. We could build on our re-definition of marginalized sexuality as queer rather than gay, and visualize an outcome in which “being a champion” means to champion anti-subordination.

With a new theme song and sense of our task, the question remains on how society is to attain this goal. Post-structuralism teaches that multiple ways exist to tackle particular problems, and progressive movements include a tremendous diversity of good faith anti-subordination perspectives.<sup>12</sup> Rejecting this

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<sup>9</sup>See, e.g., Michael Warner, *Introduction*, in *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* (Michael Warner ed., 1993).

<sup>10</sup>*In and Out* (Paramount Pictures, 1997).

<sup>11</sup>Queen, *supra* note 6.

<sup>12</sup>See, e.g., Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 99 U. CHI. L. FORUM 21, 46-48 (1999) (describing various strands of feminism).

methodological multiplicity results in an essentialism that will not hold up under scrutiny. Michael Warner suggests in his recent book that Hawaii's reciprocal beneficiaries legislation, providing many of the benefits of marriage (though not all of them by a long shot) is a "politically brokered compromise" and a dangerous form of second class citizenship.<sup>13</sup> I suspect that Warner's view is too narrow. Reciprocal beneficiaries legislation allows same sex couples, and other couples who are barred from marrying, to engage in some partnership-related activities, recognized and validated by state law.<sup>14</sup> The movement to broaden the range of state-recognized intimate affiliations requires that advocates seek both marriage and alternatives to marriage (such as civil unions in Vermont, reciprocal beneficiary relationships in Hawaii, and domestic partnership protections in other jurisdictions). These alternative claims complement rather than compete with one another: if the Hawaii Supreme Court had not been on the verge of recognizing same-sex marriage, then the Hawaii Legislature would not have responded by enacting what was at the time the broadest set of rights and responsibilities accorded to same-sex couples in the U.S.<sup>15</sup> Moreover, a legal regime that recognizes only marriage (opposite-sex and same-sex) remains subordinating to the extent that it ignores non-marital intimate affiliations and normalizes those who do enter into marriage.<sup>16</sup> The optimal system would instead recognize a range of intimate affiliations, including marriage, but not preferencing it as morally, religiously or naturally superior.<sup>17</sup> Recognizing reciprocal beneficiaries alongside domestic partnerships, civil unions, and marriage is consistent with this larger goal. In other words, multiple modes of legal claims can co-exist and need not be compared along zero-sum lines. Among the array of legal claims are the ones that mine private law to reconstruct our understandings of intimate affiliation.

The two examples of re-structuring the legal regulation of intimate affiliations that I will address here may seem retrograde or assimilationist. However, there is an argument to be made that they are also interventions in conventional ways of seeing both problems and solutions. Specifically, privatized understandings of intimate

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<sup>13</sup>MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS AND THE ETHICS OF QUEER LIFE* 126 (1999). The same arguments can be made regarding Vermont's civil unions, a parallel status to marriage that is available only to same-sex couples.

<sup>14</sup>In Hawaii reciprocal beneficiaries must be barred from marrying, so same sex couples can be reciprocal beneficiaries. HAW. REV. STAT. §§ 572-1 to 572-7 (Supp. 1999). In Vermont, in contrast, reciprocal beneficiaries must be barred from both marriage and civil unions so that same-sex romantic couples cannot be reciprocal beneficiaries in Vermont. VT. STAT. ANN. tit. 15, §§ 1201-1207 (Supp. 2000).

<sup>15</sup>Susan Essoyan, *Hawaii Approves Benefits Package for Gay Couples*, L.A. TIMES, April 20, 1997, at A3.

<sup>16</sup>See Nancy Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not 'Dismantle the Legal Structure of Gender in Every Marriage'*, 79 VA. L. REV. 1535 (1993); Paula Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J. L. & POL'Y. 107 (1996); Janet E. Halley, *Recognition, Rights, Normalization, Regulation: Rhetorics of Justification in the Same-Sex Marriage Debate*, in *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN, AND INTERNATIONAL LAW* (Robert Wintemute & Mads Andenaes eds., 2000).

<sup>17</sup>Ertman, *supra* note 2.

affiliation contribute to the denaturalization of the conventional heterosexual family, making it possible to recognize same-sex and other marginalized affiliations. I will describe two examples. The first relates to same-sex cohabitation contracts, and the second proposes importing debtor-creditor law to the law governing heterosexual marriage.

First, same-sex cohabitation contracts. It is consistent with the current direction of doctrine and theory regarding same-sex sexuality to mine the emancipatory potential of relationship contracts. In 1992, the Georgia Supreme Court enforced a cohabitation contract between two lesbians, named Croke and Gilden respectively.<sup>18</sup> Gilden sought specific performance of their written relationship contract, which contained a merger clause. A merger clause provides that the writing represents the complete agreement of the parties, and that evidence from outside the writing is not admissible to determine the meaning of the agreement.<sup>19</sup> Gilden came to court saying: we have a writing, it contains a merger clause, please enforce it. Croke tried to prevent the court from enforcing the agreement, arguing that the agreement was unenforceable as it was supported by illicit and immoral consideration. The Georgia Supreme Court rejected Croke's argument. It invoked the parol evidence rule, which is the legal equivalent of putting on blinders, relying on the merger clause to conclude that the court can only look at the writing and not at any extrinsic evidence.<sup>20</sup> It refused, in other words, to consider whether the relationship agreement between two female romantic partners was supported by illicit and immoral consideration. As a result, the Georgia Supreme Court enforced the same-sex relationship contract.<sup>21</sup>

Similarly, in *Posik v. Layton*, the Florida Court of Appeals enforced a same-sex cohabitation contract.<sup>22</sup> Just as the Georgia Supreme Court invoked the classical contract doctrine of parol evidence, the Florida court invoked the liberal ideal of freedom of contract to enforce the cohabitation agreement.<sup>23</sup> While *Croke v. Gilden* was decided in the shadow of *Bowers v. Hardwick*,<sup>24</sup> *Posik v. Layton* was decided in the shadow of Florida's affirmative bans on same-sex marriage and adoption by gay people.<sup>25</sup> The *Posik* court used freedom of contract rhetoric to navigate around the shadow of the anti-gay law:

Even though the agreement was couched in terms of a personal services contract, it was intended to be much more. It was a nuptial agreement

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<sup>18</sup>*Croke v. Gilden*, 414 S.E.2d 645 (Ga. 1992).

<sup>19</sup>JAMES J. WHITE & ROBERT S. SUMMERS, UNIF. COMMERCIAL CODE 103-4 (5th ed. 2000).

<sup>20</sup>*Croke*, 414 S.E.2d at 646. It further reasoned that even if the parol evidence was relevant, the sexual element of the relationship between Croke and Gilden was "incidental to the contract rather than required by it." *Id.*

<sup>21</sup>*Id.*

<sup>22</sup>695 So.2d 759 (Fla. App. 1997), *review denied*, 699 So.2d 1374 (Fla. 1997).

<sup>23</sup>*Id.* at 761.

<sup>24</sup>478 U.S. 186 (1986) (upholding Georgia's criminal sodomy statute as applied to people engaged in same-sex activity).

<sup>25</sup>*Posik v. Layton*, 695 So.2d 759, 761 (1997), *review denied*, 699 So.2d 1374 (Fla. 1997).

entered into by two parties that the State prohibits from marrying. But even though the State has prevented same-sex marriages and same-sex adoptions it has not prohibited this type of agreement. By prohibiting same-sex marriages, the State has merely denied homosexuals the rights granted to married partners that flow naturally from the marital relationship. . . . But the State has not denied those individuals their right to either will their property as they see fit nor to privately commit by contract to spend their money as they choose. The State is not thusly condoning the lifestyles of homosexuals or unmarried live-ins, it is merely recognizing their constitutional private property and contract rights.<sup>26</sup>

This language suggests that contract law may provide an under-explored mechanism whereby marginalized people, here gay people, can obtain some rights (and incur responsibilities) that they might not otherwise.

While contract doctrine, such as the parol evidence rule, allows the court to recognize same-sex relationship contracts, it also presents unmistakable dangers. *Crooke* encourages same-sex couples to be quiet about their personal lives and about their sexuality in particular.<sup>27</sup> If the writing between Crooke and Gilden had included reference to their relationship such as a recitation of their reason for entering the agreement (by referencing the exchange of services of a “lover, companion, homemaker, travelling companion, housekeeper and cook”),<sup>28</sup> the court might have refused to enforce the agreement, reasoning that the agreement’s “rendition of sex and other services naturally flowing from sexual cohabitation was an inseparable part of the consideration for the so-called cohabitation agreement.”<sup>29</sup> The parol evidence rule merely excludes extrinsic evidence, not evidence in the writing itself. Moreover, power disparities within relationships may jeopardize free choice in entering the agreement. These are important questions for people who are concerned with power imbalances. However, as a practical matter Gilden got more than she would have without asserting her rights under the cohabitation contract. She enjoyed specific performance, and at least some legal visibility. The judges had to look at her as a legal subject and citizen.

In prior work I have argued that the ability to contract can be part of what constructs one as a legal person.<sup>30</sup> In the Nineteenth Century and beforehand, white women and African-American men and women were legally defined in part by their inability to enter binding contracts.<sup>31</sup> Those doctrines changed with the advent of the

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<sup>26</sup>*Id.*

<sup>27</sup>Martha M. Ertman, *Contractual Purgatory for Sexual Minorities: Not Heaven, But Not Hell Either*, 73 *DENV. U. L. REV.* 1107 (1996).

<sup>28</sup>*Jones v. Daly*, 176 Cal. Rptr. 130, 134 (Ct. App. 1981) (refusing to enforce a same-sex relationship contract on the grounds that its reference to the relationship of the parties as lovers made it a meretricious contract).

<sup>29</sup>*Whorton v. Dillingham*, 248 Cal. Rptr. 405, 410 (Ct. App. 1988) (distinguishing *Jones v. Daly*, 176 Cal. Rptr. 130, 134 (Ct. App. 1981)).

<sup>30</sup>Ertman, *supra* note 27, at 1162-64.

<sup>31</sup>*Id.* at 1163.

Married Women's Property Acts and 42 U.S.C. § 1981.<sup>32</sup> In a nutshell, the Married Women's Property Acts provided that married women have the right to contract and own property.<sup>33</sup> Similarly, § 1981 provided that "all persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."<sup>34</sup> As with the cohabitation contract cases, contract here presents a double-edged sword presupposing control over property and equality of bargaining power. However some of the problems of inequality inherent in contract may be addressed by accounting for the ways that law and society influence each other. The intermediate step of recognizing gay people's contractual rights could set the stage for a more full exercise of rights.<sup>35</sup>

One final benefit of contract analysis is related to issues of moral rhetoric. Gay and other marginalized people tend to suffer moral condemnation because of their marginal (and often minority) status. Majoritarian morality is one of the primary impediments to equality for sexual minorities. Majoritarian morality often supports traditional family values, defining heterosexual marriage as legitimate because of its difference from non-heterosexual, non-marital arrangements. Contract theory and doctrine offer a respite from majoritarian and moral views. Same sex couples, for example, can contract for rights and responsibilities that they cannot get from a legislature that is held hostage to majoritarian morality. In sum, contractual analysis of same sex relationships is both a practical solution to the marginalization of most gay couples and a theoretical foundation for constructing gay personhood.

Having explored how contract doctrine can facilitate legal visibility for same-sex couples, I now turn to focus on the heterosexual family. My second example of how private law mechanisms can reconstruct the family proposes importing debtor-creditor law to family law to redistribute power and assets within the heterosexual family. In an article titled *Commercializing Marriage*,<sup>36</sup> I proposed importing Uniform Commercial Code Article 9 to domestic relations law as a means to reimburse primary homemakers for their contributions to family wealth.<sup>37</sup> Article 9 of the UCC governs the relationship between a debtor and a creditor when the creditor takes an interest in collateral to secure payment of a debt or performance of an obligation.<sup>38</sup> My proposal provides a way to recognize the ways in which primary wage earners owe a debt to their primary homemaking spouses. Specifically, primary homemakers contribute to primary wage-earners' earning potential when

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<sup>32</sup>*Id.* at 1163-64.

<sup>33</sup>For an excellent discussion of the evolution of married women's property acts, see Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994).

<sup>34</sup>42 U.S.C. § 1981 (1994).

<sup>35</sup>For an argument for the progressive potential of recognizing marginalized people's ability to engage in market relationships, which she calls "economic personality," as distinct from "political personality," see Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 242 (1999).

<sup>36</sup>Ertman, *supra* note 3.

<sup>37</sup>*Id.*; U.C.C. § 9-101 *et seq.* (1990).

<sup>38</sup>U.C.C. §§ 9-102; 1-201(37) (1990).

they perform homemaking services and forego opportunities to develop their own earning potential. To recognize this debt and provide a self-help remedy if the primary wage-earner does not repay it by sharing his income with his primary homemaking spouse (i.e., if the couple divorces), I suggest that the couple execute what I call a Premarital Security Agreement (PSA) at the outset of the marriage. In the PSA, the spouses agree that if a debt arises during the marriage through the primary homemaker's contributions to family wealth, the primary wage-earner must repay that debt to the primary homemaker. This model gives the socially weak primary homemaker a very powerful socio-economic role as an Article 9 secured creditor.<sup>39</sup> Those familiar with Article 9 know that being a secured creditor is a powerful advantage, in large part because you get repossession rights. If the debtor refuses to pay, you can seize the collateral, and either keep it or sell it to pay off the debt.<sup>40</sup> The private industry of "repo people," hired by homemakers, out seizing computers and cars and other collateral owned by primary wage-earners, could destabilize marriage as a hierarchical institution.

It may seem strange to talk about heterosexual marriage when this conference has focused on same-sex sexuality. Why should gay people care about the plight of displaced homemakers? I suggest that queers should be concerned about the non-commodification of homemaking labor. Not just to be friendly, not even to be liberal, but in fact because the definition of queer demands we pay attention to gender subordination generally, not just in the context of same-sex sexuality. The re-definition of queer posits that identity is socially constructed, and that identity constructions can change in ways that alleviate subordination.<sup>41</sup> According to queer theory (along with postmodern theory and much of feminist theory), sex, race, gender and sexual orientation are not natural, but rather social artifacts.<sup>42</sup> These identity categories are not transhistorical, but instead change in various contexts. For example, sex could be determined by a lot of things. It could be determined by your genitalia, by your chromosomes, by your identity (what you choose to call yourself), or by secondary sexual characteristics. Clearly some people change their sex, or do not neatly fit into the category man or women. Thus we see that sex is not essential, is not biological, is not inevitable.<sup>43</sup> Social judgment rather than biological fact, declares that a person is male or female.

Similarly, race is socially constructed. At various times race has been determined in different ways. Until recently, the U.S. Census did not ask people to identify their race. The census taker instead looked at a person and made a racial

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<sup>39</sup>Ertman, *supra* note 3, at 94-95.

<sup>40</sup>U.C.C. §§ 9-501 to 9-505 (1990).

<sup>41</sup>Martha M. Ertman, *Oscar Wilde: Paradoxical Poster Child for Both Identity and Post-Identity*, 25 L. & SOC. INQ. 153 (2000).

<sup>42</sup>*Id.* at 169-71.

<sup>43</sup>*See, e.g.*, Littleton v. Prange, 9 S.W.3d 223 (1999) (holding that a transsexual woman is biologically male). Two sexes do not exhaust the possibilities. As one commentator explained, "I am biologically female but don't identify as a woman. I look like a man but am not a man. The most suitable word to describe me is transgendered." Jennifer Levi & Shannon Minter, *Female to Male, Nine to Five*, GIRLFRIENDS, June 2000, at 10 (quoting Jennifer Levi, a "trans-identified lesbian").



classification based on appearance (i.e., skin color or facial features).<sup>44</sup> Over time the Census gradually evolved toward asking people to determine their own race. Along the line, multi-racial people were classified differently at different times. Sometimes race turned on the father's race, sometimes on the race of the non-white parent, and still other times on the mother's race.<sup>45</sup> The changing methods of determining race demonstrate that it is a social construction rather than biological fact.

Sexual orientation is also socially constructed. It can be based on identity (what one calls oneself), desire (past or current), activity (past or present), or gender performance. Particular situations highlight the difficulty of any particular method of determining sexual orientation. Are female cohabitants who were once lovers but have not had sex in years still lesbians? If they are sexual, but do not call themselves lesbians, are they gay? What is the sexual orientation of a heterosexually married woman who desires same-sex sexual contact but does not act on that desire? How about a woman who identifies as gay but desires sexual contact with men? What if she has had most sexual experiences with men, but now is sexual with a woman? How about a woman who has been heterosexually married for years, but has affairs with women? What if a woman is romantically involved with a male-to-female transsexual? The judgment calls required to answer these questions reveal that sexual orientation, like gender and race, is socially constructed rather than grounded in biological fact.

One danger of focusing on the social construction of identity is that society tends to focus on marked, marginalized identities. We talk about the contingency of African-American identity, not whiteness. We talk about the contingency of gay and lesbian categories, not heterosexuality. This pattern is dangerous, as it leaves the unmarked category (whiteness, heterosexuality, maleness) unchallenged in its naturalized status. As Dorothy Allison and Esther Newton urged, it is imperative to deconstruct heterosexuality first.<sup>46</sup> One effective way to deconstruct heterosexuality (in other words, to denaturalize the heterosexual family) is to intervene in its legal construction. Every proposal to destabilize the construction of the family as natural, biological or inevitable implicitly furthers this project.

Commercializing marriage and contractualizing intimate affiliation generally are ways to destabilize the construction of one form of intimate affiliation ("the family") as natural, biological, or inevitable. Commercializing marriage, in particular, denaturalizes the family in at least four ways. It could contribute to destabilizing compulsory heterosexuality, demonstrate the performativity of gender and sexual orientation, queer the state, and pave the road for state recognition of same-sex relationships.

If queers sign on to projects such as alleviating the plight of displaced homemakers, doing so could also benefit gay people by denaturalizing the family. We have quite a long way to go in dismantling what Adrienne Rich famously called

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<sup>44</sup>U.S. Department of Commerce, *Statistical Abstract of the United States* 2 (1959); U.S. Department of Commerce, *Statistical Abstract of the United States* 3 (1971); U.S. Department of Commerce, *Statistical Abstract of the United States* B-2 (1980).

<sup>45</sup>*Id.*

<sup>46</sup>Lisa Duggan, *supra* note 8, at 179, 185.

compulsory heterosexuality.<sup>47</sup> By increasing financial power for women in heterosexual relationships, commercializing marriage creates exit options for women. Providing a way out is undoubtedly consistent with queer theory and political goals.

A second way that private law imports to domestic relations law denaturalize family is that contractual models of intimacy demonstrate the performative nature of gender. Judith Butler has insightfully written about the social construction of gender, arguing that it is not real, true or biological, but rather a performance.<sup>48</sup> She uses the example of drag queens to illustrate that there is nothing real about sex or gender. A man in a dress shows that gender is a performance, revealing that women in dresses similarly perform gender. Even claims that gender is natural reveal the contingency of gender. When Aretha Franklin sings "You Make Me Feel Like a Natural Woman"<sup>49</sup> the operative term is *like*, suggesting that Aretha declares that she can only impersonate the real thing, because there is no such a thing as a natural woman – only the idea that gender is natural.<sup>50</sup> Just listing a few of the activities that many women engage in each morning to prepare to face the world, such as styling hair, shaving legs and underarms, plucking eyebrows, and bleaching mustaches, demonstrates that there is no such thing as a natural woman.<sup>51</sup> As Simone de Beauvoir famously stated, "one is not born a woman, but rather becomes one."<sup>52</sup>

A third reason to champion private law interventions into domestic relations law is that doing so has the potential to queer the state. Lisa Duggan has pointed out that queer theory and activism, which is really what this symposium explores, often seem to be headed in opposite directions.<sup>53</sup> She suggests that activism and theory should be both transformative and effective; we need to be both liberational and subversive.<sup>54</sup> Just seeking same-sex marriage all by itself is only going to be

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<sup>47</sup>Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *THE LESBIAN AND GAY STUDIES READER* 227 (Henry Abelove et al. eds., 1993).

<sup>48</sup>JUDITH BUTLER, *GENDER TROUBLE* (1990).

<sup>49</sup>ARETHA FRANKLIN, [YOU MAKE ME FEEL LIKE A] NATURAL WOMEN, *THE VERY BEST OF ARETHA FRANKLIN: THE 60'S* (1994).

<sup>50</sup>Judith Butler, *Imitation and Gender Subordination*, 27-28 in *INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES* (Diana Fuss ed., 1991) ("When Aretha Franklin sings, 'you make me feel like a natural woman,' she seems at first to suggest that some natural potential of her biological sex is actualized by her participation in the cultural position 'woman' as object of heterosexual recognition. . . . [S]he also seems fully and paradoxically mindful that that confirmation is never guaranteed, that that effect of naturalness is only achieved as a consequence of that moment of heterosexual recognition. After all, Aretha sings, you make me feel *like* a natural woman, suggesting that this is a kind of metaphorical substitution, and act of imposture, a kind of sublime and momentary participation in an ontological illusion produced by the mundane operation of heterosexual drag.").

<sup>51</sup>Additional, and common interventions to create female gender identity include applying make-up, selecting appropriate clothing and accessories, and enhancing secondary sexual characteristics such as breast size.

<sup>52</sup>SIMONE DE BOUVOIR, *THE SECOND SEX* 301 (H.M. Parshley ed. & trans., 1974).

<sup>53</sup>Duggan, *supra* note 8.

<sup>54</sup>Duggan, *supra* note 8, at 193.

liberational, it is only going to get some gay people goodies. It seems unlikely to intervene in fundamental hierarchies that elevate some of us as morally or naturally superior to others, and it may not significantly denaturalize the family. Even gay marriage could leave intact the presumption that some kinds of relationships are natural and/or moral thereby deserve legal protection and support while others are stigmatized as unnatural. Doctrinal interventions should therefore be both liberational and transformative. PSAs have the potential to be both. They liberate primary homemakers from the indignity associated with the non-commodification of their contributions to family wealth. They are transformative, showing that the role of primary homemaker and primary wage-earner are performative, that anybody could do them.<sup>55</sup> It could be someone with breasts and a vagina. It also could be somebody with a penis. That very redefinition of a primary homemaker, into someone who has the market characteristics of a secured creditor, powerfully changes family as we currently understand it.

Fourth and finally, importing private law to the law governing intimate affiliations could facilitate state recognition of same-sex relationships. The primary barrier to that recognition is hostility to relationships that are deemed unnatural. As long as the only kinds of relationships recognized by the state are those comprised of one man and one woman, who can engage in penile-vaginal penetration,<sup>56</sup> the state cannot recognize same-sex relationships. There is a myth that this heterosexual dyad is the only kind of real family. Yet this "real family" represents only a fraction of the population; fully thirty percent of American households are "non family," meaning that people live alone or with non-relatives.<sup>57</sup> If we commercialize marriage and contractualize relationships that are often understood as natural, we might over time see intimate affiliation as not necessarily a matter of engaging in natural or unnatural acts, but instead of engaging in agreements about exchanging resources (financial, emotional, social, physical). Under this analysis, legal regulation is functional rather than judgmental. If a consensual adult intimate affiliation exists, the state would not have to shy away from recognizing it on grounds that some religions deem it unnatural.

In conclusion, this panel is about making progress in obtaining benefits for people who are marginalized by law and by society. To paraphrase Catharine MacKinnon, law is not everything, but it's not nothing either.<sup>58</sup> It can be used in a lot of creative ways. Specifically, importing private business models to domestic relations law has the potential to contribute to a reconstruction of law and sexuality to recognize that we can all be champions. At a minimum, a focus on contract sports offers models in which many more of us win than the current, naturalized, model of family.

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<sup>55</sup>Martha M. Ertman, *Reconstructing Marriage: An Intersexional Approach*, 75 DENV. U. L. REV. 1215 (1998).

<sup>56</sup>For further discussion of the penile-vaginal-penetration requirement for legal marriages, see Karla C. Robertson, *Penetrating Sex and Marriage: The Progressive Potential of Addressing Bisexuality in Queer Theory*, 75 DENV. U. L. REV. 1375 (1998).

<sup>57</sup>A STATISTICAL PORTRAIT OF THE U.S. 24 (Mark S. Littman ed., 1998).

<sup>58</sup>CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 116 (1987) ("Law is not everything in this respect, but it is not nothing either.").

