

# WHY LESBIANS AND GAY MEN SHOULD READ MARTHA FINEMAN

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Martha Fineman is the preeminent feminist family theorist of our time. She barely mentions lesbian and gay families; in her article in this symposium issue she does not mention them at all.<sup>1</sup> Nonetheless, this article and her earlier work should be required reading for all those interested in family law from a gay and lesbian perspective, and most specifically for anyone participating in the debate about legalizing marriage for lesbians and gay men. Through reading Martha Fineman, it becomes possible to see that the equality model that seeks a right to marry on equal terms with heterosexuals, and the incantation of “choice,” as in “lesbians and gay men should have the choice to marry,”<sup>2</sup> fail to envision a truly transformative model of family for all people. It is that transformative model that Professor Fineman provides.<sup>3</sup>

For several years, activists and scholars in the gay and lesbian community debated the value of same-sex marriage.<sup>4</sup> It was largely an

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1. Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self Sufficiency*, 8 AM. U.J. GENDER, SOC. POL'Y & L. 13 (2000) [hereinafter Fineman, *Cracking the Foundational Myths*].

2. The clearest exposition of the equality based and “choice” based reasons to make obtaining legal marriage the preeminent issue for lesbians and gay men is contained in 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, 580, 591, 599 (1994-95).

3. Fineman, *Cracking the Foundational Myths*, *supra* note 1, at 16-17.

4. One of the most widely cited set of articles taking opposing views on lesbian and gay marriage was written by attorneys Tom Stoddard and Paula Ettelbrick when both were working at Lambda Legal Defense and Education Fund, the nation's largest lesbian and gay legal organization. See Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation?* and Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry* in LESBIAN AND GAY MARRIAGE (Suzanne Sherman ed., 1992). In addition to the article by Wolfson, *supra* note 2, law review articles reflecting this debate include Nan D. Hunter, *Marriage, Law and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9 (1991); Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 LAW & SEXUALITY 31 (1991); Mary C. Dunlap, *The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 LAW & SEXUALITY 63 (1991); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993); Nancy D. Polikoff, *We Will Get What We*

academic question. No legal theory had ever persuaded a court to require a state to recognize same-sex marriage, and no organization would have wasted its precious political capital lobbying in state legislatures for such a losing cause. But it was a debate with real consequences because the context often was whether the limited resources of gay and lesbian legal organizations should be devoted to pursuing this particular goal. The intra-community debate was thus about both whether marriage was an institution worth trying to enter and whether, of all the pressing reforms needed by gay men and lesbians, marriage should be a priority.

Until 1993, the debates on this topic among the national gay and lesbian legal organizations ended with decisions to stay away from court cases challenging marriage restrictions. *Baehr v. Lewin*<sup>5</sup> changed all that. In *Baehr*, the Hawaii Supreme Court held that the state's ban on same-sex marriage was a form of sex discrimination prohibited by the equal rights amendment to the Hawaii state constitution, and it remanded the case to the trial court for the state to attempt to show that the ban was necessary to achieve a compelling state interest.<sup>6</sup> If the state could not meet this strict scrutiny test, Hawaii's ban on same-sex marriage would fall.

Almost overnight, the conversation about gay and lesbian marriage moved into mainstream America. There, the discussion was not about priorities or strategies for achieving justice for lesbians and gay men. The lines were rather more starkly drawn between those who abhor homosexuality and reject all claims to legitimacy, protection, and acceptance of lesbians and gay men; those embracing lesbians and gay men as full members of a pluralistic society; and those in between (like President Clinton) who purport to value lesbians and gay men but pick marriage as a line in the sand they will not cross. Congress quickly introduced Legislation entitled The Defense of Marriage Act (DOMA),<sup>7</sup> and many state legislatures introduced analogous bills.<sup>8</sup> The federal bill passed easily, codifying "marriage"

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*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). The debate appears in the gay press, see GAY COMMUNITY NEWS, Vol. 21, No. 3-4, pp. 4-5, 25-27, 34-35 (1996), and in the mainstream press, see Andrew Sullivan, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, NEW REPUBLIC, Aug. 28, 1989 at 20, and Fenton Johnson, *Wedded to An Illusion: Do Gays and Lesbians Really Want the Right to Marry?*, HARPERS, Nov. 1996, at 43.

5. 852 P.2d 44, *clarified on grant of reconsideration in part*, 852 P.2d 74 (Haw. 1993).

6. *Id.* (deciding that sex is a suspect category under the Hawaii State Constitution).

7. Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 1 U.S.C. § 7, 28 U.S.C. § 1738C (1996)).

8. See, e.g., Alabama Marriage Protection Act, ALA. CODE § 30-1-19 (1998); ARK. CODE

under federal law as the union of a man and a woman,<sup>9</sup> and permitting states to disregard same-sex marriages approved in other states.<sup>10</sup> The state bills, which generally reaffirmed marriage as a union of a man and a woman and denied recognition in the state to any same-sex marriage performed elsewhere, passed over the course of the subsequent three years in thirty states.<sup>11</sup> Gay and lesbian legal and political organizations reallocated their resources to mobilize around these legislative proposals at both the state and federal level, spearheaded by the Marriage Project at Lambda Legal Defense and Education Fund in New York. Those of us who opposed the allocation of resources towards facilitating marriage for gay and lesbian couples stayed on the sidelines. We were hardly inclined to oppose same-sex marriage in a climate where such opposition expressed anti-gay sentiment; yet neither could we wholeheartedly join in the fight to achieve an end we fundamentally did not embrace.

Those of us who had long opposed advocating for same-sex marriage had tried to reframe the discussion. For example, to those who documented the number of lesbians and gay men who had no access to health care because they did not have insurance through their work and could not be counted as spouses on their partner's health insurance, we argued that health care access should depend upon neither marital status nor employment, but should rather be a right guaranteed to everyone. To those who saw in marriage the ultimate societal approval of lesbian and gay relationships, we paraded the multiplicity of ways in which lesbians and gay men—indeed all people—arrange their intimate relationships and argued that it was a mistake to privilege one form over others.

Many of us grounded our disagreement with lesbian and gay marriage in the radical feminist critique of the institution of marriage. Nineteenth century feminists had many examples of *de jure* inequality to fuel such a critique. Married women could not own property and had no right to custody of their children. Married women could not contract and, indeed, had no legal personhood.<sup>12</sup>

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ANN. § 9-11-109 (Michie 1997); HAW. REV. STAT. ANN. § 572-1 (Michie 1998); MICH. COMP. LAWS ANN. § 551.1 (West 1999); MO. ANN. STAT. § 451.022 (West 1998).

9. See 1 U.S.C. § 7 (1999).

10. See 28 U.S.C. § 1738C (1999).

11. See National Gay and Lesbian Task Force Policy Institute, 1998 CAPITAL GAINS AND LOSSES: A STATE-BY-STATE REVIEW OF GAY, LESBIAN, BISEXUAL, TRANSGENDER, AND HIV/AIDS-RELATED LEGISLATION IN 1998 5 (1998).

12. The Declaration of Sentiments, written at the first Women's Rights Convention held in

Second-wave feminists of the late 1960s and early 1970s still had complaints about the legal status of married women: husbands had the right to select the family domicile; women were required to change their surnames; a man's forced sexual intercourse with his wife was not a rape under the law.<sup>13</sup>

But second-wave feminists had a more searing critique, one which survived the gradual elimination of legally sanctioned dominance by husbands of their wives. Marriage was the principal institution that maintained the patriarchy. Women who married lost their identity, their aspirations and abilities subsumed to those of their husbands. Love, in whose name marriage was exalted, was itself constructed for the benefit of male control over women. Marriage could not be transformed through the eradication of *de jure* inequality because the social, cultural, and economic aspects of marriage were relentlessly resistant to transformation.<sup>14</sup>

The radical feminist critique of marriage encouraged experimentation with other forms of family.<sup>15</sup> Radical feminism also

the United States, in July 1848, contained, among others, the following reflections on women's legal status:

The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. To prove this, let facts be submitted to a candid world. . . . He has made her, if married, in the eye of the law, civilly dead. He has taken from her all right in property, even to the wages she earns. . . . In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master—the law giving him power to deprive her of her liberty, and to administer chastisement. He has so framed the laws of divorce, as to what shall be the proper causes, and in case of separation, to whom the guardianship of the children shall be given, as to be wholly regardless of the happiness of women—the law, in all cases, going upon a false supposition of the supremacy of man, and giving all power into his hands.

Reprinted in MARY BECKER, CYNTHIA GRANT BOWMAN & MORRISON TORREY, *FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* (1994).

13. See generally LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT* 5-22 (1981).

14. See, e.g., Beverly James, *The Dynamics of Marriage and Motherhood*, in *SISTERHOOD IS POWERFUL: AN ANTHOLOGY OF WRITINGS FROM THE WOMEN'S LIBERATION MOVEMENT* 46 (Robin Morgan ed., 1970) [hereinafter *SISTERHOOD IS POWERFUL*]; *Confront the Whoremakers at the Bridal Fair*, in *SISTERHOOD IS POWERFUL* 543-47; SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX* 126-45 (1970).

15. See, e.g., Robin Morgan, *Introduction: The Women's Revolution*, in *SISTERHOOD IS POWERFUL*, *supra* note 14, at xxxiii-xxxiv; Charlotte Bunch, *A Broom of One's Own: Notes on the Women's Liberation Program*, *PASSIONATE POLITICS* 43 (1987) (chapter reprinted from article published in 1970), who wrote:

While not necessarily advocating a total end to family for all people, married and single women in women's liberation are involved in various living experiments. Such experiments include all-female communes, group marriages, cooperative houses, and extended families. Social barriers to these should be abolished, relaxing marriage and divorce laws, changing housing policies that prevent or discourage communal living, challenging attitudes toward 'illegitimate' children, unmarried couples, group living,

produced many tangible benefits.<sup>16</sup> For example, it unmasked violence against women, including marital rape and incest, and created a battered women's movement grounded at its inception in recognition of male supremacy as the source of wife abuse.<sup>17</sup> In the groundbreaking 1978 book, *Kiss Daddy Goodnight: A Speak Out on Incest*,<sup>18</sup> author Louise Armstrong told the stories of child victims of incest by their fathers and stepfathers, locating the cause of such behavior in male abuse of power condoned by society. But as the problems of battering and incest gained mainstream attention into the 1980s, the radical feminist analysis was replaced with models of individual pathology and family dysfunction. The language became gender neutral—domestic violence rather than wife abuse. Ten years after the publication of *Kiss Daddy Goodnight*, Armstrong decried the unwillingness or outright refusal to recognize incest as a gender issue.<sup>19</sup>

As significant as the concrete changes inspired by radical feminism is the fact that the generation of women who came of political age during its prime developed a prism through which to observe and evaluate the entire social, economic, political, and cultural order. This prism accepts the existence of patriarchy, of firmly, historically entrenched male domination of women, and it judges progress in all areas, including the law, by the extent to which the hierarchical power of men over women, and indeed all hierarchical power, is diminished.

Over time, radical feminism's language of power and patriarchy was replaced by the language of equality and choice, liberal notions more easily translated into legal theories. Feminists politically grounded in equality and choice do not see marriage as a fundamentally flawed institution, but rather as a contested site in which equality can prevail if one picks the right man and in which wives can choose whether to stay home and raise children, work outside the home, or do a combination of both. These two themes,

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and so forth. Only through experimentation can we discover what variety of social units meet different people's needs for love and security, without oppressing women, men or children.

16. For an analysis of the effect of radical feminism on women's lives, see Ellen Willis, *Foreword* to ALICE ECHOLS, *DARING TO BE BAD: RADICAL FEMINISM IN AMERICA 1967-1975* (1989).

17. See SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* 238 (1982) ("Since male supremacy is the historical source of battering, and class domination perpetuates male privilege, a long-range plan to end abuse includes a total restructuring of society that is feminist, anti-racist, and socialist").

18. LOUISE ARMSTRONG, *KISS DADDY GOODNIGHT: A SPEAK OUT ON INCEST* (1978).

19. LOUISE ARMSTRONG, *KISS DADDY GOODNIGHT: TEN YEARS LATER* 277-78 (1987).

equality and choice, dominate the rhetoric surrounding the push for same-sex marriage.<sup>20</sup> In contemporary feminist legal theory, it is Martha Fineman whose work goes farthest in illuminating the deficiencies in this approach.<sup>21</sup>

Professor Fineman is renown for her critique of how the equality model has hurt divorced women with respect to both economic consequences<sup>22</sup> and custody determinations.<sup>23</sup> She has also written eloquently of continuing inequality between husbands and wives in spite of the fiction of equality facilitated by the gender neutral language of today's family law.<sup>24</sup> In her book *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*,<sup>25</sup> Fineman brought her analysis to another plane by re-envisioning the legal construction of family relationships. In *The Neutered Mother*, Fineman introduces the concepts of inevitable and derivative dependencies, upon which she builds in her article in this symposium.<sup>26</sup> She criticizes custody, paternity, support, and welfare laws that elevate the importance of the father, while simultaneously denigrating the work of mothering done overwhelmingly by women.<sup>27</sup> She rejects the incantation of gender neutrality in the face of overwhelming evidence that gendered lives continue unabated and that acknowledgment of such reality is necessary "to remedy socially and culturally imposed harms

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20. See Wolfson, *supra* note 2, at 580-99 (discussing the critique of marriage as an "inherently problematic" institution and the desire of the gay community to attain the equal right to marry).

21. See *infra* notes 22-24 and accompanying text (reviewing Fineman's concepts regarding the legal construction of family and her arguments against gender-neutral principals within family law discussions).

22. Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789 (examining the feminist reform movement leading to the revision of rules governing the economic consequences of divorce in Wisconsin).

23. Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107 (critiquing the use of social science data to create new legislation regarding child custody policies). Fineman and Opie analyze contributing factors in the process such as the history of child custody rules, recent challenges to the norm of mother custody, and new father custody studies. *Id.* at 107.

24. See Martha L. A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2198-2203, 2208-10 (1995) (reviewing the linguistic transition from the hierarchical common law marriage to the egalitarian partnership marriage, and the inconsistent reality of today's real-life family).

25. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995) [hereinafter FINEMAN, *THE NEUTERED MOTHER*].

26. FINEMAN, *THE NEUTERED MOTHER*, *supra* note 25, at 161-64.

27. See FINEMAN, *THE NEUTERED MOTHER*, *supra* note 25.

to women.”<sup>28</sup> Thus, she advocates the abolition of marriage as a legal category and its replacement with protection for the Mother-Child Dyad as the core, legally privileged, family connection.<sup>29</sup>

Fineman is careful to limit her proposal to abolition of marriage as a *legal* category.<sup>30</sup> Ceremonies, secular or religious, could continue if they suited a couple’s desire for public or sacred affirmation.<sup>31</sup> But such ceremonies would have no legal consequences.<sup>32</sup> With this, the state would lose its interest in bolstering one form of family intimacy, and voluntary adult sexual relationships would be none of the state’s business. To Fineman, there is no good reason to elevate a monogamous, adult, sexual relationship to an institution with a privileged position in the law.<sup>33</sup> As long as such an institution exists, she writes:

It will continue to occupy a privileged status and be posited as the ideal, defining other intimate entities as deviant. Instead of seeking to eliminate the stigma by analogizing more and more relationships to marriage, why not just abolish the category as a legal status and, in that way, render all sexual relationships equal with each other and all relationships equal with the sexual?<sup>34</sup>

On the other hand, the relationship that needs the resources and protection of society is the relationship between inevitable dependents, paradigmatically children, and their caretakers. As she says in her article in this issue, “without [this type of] caretaking in the aggregate, there could be no society.”<sup>35</sup> As Fineman envisions it, the social and economic subsidies now provided to the marital unit would be reallocated and redistributed to the unit consisting of inevitable dependents and their caretaker.<sup>36</sup> This unit would also be

28. FINEMAN, THE NEUTERED MOTHER, *supra* note 25, at 48.

29. Fineman uses gender specific terminology so as not to mask the reality that mothers overwhelmingly perform the function of caretaking. Gender neutral terminology belies the fact that men and women live gendered lives. Fineman acknowledges, however, that men can be mothers and considers references to the Mother-Child Dyad as a metaphor for the relationship between inevitable dependants and their caretakers. FINEMAN, THE NEUTERED MOTHER, *supra* note 25, at 234-35.

30. FINEMAN, THE NEUTERED MOTHER, *supra* note 25, at 228.

31. See FINEMAN, THE NEUTERED MOTHER, *supra* note 25, at 229 (noting that couples would have to make separate agreements to govern areas traditionally covered by marriage).

32. See FINEMAN, THE NEUTERED MOTHER, *supra* note 25, at 229 (articulating that the laws governing society generally would control male and female relationships).

33. FINEMAN, THE NEUTERED MOTHER, *supra* note 25, at 229-30.

34. FINEMAN, THE NEUTERED MOTHER, *supra* note 25, at 230.

35. Fineman, *Cracking the Foundational Myths*, *supra* note 1, at 21.

36. FINEMAN, THE NEUTERED MOTHER, *supra* note 25, at 231-32. See also Fineman, *Cracking the Foundational Myths*, *supra* note 1, at 22-25, 28 (arguing that those assigned the role of

entitled to family privacy, thereby severely limiting unwanted state intervention in a fashion reserved today only for marital family units.<sup>37</sup>

This proposal beautifully reframes the demand for equality underlying the push for lesbian and gay marriage. Under Fineman's proposal,<sup>38</sup> there is complete equality between adult, coupled heterosexual and homosexual relationships. Neither relationship receives legal recognition by the state. Further, there is equality in the protection afforded a lesbian or gay parent providing primary care to a child and that afforded a heterosexual parent providing primary care to a child.<sup>39</sup> Both are recognized as performing the public good of the caretaking of inevitable dependents.

Fineman's work also exposes the defects in the position that marriage should be a choice available to lesbians and gay men. Those who hold this position generally observe that the availability of legal marriage would not require that lesbians and gay men marry. Rather, it would give them the choice to do so.<sup>40</sup> Because Fineman's work addresses primarily the work of raising children without pay or other remuneration, she is also susceptible to responses that invoke the mantra of choice. Women *choose* to become primary caretakers of children; they are not legally mandated to do so. Women *choose*, and should have the right to choose, to stay home with their children or to circumscribe their employment options in order to be primary caretakers. No feminist theory should impugn such choices, and it is unnecessary and unwise to ascribe injustice to the gendered nature of childrearing, including the derivative dependency it produces, when such a gendered situation is merely the accumulation of the choices made by women.

In *Cracking the Foundational Myths*, Fineman provides a powerful answer to such arguments:

The status of derivative dependency is structured by and through existing societal institutions, according to a script rooted in

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caretaker become independent only when they have access to necessary resources, i.e. money and health care).

37. See FINEMAN, THE NEUTERED MOTHER, *supra* note 25, at 231-32.

38. FINEMAN, THE NEUTERED MOTHER, *supra* note 25, at 231-32.

39. See FINEMAN, THE NEUTERED MOTHER, *supra* note 25, at 231-32; see also Fineman, *Cracking the Foundational Myths*, *supra* note 1, at 18-21. Fineman's discussion in this issue does not mention the gay or lesbian parent. However, her description of the caretaker/inevitable dependant Dyad allows for the application of family protection equally among heterosexual and gay/lesbian parents.

40. Wolfson invokes choice many times, using his own words or those of others, as a principal value for legalizing same-sex marriage. See Wolfson, *supra* note 2, at 580-81, 585-86, 591, 597, 599, 606.

ideologies, particularly those of capitalism and patriarchy. These scripts function at an unconscious (and therefore, unexamined) level, and channel our beliefs and feelings about what is considered natural and what are appropriate institutional arrangements. When individuals act according to these scripts, consistent with prevailing ideology and institutional arrangements, we say they have chosen their path from available options . . . . We ignore the fact that individual choice occurs within the constraints of social conditions. These constraints include ideology, history, and tradition, [that] funnel decisions into prescribed channels, and often operate in a practical and symbolic manner to limit options.<sup>41</sup>

With respect to the “choice” to marry, the constraints that Fineman describes operate today for heterosexuals. While rejecting an institution they believed incapable of transformation, for a brief historical moment heterosexual feminists chose not to marry but rather to live with their male partners, and raise children. That moment passed at least twenty years ago. Today, although premarital cohabitation is common, long-term, voluntary, non-marital cohabitation, especially if it includes children, is not truly a choice. Although my law students are not a random sample, I explore this question with them in my family law seminar. I have yet to find one woman who believed she could exercise a choice not to marry. One student, involved in a long-term, primary relationship, swore she would not marry out of solidarity with lesbians and gay men who could not. A few years after graduation, a colleague of mine received an invitation to her wedding. I do not blame her. The constraints of ideology, history and tradition that Fineman describes are powerful forces.

The absence of choice in entering heterosexual marriage, and as a legitimate driving force for legalizing same-sex marriage, is evident in the history of domestic partnership benefits. Many, if not most, such benefits, including those provided by my own employer, American University, are limited to same-sex couples.<sup>42</sup> This limitation is imposed explicitly because heterosexual couples can marry. Thus, to obtain the benefits, heterosexual couples must marry. There is no choice. If lesbian and gay couples are permitted to marry, there is every reason to believe that the “choice” to obtain benefits through domestic partnership rather than marriage would disappear.<sup>43</sup>

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41. Fineman, *Cracking the Foundational Myths*, *supra* note 1, at 23-24.

42. AMERICAN UNIVERSITY, FACULTY AND STAFF BENEFITS, A4-A5 (May 1, 1997).

43. For a recent defense of domestic partnership benefits for same-sex couples only, explicitly based on the belief that heterosexual couples should not have the choice to forego

This is not to say that domestic partnership benefits tied to a sexually intimate, adult relationship should be the direction of the future. Martha Fineman is right; the sexually intimate, adult relationship is not the cornerstone of society without which the world would fall apart.<sup>44</sup> The care required of inevitable dependents is a biological necessity, and those who provide such care have a legitimate claim to the collective resources of society. Beyond that, as members of society all individuals need access to food, housing, and health care. One's attachment to another adult in an intimate, sexual relationship should not be the basis for apportioning these basic necessities. As long as benefits are extended on anything other than an individual basis, for example, the health insurance that many employers provide to employees, their spouses, and children (and occasionally domestic partners), the availability of such benefits should be redefined to permit the employee to cover all children and one other individual, without requiring that individual to be the employee's marital or non-marital sexual partner. An ailing mother, an unemployed dear friend, a brother or sister, or an informally adopted kin, all should be acceptable choices for the conferral of benefits now linked to the status as sexual partner.

Supporters of legalizing same-sex marriage are correct when they complain that domestic partnership benefits for gay and lesbian couples while only heterosexual couples can marry perpetuates inequality.<sup>45</sup> They are wrong when they see equal access to marriage as the only way out of this inequality. Abolish marriage as a legal category for everyone. Read Martha Fineman.

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marriage because marriage must be nurtured and encouraged by society, see James M. Donovan, *An Ethical Argument to Restrict Domestic Partnerships to Same-Sex Couples*, 8 L. & SEXUALITY 649 (1998).

44. See generally FINEMAN, THE NEUTERED MOTHER, *supra* note 25, Part 6; see also Fineman, *Cracking the Foundational Myths*, *supra* note 1, at 22-24, 28 (discussing the importance of society's contributions to the well-being of caretakers and dependants).

45. See Wolfson, *supra* note 2, at 606 (arguing that the state "reinforces second-class citizenship" when it creates a separate domestic status that does not include all of the same benefits as marriage).