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## EQUALITY AND JUSTICE FOR LESBIAN AND GAY FAMILIES AND RELATIONSHIPS

*Nancy D. Polikoff\**

When Leslie Blanchard died as a result of AIDS complications in September 1986, he and Miguel Braschi had lived together for 11 years in a rent-controlled New York City apartment leased in Blanchard's name alone.<sup>1</sup> Two months later, the landlord sought to evict Braschi, contending that the law allowed an occupant whose name was not on the lease to remain in the apartment only if he was a surviving spouse or some other member of the deceased tenant's "family."<sup>2</sup> The first appeals court to hear the case ruled that the law included only "traditional, legally recognized familial relationships."<sup>3</sup> The state's highest court, however, ruled that "[t]he intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life."<sup>4</sup> Miguel Braschi won the right to keep his home.

The *Braschi* case was decided in 1989, the same year as the now-iconic Paula Ettelbrick and Tom Stoddard essays.<sup>5</sup> The case provides one lens for assessing both the historical circumstances in which Ettelbrick cautioned against seeking marriage for same-sex couples and the contemporary marriage equality movement.

After reviewing the context for both *Braschi* and the Ettelbrick

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\* Professor of Law, American University Washington College of Law. I would like to thank Emily Stark (WCL '09) for her research assistance; Paula Ettelbrick and John D'Emilio for helpful and provocative conversations as I developed this piece; and Carlos Ball for recognizing the importance of updating the intracommunity debate about marriage. Portions of this article have been adapted from NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE* (2008), reprinted by permission of Beacon Press, Boston.

1. *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 50 (N.Y. 1989).

2. *Id.*

3. *Id.* at 51 (quoting *Braschi v. Stahl Assocs. Co.*, 531 N.Y.S.2d 562, 563 (App. Div. 1988)).

4. *Id.* at 53.

5. See Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, *OUT/LOOK*, Fall 1989, at 9, reprinted in WILLIAM B. RUBENSTEIN, CARLOS A. BALL & JANE S. SCHACTER, *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* 678 (3d ed. 2008); Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, *OUT/LOOK*, Fall 1989, at 14, reprinted in RUBENSTEIN ET AL., *supra*, at 683.

essay, I describe two major developments since 1989 that shape LGBT advocacy today. Those developments are two movements with marriage at their core, one seeking marriage for same-sex couples and the other seeking promotion of life-long heterosexual marriage as the key to social well-being. I then criticize today's efforts towards marriage equality that stray from support for the diverse families formed by LGBT—and heterosexual—people and that ignore underlying injustices in the legal significance of marriage today. I then present an alternate family policy vision, return to the *Braschi* case with a question of where it fits into today's advocacy for gay and lesbian families, and reflect on the way ahead.

## I. THE HISTORICAL CONTEXT FOR THE ETTTELBRICK ESSAY

### A. *Early Family Advocacy*

The early gay rights movement stood squarely with those who supported diverse family forms and who saw the struggle for gay liberation as linked to the struggles of the other social justice movements of the late 1960s and 70s. At the time, marriage was part of the problem, not part of the solution. Marriage was a problem because it channeled everyone into only one approved relationship, it regulated the lives of men and women along gender lines, and it policed the boundary between acceptable and unacceptable sexual expression.

Court victories of that era transformed the legal meaning of marriage. The Supreme Court ruled that unmarried persons had a right to use birth control,<sup>6</sup> that women with unmarried male partners could not be denied public assistance,<sup>7</sup> that children born outside marriage could no longer have a second-class legal status,<sup>8</sup> that all women had the right to terminate a pregnancy,<sup>9</sup> that laws could not discriminate against women in marriage or in the public sphere,<sup>10</sup> and that Congress could not deny food stamps to hippie communes.<sup>11</sup> While none of these were gay rights cases, they all made marriage matter less, thus opening the social and political space for all families that did not fit the traditional form.<sup>12</sup>

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6. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

7. See *King v. Smith*, 392 U.S. 309, 329-30 (1968).

8. See, e.g., *Gomez v. Perez*, 409 U.S. 535, 538 (1973); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 169-70 (1972).

9. See *Roe v. Wade*, 410 U.S. 113, 162-63 (1973).

10. See, e.g., *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); *Frontiero v. Richardson*, 411 U.S. 677, 686-87 (1973); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971).

11. See *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973).

12. In an important essay, historian John D'Emilio analyzes the economic conditions that during this same period of time dramatically reduced the importance of marriage. John D'Emilio, *The Marriage Fight is Setting Us Back*, *GAY & LESBIAN REV.*,

In the political arena, gay rights advocates joined a chorus of voices supporting diverse families. For example, in 1977, lesbian feminists worked alongside their heterosexual sisters at the National Women's Conference in Houston to develop a feminist platform that valued families outside of marriage.<sup>13</sup> The Plan of Action that emerged from that conference included support for both lesbian mothers and mothers raising children on welfare, whom conference chair, Congresswoman Bella Abzug, said "should be afforded the dignity of having that payment called a wage, not welfare."<sup>14</sup>

Two years later, in the context of the White House Conference on Families, the National Gay Task Force joined about fifty moderate and liberal organizations in the Coalition of Families.<sup>15</sup> That coalition endorsed the Equal Rights Amendment, the right to choose abortion, and the "elimination of discrimination and encouragement of respect for differences based on sex, race, ethnic origin, creed, socioeconomic status, age, disability, diversity of family type, sexual preference, or biological ties."<sup>16</sup>

These efforts to transform the meaning of family met strong resistance. At the Houston conference, conservative, anti-ERA activist Phyllis Schlafly led a vocal minority of about twenty percent of the delegates.<sup>17</sup> They argued for maintenance of rigid gender roles within the family, which they claimed to be biologically based, and wrote that "the definition of family should never be extended to in any way include homosexuals or biologically unrelated, unmarried couples or otherwise accord to them the dignity which properly belongs to husbands and wives."<sup>18</sup>

This conservative activism was part of the backlash against gay rights and feminism that encompassed Anita Bryant's "Save the

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Nov.-Dec. 2006, at 13.

13. See NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 20-21 (2008).

14. *Id.* at 21; see *National Plan of Action*, in *THE SPIRIT OF HOUSTON: THE FIRST NATIONAL WOMEN'S CONFERENCE, AN OFFICIAL REPORT TO THE PRESIDENT, THE CONGRESS AND THE PEOPLE OF THE UNITED STATES* 13, 90, 93-95 (1978); *SISTERS OF '77* (Media Projects, Inc. 2005).

15. See Thomas J. Burrows, *Family Values: From the White House Conference on Families to the Family Protection Act*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 336, 336, 340 (John D'Emilio, William B. Turner & Urvashi Vaid eds., 2000). This diverse set of groups included, among others, the American Home Economic Association, Planned Parenthood, National Association of Social Workers, National Organization for Women, Urban League, American Red Cross, and the National Council of State Committees for Children and Youth. *Id.* at 340.

16. *Id.* at 347.

17. See POLIKOFF, *supra* note 13, at 40-41.

18. *Id.* at 41; see also Joan Gubbins et al., *To Establish Justice: Minority Report*, in *THE SPIRIT OF HOUSTON: THE FIRST NATIONAL WOMEN'S CONFERENCE*, *supra* note 14, 265, 265-72.

Children" campaign, which pushed back gay rights ordinances in Dade County, Florida and other cities.<sup>19</sup> These efforts were part of a larger movement against women's reproductive freedom, the equal rights amendment, and all challenges to the "traditional" family.

At the White House Conference on Families, such conservatives formed the National Pro-Family Coalition and articulated that our nation was founded on a strong traditional family, meaning a married heterosexual couple with or without natural children.<sup>20</sup> They sought platform positions opposing feminism, abortion, the ERA, homosexuality, and big government. They argued against unmarried partners, mothers with nonmarital children, and gay and lesbian relationships.

The opposing camps at the White House Conference looked at the variety of family structures in U.S. society and named them differently. Where the Coalition for Families saw family pluralism, the National Pro-Family Coalition saw family breakdown. Family pluralism encompassed everyone who benefited from the demise of legally mandated gender norms and the reduced imperative of marriage. Expanded options for women and new family structures constituted family breakdown for those who considered ideal the "traditional" married heterosexual couple living gendered lives, and who labeled other forms deviant.

The early 1980s saw a push for a status called "domestic partnership" as an alternative to marriage. It was a status available to both same-sex and different-sex couples. Although heterosexuals *could* marry, domestic partnership recognition was consistent with the proposition that they should not have to. Recognition of those who *could not* and those who *chose not* to marry was two sides of the same coin.<sup>21</sup> In Madison, Wisconsin, the Alternative Family Rights Task Force of the Madison Equal Opportunity Commission developed a definition of "domestic partner" beyond couples to those in a "relationship of mutual support, caring, and commitment."<sup>22</sup>

In the late 1980s, gay and lesbian advocates often played critical

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19. See POLIKOFF, *supra* note 13, at 40-43.

20. Burrows, *supra* note 15, at 349.

21. See POLIKOFF, *supra* note 13, at 49. The first policy in the private sphere was enacted by the publication the Village Voice in 1982. *Id.* In 1985, Berkeley and West Hollywood became the first municipalities to enact domestic partner ordinances, with Santa Cruz following suit in 1986. *Id.* at 50.

22. *Id.* at 50-51 (quoting MADISON, WIS., EQUAL OPPORTUNITIES ORDINANCE § 39.03 (2007)). For a detailed and historically important account of the Alternative Family Rights Task Force, including its efforts to obtain protections for the broadest possible definition of family, see Barbara J. Cox, *Choosing One's Family: Can the Legal System Address the Breadth of Women's Choice of Intimate Relationship?*, 8 ST. LOUIS U. PUB. L. REV. 299 (1989).

roles in coalition advocacy on behalf of diverse family structures. Both the state of California and the city of Los Angeles issued task force reports on family diversity. Representatives of gay and lesbian organizations were members of these task forces. The Los Angeles report urged government to define families to reflect the way people actually live.<sup>23</sup> It noted that families care for dependent members, including children, the elderly, the disabled, the sick and the poor; that they provide a haven and source of renewal for family members; and that they are a great source of meaning and satisfaction to individuals.<sup>24</sup> It recommended flexible definitions of family, a ban on marital-status discrimination, and domestic partnership status for two people who lived together and shared the "common necessities of life."<sup>25</sup>

### *B. Constructing the Case for Miguel Braschi*

This was the climate in which the ACLU Lesbian and Gay Rights Project undertook the representation of Miguel Braschi. The victory in that case was the result of a coalition effort on behalf of diverse family forms. Certainly it was a victory for lesbian and gay couples, but the legal issue in the case was the definition of the word "family" in rent control laws. The landlord wanted a narrow definition, limited to married couples and legal relatives such as biological and adoptive parents and children. The strategy of the gay rights lawyers representing Mr. Braschi included the submission of numerous friend-of-the-court briefs explaining how many different types of families would be harmed by such a definition.

The friend-of-the-court brief filed by Lambda Legal was written by Paula Ettelbrick.<sup>26</sup> It noted that the court's decision would affect thousands of nontraditional family units, including gay and lesbian families, heterosexual unmarried couples, and the poor.<sup>27</sup> It argued that traditional families were not more worthy of government protection than alternative families.<sup>28</sup> Gay Men's Health Crisis and several AIDS service agencies filed a brief detailing the circumstances of those like Mr. Braschi, who had cared for his partner who was dying of AIDS.<sup>29</sup>

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23. LOS ANGELES CITY TASK FORCE ON FAMILY DIVERSITY, STRENGTHENING FAMILIES, A MODEL FOR COMMUNITY ACTION 21-22 (1988).

24. *Id.* at 22.

25. *Id.* at 84-85.

26. Brief Amicus Curiae of Lambda Legal Defense and Education Fund in Support of Plaintiff-Appellant, *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (N.Y. 1989) (No. 02194-87).

27. *Id.* at 2, 6-16.

28. *Id.* at 20.

29. Brief Amicus Curiae of the Gay Men's Health Crisis, Inc. et al. in Support of

Briefs from other organizations acknowledged the vast diversity of families in New York and argued passionately for protection for all families. Community Action for Legal Services, a non-profit organization for low-income New Yorkers with seventeen offices in the five boroughs, argued that a narrow definition of family would be devastating for its clients, some of whom lived in functional but not formalized families because formalization through adoption of a child, or divorce of a prior marriage in order to remarry, was financially out of reach. It advocated a functional definition of family and pointed to court decisions describing a family as "a continuing relationship of love and care, and an assumption of responsibility for some other person."<sup>30</sup>

Family Service America (now Alliance for Children and Families), then a network of 290 local agencies providing services to more than 3 million people, pointed out the tremendous diversity of family relationships and argued for a definition reflecting the reality of contemporary family living arrangements.<sup>31</sup> Its own statement of "Family Definition," adopted in January 1988, read:

American family life reflects America's heritage of cultural and ethnic diversity. Family Service America recognizes pluralism of family form. Family Service America views the family primarily in terms of its status as a functional group rather than in terms of its form. Well functioning families are both a building block for and a support to the larger society. Such families provide emotional, physical and economic mutual aid to their members, assisting family members in both survival and well-being. Ideally, such families are characterized by intimacy, intensity, continuity, and commitment among their members.<sup>32</sup>

In its friend-of-the-court brief, Family Service America argued that New York's public policy favored an inclusive definition of family and drew from earlier cases to suggest that a family include those in a single housekeeping unit of relative permanence engaging in activities that are functionally equivalent to those of a more traditionally defined family.<sup>33</sup> It also argued that freedom of association protects choices about entering and maintaining relationships, and that such protections should not depend on a biological tie or a marriage ceremony.<sup>34</sup>

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Plaintiff-Appellant, *Braschi*, 543 N.E.2d 49 (No. 02194-87).

30. Brief of Community Action for Legal Services, Inc., Amicus Curiae at 15, *Braschi*, 543 N.E.2d 49 (No.02194-87).

31. Brief Amici Curiae of Family Service America et al. at 1, *Braschi*, 543 N.E.2d 49 (No. 02194-87).

32. *Id.*

33. *Id.* at 23-24.

34. *Id.* at 34.

The Association of the Bar of the City of New York also filed a friend-of-the-court brief.<sup>35</sup> This organization of about 18,000 lawyers identified among its goals "facilitating and improving the administration of justice" and "promoting reforms in the law."<sup>36</sup> The brief opined that the narrow construction of "member of the . . . family" given by the first appeals court violated "constitutional principles of due process and equal protection."<sup>37</sup> It argued that,

[u]nless reversed, the decision [would] result in widespread discrimination, contrary to public policy, against broad classes of New Yorkers who are already victimized, and often helpless, including the poor, the elderly, people with AIDS, lesbians and gay men, and many others who, merely because they do not fit the traditional family model, will be more likely than others to lose their homes.<sup>38</sup>

The group argued for an inquiry into whether the household was the "functional and factual equivalent of a natural family."<sup>39</sup>

The Braschi decision identified the purpose of the state's rent control laws as protection from the sudden loss of one's home. The court quoted the Webster's Dictionary's first definition of "family" as "a group of people united by certain convictions or common affiliation," and concluded that protection from eviction should extend to "those who reside in households having all the normal familial characteristics."<sup>40</sup> After listing many characteristics that a trial court should consider in applying this test, the court held that the controlling factor should be the "totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties."<sup>41</sup> Miguel Braschi and Leslie Blanchard met that test.<sup>42</sup>

## II. THE LAWYERS DIVIDE OVER MARRIAGE

In the mid-1980s, gay rights litigators from around the country began "roundtable" meetings. At these gatherings, the movement's lawyers shared information on test cases, coordinated legal strategies, and established priorities. Whether marriage for same-sex couples should be one of those priorities was a frequent topic of discussion, and from those discussions emerged the now-iconic

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35. Brief Amicus Curiae of the Association of the Bar of the City of New York in Support of Plaintiff-Appellant, *Braschi*, 543 N.E.2d 49 (No. 02194-87).

36. *Id.* at 1-2.

37. *Id.* at 3.

38. *Id.*

39. *Id.* at 8 (quoting *Group House of Port Wash. v. Bd. of Zoning & Appeals*, 380 N.E.2d 207, 209 (N.Y. 1978)).

40. *Braschi*, 543 N.E.2d at 54-55.

41. *Id.*

42. *Id.*



Ettelbrick/Stoddard essays.<sup>43</sup> Ettelbrick's essay cautioned that advocacy for same-sex marriage was a retrenchment from support for diverse family forms, an attempt to standardize gay and lesbian relationships, and an abandonment of a larger social justice agenda.<sup>44</sup> Stoddard urged access to marriage as the most important issue for every gay organization, based both on the many rights conferred by marriage and the importance of marking the equal significance of same-sex relationships.<sup>45</sup>

Roundtable participants were not satisfied with the rift represented by the Ettelbrick/Stoddard divide. They sought common ground in a position paper designed to capture both the importance of opening marriage to same sex couples and the need to value all families without carving out special status for married couples. Evan Wolfson, then a new Lambda Legal staff attorney, drafted a blueprint for a just policy, entitled Family Bill of Rights.<sup>46</sup> The preamble read as follows:

WHEREAS, Americans value not only their freedom, rights, and identities as individuals, but also the relationships they inherit and form as members of families; and

WHEREAS, the diversity of the cultures within American society and the choices individuals make result in many kinds of living arrangements sharing the values properly associated with family; and

WHEREAS, these defining family values include mutual emotional and financial commitment and interdependence, lives shared together in relationships of dedication, caring, and self-sacrifice; and

WHEREAS, the reality of American life today is that families are formed in many ways, through blood, marriage, and adoption, as well as by choice, commitment, and association, and that, therefore, family can be best defined not by reliance on fictitious legal distinctions, but rather with respect to such attributes as the level of emotional and financial commitment, the manner in which the family members have conducted their everyday lives and held themselves out to society and friends, the reliance placed upon one another for daily family services, the longevity of the family relationship, and any other pattern of conduct, agreement, or action which evidences their intention of creating long-term, emotionally committed relationships; and

WHEREAS, the American tradition of respect for individual freedom in shaping one's own destiny and making important

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43. See *supra* note 5.

44. Ettelbrick, *supra* note 5, at 684-87.

45. Stoddard, *supra* note 5, at 679-82.

46. For a draft copy of this unpublished document, see *infra* Appendix A.

personal choices free of government intrusion, and of encouraging diversity and pluralism warrants that all family relationships that, in the totality of circumstances, possess such attributes be accorded equal respect, recognition, and rights; and

WHEREAS, government actions should encourage, not undermine all families possessing such attributes,

NOW, THEREFORE, we representatives of all of America's diverse families, united in commitment and concern for our family members, our communities, our nation, and each other, do urge the adoption of this FAMILY BILL OF RIGHTS, to protect our equal needs and entitlements in the following areas:

#### I. RECOGNITION

All families have a right to secure formal recognition of their relationships. Where benefits are conditioned upon such recognition, it should not depend on marital relation, genetic history, or other arbitrary distinctions, but rather should reflect the defining family values set forth in the preamble.<sup>47</sup>

The draft Family Bill of Rights went on to address specific areas, including government and employee benefits, child-rearing, and protections in civil and criminal law.<sup>48</sup> Although it included a provision that same-sex couples should be allowed to marry, it made clear that marriage should not be a prerequisite for family recognition.<sup>49</sup>

Consistent with the efforts in *Braschi*, the unmistakable gist of the draft Family Bill of Rights was that *no* family should be penalized because it was not based on marriage. Although the document never progressed beyond draft form, it reflects the efforts of that time to capture a "both/and" approach to work on family issues within the gay rights movement.

#### III. ADVOCACY FOR MARRIAGE—SAME-SEX AND OTHERWISE—IN THE YEARS AFTER THE ETTLEBRICK/STODDARD ESSAYS

Two major developments ensued just a few years after the Ettelbrick/Stoddard essays. The first is that access to marriage for same-sex couples moved from the theoretical to the possible. Since at least 2004, the "marriage equality" movement has become virtually synonymous with the gay rights movement, and the successes and failures of that movement over the last fifteen years have dominated all discussions of LGBT issues. The second is the ascendance of a secular "marriage movement" blaming all social ills on the decline of life-long heterosexual marriage. That movement falls squarely in the

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47. *Id.*

48. *Id.*

49. *Id.*

camp of seeing diverse families as a sign of family breakdown.

As early as 1989, a gay voice emerged urging a shift away from redefining family. Within weeks of the *Braschi* success, commentator Andrew Sullivan published an essay in the *New Republic* entitled *A Conservative Case for Gay Marriage*.<sup>50</sup> He was less than enthusiastic about the *Braschi* ruling. Rather than allowing courts to define family, he wrote, the government should allow gay couples to marry; the generation that did not live through Stonewall (Sullivan was born in 1963) wanted to fit in, he said.<sup>51</sup> He extolled the values of "old-style," "traditional" marriage, asking only that same-sex couples have that option as well.<sup>52</sup>

In 1993, the first book length articulation of gay conservative thought emerged in Bruce Bawer's *A Place at the Table*, which repudiated making claims on behalf of gay people in a broader context, arguing against "alliance politics" and denying any connection between the interests of homosexuals and those of women, racial minorities, or the economically disadvantaged.<sup>53</sup> He said the gay rights movement should be about gay rights and endorsed what he called a conservative case for gay marriage.<sup>54</sup> Two years later, Andrew Sullivan called gay marriage "the only reform that truly matters."<sup>55</sup>

Nineteen ninety-three was also the year that the Hawaii Supreme Court ruled in *Baehr v. Lewin* that the ban on gay marriage would violate the state's constitution unless the state could provide a very strong justification for the ban.<sup>56</sup> Efforts to overturn exclusion from marriage in court thus moved from the category of almost hopeless, but of symbolic importance, to the category of plausible. Once there was a plausible challenge, and one that would be waged regardless of whether the gay rights legal groups lent their support and expertise, the national legal groups entered the litigation. Evan Wolfson began working on the *Baehr* case, and Lambda Legal launched a Marriage Project.

By this point, the underlying purpose of many domestic partnership laws and policies had also begun to change. Employers began granting domestic partner benefits only to same-sex couples,

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50. Andrew Sullivan, *Here Comes the Groom: A Conservative Case for Gay Marriage*, NEW REPUBLIC, Aug. 28, 1989, at 20.

51. *Id.* at 22 ("A need to rebel has quietly ceded to a desire to belong.").

52. *Id.* at 20-22.

53. BRUCE BAWER, *A PLACE AT THE TABLE: THE GAY INDIVIDUAL IN AMERICAN SOCIETY* (1993).

54. *Id.*

55. ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT SEXUALITY* 185 (1995).

56. *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993).

calling it an equity issue for gay employees who could not marry. With this, domestic partnership ceased being about creating alternatives to marriage. One employer went so far as to require domestic partners to affirm that they *would* marry if it became lawful in their state.<sup>57</sup>

Meanwhile, in 1989, the year of Ettelbrick/Stoddard and the draft Family Bill of Rights, the right wing "family values" movement was still distinctly religious. Opposition to gay and lesbian relationships and families, along with rhetoric about the sanctity of heterosexual marriage, developed from Anita Bryant's "Save the Children" campaign to Rev. Jerry Falwell's Moral Majority and Rev. James Dobson's Focus on the Family. Christian religious broadcaster Pat Robertson ran for president in the Republican primary of 1988, and his two-million-strong mailing list allowed him to found the Christian Coalition in 1989.<sup>58</sup>

While religion-based arguments did influence public policy, secular arguments were likely to have a much wider appeal. In 1993, the same year as *Baehr v. Lewin*, "traditional family values" proponents began a shift away from the language of religion to the language of social science in their rhetoric. Their attack was not limited to gay couples. Rather, they asserted that the breakdown of life-long heterosexual marriage had created disastrous social consequences.

Nineteen ninety-three was the year that *Dan Quayle Was Right*, according to an article by social historian Barbara Dafoe Whitehead published in the *Atlantic Monthly*.<sup>59</sup> The title reference was to a speech then-Vice-President Quayle had delivered the previous year in which he blamed the rise of gangs and other social problems on single mothers.<sup>60</sup> The speech became famous for its reference to Murphy Brown, a popular television character played by Candace Bergen, who gave birth on the program as a single mother. Quayle scolded the media for a portrayal that he argued mocked the importance of fathers.<sup>61</sup>

Although Quayle at the time was almost uniformly attacked for

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57. See POLIKOFF, *supra* note 13, at 61 (describing the policy implemented by Fortune 500 Company Oracle).

58. See *id.* at 63.

59. Barbara Dafoe Whitehead, *Dan Quayle Was Right*, ATLANTIC MONTHLY, Apr. 1993, at 47.

60. See POLIKOFF, *supra* note 13, at 63-64.

61. Debra J. Saunders, *Standing Firm and Whining*, SAN FRANCISCO CHRONICLE, Sept. 2, 1994, at A25 (quoting Quayle as saying: "It doesn't help matters when prime time TV has Murphy Brown—a character who supposedly epitomizes today's intelligent, highly paid, professional woman—mocking the importance of fathers by bearing a child alone, and calling it just another 'lifestyle choice.'").

his remarks, Whitehead forcefully sought to rehabilitate his argument. She argued that social science showed that nonmarital births, divorce, and father absence had shattering consequences for children and that an intact two-parent family was necessary to achieve better child outcomes. She presented support for the proposition that family disruption was the "central cause" of poverty, crime, and poor school performance. She criticized feminism, deplored the diminished importance of marriage, and stated that family diversity was undermining society.<sup>62</sup>

Whitehead was not alone. William Galston, a domestic policy adviser to President Clinton, wrote that a "stable, intact family" was the nation's best antipoverty program.<sup>63</sup> Sociologist Charles Murray wrote that "illegitimacy is the single most important social problem of our time—more important than crime, drugs, poverty, illiteracy, welfare or homelessness because it drives everything else."<sup>64</sup> To solve the problem, he advocated withdrawing all economic support for single mothers, returning social stigma to nonmarital births, making adoption easier for married couples, and reviving orphanages.<sup>65</sup> A "fatherhood movement" emerged, postulating the catastrophic consequences of father absence and criticizing feminism for driving men from their families with extreme beliefs about gender equality.<sup>66</sup>

Sociologist Judith Stacey was an early critic of the social scientists who offered as "truth" what she called "one of the most widely held prejudices about family life in North America—belief in the superiority of families composed of heterosexual, married couples and their biological children."<sup>67</sup> She demonstrated that the social science was far more in dispute. After critiquing their arguments, she concluded that research supported the importance of the quality of family relationships over their form.<sup>68</sup> More recently, Stanford law professor Michael Wald has reviewed the literature and reached

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62. See POLIKOFF, *supra* note 13, at 63-64, 66-67.

63. William Galston, *Stable Families Fabric of Strong Society*, WIS. ST. J., Apr. 25, 1993.

64. Charles Murray, *The Coming White Underclass*, WALL ST. J., Oct. 29, 1993, at A14.

65. *Id.*

66. See, e.g., DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM (1995); DAVID POPENOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSIBLE FOR THE GOOD OF CHILDREN AND SOCIETY (1996).

67. Judith Stacey, *Scents, Scholars and Stigma: The Revisionist Campaign for Family Values*, 40 SOCIAL TEXT 51, 55 (1994) [hereinafter Stacey, *Scents, Scholars, and Stigma*]; see also JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE (1996); Judith Stacey, *The New Family Values Crusaders*, NATION, July 25, 1994.

68. Stacey, *Scents, Scholars, and Stigma*, *supra* note 67, at 57.

similar conclusions.<sup>69</sup>

Nonetheless, arguments about fatherhood and marriage quickly came to dominate public policy discussions under Democratic President Bill Clinton. The legislation ending poor children's entitlement to a social and economic safety net, otherwise known as "welfare reform," began with a recitation of four purposes, three of which directly affected marriage and fatherhood: ending dependence on the government by promoting "job preparation, work, and marriage"; preventing and reducing "out-of-wedlock" pregnancy; and encouraging "the formation and maintenance of two-parent families."<sup>70</sup> The new law began, "[m]arriage is the foundation of a successful society" and "[m]arriage is an essential institution of a successful society which promotes the interests of children."<sup>71</sup> It referred to "out-of-wedlock" pregnancies as a "crisis."<sup>72</sup>

By the time George W. Bush took office in 2001, there was a self-described "marriage movement" emphasizing the urgency of tying children to fathers through marriage. Advocates again used the language of social science, this time to argue that marriage made people live happier, longer, and healthier lives filled with more sex and more money.<sup>73</sup> When welfare reform came up for congressional reauthorization, President Bush shifted the goal to encourage the formation and maintenance of two parent *married* families.<sup>74</sup> He obtained \$750 million in funding for "marriage promotion" activities as part of the welfare reauthorization bill.<sup>75</sup>

69. Michael S. Wald, *Adults' Sexual Orientation and State Determinations Regarding Placement of Children*, 40 FAM. L.Q. 381 (2006). Among other things, Professor Wald concludes that "there is no evidence that children in general do better with a father and mother than with two mothers or two fathers." *Id.* at 405.

70. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, tit. 1, § 103(a), 110 Stat. 2105, 2113 (codified at 42 U.S.C. § 601 (2006)).

71. *Id.* § 101(1)-(2), 110 Stat. at 2110.

72. *Id.* § 101(10), 110 Stat. at 2112.

73. See, e.g., LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* (2000). For a thorough critique of the research claims in this book, see BELLA DEPAULO, *SINGLED OUT: HOW SINGLES ARE STEREOTYPED, STIGMATIZED, AND IGNORED, AND STILL LIVE HAPPILY EVER AFTER* 48-61 (2006).

74. WORKING TOWARDS INDEPENDENCE: SUMMARY OF THE BUSH PROPOSAL 3 (2002), <http://www.nls.gov/offices/pih/programs/hcv/wtw/ta/sfSummaryofBushwelfareproposal.pdf>.

75. See ACF Healthy Marriage Initiative, <http://www.acf.hhs.gov/healthymarriage/about/mission.html#background> (last visited May 9, 2009). NOW Legal Defense and Education Fund (now Legal Momentum) was among feminist organizations opposing funding of marriage promotion efforts. See Press Release, NOW Legal Defense and Education Fund, *Why Now Legal Defense Opposes Federal Marriage Promotion in TANF Reauthorization*,

In the climate created by the “marriage movement,” *family diversity* is the problem and *marriage* is the solution. Numerous activists and scholars oppose this formulation. They note that such arguments are part of a right-wing agenda that is both antifeminist and antigay and that diverts attention from real solutions to social problems.<sup>76</sup> Law professor Vivian Hamilton calls it the “red herring of marriage,” used to justify decreasing public responsibility for the economic well-being of families by blaming the unmarried for our social and economic problems.<sup>77</sup>

This is the cultural context in which the “marriage equality” movement has grown, with all its successes and defeats, from the spark of hope ignited by the Hawaii decision in *Baehr v. Lewin* in 1993,<sup>78</sup> through the shameful federal Defense of Marriage Act in 1996,<sup>79</sup> the breakthrough of civil unions in Vermont in 2000,<sup>80</sup> Evan

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<http://www.legalmomentum.org/assets/pdfs/marriagebackgrounder.pdf>; Press Release, Now Legal Defense and Education Fund, Looking for Love in All the Wrong Places: The Case Against Government Marriage Promotion, <http://www.legalmomentum.org/assets/pdfs/lookingforlove.pdf>.

76. For the most thorough analyses of “marriage promotion,” see ALTERNATIVES TO MARRIAGE PROJECT, LET THEM EAT WEDDING RINGS (2d ed. 2007), <http://www.unmarried.org/rings2.pdf>, JEAN V. HARDISTY, POLITICAL RESEARCH ASSOCS., PUSHED TO THE ALTAR: THE RIGHT WING ROOTS OF MARRIAGE PROMOTION (2008), JEAN V. HARDISTY, POLITICAL RESEARCH ASSOCS., MARRIAGE AS A CURE FOR POVERTY? SOCIAL SCIENCE THROUGH A “FAMILY VALUES” LENS (2008), [http://www.publiceye.org/jeans\\_report/marriage-promotion-part-2.pdf](http://www.publiceye.org/jeans_report/marriage-promotion-part-2.pdf), and JEN HEITEL YAKUSH, SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S., LEGALIZED DISCRIMINATION: THE RISE OF THE MARRIAGE-PROMOTION INDUSTRY AND HOW FEDERALLY FUNDED PROGRAMS DISCRIMINATE AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH AND FAMILIES (2007), [http://www.siecus.org/\\_data/global/images/Legalized-Discrimination.pdf](http://www.siecus.org/_data/global/images/Legalized-Discrimination.pdf).

77. Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL’Y & L. 307, 368 (2004). For additional analysis of faults in the arguments of the “marriage movement,” see POLIKOFF, *supra* note 13, at 72-82.

78. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). Hawaii never did extend the right to marry to same sex couples. On remand, the state failed to prove it was necessary to block same-sex couples from marrying in order to achieve a compelling state interest. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at \*21-22 (Haw. Cir. Ct. Dec. 3, 1996). Before the appeal of that decision was heard by the Hawaii Supreme Court, the people of Hawaii enacted a constitutional amendment in November 1998 allowing the state legislature to limit marriage to a man and a woman, see HAW. CONST. art. 1, § 23 (“The legislature shall have the power to reserve marriage to opposite-sex couples.”), which it did. HAW. REV. STAT. § 572-1 (2008). The state legislature did create a status called “reciprocal beneficiaries,” open to any two people barred from marriage, and extending to those who register for the status a few of the legal consequences of marriage such as worker’s compensation and the right to sue for wrongful death. See Hawaii Reciprocal Beneficiaries Act, 1997 Haw. Sess. Laws 383 (codified in part at HAW. REV. STAT. § 572C (2008)).

79. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2006)).

80. In 1999, the Vermont Supreme Court held that denying the rights and

Wolfson's founding of Freedom to Marry as a stand-alone organization in 2001,<sup>81</sup> marriage in Massachusetts in 2004,<sup>82</sup> twenty-nine state constitutional amendments limiting marriage to a man and a woman (more than half of which ban recognition of all unmarried couples),<sup>83</sup> ten states and the District of Columbia that grant a formal status to same-sex couples that conveys all or virtually all the state-based consequences of marriage,<sup>84</sup> and an effort to defeat Proposition 8 in California that cost \$40 million, draining funds away from other gay issues and causing organizations to cut staff and programs.<sup>85</sup>

The gay rights movement has to position itself somewhere in the public policy debates over family structure. If it stands with family diversity, then it must keep company and build coalitions with advocates for poor families that often consist of single women or extended families raising children. It must actively resist the glorification of marriage, the bestowal of tangible and intangible advantages on those who marry, and the blaming of the decline of marriage for our many social problems. It must seek family policy goals by starting with what all families need, including all the families and relationships that gay people form, and seeking just

obligations of marriage to same-sex couples violated the state's constitution. *Baker v. State*, 744 A.2d 864, 912 (Vt. 1999). It required equalization of the legal consequences of marriage but did not require that marriage be opened to same-sex couples. *Id.* at 886. In response, the legislature enacted the status of "civil unions" extending all the state-based consequences of marriage to same-sex couples who enter civil unions. VT. STAT. ANN. tit. 15, § 1201 (2007). In April 2009, the Vermont legislature enacted legislation giving same-sex couples access to marriage, effective on September 1, 2009. S. 115, 2009 Leg., Reg. Sess. (Vt. 2009).

81. See generally *Freedom to Marry*, <http://www.freedomtomarry.org> (last visited Apr. 7, 2009).

82. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

83. See NATIONAL GAY AND LESBIAN TASK FORCE, *ANTI-GAY MARRIAGE MEASURES IN THE U.S.* (2009), [http://www.thetaskforce.org/downloads/reports/issue\\_maps/GayMarriage\\_04\\_09.pdf](http://www.thetaskforce.org/downloads/reports/issue_maps/GayMarriage_04_09.pdf).

84. See NATIONAL GAY AND LESBIAN TASK FORCE, *RELATIONSHIP RECOGNITION FOR SAME-SEX COUPLES IN THE U.S.* (2009), [http://www.thetaskforce.org/downloads/reports/issue\\_maps/relationship\\_recognition\\_05\\_09\\_color.pdf](http://www.thetaskforce.org/downloads/reports/issue_maps/relationship_recognition_05_09_color.pdf). In those states in which the status has expanded over several years to include more legal consequences or a different name, the date in parentheses is the most recent year the consequences of the status were expanded or the name of the status available to same-sex couples was changed. Marriage: Massachusetts (2004), Connecticut (2008), Iowa (2009), Maine (2009), Vermont (2009), New Hampshire (governor's signature expected 2009); domestic partnerships: California (2005), Oregon (2007), Washington (2009); civil unions: New Jersey (2006). Both same-sex and different-sex couples can register as domestic partners in the District of Columbia. D.C. CODE § 32-701(3) (2009).

85. See Dan Aiello, *No on Prop 8 Official Grilled over Campaign*, BAY AREA REP., Nov. 13, 2008, <http://ebar.com/news/article.php?sec=news&article=3475>.



laws and policies that meet those needs.

The alternative, which is the one the most visible part of the movement has chosen, is to stand with marriage—as long as same-sex couples can marry too. The couples chosen as plaintiffs in marriage litigation, and others who are spokespersons for marriage equality, emphasize how much they resemble married heterosexual couples. Although as individuals, gay rights activists and lawyers often do support family diversity, in litigation and political advocacy they argue that allowing same-sex couples to marry will strengthen marriage and that this is good for society.<sup>86</sup> They also adapt the methodologically-flawed, ideologically-driven argument that children do better raised by married parents to argue that children of same-sex couples will do better if their parents can marry.<sup>87</sup> In the context of public policy debates dominated by “marriage movement” ideology, an argument based on the perceived good of strengthening marriage or the importance to children of having married parents is an argument that denigrates the families and relationships of those who are not married.<sup>88</sup>

The cost of losing ballot initiatives about same-sex marriage is well understood, especially when the constitutional amendment that a state enacts disallows recognition of unmarried couples, gay or straight. This is the type of result that cost public employees in Michigan their domestic partner benefits.<sup>89</sup>

But the cost of *winning* marriage equality may be less obvious. Although advocates articulate that their goal is giving same-sex couples the *choice* to marry rather than standardizing all gay couples into marital units, in fact winning marriage equality hardens the line between married couples and everyone else. We have seen this in Massachusetts, where many employers stopped offering domestic partner benefits once same-sex couples could marry,<sup>90</sup> and where the

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86. See GLAD, WHY MARRIAGE MATTERS, <https://www.massequality.org/ourwork/marriage/whymarriagematters.pdf>.

87. For additional critique of the use of these arguments by the marriage equality movement, see POLIKOFF, *supra* note 13, 98-103.

88. This is most problematic when advocates for same-sex marriage argue that it is necessary for the well-being of children. See Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573, 585-86 (2005).

89. See *Nat'l Pride at Work, Inc. v. Governor of Mich.*, 748 N.W.2d 524 (Mich. 2008); POLIKOFF, *supra* note 13, at 95-96.

90. See Judy Greenwald, *Advent of Gay Marriage Alters Massachusetts Partner Benefits*, BUS. INS., Jan. 17, 2005, at 4 (including The New York Times Co., Armonk, IBM Corp., Raytheon Corp., National Fire Protection Assn., Boston Medical Center, and Emerson College); GLAD, DOMESTIC PARTNERSHIP BENEFITS STILL MATTER IN THE AGE OF EQUAL MARRIAGE: MARRIAGE DOES NOT MEAN INSTANT EQUALITY FOR LESBIAN AND GAY EMPLOYEES (2008), <http://www.glad.org/uploads/docs/publications/dp->

state's highest court has reaffirmed that married and unmarried same-sex couples can be treated differently in determining parentage<sup>91</sup> or gaining access to loss of consortium actions.<sup>92</sup>

#### IV. THE MISGUIDED FOCUS OF CURRENT SAME-SEX MARRIAGE ADVOCACY

The gay rights movement should stand for both equality and justice. Fighting for marriage is different from fighting for equality. And fighting for the current legal consequences of marriage when those consequences are unjust, even to the majority of same-sex couples that marry, is different from fighting for justice. Two examples demonstrate just how constricted the advocacy for same-sex marriage has become.

##### *A. The California Marriage Litigation*

The strongest argument for same-sex marriage is that as long as different-sex couples have the option to marry, the principle of equality demands that same-sex couples have that option also. When a state grants the benefits of marriage to same-sex couples under a different name, such as domestic partnership or civil union, that is a decision to treat same-sex couples as different and implicitly inferior. It is not equality.

But if the state abolished marriage for everyone, or replaced the word "marriage" with a new term for all intimate partnerships, such as civil union, civil partnership, or domestic partnership, that would also be equality. There is precedent in family law for replacing words laden with baggage from a problematic past, such as "divorce" and "alimony," with new terminology that symbolizes a break with that past, such as "dissolution" and "support."<sup>93</sup>

"Marriage" has a long history of exclusion; slaves, interracial couples, and same-sex couples have been denied it. "Marriage" has a long, sex-stereotyped past that is both unconstitutional and inconsistent with modern values. For many people, "marriage" is moored to religious doctrine that belongs in churches, synagogues, and mosques. Different terminology, such as civil partnership, distances the legal status from this past and from the components of marriage defined by religions.

In the California marriage litigation, gay rights groups had an opportunity to champion equality and at the same time support the

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benefits-post-goodridge.pdf (urging Boston companies not to rescind domestic partner benefits).

91. *T.F. v. B.L.*, 813 N.E.2d 1244, 1251-52 (Mass. 2004).

92. *Charron v. Amaral*, 889 N.E.2d 946, 948 (Mass. 2008).

93. See POLIKOFF, *supra* note 13, at 25-26.

use of new terminology for the civil status granted all couples. Because California law granted all the state-based consequences of marriage to same-sex couples who registered for the status it called domestic partners,<sup>94</sup> the litigation in that state was for the name "marriage." It was not about a denial of rights; it was about access to marriage rather than a separate status.

After the case was fully briefed, the California Supreme Court asked four supplemental questions and requested additional briefs with the litigants' answers.<sup>95</sup> One question asked the parites to identify "[w]hat, if any, are the minimum, constitutionally-guaranteed substantive attributes or rights that are embodied within the fundamental constitutional 'right to marry.'"<sup>96</sup> Another asked whether "the terms 'marriage' or 'marry' themselves have constitutional significance" and whether it would be constitutional for the California legislature to "change the name of the legal relationship of 'marriage' to some other name, assuming the legislation preserved all of the rights and obligations that are now associated with marriage."<sup>97</sup>

This was the opportunity for gay rights advocates to tell the court that the issue was equality, and that if the state abolished "marriage" for everyone, and renamed the legal status granted to all intimate unions "domestic partnership," then that would be constitutional. What was unconstitutional, they could have argued, was creation of a separate status for same-sex couples alone.

Instead, the state of California said it could eliminate the word marriage, and the gay rights groups argued that the state could not.<sup>98</sup> The *word* marriage was part of the constitutional right to marry. No other name for an intimate union was permissible. On this point the gay rights groups agreed with the ring-wing opponents of marriage equality who were parties in the case.

The briefs filed by gay rights groups read as an ode to marriage as something of "majestic status"<sup>99</sup> that provides a "unique quality of intimacy and emotional connection," "unique public validation,"<sup>100</sup> and "unique ability to bind two people in a distinct relationship of

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94. Domestic Partner Rights and Responsibilities Act, ch. 421, 2003 Cal. Stat. 2586 (codified as amended at CAL. FAM. CODE §§ 297-299.3 (West 2008)).

95. See Respondents' Supplemental Brief, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999), [http://www.nclrights.org/site/DocServer/Rymer\\_Supplemental\\_Brief081707.pdf?docID=1861](http://www.nclrights.org/site/DocServer/Rymer_Supplemental_Brief081707.pdf?docID=1861) [hereinafter Supplemental Brief].

96. *Id.* at 18.

97. *Id.* at 32.

98. *Id.* at 32-40.

99. *Id.* at 36.

100. *Id.* at 22.

love and mutual commitment that is central to personal identity.”<sup>101</sup> The briefs quote approvingly from prior cases the language that “the structure of society itself largely depends upon the institution of marriage”<sup>102</sup> and that marriage is “the basic unit of society.”<sup>103</sup>

The constitutional right to marry, one brief says, “cannot be separated from the social and personal meaning attached to the words ‘marriage’ and ‘marry.’”<sup>104</sup> The gay rights groups called the state’s position that the words “marry” and “marriage” were not constitutionally mandated and could be abolished “remarkable”<sup>105</sup> and responded that “[t]hese arguments denigrate the institution of marriage and undermine its constitutionally protected status.”<sup>106</sup>

Replacing the term for marriage with another term would infringe the fundamental right to marry for everyone, they argued.<sup>107</sup>

The essence of marriage lies in its intangible and symbolic aspects, which derive in large part from its historical and traditional significance, as well as from its continued centrality as the “basic unit of our society.” By definition, neither domestic partnership nor any other newly minted status can provide the “intangible benefits that come from the ancient tradition of public declaration and recognition” that marriage—and only marriage—provides.<sup>108</sup>

These positions play squarely into the hands of opponents of family diversity and denigrate the lives of many lesbians and gay men. They reinforce the propriety of giving married couples a special legal status. They reject a truly transformative outcome that the gay rights movement could achieve: a new legal word to describe the civil status of couples.

### *B. Marriage and Social Security Law*

When the claim for same-sex marriage is based on equality it can still be problematic. Equality and justice, as Paula Ettelbrick eloquently argued, are two separate matters.<sup>109</sup> Arguing for equal

101. Respondents’ Consolidated Supplemental Reply Brief at 23, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999), [http://www.nclrights.org/site/DocServer/2007.08.31.Rymer.Reply\\_to\\_Supps.pdf?docID=2202](http://www.nclrights.org/site/DocServer/2007.08.31.Rymer.Reply_to_Supps.pdf?docID=2202) [hereinafter Consolidated Supplemental Reply Brief].

102. Supplemental Brief, *supra* note 95, at 24 (quoting *Marvin v. Marvin*, 557 P.2d 106, 123 (Cal. 1976)).

103. Consolidated Supplemental Reply Brief, *supra* note 101, at 14 (quoting *De Burgh v. De Burgh*, 250 P.2d 598, 601 (Cal. 1952)).

104. Supplemental Brief, *supra* note 95, at 32.

105. Consolidated Supplemental Reply Brief, *supra* note 101, at 23.

106. *Id.* at 10.

107. Supplemental Brief, *supra* note 95, at 32-33.

108. Consolidated Supplemental Reply Brief, *supra* note 101, at 14 (citation omitted).

109. Ettelbrick, *supra* note 5, at 684-85.

treatment of same-sex couples within an unjust legal scheme is not an unqualified good thing.

The law on access to Social Security retirement and survivors' benefits illustrates this point. Lack of access to a same-sex partner's Social Security retirement benefits shows up on several lists of the unfairness of denying marriage to same-sex couples. In GLAD's recent lawsuit challenging the constitutionality of the Defense of Marriage Act, three of the plaintiffs, each a surviving spouse, make this claim.<sup>110</sup>

The LGBT equality principle is straightforward. Married couples are eligible for spousal Social Security retirement and survivors' benefits; same-sex couples cannot marry and therefore cannot get these benefits; this is unequal and unfair. In the DOMA challenge, the plaintiffs say that if their marriage was federally recognized, they would be better off under Social Security law.<sup>111</sup>

But as it turns out, marriage won't produce higher benefits for most same-sex couples, because only married couples with one higher income earner and a stay-at-home or low-income-earning spouse are the winners under our current Social Security system.<sup>112</sup> GLAD could not use any married same-sex couple as plaintiffs but had to select those who met the particular, gendered family profile for which Social Security was created—a couple with one primary wage earner. The current system disadvantages equal-earning heterosexual married couples as much as it disadvantages unmarried gay and straight couples. Because African-American married couples are more likely than their white counterparts to be equal earners, our current system disproportionately harms black families.<sup>113</sup>

This is how Social Security benefits work: The wife of a retired worker gets her own retirement benefit, which is half that of her husband, without ever paying into the system.<sup>114</sup> The more her

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110. See GLAD, "DOMA" MEANS FEDERAL DISCRIMINATION AGAINST MARRIED SAME-SEX COUPLES 4 (2009), <http://www.glad.org/uploads/docs/publications/doma-overview.pdf> [hereinafter GLAD, "DOMA" MEANS FEDERAL DISCRIMINATION]. For information on the plaintiffs, see GLAD, GLAD Challenges DOMA Section 3, Plaintiffs, <http://www.glad.org/doma/plaintiffs/> (last visited Apr. 21, 2009).

111. GLAD, "DOMA" MEANS FEDERAL DISCRIMINATION, *supra* note 110, at 4.

112. ROCHELLE STANFIELD & CORINNA NICOLAOU, URBAN INST., SOCIAL SECURITY: OUT OF STEP WITH THE MODERN FAMILY 10-11 (2000), [http://www.urban.org/UploadedPDF/out\\_of\\_step.pdf](http://www.urban.org/UploadedPDF/out_of_step.pdf).

113. Dorothy A. Brown, *Social Security and Marriage in Black and White*, 65 OHIO ST. L.J. 111, 112-13 (2004).

114. STANFIELD & NICOLAOU, *supra* note 112, at 6. Although I use gendered terms here, the law today is gender neutral. When the wife is the high income earner, her husband has the same opportunity to receive a benefit amounting to 50% of that paid the wife. I use the gendered terminology because it is accurate that for those couples who do have one high income earner, the husband is much more likely than the wife to

husband earned, the higher her benefit. If his benefit is \$1,800, hers will be \$900, for a total of \$2,700 in household income. When her husband dies, she'll get *his* full benefit amount,<sup>115</sup> \$1,800, for a reduction of income to her household of only one-third.

A spouse always has the option to receive benefits calculated as 50% of that of her spouse. But members of an equal-earning couple elect to receive benefits based on their individual earnings, because their total is more than the sum of one spouse's benefit plus the spousal benefit of 50% of that amount. As an example, assume each is entitled to \$1,350 based on his own earnings; the household will receive \$2,700. The spousal benefit for someone receiving \$1,350 is \$675, so the household would receive only \$1,925 if the second earner elected to receive the spousal benefit. But this equal-earning couple is disadvantaged relative to a couple with a single high-income earner when the first spouse dies. In the equal-earning couple the survivor is left only with her own benefit, \$1,350, causing a 50% cut in income.

Because same-sex couples have no access to the spousal retirement or survivors' benefit, those with significant income disparity between the two partners lose when compared with a married heterosexual couple in the same situation. If the high earner is the first to die, the survivor will have only his own benefits to rely upon.

One publication on LGBT family policy used the following example of "Thorsten," who earned \$44,000 a year, and "Christopher," who earned \$4,000:<sup>116</sup> Based on their earnings at the time, Thorsten's retirement benefit would be \$1,527 a month and Christopher's \$303. If Thorsten died first, Christopher would be left with his \$303 benefit. If Thorsten and Christopher were a married couple under federal law, they would receive, while both are alive, Thorsten's \$1,527 plus a spousal benefit of half that (\$764), which is \$461 a month more than Christopher's benefit alone. Whoever died first, the survivor would receive the amount of Thorsten's benefit—\$1,527 a month.

It's easy to see why Christopher and Thorsten would be better off as a federally-recognized married couple. But that begs the question about whether it is just that a married couple with \$48,000 in annual earnings split equally between them fares less well than a couple

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be that high income earner.

115. *Id.*

116. See SEAN CAHILL & SARA TOBIAS, POLICY ISSUES AFFECTING LESBIAN, GAY, BISEXUAL, AND TRANSGENDER FAMILIES 34-35 (2006) (referencing TERENCE DOUGHERTY, NAT'L GAY & LESBIAN TASK FORCE, ECONOMIC BENEFITS OF MARRIAGE UNDER FEDERAL AND MASSACHUSETTS LAW 7 (2004), <http://www.thetaskforce.org/downloads/reports/reports/EconomicBenefitsMA.pdf>).

whose earnings reflect the single dominant wage-earner model for which Social Security was developed.<sup>117</sup> In fact, a single parent who has raised children and suffered decreased lifetime earnings because of her family obligations may also receive less in Social Security than the never-employed wife of a wealthy man.

Many advocates have questioned our current scheme for allocating benefits, using single parents and equal earning couples as two of the many examples of injustice. The Urban Institute has developed several revenue-neutral schemes for revising Social Security law to make it more just.<sup>118</sup> They have pointed out that the American family has changed dramatically since the inception of Social Security in 1939 and that the failure to consider all of those changes produces unfairness that should be rectified.<sup>119</sup>

Advocates for gay and lesbian families should be part of any effort to reform Social Security's treatment of families. Even if the constituency for gay rights groups is only gay and lesbian families, and not all those harmed by outdated notions of family in Social Security law, the decision to seek equality under the current law for a minority of married same-sex couples ignores the needs of all the other married same-sex couples who would benefit more from reform of the system for everyone. In this case, equality for some reinforces injustice for many.<sup>120</sup>

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117. STANFIELD & NICOLAOU, *supra* note 112, at 6.

118. See *id.*; Edward D. Berkowitz, *Family Benefits in Social Security: A Historical Commentary*, in SOCIAL SECURITY AND THE FAMILY: ADDRESSING UNMET NEEDS IN AN UNDERFUNDED SYSTEM 19, 28-36 (Melissa M. Favreault, Frank J. Sammartino & C. Eugene Steuerle eds., 2002).

119. See STANFIELD & NICOLAOU, *supra* note 112, at 4; Berkowitz, *supra* note 118, at 28-36.

120. There are other examples. Other plaintiffs in GLAD's anti-DOMA lawsuit have paid many thousands of dollars a year in added federal income tax because their marriage is not recognized under federal law. Press Release, GLAD, GLAD Files Lawsuit Challenging Denial of Critical Federal Benefits to Married Same-Sex Couples (Mar. 3, 2009), <http://www.glad.org/uploads/docs/press-releases/2009-03-03-DOMA.pdf>. But these are also the couples that have one primary wage earner. Those couples married in Massachusetts who have two relatively equal income earners are *better off* because they file federal income tax as single rather than married persons. JANE G. GRAVELLE, CONG. RESEARCH SERV., FEDERAL INCOME TAX TREATMENT OF THE FAMILY 2 (2006), [http://assets.opencrs.com/rpts/RL33755\\_20061219.pdf](http://assets.opencrs.com/rpts/RL33755_20061219.pdf). The "marriage bonus" that accrues to married couples with one primary wage earner cost the government \$49 billion in 2004. Dennis J. Ventry, Opinion: Presidential Candidates Offer More Tax Cuts for "Traditional" Families, Alternatives to Marriage Project, <http://www.unmarried.org/opinion-presidential-candidates-offer-more-tax-cuts-for-traditional-families.html> (last visited Apr. 12, 2009). That same year, about eighteen million married couples with equal or close to equal earnings paid \$19 billion in marriage penalties. *Id.* As a result of DOMA, equal earning same-sex couples married in Massachusetts are spared the marriage penalty. Those couples are not plaintiffs in the anti-DOMA lawsuit. Instead of arguing that same-sex couples should get the

These examples—the California marriage arguments and the selective use of married same-sex couples who want to benefit from Social Security’s outmoded, gender-based concept of family—demonstrate just how narrow the advocacy for same-sex marriage has become. Advocates wear a type of blinders. They see the marriage that different sex couples have and they want that. They do not want to usher in a new era for everyone, although the California Supreme Court offered them that opportunity. And they do not seek to restructure important government benefits, even to meet the economic needs of same-sex couples.

#### V. ANOTHER WAY: THE *BEYOND SAME-SEX MARRIAGE* VISION STATEMENT

In 2006, about two dozen gay rights advocates came together to draft a vision statement “for securing governmental and private institutional recognition of diverse kinds of partnerships, households, kinship relationships and families” in hope of “mov[ing] beyond the narrow confines of marriage politics as they exist in the United States today.”<sup>121</sup> That statement, entitled *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families and Relationships*, is a comprehensive contemporary reassertion of the values embodied in Paula Ettelbrick’s 1989 essay.<sup>122</sup>

The “beyond marriage” vision rejects identity politics. Instead, it declares:

We stand with people of every racial, gender and sexual identity, in the United States and throughout the world, who are working day-to-day—often in harsh political and economic circumstances—to resist the structural violence of poverty, racism, misogyny, war, and repression, and to build an unshakeable foundation of social and economic justice for all . . .<sup>123</sup>

It also acknowledges the many relationship and family forms important to gay (and straight) people, with special mention of the support systems constructed during the height of the AIDS epidemic.<sup>124</sup> From this, it concludes that: “To have our government

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marriage bonus, gay rights groups would serve the needs of their constituency better by arguing for changes to the laws of family taxation. For a review of literature concerning taxes and the family, see Alternatives to Marriage Project, *More Resources on Taxation*, <http://www.unmarried.org/more-resources-on-taxation.html> (last visited Apr. 12, 2009).

121. *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families & Relationships* 1 (July 26, 2006), <http://www.beyondmarriage.org/BeyondMarriage.pdf> [hereinafter *Beyond Same-Sex Marriage*].

122. See *id.*; Ettelbrick, *supra* note 5.

123. *Beyond Same-Sex Marriage*, *supra* note 121, at 1.

124. *Id.* at 1-2.



define as 'legitimate families' only those households with couples in conjugal relationships does a tremendous disservice to the many other ways in which people actually construct their families, kinship networks, households, and relationships."<sup>125</sup>

The "beyond marriage" statement emphasizes that opposition to same-sex marriage is but one part of a comprehensive right-wing program.

The Right's anti-LGBT position is only a small part of a much broader conservative agenda of coercive, patriarchal marriage promotion that plays out in any number of civic arenas in a variety of ways—all of which disproportionately impact poor, immigrant, and people-of-color communities. The purpose is not only to enforce narrow, heterosexist definitions of marriage and coerce conformity, but also to slash to the bone governmental funding for a wide array of family programs, including childcare, healthcare and reproductive services, and nutrition, and transfer responsibility for financial survival to families themselves.<sup>126</sup>

And it urges that any agenda for LGBT families and relationships value differences within LGBT communities rather than only those whose lives mirror heterosexual married couples.

So many of us long for communities in which there is systemic affirmation, valuing, and nurturing of difference, and in which conformity to a narrow and restricting vision is never demanded as the price of admission to caring civil society. Our vision is the creation of communities in which we are encouraged to explore the widest range of non-exploitive, non-abusive possibilities in love, gender, desire and sex—and in the creation of new forms of constructed families without fear that this searching will potentially forfeit for us our right to be honored and valued within our communities and in the wider world. Many of us, too, across all identities, yearn for an end to repressive attempts to control our personal lives. For LGBT and queer communities, this longing has special significance.<sup>127</sup>

Acknowledging the personal and spiritual meaning of marriage for many people, the statement does not oppose marriage equality. Rather it urges that marriage not be legally or economically privileged, and it cautions against foreclosing other means for obtaining economic and emotional well-being.

Rather than focus on same-sex marriage rights as the only strategy, we believe the LGBT movement should reinforce the idea that marriage should be one of many avenues through which households, families, partners, and kinship relationships can gain

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125. *Id.* at 2.

126. *Id.* at 3.

127. *Id.* at 4.

access to the support of a caring civil society.

....

... LGBT movement strategies must never secure privilege for some while at the same time foreclosing options for many. Our strategies should expand the current terms of debate, not reinforce them.<sup>128</sup>

The statement identifies a number of principles that should be at the root of all strategies and actions affecting LGBT families. Among them are:

Recognition and respect for our chosen relationships, in their many forms[;] [l]egal recognition for a wide range of relationships, households, and families, and for the children in all of those households and families... [;] separation of benefits and recognition from marital status... [;] [s]eparation of church and state in all matters, including regulation and recognition of relationships, households, and families[;] [a]ccess for all to... health care,... housing, a secure and enhanced Social Security system,... [and] welfare for the poor[;] [and] [f]reedom from a narrow definition of our sexual lives and gender choices, identities, and expression.<sup>129</sup>

Finally, the statement urges work in coalitions with others “hit hard by the greed and inhumanity of the Right’s economic and political agendas,” including immigrants, senior citizens, single parents, the working poor, battered women, and prisoners and former prisoners.<sup>130</sup> The idea of coalitions contemplated by the “beyond marriage” vision is decidedly not the idea professed by the marriage equality movement when it speaks of the many nongay organizations that support access to marriage for same-sex couples. Rather, it is the idea that those representing LGBT families and relationships should work with those who represent other disfavored constituencies to achieve reforms that benefit all.

## VI. *BRASCHI* RECONSIDERED

This is the time to reconsider Miguel Braschi. His victory came under the banner of support for diverse families. But imagine Braschi and Blanchard today, living in a state that allowed them to marry or enter a formal status of civil union or domestic partnership. Imagine that they did not avail themselves of the “choice” afforded by such victories. Who will represent Miguel Braschi? Will GLAD or Lambda Legal take his case and argue that he should be protected

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128. *Id.* at 4-5.

129. *Id.* at 5.

130. *Id.* at 7; *see also id.* at 5.

from eviction as a member of a functional family, even though he had the option to be in a formally recognized family? At that point, is his case a "gay" case at all?

I fear not. Having won the option to marry, the gay rights legal groups have acquired the legal consequences of marriage for those who exercise that option. With it, they may have lost the ability to argue for a fit between a law's purpose and the relationships included within that law that does not draw the line at marriage. This is precisely the mistake cautioned against in the "beyond marriage" vision statement, as it reinforces, rather than expands, the terms of the debate about families and the law. For those like myself who believe passionately in valuing family diversity, it is nothing short of disaster.

In 2000, Lambda Legal filed a friend-of-the-court brief in support of Milagros Irizarry, a Chicago public school employee.<sup>131</sup> Ms. Irizarry had lived with a man for more than twenty years and raised two children with him.<sup>132</sup> She challenged, on equal protection and due process grounds, the school system's policy of providing employee benefits only to same-sex, and not also to different-sex, domestic partners.<sup>133</sup>

As characterized by the Seventh Circuit in its opinion rejecting Irizarry's claim, "Lambda want[ed] to knock marriage off its perch by requiring the board of education to treat unmarried heterosexual couples as well as it treats married ones, so that marriage will lose some of its luster."<sup>134</sup> The court's opinion echoed right-wing marriage movement tropes and contested social science as evidence of the soundness of the city requiring heterosexual couples to marry before it would protect the health of all members of an employee's household.<sup>135</sup>

Almost a decade later, I fear that Lambda would no longer enter such a case. I believe that they are too identified with seeking marriage for same-sex couples to argue for equal treatment of married and unmarried partners of heterosexual employees. That

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131. Brief Amicus Curiae of Lambda Legal Defense and Education Fund, Inc. in Support of Neither Party and in Support of Reversal, *Irizarry v. Bd. of Educ.*, 251 F.3d 604 (7th Cir. 2001) (No. 00-3216).

132. *Irizarry*, 251 F.3d at 606.

133. *Id.*

134. *Id.* at 609.

135. *Id.* at 607-08 ("[T]he evidence that on average married couples live longer, are healthier, earn more, have lower rates of substance abuse and mental illness, are less likely to commit suicide, and report higher levels of happiness—that marriage civilizes young males, confers economies of scale and of joint consumption, minimizes sexually transmitted disease, and provides a stable and nourishing framework for child rearing—refutes any claim that policies designed to promote marriage are irrational." (citations omitted)).

suggests they also would have difficulty arguing for equal treatment of married and unmarried partners (and civil unioned and not civil unioned partners) of gay and lesbian employees in a state where same-sex marriage (or civil union) is possible.

In 2007, Lambda undertook a case on behalf of a lesbian couple whose mortgage company had treated them differently from how it would have treated a married heterosexual couple.<sup>136</sup> Although the cause of action in the complaint was marital status discrimination in violation of federal equal credit law, a cause of action that would have been equally available to an unmarried heterosexual couple, Lambda's public relations campaign about the case touted the couple's situation as evidence of the unfairness of excluding same-sex couples from marriage.<sup>137</sup> This was a missed opportunity—deliberately I presume—to publicly advocate the equal treatment of gay and straight, married and unmarried, homeowning couples.

When litigation fails, gay rights groups often pursue legislative solutions. After losing two cases in New York in which surviving partners sought recovery for the wrongful death of their same-sex partners,<sup>138</sup> Lambda Legal, along with the LGBT advocacy group Empire State Pride Agenda, could have urged law reform altering the scope of those entitled to file wrongful death actions. Family structures look very different from the way they looked in the mid-nineteenth century, when wrongful death statutes were enacted, but even then drafters had in mind compensating those dependent on the decedent.

Most western countries extend wrongful death recovery to cohabiting unmarried partners.<sup>139</sup> A modern statute should compensate anyone in a dependent or interdependent economic relationship with the decedent.<sup>140</sup> Marriage is the wrong dividing line between who can file and who cannot. But it is practically impossible to argue *both* that refusal to permit wrongful death recovery is a reason same-sex couples must be allowed to marry *and*

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136. Complaint at 1-3, *DeWolf v. Countrywide Financial Corp.*, (S.D.N.Y. filed May 24, 2007), <http://data.lambdalegal.org/pdf/legal/dewolf/dewolf-c-05242007.pdf>.

137. Press Release, Lambda Legal, Lambda Legal to File Lawsuit on Behalf of Lesbian Homeowners in Federal Court Against Self-Described 'America's #1 Home Loan Lender' (May 24, 2007), <http://www.lambdalegal.org/news/pr/lambda-legal-to-file-lawsuit.html> [hereinafter Lambda Legal Press Release]. The press release included the following: "Everyone from kids to creditors knows what it means when two people say they are married," said David S. Buckel, Marriage Project Director for Lambda Legal and attorney on the case. "If these two women had been able to marry in New York, this never would have happened." *Id.*

138. See *Langan v. St. Vincent's Hosp.*, 802 N.Y.S.2d 476, 479-80 (App. Div. 2005); *Raum v. Rest. Assocs.*, 675 N.Y.S.2d 343, 370-71 (App. Div. 1998).

139. For specific countries, see POLIKOFF, *supra* note 13, at 110-20.

140. See *id.* at 193-96.

that a modern wrongful death statute shouldn't draw the line at marriage.

This is why I fear that Professor Ed Stein is wrong in his contribution to this Symposium when he argues that we can further the visions of both Tom Stoddard and Paula Ettelbrick.<sup>141</sup> Law reform depends upon identifying the cause of the existing problem. Gay rights groups argued that Miguel Braschi's problem was caused by insistence on a narrow, formal definition of family.<sup>142</sup> Today gay rights groups articulate that the problems facing surviving same-sex partners are caused by the denial of marriage to same-sex couples.<sup>143</sup>

I further lack Professor Stein's optimism because the focus on marriage has meant that gay rights advocates minimize the importance of innovative approaches to family recognition that emerge from jurisdictions hostile to same-sex marriage. Colorado recently enacted the status of "designated beneficiary."<sup>144</sup> It allows any two unmarried people to use a simple form to create what amounts to next-of-kin status.<sup>145</sup> The form allows the two people to select which of the numerous, available legal consequences they actually want, and it doesn't require both people to pick the same consequences. This approach helps both same-sex and different-sex couples and unpartnered gay and straight individuals who do not want the state to look to a parent or sibling as their primary family relationship.<sup>146</sup>

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141. Edward Stein, *Marriage or Liberation?: Reflections on Two Strategies in the Struggle for Lesbian and Gay Rights and Relationship Recognition*, 61 RUTGERS L. REV. 567, 574 (2009) ("In retrospect, [Stoddard and Ettelbrick's] two goals, although different, can be achieved at the same time . . .").

142. See *supra* text accompanying notes 26-39.

143. In calling for just treatment of surviving partners of those who died on September 11, 2001, Lambda Legal's Executive Director said, "Because they could not marry, surviving lesbian and gay partners of this tragedy are suffering not only the additional psychological trauma of having their relationships ignored, but may also suffer the consequences of not being equally supported in their time of need." See Civil Rights Groups Urge Fair Treatment for Surviving Lesbian and Gay Partners of September 11th Victims, <http://www.lambdalegal.org/news/pr/civil-rights-groups-urge-fair.html> (last visited May 16, 2009).

144. H.B. 09-1260, 67th Gen. Assem., Reg. Sess. (Colo. 2009) (amending Title 15 of Colorado Revised Statutes).

145. *Id.* § 15-22-106.

146. In *Beyond Straight and Gay Marriage*, I advocate a similar status I call "designated family relationship." POLIKOFF, *supra* note 13, at 133-35, 187-88. I limit the legal consequences of the status to those matters that concern effectuation of individual autonomy, such as inheritance without a will and ability to make medical and burial decisions. The Colorado law goes beyond that and allows designation of such consequences as the ability to recover for wrongful death. § 15-22-105(3)(k). I do not include such a consequence because I would allow anyone partially or totally dependent on the decedent to sue for wrongful death—and would not extend that right to anyone lacking financial dependency or interdependency—regardless of formalized

Passage of this law received a tiny fraction of the attention accorded to several legislative votes on same-sex marriage during the same month.<sup>147</sup> When gay rights advocates frame such a law as a crumb distributed by those unwilling to extend marriage, they miss the opportunity to hail it as an important victory that makes marriage matter less and helps a wide range of LGBT relationships. This, in turn, perpetuates the perception that same-sex couples who want to marry are the only subset of the LGBT community that really matters. We need movement leaders to take up the call of the “beyond marriage” statement and articulate a more inclusive vision.

Of course, such a law does not grant equality to same-sex couples in Colorado, and the fight for equality should continue. But there is no state in which gay rights advocates have achieved marriage equality and *subsequently* urged passage of a law such as this that validates relationships outside of marriage. Only when that happens will I share Professor Stein’s optimism that the visions of both Tom Stoddard and Paula Ettelbrick animate the gay rights movement.

Also in this Symposium, Professor Mark Strasser offers as support for same-sex marriage the argument that the legal structure of divorce may cause couples to invest more in their relationships and that therefore same-sex couples would invest more in their relationships if they were married.<sup>148</sup> Professor Strasser’s hypothesis is highly debatable. But even if the legal consequences of separation do contribute to a couple’s investment in their relationship, the result he seeks would be equally obtained *if unmarried couples experienced the same economic rules on dissolution as married couples*.

This is the law in Australia.<sup>149</sup> It is the law urged by the

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legal status.

147. The National Gay and Lesbian Task Force headlined on its website April 2009 votes on marriage equality in Vermont, New Hampshire, Maine, and the District of Columbia, and a vote on expanded domestic partnership rights in Washington. It did not mention the Colorado law. National Gay and Lesbian Task Force, <http://www.thetaskforce.org/press/latest> (last visited May 3, 2009). The marriage votes were covered in national newspapers, but only Colorado newspapers covered that state’s law. Colorado’s gay rights group, Equal Rights Colorado, announced the law on its website, but described it dispassionately, thus missing the opportunity to hail it as an innovative approach that should guide reform in other states. Equal Rights Colorado, [http://www.kintera.org/site/c.qkIOKeMWItF/b.3809035/k.89E5/ERC\\_Home\\_Page.htm](http://www.kintera.org/site/c.qkIOKeMWItF/b.3809035/k.89E5/ERC_Home_Page.htm) (last visited May 3, 2009).

148. Mark Strasser, *A Little Older, a Little Wiser, and Still Committed*, 61 RUTGERS L. REV. 507, 517-19 (2009).

149. Jenni Millbank, *The Recognition of Lesbian and Gay Families in Australian Law – Part 1: Couples*, 34 FED. L. REV. 1, 30 (2006). For an overview of additional recent law reforms that give de facto same-sex couples the same access to federal family courts as de facto different-sex couples, see Gay and Lesbian Rights Lobby, *Relationship Breakdown*,

American Law Institute since the publication in 2000 of its Principles of the Law of Family Dissolution.<sup>150</sup> It is the law, in part, in Washington state, which has adapted to modern family life by applying community property law to the division of property of both married and unmarried, same-sex and different-sex, couples.<sup>151</sup> Yet no gay rights group has taken the lead on pursuing legislative implementation of the ALI Principles.<sup>152</sup>

## VII. THE WAY AHEAD: LAW REFORM THAT VALUES ALL FAMILIES

I advocate law reform that values all families and relationships. This does not mean that the law should treat all relationships in the same way. It means that we should identify the purpose of any law and include within that law the relationships that will further its purpose. Marriage should never be the dividing line between who is in and who is out.<sup>153</sup>

I do not start with marriage, or with the package of rights that marriage gives different-sex couples, and work down from there, strategizing about how many of those rights politicians are willing to grant same-sex couples who sign up with the state in a status called civil union or domestic partnership. Instead, I start by identifying the needs of all LGBT people and work up from there to craft legislative proposals to meet those needs.

Laws that value all families are not primarily about legitimating gay relationships that mirror marriage. They are about ensuring that every relationship and every family has the legal framework for economic and emotional security. Laws that value all families value same-sex couples but not only same-sex couples. Lesbian, gay, bisexual, and transgender people live in varied households and families. A valuing-all-families approach strives to meet the needs of all of them, making real the vision in the *Beyond Same-Sex Marriage* statement that "marriage is not the only worthy form of family or relationship, and it should not be legally and economically privileged

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<http://grrl.org.au/index.php/Rights/Relationships/Relationship-Breakdown>.

150. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS § 6.03(1) (2002).

151. See *Connell v. Francisco*, 898 P.2d 831 (Wash. 1995); *Gormley v. Robertson*, 83 P.3d 1042 (Wash. Ct. App. 2004).

152. For a fuller discussion of how the law should deal with the breakdown of couple relationships, see POLIKOFF, *supra* note 13, at 174-82.

153. I develop this methodology at length in my book *Beyond (Straight and Gay) Marriage*. See POLIKOFF, *supra* note 13, at 123-45. I then apply it to numerous areas of law that have figured prominently in same-sex marriage advocacy, including employee benefits, surrogate medical decision making and hospital visitation, family and medical leave, the consequences of relationship breakdown, inheritance and the tax consequences of death, wrongful death recovery, workers' compensation survivors benefits, and Social Security. *Id.*

above all others.”<sup>154</sup>

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154. Beyond Same-Sex Marriage, *supra* note 121, at 2.



## Appendix A: Family Bill of Rights (Evan Wolfson Draft, Sept. 14, 1989)

DRAFT 9/14/89 (EW)

FAMILY BILL OF RIGHTS

PREAMBLE

WHEREAS, Americans value only their freedom, rights, and identities as individuals, but also the relationships they inherit and form as members of families; and

WHEREAS, the diversity of the cultures within American society and the choices individuals make result in many kinds of living arrangements sharing the values properly associated with family; and

WHEREAS, these defining family values include mutual emotional and financial commitment and interdependence, lives shared together in relationships of dedications, caring, and self-sacrifice; and

WHEREAS, the reality of American life today is that families are formed in many ways, through blood, marriage, and adoption, as well as by choice, commitment, and association, and that, therefore, family can be best be defined not by reliance on fictitious legal distinctions, but rather with respect to such attributes as the level of emotional and financial commitment, the manner in which the family members have conducted their everyday lives and held themselves out to society and friends, the reliance placed upon one another for daily family services, the longevity of the family relationship, and any other pattern of conduct, agreement, or action which evidences their intention of creating long-term, emotionally committed relationships; and

WHEREAS, the American tradition of respect for individual freedom in shaping one's own destiny and making important personal choices free of government intrusion, and of encouraging diversity and pluralism warrants that all family relationships that, in the totality of circumstances, possess such attributes be accorded equal respect, recognition, and rights; and

WHEREAS, government actions should encourage, not undermine all families possessing such attributes,

NOW, THEREFORE, we representatives of all of America's diverse families, united in commitment and concern for our family members, our communities, our nation, and each other, do urge the adoption of this FAMILY BILL OF RIGHTS, to protect our equal needs and entitlements in the following areas:

## I. RECOGNITION

All families have a right to secure formal recognition of their relationships. Where benefits are conditioned upon such recognition, it should not depend on marital relation, genetic history, or other arbitrary distinctions, but rather should reflect the defining family values set forth in the preamble.

### Bill of Particulars

- ¶ The institution of marriage should be open to same-sex couples.
- ¶ Whether or not they then elect to marry, lesbians and gay men in same-sex couples should be accorded the same recognition and rights as partners in formally married couples.
- ¶ Family relationships and recognition should not turn on the presence or absence of a marital unit.

## II. GOVERNMENT BENEFITS AND PRIVILEGES

All families have a right to equal treatment under the laws in the allocation of benefits, privileges, and presumptions by local, state, and federal government.

### Bill of Particulars

- ¶ Taxation should not reward or penalize any particular family living arrangement, nor should there be special benefits extended solely to formally married couples. In particular, tax codes should be amended to eliminate any restrictions on employers' ability to provide benefits without marital relation or other arbitrary cut-off. [i.e. § 89]
- ¶ If benefits are to be extended to individuals on the basis of their relation to another family member, i.e., to dependents or committed partners, all similarly situated family members should be treated the same.
- ¶ Equality should be extended to the benefits and privileges offered under Social Security, veterans' benefits programs (educational and medical), ERISA, and so on.



### III. PROPERTY AND ECONOMIC MATTERS

All families have a right to equal access to protections for their property and family members' shared economic interests.

#### Bill of Particulars

- § Insurance (renters', life -- beneficiary designations, liability caps, definition of household, a protection of domestic partner, etc.)
- § Inheritance, intestacy rules
- § Family package benefits (i.e., TWA, etc.)

### IV. HEALTH

All families have a right to equal access to adequate and compassionate health care, and to equal treatment by health care providers and systems.

#### Bill of Particulars

- § universal health care, access to preventive, catastrophic, and long-term care
- § medical decision making
- § hospital visitation

### V. HOUSING

All families have a right to equal protection against eviction, equal access to decent housing, and equal enjoyment of their homes without discriminatory zoning or other such restriction.

#### Bill of Particulars

- § Rent control/rent stabilization stuff (Braschi)
- § HUD housing programs
- § zoning (McMinn, etc.) -- functional family, group homes

## VI. EMPLOYMENT

All families have a right to equal treatment in an employer's provision of benefits and other compensation.

### Bill of Particulars

- ¶ Ideally, each citizen would have his or her own health insurance and other vital protections through universal systems, rather than leaving such necessities up to the vagaries of employers, employment, or family relation and dependency. Also ideally, individual workers would not be asked to accept disparate pay and to shoulder the burden of providing such coverage to the families or dependents of fellow employers.
- ¶ Until this ideal is achieved, employee-benefit plans should allocate benefits fairly, making provision for all similarly situated family members of employees without regard to formal marital relationship or other arbitrary distinction.
- ¶ Workers' compensation programs should treat similarly situated family members the same, defining recipients and dependents without regard to formal marital relationships or other arbitrary distinction.

## VII. CHILDREN

All families have a right to equal respect for their desire to have, raise, and care for children. There should be no invidious discrimination with respect to children, but rather the best interests of children should be recognized without regard to prejudice, stereotype, or mandated conformity.

### Bill of Particulars

- ¶ end to anti-gay prejudice
- ¶ adoption/foster care
- ¶ custody/visitation



¶ alternative insemination/surrogacy

#### VIII. LEGAL SYSTEM

All families have a right to equal access to, and equal treatment by, the civil and criminal legal systems.

##### Bill of Particulars

¶ The protections of the criminal justice system should be extended on a full and equal basis to members of families affected by crimes. In particular, similarly situated family members should be treated equally by crime victims compensation programs, should be equally eligible for protection under statutory schemes regarding domestic violence, and should be accorded testimonial and other evidentiary privileges commensurate with the attributes of the relationship.

¶ Marital relation or other arbitrary distinction should not be required when a family member seeks to compose a living will, health care proxy or medical directive, or durable power of attorney.

¶ Protections and claims under tort law, such as recovery for wrongful death or loss of consortium, should not rest on marital relation or other arbitrary distinction.

#### IX. IMMIGRATION

All families have a right to an equal opportunity to live, travel, and migrate together.

##### Bill of Particulars

¶ end exclusions based on sexual orientation

¶ marriage and biology should not be the sole criteria for reunifying families

## X. AUTONOMY

All families have a right to autonomy and privacy in making important decisions free of government intrusion.

Bill of Particulars

- ¶ Laws penalizing adult consensual sexual behavior should be abolished immediately.
- ¶ something about religion/educational/ethnic choices a la Yoder, but be careful?