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Law that Values All Families: Beyond (Straight and Gay) Marriage*

by

Nancy D. Polikoff†

I. Introduction

Karen Thompson had a problem. Her lover of four years, Sharon Kowalski, lay in a hospital bed, having suffered a brain injury caused when a car operated by a drunk driver collided with her car on a stormy Minnesota night. Because Karen wasn't a family member, the nursing staff would not let her see Sharon; this would be the beginning of a decade-long struggle pitting Karen against Sharon's parents over control of Sharon's treatment.¹

Susan Burns had a problem. The divorce decree awarding custody of her three children to their father stated that the children could not visit her if at any time during their stay she was living with or spending overnights with a person to whom she was not legally married. More than four years later, on July 1, 2000, Vermont instituted civil unions for same-sex couples. Susan entered into a civil union with her partner on July 3, 2000. When the children spent the night in the home Susan shared with her partner, a judge found her in contempt of court.²

Larry Courtney had a problem. His partner of fourteen years, Eugene Clark, did not come home from his job on the 102nd floor of the south tower of the World Trade Center on September 11, 2001. When Larry filed a workers' compensation claim, the reviewing agency replied that he did not qualify for

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¹ See generally CASEY CHARLES, *THE SHARON KOWALSKI CASE* (2003).

² See *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002).

benefits, which might instead be paid to Eugene's father, from whom Eugene had been estranged for twenty years.³

Lisa Stewart had a problem. At thirty-three, and with a five-year old daughter, Emily, she was diagnosed with breast cancer, which became terminal. She was unable to continue working as a real estate appraiser and lost her income and her health insurance. Her partner of ten years, Lynn, had insurance through her job, but it did not cover Lisa and Emily. Lisa and Lynn live in South Carolina, which does not allow "second-parent" adoption, so Lisa is Emily's only legally recognized parent. When Lisa dies, Emily will receive Social Security survivors' benefits, but Lynn will not.⁴

A consumer of current news might imagine that access to same-sex marriage is the most contested issue in contemporary family policy, and that marriage is the only cure for the disadvantages faced by lesbian and gay families. Both of these observations would be wrong. The most contested issue in contemporary family policy is whether married-couple families should have "special rights" not available to other family forms. Excluded families include unmarried couples of any sexual orientation, single-parent households, extended-family units, and any other constellation of individuals who form relationships of emotional and economic interdependence that do not conform to the one-size-fits-all marriage model. No other Western country, including those that allow same-sex couples to marry, creates the rigid dividing line between the law for the married and the law for the unmarried that exists in the United States.⁵

Consider the situations of the people above. Some may see them as evidence that same-sex couples must be allowed to marry. If Karen and Sharon had been married, no one would have questioned Karen's right to be Sharon's guardian. If Susan and her partner were married, she would not have been in violation of the court order when her children visited. If Larry and

³ SEAN CAHILL, MITRA ELLEN, SARAH TOBIAS, FAMILY POLICY: ISSUES AFFECTING GAY, LESBIAN, BISEXUAL, AND TRANSGENDER FAMILIES 21-22 (2003), available at http://www.thetaskforce.org/reports_and_research/family_policy.

⁴ Cahill, et al., *supra* note 3 at 149-50.

⁵ See Nancy Polikoff, BEYOND (STRAIGHT AND GAY) MARRIAGE 110-22 (2008).

Eugene had been married, Larry would have received Eugene's workers' compensation benefit. If Lisa and Lynn could marry, Lisa would be covered on Lynn's health insurance, Lynn could adopt Emily, and Lisa and Emily would both receive Social Security survivors' benefits when Lisa died.

I see these stories differently. Karen was the right choice to be Sharon's guardian because she knew Sharon best and was indisputably committed to her, because Sharon progressed when Karen worked with her while she was institutionalized, and because Karen was willing to take Sharon out of an institution and care for her in their home. Susan and her children were entitled to regular visitation to sustain and support their mother-child relationship, and unless her partner was harming the children, the fact that Susan lived with a partner should not have concerned a family court judge. Larry and Eugene were an economic unit; Eugene's death hurt Larry, not Eugene's father. Lisa needed healthcare; her daughter needed legal recognition of the two parents she had; and on Lisa's death, Lynn needs survivors' benefits to help her continue raising Emily.

II. An Alternate Vision: Valuing All Families

I propose family law reform that would recognize all families' worth. Marriage as a family form is not more important or valuable than other forms of family, so the law should not give it more value. Couples should have the choice to marry based on the spiritual, cultural, or religious meaning of marriage in their lives; they should never *have to* marry to reap specific and unique legal benefits. I support the right to marry for same-sex couples as a matter of civil rights law. But I oppose discrimination against couples who do not marry, and I advocate solutions to the needs all families have for economic well-being, legal recognition, emotional peace of mind, and community respect.

Consider the following:

Bonnie Cord graduated from law school and began working at a government agency. She bought a home with her male partner in the foothills of the Blue Ridge Mountains in Virginia. When she applied to take the Virginia bar exam—a test necessary to obtain the right to practice law in the state—a judge ruled

that her unmarried cohabitation made her morally unfit to do so.⁶

Catrina Graves was driving her car behind a motorcycle driven by Brett Ennis, the man with whom she had been living for seven years. A car failed to stop at a stop sign and hit Brett's motorcycle; Brett was thrown onto the pavement. Catrina saw the accident, stopped her car, and ran to Brett, who had suffered trauma to his head and was bleeding from the mouth. He died the next day. When Catrina sued the driver for negligent infliction of emotional distress, the court dismissed her lawsuit because she was not related to Brett by blood or marriage.⁷

Olivia Shelltrack and Fondray Loving had lived together for thirteen years when they bought a five-bedroom home in Black Jack, Missouri. They moved in with their two children and a third child from Olivia's previous relationship. The city denied them an occupancy permit because its zoning laws prohibit three persons unrelated by blood or marriage from living together.⁸

These are heterosexual couples and they *could* marry. But they shouldn't *have* to. Bonnie's choice to live with an unmarried partner bore no relationship to her ability to practice law. Catrina's anguish would have been no different had Brett been her spouse. The proper zoning concerns of Black Jack, Missouri, do not turn on whether Olivia and Fondray marry.

Extending legal rights and obligations to unmarried couples, as many Western countries do, is a start, but it is not enough. "Couples," meaning two people with a commitment grounded on a sexual affiliation, should not be the only unit that counts as family.

Consider these examples:

As a foster child, Jason was placed with married parents, Daniel and Mary Lou, who divorced two years later. Jason then lived with Mary Lou and visited Daniel, who also paid child sup-

⁶ See *Cord v. Gibb*, 254 S.E.2d 71 (Va. 1979) (overruling a lower court decision that denied the plaintiff the certificate of honest demeanor or good moral character required by statute as a prerequisite to her right to take the Virginia Bar examination).

⁷ See *Graves v. Estabrook*, 818 A.2d 1255 (N.H. 2003) (holding that the complaint supported a claim for negligent infliction of emotional distress despite the fact that the plaintiff and the decedent were not "closely related" by marriage).

⁸ Kate Klise, *Get Married or Move Out*, PEOPLE, March 27, 2006.

port. When Mary Lou and Daniel petitioned to adopt Jason, the court ruled that unmarried adults could not adopt a child together.⁹

Two sisters in England, Joyce, eighty-eight, and Sybil, eighty, have lived together all their lives. They grew up on a thirty-acre farm and worked on the land. They moved away for about fifteen years but returned in 1965, built a home on the land, and leased the farm. They live off the rental income. They each have wills naming the other as their beneficiary. When the first sister dies, the 40 percent inheritance tax will make it necessary for the survivor to sell the land and move. The survivor of a heterosexual married couple or a registered same-sex civil partnership would not have to pay this tax.¹⁰

Fifty-nine-year-old Maria Sierotowicz had been living in the same one-bedroom, subsidized housing unit in Brooklyn since 1984. Her mother, who lived with her, passed away in 1990. Ten years later, her eighty-one-year-old father returned to the United States from Poland and moved in with her so that she could care for him. Maria followed procedures and requested that he receive permission to join her Section 8 household. Her request was denied because he wasn't her spouse and his presence would make her unit "overcrowded." Maria received a notice terminating her Section 8 subsidy.¹¹

Marriage cannot be the solution to these problems. Jason's parents tried marriage; it didn't work for them. They need to be able to adopt Jason as two unmarried parents, if a judge finds that such an adoption is in Jason's best interests. Sybil and Joyce are a family, but not a family based on marriage or even on a marriage-like relationship. They are a long-term, interdependent unit, and they need—perhaps more than many spouses do—the financial advantages now extended only to spouses. If Maria had married, her husband would have automatically received permission to live with her. Instead she wants to care for someone unable to care for himself. She needs occupancy rules that do not stand in her way.

⁹ See *In re Jason C.*, 533 A.2d 32 (N.H. 1987).

¹⁰ James Slack, Luke Salkeld, Nick McDermott, *Euro-Court Denies Sisters the Same Tax Breaks as Gay Couples*, DAILY MAIL, December 12, 2006.

¹¹ See *Sierotowicz v. New York State Div. of Hous. and Comty. Renewal*, No. 04-CV-3887 (NGG), 2007 WL 1825402 (E.D.N.Y. June 21, 2007).

It is possible to envision family law and policy without marriage being the rigid dividing line between who is in and who is out. Keeping the state out of marriage entirely, making marriage only a religious, cultural, and spiritual matter, would be one way to accomplish this. But the law would still have to determine how to allocate rights and responsibilities in families and when relationships among people would create entitlements or obligations. This necessity, coupled with the disruption of expectations that ending the state's involvement in marriage would produce, suggests another approach.¹²

I call this approach "valuing all families." The most important element in implementing this approach is identifying the purpose of a law that now grants marriage unique legal consequences. By understanding a law's purpose, we can identify the relationships that would further that purpose without creating a special status for married couples.

III. The Historical, Political and Social Context for this Vision

Sweeping legal changes in the late 1960s and early 1970s altered the significance of marriage and laid the groundwork for this pluralistic vision. Those changes grew out of cultural and political shifts, including feminism and other social-change movements, greater access to birth control and acceptance of sex outside marriage, and increased dissatisfaction with marriage. The legal changes included decreased penalties for non-marital sex, especially an end to discrimination against children born to unmarried mothers; equality between women and men; and no-fault divorce.¹³

Early gay and lesbian rights advocates forged alliances with others who challenged the primacy of marriage: divorced and never-married mothers, including those receiving welfare benefits; unmarried heterosexuals, both those consciously rejecting the baggage associated with marriage and those who simply did not marry; and nonnuclear units, such as communal living groups and extended families. The gay rights movement was part of

¹² I do advocate changing the name of legal marriage to "civil partnership." See Polikoff, *supra* note 5 at 130-32.

¹³ See Polikoff, *supra* note 5 at 26-32.

broader social movements challenging the political, economic, and social status quo and seeking to transform society into one in which sex, race, class, sexual orientation, and marital status no longer determined one's place in the nation's hierarchy. Marriage was in the process of losing its ironclad grip on the organization of family life, and lesbians and gay men benefited overwhelmingly from the prospect of a more pluralistic vision of relationships.¹⁴

There were setbacks. A backlash resulted in restrictions on women's reproductive freedom, repeal of gay rights laws, and less support for welfare mothers. Conservatives employed the rhetoric of "traditional family values" to fight any proposal advancing recognition and acceptance of lesbian, gay, bisexual, and transgender (LGBT) people, and used antigay propaganda to raise money and garner votes for a wide-ranging conservative agenda.¹⁵

I seek to reclaim and build on the principle that law should support the diverse families and relationships in which children and adults flourish.

Since the mid-1990s, two movements have placed marriage in the public policy spotlight. The "marriage movement"—with both religious and secular components—opposes not only recognition of LGBT families but also easily obtained divorce, childbearing and sex outside marriage, and sex education that teaches anything other than abstinence.¹⁶ It advocates government funding of "marriage promotion" efforts.¹⁷ Its most prominent religion-based groups are Focus on the Family and the Family Research Council. They speak of a "God-ordained family."

¹⁴ See Polikoff, *supra* note 5 at 43-45.

¹⁵ See Polikoff, *supra* note 5 at 40-43.

¹⁶ See Polikoff, *supra* note 5 at 63-82.

¹⁷ For excellent critiques of "marriage promotion," see Alternatives to Marriage Project, *Let them Eat Wedding Rings: Executive Summary* 2007, available at <http://www.unmarried.org/rings.html>; SIECUS, *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, available at <http://www.siecus.org/index.cfm?fuseaction=Page.viewPage&pageId=484&parentID=478>; Jean Hardisty, *PUSHED TO THE ALTAR: THE RIGHT WING ROOTS OF MARRIAGE PROMOTION* (2008).

David Blankenhorn of the Institute for American Values and Maggie Gallagher of the Institute for Marriage and Public Policy are leading spokespeople for the secular claim that supporting any family form other than heterosexual marriage endangers the social fabric. By blaming poverty, crime, drug abuse, and education failure on family diversity, they point the finger at unmarried mothers and absolve government of the responsibility for wage stagnation, income inequality, poor schools, sex and race discrimination, and inadequate childcare and healthcare.¹⁸ Legal groups such as the Alliance Defense Fund and Liberty Counsel represent these positions in litigation. The mission of Liberty Counsel is “restoring the culture one case at a time by advancing religious freedom, the sanctity of human life, and the traditional family.”¹⁹

The “marriage equality” movement advocates for gay and lesbian couples to be able to marry.²⁰ Attorney Evan Wolfson heads a national organization, Freedom to Marry, which has the support of numerous partner organizations, gay and non-gay, at the national, state, and local levels. Two national groups, the Human Rights Campaign and the National Gay and Lesbian Task Force, work to advance many LGBT rights issues and devote some of their resources to marriage-related organizing and advocacy. Four legal groups that challenge discrimination against LGBT people in all areas, including employment, schools, immigration, the military, and family law, have had primary responsibility for the litigation contesting restrictions on access to marriage: Lambda Legal (formerly known as Lambda Legal Defense and Education Fund); Gay & Lesbian Advocates & Defenders, the Boston-based group that won the right to marriage equality in Massachusetts; the American Civil Liberties Union Lesbian Gay Bisexual Transgender Project; and the National Center for Lesbian Rights.

Both these movements focus on marriage. Neither starts by identifying what all families need and then seeking just laws and policies to meet those needs. The marriage movement does not want to meet the needs of all families. Its leading spokespeople

¹⁸ See Polikoff, *supra* note 5 at 66-72.

¹⁹ See Liberty Counsel, *About Us*, available at <http://www.lc.org/index.cfm?pid=14096>.

²⁰ See Polikoff, *supra* note 5 at 83-98.

argue that the intrinsic purpose of marriage is uniting a man and a woman to raise their biological children. They oppose marriage for same-sex couples, and want marriage to have a special legal status.

The marriage-equality movement wants the benefits of marriage granted to a larger group: same-sex partners. With few exceptions, advocates for gay and lesbian access to marriage do *not* say that “special rights” should be reserved for those who marry. But the marriage-equality movement is a movement for gay civil rights, not for valuing all families. As a civil rights movement, it seeks access to marriage as it now exists.

The movement’s most consistent claim is that exclusion from marriage harms same-sex couples in tangible ways. But people in any relationship other than marriage suffer, sometimes to a level of economic or emotional devastation. The law is not uniquely unfair for gay and lesbian couples. Access to marriage will provide some gay men and lesbians with the economic support and peace of mind that come from knowing that all your family members have adequate health insurance, that a loved one can make medical decisions for you if you are ill, that your economic interdependence will be recognized at retirement or death, and that your children can be proud of the family they have. But other LGBT people, and all whose family form, for whatever reason, is not marriage, will still be without those supports that every family deserves.

The focus on access to marriage may be constricting the imagination of advocates for LGBT families who attribute every problem a same-sex couple experiences to marriage discrimination. Consider this:

Openly gay San Francisco supervisor Harvey Milk was assassinated on November 27, 1978, by a former supervisor, who also murdered the city’s mayor, George Moscone. Milk was a community leader, dubbed the Mayor of Castro Street, and the first openly gay elected official in a major U.S. city. A film about his life won the Academy Award for best documentary in 1985 and 2008 saw the release of a major motion picture, “Milk,” starring Sean Penn in the title role. San Francisco named a plaza in his honor, and numerous gay community organizations and alternative schools across the country bear his name.

His surviving partner, Scott Smith, received death benefits from the state Workmen's Compensation Appeals Board.²¹

When gay surviving partners of those who died on September 11, 2001, did not receive workers' comp death benefits, gay rights advocates attributed it to marriage discrimination. But solutions to this problem and others are available or more achievable using a valuing-all-families approach, and they will help more people. Scott Smith was successful because California does not base entitlement to workers' comp death benefits on marriage. Its law is one model other states could adopt.

Laws that distinguish between married couples and everyone else need to be reexamined. They stem from the days when a husband was the head of his household with a dependent wife at home, when a child born to an unmarried woman was a social outcast, and when virtually every marriage was for life regardless of the relationship's quality. It was a very different time.

When the Supreme Court declared the laws differentiating between men/husbands and women/wives unconstitutional, the laws became gender-neutral. This created a new problem. It left distinctions between married couples and everyone else without assessing the justness of that approach. It's time to make that assessment. Today more people live alone, more people live with unmarried partners, and more parents have minor children who live neither with them nor with their current spouse. The laws that affect families need to be evaluated in light of contemporary realities. A valuing-all-families approach does this by demanding a good fit between a law's purpose and the relationships subject to its reach.

IV. The Methodology in Action

Two examples illustrate application of the valuing-all-families methodology: dissolution of intimate couple relationships and compensating for the loss of an income earner. In addition, this methodology requires reconsideration of numerous laws that downplay the needs of children.

²¹ *Death Benefit Voted for Homosexual's Lover*, NEW YORK TIMES, November 11, 1982.

A. *Couple dissolution*

In Washington state, when a cohabiting couple separates, the court treats the property acquired by each as community property and divides it according to the community property principles applied when a marriage ends.²² It is the only state that does this. The other 49 should adopt this approach.²³

I reach this conclusion by first asking the purpose of any law adjusting finances at the end of a marriage. Why not use the principles of contract and property law that generally resolve disputes between individuals over money, assets, and obligations? Historically, laws applied at the end of a marriage were determined by wives' subordination to and legally mandated economic dependency upon their husbands, and by the need for penalties for "fault" leading to marital failure. In addition, the disapproval of sex outside of marriage, through criminal law and laws punishing unmarried mothers and their children, made it unthinkable that the law would deal objectively with the needs of separating unmarried couples.

Today we allow no fault divorce, and our laws reflect equality between men and women, husbands and wives. Sex outside of marriage is the norm. What happens to property upon marital dissolution can't be based on expecting couples to stay married, reinforcing gender norms, or punishing nonmarital sex.

Nonetheless, there is good reason to depart from contract and property standards when a marriage ends; a married couple likely functions differently from other people who exchange money, goods, and services. In a marriage, a division of labor and pooling of resources take place according to principles that differ from those that drive non-intimate markets. If we make a wife prove that her husband explicitly agreed to support her if the marriage ended, if we make her prove that she made a financial contribution to property titled in his name alone, there will be unjust results.

Community property rules, or equitable division in common law property states, produce a more just result. Among other

²² See *Connell v. Francisco*, 898 P.2d 831 (Wash. 1995); *Gormley v. Robertson*, 83 P.3d 1042 (Wash. Ct. App. 2004).

²³ I develop this argument more fully in *BEYOND (STRAIGHT AND GAY) MARRIAGE*, pages 177-79.

things, they allow a court to acknowledge nonfinancial contributions to a family unit and foregone economic opportunities in the service of making a household unit function well.

With this purpose in mind, it becomes clear that any couple who functions as such a unit should have access to the same legal rules when their relationship ends, whether they marry or don't. UCLA law professor Grace Ganz Blumberg has advocated this result for thirty years.²⁴

In 2003, there were 5.5 million cohabiting unmarried couples. Forty-four percent of heterosexual cohabiting couples had children under 18 in their homes. 38% of lesbian couples and 27% of gay male couples also had children under 18 in their homes.²⁵ When one of these relationships ends, a court has all the information it needs about how the couple lived and should be able to rule on the economic consequences of their dissolution in a way that achieves just results.

The American Law Institute urges precisely this law reform. Its *Principles of the Law of Family Dissolution*, promulgated in 2000 after 12 years of study, creates a category called "domestic partners" and applies the same rules to ending a domestic partnership as it applies to ending a marriage.²⁶

"Marriage movement" ideologues attacked the ALI's recommendations.²⁷ They always advocate a rigid legal line between married and unmarried couples, no matter what the injustice. Some scholars also criticized the ALI domestic partner principles, arguing that people should not be subject to rules they did not choose.²⁸ But this argument lacks merit. Married couples

²⁴ See Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 125, 1125 (1981); Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555 (2004). See also Polikoff, *supra* note 5 at 125.

²⁵ See Diana B. Elliott, Jane Lawler Dye, *Unmarried Partner Households in the United States: Descriptions and Trends 2000 to 2003*, available at www.census.gov/acs/www/Downloads/PAA-up_poster4.ppt.

²⁶ See American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2000). See also Polikoff, *supra* note 5 at 177-78.

²⁷ See Polikoff, *supra* note 5 at 178-79.

²⁸ See Polikoff, *supra* note 5 at 179-80.

don't choose a set of rules in the event they divorce. Those rules depend upon where they live. Claims to separate property, compensation for contributing to a spouse's professional degree, the significance of adultery, presumptive 50-50 property division versus "equitable" division, and the ability of an employed spouse to obtain alimony are just a few of the many issues upon which state laws differ. Lawmakers establish the rules governing the economic consequences of divorce based on their assessment of what is fair and just. They can and should establish rules governing the economic consequences of domestic partner dissolution that recognize the vulnerabilities and interdependency of a shared life together as a couple.

As is often the case, there are other countries that have taken this approach.²⁹ Australia and New Zealand treat separating married and unmarried couples identically. In Canada, ongoing support is available equally to a married or an unmarried partner when a relationship ends.³⁰ The first Canadian case establishing this principle for unmarried heterosexual couples was decided in 1972. In 1999, the Supreme Court of Canada ruled that a lesbian was entitled to support payments from her former partner.³¹ Although Washington state has extended equality in property division to unmarried gay and straight couples, no American state, including Washington, has extended such equality to claims for ongoing support.

B. *Workers' Compensation Survivors Benefits*

A handful of states evaluate entitlement to death benefits when an employee dies on the job based on a survivor's actual dependency, in whole or in part, on the deceased employee. In those states, marriage is neither necessary nor sufficient to receive the benefit. This is the approach all states should take.³²

To reach this conclusion, I ask why states provide a surviving spouse with this benefit. The answer is obvious; the purpose of the benefit is to compensate for the loss of an economic provider. Digging deeper into the history provides even more evidence

²⁹ See Polikoff, *supra* note 5 at 181.

³⁰ See Polikoff, *supra* note 5 at 115.

³¹ See *M. v. H.* [1999] 2 S.C.R. 3.

³² See Polikoff, *supra* note 5 at 196-202.

that marriage is the wrong dividing line between who gets it and who doesn't.

Workers' comp is a no-fault insurance system. It allows a worker injured on the job, or the survivor of a worker who died on the job, to receive a regular benefit check regardless of whose "fault" caused the injury or death. It developed, over a century ago, as a response to the growing number of industrial accidents causing injury or death. Under the old system, a worker, or his survivor, could recover only by proving the employer was at fault; this too often left disabled workers, and the families of deceased workers, completely impoverished.

Workers' comp benefits come from a state-administered fund into which all employers pay. In return for paying into the fund, employers are assured that an injured worker or the survivor of a deceased worker will be unable to sue in court for damages; the workers' comp benefit is the only payment made to the worker or his survivors.

Each state establishes criteria for its program, including who counts as a survivor, how long benefits are paid, how much the payment is, and the circumstances under which the payment ceases. The key to receiving death benefits has always revolved around determination of total or partial dependency, and state statutes typically include a list of relatives who may receive a share of the death benefit upon proof of actual dependency upon the deceased worker.

Through the 1970's, workers' comp was called *workmen's* comp and contained restrictions that reflected traditional family law principles. A state could deny survivors' benefits to an employee's children born outside marriage.³³ A state could distinguish between husbands and wives.³⁴

Missouri law contained a typical survivor's benefit provision. A widow was presumed wholly dependent upon her deceased husband. A widower, however, could not recover unless he proved that he had received more than 50% of his support from his deceased wife. This statute was originally enacted in 1925.³⁵

³³ See *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972). See also Polikoff, *supra* note 5 at 197.

³⁴ See *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980). See also Polikoff, *supra* note 5 at 197.

³⁵ See *Wengler*, 446 U.S. at 1510 (1980).

At the time only 7% of married women in the state worked outside the home.

When challenged as unconstitutional sex discrimination, Missouri offered a sensible defense of its scheme. The state argued that it made administrative sense to presume that widows had been economically dependent upon their husbands; an individualized determination of actual dependency would be an unwise allocation of administrative resources. Widowers, on the other hand, were much less likely to have depended upon their working wives, and so before paying out benefits it made sense to require actual proof of dependency.

This defense was based on a premise that was undeniably accurate when the scheme was created. It also revealed the true purpose of this benefit: pay compensation to a survivor who had depended upon the employee's income; don't pay it to one who had not.

By 1980, when the challenge to this statute reached the United States Supreme Court, the Court had already thrown out several government benefits schemes based upon this same premise.³⁶ The state could no longer presume a wife's dependency upon her husband while requiring proof of a husband's dependency upon his wife. The Missouri statute was declared unconstitutional.

States could remedy the constitutional deficiency in two ways; they could require all surviving spouses to prove dependency or they could make payments to all surviving spouses without requiring anyone to prove dependency. Most states chose this latter approach. Today's statutes that automatically award death benefits to surviving spouses thus conceal the underlying purpose of the workers' comp program – compensating a dependent for the loss of a wage earner's income.

But some modern statutes do reflect the scheme's underlying purpose by requiring proof of dependency for all surviving spouses. And, in keeping with the overarching goal of this benefit, some states pay the benefit based on dependency with no need to prove any legal relationship.

³⁶ See *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

Maryland is one such state. Anyone "wholly dependent" can receive the benefit. If no one is wholly dependent then it goes proportionately to anyone partially dependent.³⁷ Surviving spouses must prove dependency just like anyone else. In a 1950 case, the state's highest court expressed the purpose of the law succinctly. Workers' comp "is not a code of morals, but a practical device for the economic protections of employees and those dependent upon them."³⁸ In that case payment went to the deceased worker's unmarried cohabiting partner.

California compensates any household member who was wholly or partly dependent on the worker who died.³⁹ That is why Larry Courtney, and the other same-sex partners of those who died in the September 11 attacks, would have been eligible for benefits had the World Trade Center been a landmark in Los Angeles.

C. Valuing All Children

So far, I've demonstrated the valuing-all-families methodology in the context of adult interdependency. When a dependent child is in the picture, the focus should shift. Children are, as Martha Fineman has brilliantly described, *inevitable* dependents; they cannot care for themselves.⁴⁰ Upon the death of an adult who has supported children, those children should be the primary target of compensation.

This does not happen now. Instead, a surviving spouse is favored, even if that person is fully capable of self-support. Perhaps nowhere is this starker than in the law of wills. In almost every state, a person cannot disinherit his spouse, absent a valid contract to the contrary. In almost every state, a person *can* disinherit his minor children.⁴¹

When these basic principles were established centuries ago, family life and family laws were very different. A wife lost her independent identity upon marriage and could not support her-

³⁷ MD. CODE ANN. LAB. & EMPL. § 9-681(a) (2004).

³⁸ See *Kendall v. Hous. Auth. of Baltimore City*, 76 A.2d 767, 770 (Md. 1950).

³⁹ CAL. LAB. CODE § 3502 (2003).

⁴⁰ See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

⁴¹ See Polikoff, *supra* note 5 at 139.

self; divorce was rare; a man had no obligation to support his children unless they were born to his wife. Thus if a man died with minor children he had been obligated to support, they likely lived with his surviving widow. Her entitlement to inherit assured that the children would have access to some resources.

Furthermore, children did not need support for as long as they do now. They started work at a young age, thereby becoming economic assets to their families.

But in today's world, these nearly universal legal rules produce results that can impoverish children while providing a windfall to an adult perfectly capable of self-support who may have sacrificed nothing to raise children. A man cannot disinherit the woman he married weeks ago, but he can disinherit the children who live with his former wife or nonmarital partner. If we are going to put any restrictions on testamentary freedom, the touchstone principle of the law of wills, it is those children, not surviving spouses, whose claims should prevail.

Workers' comp survivors benefits also need to give priority to children. This often does not happen now. For example, in New York, if a deceased worker leaves behind a dependent child but no spouse, the child will receive the entire benefit. If, however, the worker had a spouse, the spouse receives 55% of the benefit, leaving the child 45%. But if the spouse is not the child's mother, the child does not live with her, and the spouse is an adult capable of self-support – all uncommon factual predicates when workers' comp was first enacted but common factual predicates now – this allocation is unjust.⁴²

The “special rights” that attach to marriage need reevaluation because they often fail to meet the needs of children in today's family structures.

V. Looking Ahead

Karen Thompson was the right choice to be Sharon Kowalski's guardian. Susan Burns and her children needed regular visits with each other. Larry Courtney deserved compensation for Eugene's death. Lisa Stewart needed health insurance and the ability to provide for her family when she dies, and her daughter needed two legal parents.

⁴² See Polikoff, *supra* note 5 at 199-201.

Many of these results could be secured right now by looking for solutions other than marriage. In every area of law that matters to same-sex couples, such as healthcare decision making, government and employee benefits, and the right to raise children, laws already exist in some places that could form the basis for just family policies for those who can't marry⁴³ or enter civil unions⁴⁴ or register their domestic partnerships,⁴⁵ as well as for those who don't want to or who simply don't, and whose most important relationship is not with a sexual partner.⁴⁶ These laws will help many families, not just LGBT ones, and not just couples.

Successful reform that values all families may not come in the name of gay rights. It may come under the banner of, for example, patients' autonomy, family pluralism, and the needs of children. Some lawmakers will support important reforms precisely *because* they help many people in many families and do not appear to be "gay rights" issues. In recent years, that motivation has produced a policy in Salt Lake City that extends health insurance to any one adult member of an employee's household

⁴³ Only Massachusetts and Connecticut allow same-sex couples to marry. See *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008). In California, as a result of *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), marriage for same-sex couples became legal as of May 15, 2008. On November 4, 2008, California voters enacted "Proposition 8," amending the state's constitution to prohibit such marriages. A challenge to Prop 8 arguing that such a change to the state's constitution could not be made by ballot initiative is currently pending in the California Supreme Court. (Editor's note: Since this was written three additional states, Maine, Vermont and Iowa now allow same-sex couples to marry.)

⁴⁴ "Civil union" is one term used to describe a legal status available to same-sex couples that confers upon them all the state-based consequences of marriage. The first civil union statute was enacted in Vermont in 2000. VT. ST. ANN. TIT. 15, §§ 1501-1504 (2000). It was a result of the Vermont Supreme Court's ruling that denying same-sex couples the benefits and obligations of marriage was a violation of the state's constitution. *Baker v. State*, 744 A.2d 864 (Vt. 1999). Civil union statutes exist now in Vermont, New Jersey, and New Hampshire.

⁴⁵ "Domestic partnership" laws provide varying legal consequences, some quite limited. In Oregon and California, becoming domestic partners entitles the couple to all the state-based legal consequences of marriage.

⁴⁶ See Polikoff, *supra* note 5 at 211-12.

and that person's children,⁴⁷ a law in Virginia requiring hospitals to allow patients to select their own visitors,⁴⁸ and a change in federal pension law that allows any beneficiary to inherit retirement assets without paying a tax penalty.⁴⁹ After such laws change, gay rights leaders rightly trumpet that they will help LGBT families.

A strategy in the name of gay rights toward recognition of same-sex partnerships, where successful, is a civil rights triumph. It may, however, have unfortunate consequences for family policy. Same-sex couples will have the right to a formal legal status for their relationships; those who exercise that right will have the array of consequences that married spouses now receive. This will disregard the needs of LGBT couples who don't marry or register, LGBT singles and households not organized around sexual intimacy, LGBT parents without partners, and the families and relationships of vast numbers of heterosexuals.

Where a gay rights strategy loses and does not result in marriage, civil unions, or partnership registration, the "special rights" given marriage will continue to harm same-sex couples. Where a losing gay rights strategy results in a constitutional amendment barring recognition of unmarried same-and different-sex couples, as more than a dozen states have,⁵⁰ those couples may be worse off than they are now. That's what happened in Michigan, where public employees lost domestic partner benefits.⁵¹

A valuing-all-families strategy achieves good results, for good reasons, and makes marriage matter less. That was the direction in which U.S. law and policy was headed before the right-

⁴⁷ See SALT LAKE CITY ORDINANCE, *Benefits for Dependents of Employees* § 2.52.100 (2006); Heather May, *SLC Will Offer Health Care to Unwed Couples*, SALT LAKE TRIBUNE, September 20, 2005.

⁴⁸ See VA. CODE ANN. § 54.1-2982 (2007). See also Amy Gardner, *Surprising Unity on Va. Hospital Visit Bill; Conservatives Support Right that Includes Gays*, WASHINGTON POST, February 19, 2007, at B01.

⁴⁹ Pension Protection Act of 2006, HR 4, 109th Cong. (2006); Human Rights Campaign, *Pension Law Includes Important Protection for Same-sex Couples Under Federal Law*, available at <http://www.hrc.org/issues/2704.htm>.

⁵⁰ See National Gay and Lesbian Task Force, *Anti-Gay Marriage Measures Map*, available at http://thetaskforce.org/reports_and_research/marriage_map.

⁵¹ See *National Pride at Work v. Governor of Michigan*, 748 N.W.2d 524 (Mich. 2008).

wing backlash against feminism, LGBT rights, and other progressive social change. That backlash today includes the religious and secular marriage movement. *Its* emphasis on marriage should not lead gay rights activists away from advocacy that will meet the needs of diverse families and relationships in a pluralistic society.