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MARRIAGE EQUALITY IS BOTH FEMINIST AND PROGRESSIVE

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I. INTRODUCTION

In July 1987, I presented a paper at the Feminism and Legal Theory Conference at the University of Wisconsin-Madison that became my article: *Choosing One's Family: Can the Legal System Address the Breadth of Women's Choice of Intimate Relationship?*[1] In that article, I discussed the existing presumption that "family" meant the traditional nuclear family, consisting of one husband, one wife, and their children. At that time, virtually no government legally considered family to extend beyond this narrow heterosexist definition. My article focused on the early attempts to redefine family to include "alternative families," the term used in the Madison, WI ordinance that I had helped draft from 1983 to 1985.[2] It was the third "domestic partnership" ordinance adopted in the U.S., which provided limited city benefits to "two unrelated adults and the minor children of each."[3] The article discussed our efforts to create a comprehensive alternative family rights ordinance through extensive grass-roots efforts and our failure to convince the City of Madison to define family as "two or more adults."[4]

The article then provided a feminist critique of the limitations placed on legal recognition of women's choices of intimate relationships.[5] Efforts to use the legal system might help remedy injustice but would be incremental and slow. Those efforts would also force individuals into "mainstream relationships" in order to receive legal recognition and benefits.[6] Thus, extended alternative families created by choice, not blood, would continue to be excluded from the choice of relationships that women could enter and receive societal and legal recognition. The article explained that this limitation negatively impacts working-class and poor people, people of color, and sexual minorities disproportionately because they tended to live in a broader range of relationships.[7]

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[1] Barbara J. Cox, Choosing One's Family: Can the Legal System Address the Breadth of Women's Choice of Intimate Relationship?, VIII ST. LOUIS U. PUB. L. REV. 299 (1989) [hereinafter Cox, Choosing One's Family].

[2] Id. at 303; see also Barbara J. Cox, Alternative Families Obtaining Traditional Family Benefits through Litigation, Legislation, and Collective Bargaining, 2 WISC. WOMEN'S L.J. 1 (1986) [hereinafter Cox, Alternative Families] (describing the "Alternative Families" Task force, created by the Madison Equal Opportunities Commission, in its attempt to provide municipal legal rights to alternative families, including same-sex couples).

[3] Cox, Choosing One's Family, supra note 1, at 320.

[4] Id. at 308–20.

[5] Id. at 322–33.

[6] Id. at 326.

[7] Id. at 330–32.

This article revisits that earlier one, more than 25 years since it was presented at the Feminist Legal Theory conference, and explains how my analysis has changed over the 20 years that I have been actively working to obtain marriage equality for same-sex couples.[8] After reading my *Choosing One's Family* article, many might expect that I would join those who oppose marriage equality, not to prevent same-sex couples from marrying, but because requiring marriage between two persons to receive extensive benefits is exclusionary to those who live in the broader, extended family relationships that I discussed in 1987. I agree with them that limiting benefits only to married couples, rather than expanding the relationships that receive legal recognition, is too limiting.

But I have also come to believe that marriage equality for sexual minorities provides a strong critique to the norms of heterosexuality that influence society.[9] It remains true that heterosexual marriage can be repressive and repugnant when child marriage, bride price, and arranged marriages continue to afflict millions of women around the globe.[10] Additionally, the history of marriage in the U.S. includes the exclusion of African slaves, anti-miscegenation and other laws that imposed barriers to marriage based on racism,[11] loss of the woman's self into her husband's identity,[12] and freedom from criminal penalties for marital rape and domestic violence.[13]

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[8] I have written numerous articles and book chapters on marriage equality since 1994 when I published my first article, Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married when We Return Home?, 1994 WIS. L. REV. 1033. [hereinafter Cox, If We Marry]. Since 2003, I also have chaired or co-chaired the Board of Freedom to Marry, the campaign to win marriage equality nationwide. See FREEDOM TO MARRY, http://www.freedomtomarry.org (last visited Feb. 17, 2014). My commitment to marriage equality is both as a scholar and as an activist.

[9] During 2013-mid 2014, while I was writing this article, the marriage equality movement made significant progress in the U.S. During 2013, 7 additional states added marriage for same-sex couples (RI, MN, DE, CA, NJ, HI, and NM) and in 2014, IL started to marry same-sex couples on June 1, 2014 based on a law adopted in 2013. Oregon and Pennsylvania also added marriage for same-sex couples. See National Gay and Lesbian Task Force, Relationship Recognition for Same Sex Couples in the U.S. (2014), http://www.thetaskforce.org/downloads/reports/issue_maps/rel_recog_5_20_14_color.pdf (last visited June 19, 2014). Same-sex couples have filed lawsuits in every state that does not allow same-sex couples to marry. See, Marriage Rulings Since Windsor, FREEDOM TO MARRY, http://www.freedomtomarry.org/litigation (last visited June 19, 2014). Since Windsor, 20 consecutive courts have ruled in favor of marriage equality. See Marriage Rulings in the Courts, FREEDOM TO MARRY, http://www.freedomtomarry.org/pages/marriage-rulings-in-the-courts (last visited June 19, 2014); MARRIAGE EQUALITY USA, http://www.marriageequality.org/lawsuits (last visited June 19, 2014).

[10] See, e.g., D. MARIANNE BLAIR ET AL., FAMILY LAW IN THE WORLD COMMUNITY: CASES, MATERIALS, AND PROBLEMS IN COMPARATIVE AND INTERNATIONAL FAMILY LAW 117–19 (2d ed. 2009) [hereinafter BLAIR ET AL., FAMILY LAW IN THE WORLD COMMUNITY] (discussing the harmful practices experienced by women and girls around the world).

[11] See Laura A. Rosenbury, Marital Status and Privilege, 16 J. GENDER, RACE & JUST. 769, 769-71 (2013) (discussing Angela Onwuachi-Willig's book, ACCORDING TO OUR HEARTS: RHINELANDER V. RHINELANDER AND THE LAW OF THE MULTIRACIAL FAMILY (2013)) (although family law is now race-neutral, "social understandings of marriage remain deeply raced—privileging white couples over all

Despite this history and ongoing reality for many women, marriage equality still has the ability to lessen vulnerability for society's most needy. This article discusses two aspects of marriage equality in particular. Part II discusses why marriage equality can be feminist in practice and why obtaining marriage equality for same-sex couples will advance feminist values within marriage. Part III discusses how marriage equality can be progressive and help those who are vulnerable in our society by providing numerous rights that are otherwise unavailable or expensive to replicate. While marriage equality cannot bring an end to the many problems caused by marriage's privileged status in our society,[14] it has the ability to play an important role in promoting feminist and progressive goals.

II. MARRIAGE EQUALITY FOR SAME-SEX COUPLES WILL ADVANCE FEMINIST CRITIQUES OF MARRIAGE

This section discusses how marriage equality for same-sex couples can support feminist ideals while lessening patriarchal norms that limit all women in marriage. Subsection A considers the feminist critiques of marriage made by theorists; while agreeing with those critiques, it argues that marriage equality can help lessen those norms within all marriages. Subsection B recognizes that choice is an important feminist value and that allowing same-sex couples to choose whether to enter into marriage, rather than forcing them into alternative relationships, affirms this value. Subsection C considers the arguments made by marriage equality opponents who seek to retain the traditional gender roles of heterosexual marriage by retaining this last remaining gender-specific requirement of marriage.[15] "[T]he single most visible gender-based family law still surviving is the re-

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others and privileging monoracial couples over interracial ones." Id. at 778.); Katherine M. Franke, The Domesticated Liberty of Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1420 (2004) [hereinafter Franke, Domesticated Liberty] (discussing that enslaved couples could not enter into legally enforceable marriages).

[12] 1 WILLIAM BLACKSTONE, COMMENTARIES *442.

[13] Susan Frelich Appleton, Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate, 16 STAN. L. & POL'Y REV. 97, 110–11 (2005) [hereinafter Appleton, Missing in Action] (noting also that "American family law has changed dramatically, with the elimination of official gender roles emerging as perhaps the most significant and pervasive transformation."); Erez Aloni, Registering Relationships, 87 TUL. L. REV. 573, 619 (2013).

[14] Rosenbury, supra note 11, at 778 n.65.

[15] It was the importance of these gender roles that led the courts deciding marriage equality cases in the 1970s to reject those challenges out of hand, essentializing "as 'nature' the gender definitional boundaries of marriage." Nan D. Hunter, Marriage, Law, and Gender: A Feminist Inquiry, 1 L. & SEXUALITY: A REV. OF LESBIAN AND GAY LEGAL ISSUES 9, 13 (1991) [hereinafter Hunter, Marriage] (discussing those cases). Hunter's article was one of the first arguing that marriage equality can also support feminism.

quirement of one man and one woman for a valid marriage, even though the spouses' legal roles and responsibilities have become essentially interchangeable."[16] Elimination of these gender roles is one of marriage equality opponents' worst fears and "signals a deep resistance to finishing off what remains of marriage's traditional gender script."[17] Feminists who support the reforms that have ended this "script" should also actively support marriage equality to prevent reemergence of gender bias into an institution where "law reforms have emptied 'husband' and 'wife' of their legal substance . . . "[18] Thus, Section II concludes that marriage equality supports the important critiques of marriage that feminists have made to family law and has much to offer in support of those critiques.

A. Marriage Equality Is Feminist

The radical aspect of marriages by same-sex couples can be transformative for the couple themselves and for those around them. It is profoundly transformative to speak publicly and openly of lesbian love and commitment, not just for ourselves, but also for our family and friends, and for the public officials and others involved in our legal marriages.[19] While we must remain conscious of the oppressive history that marriage symbolizes, it is a vibrantly anti-patriarchal statement for two lesbians to reject the notion that marriage is restricted to heterosexuals and instead claim that privileged status for ourselves, after a lifetime of being denied acceptance of our relationships.[20]

In this section, I discuss some of Professor Nancy Polikoff's articles as a way to engage the anti-marriage critique. Professor Polikoff is a leading scholar and law reformer who is respected internationally, and the leading advocate for the "valuing all families" approach to family law that she has championed.[21] I seek to engage with her work, not criticize it. I respect her thoughtful and passionate defense of those who find little support from so-

[16] Appleton, Missing in Action, supra note 13, at 119.

[17] Id.

[18] Id.

[19] I have briefly raised these issues elsewhere, including Cox, If We Marry, supra note 8, at 1037 n.12, and Barbara J. Cox, A (Personal) Essay on Same-Sex Marriage, in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 27 (R.M. Baird & S.E. Rosenbaum eds., 1997). Obviously, similar, but different, critiques exist when two gay men marry.

[20] See Rosenbury, supra note 11, at 780–81 (discussing "couple privilege," Angela Onwuachi-Willig's analysis of "couple privilege," and how that privilege is lessened when the couple is mixed-race).

[21] See generally NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 123 (2008) [hereinafter POLIKOFF, BEYOND] (discussing the "value all families" approach).

ciety for their choice of whom they choose to call family. But, I also believe that marriage equality can answer many of her critiques and support her efforts to develop a progressive, broadly inclusive legal definition of family. In fact, she has discussed the work of the Madison, Wisconsin alternative families taskforce that I co-chaired and applauded our efforts to provide legal benefits to a broad range of families.[22]

Consider Polikoff's article, *Why Lesbians and Gay Men Should Read Martha Fineman*.[23] She explained that second-wave feminists had "a searing critique" of marriage.[24]

> Marriage was the principal institution that maintained the patriarchy. Women who married lost their identity, their aspirations and abilities subsumed to those of their husbands. Love, in whose name marriage was exalted, was itself constructed for the benefit of male control over women. Marriage could not be transformed through the eradication of de jure inequality because the social, cultural, and economic aspects of marriage were relentlessly resistant to transformation.[25]

Polikoff then referred to feminists who came of political age during the prime of radical feminism's influence, who,

> developed a prism through which to observe and evaluate the entire social, economic, political, and cultural order. This prism accepts the existence of patriarchy, of firmly, historically entrenched male domination of women and it judges all areas, including the law by the extent to which the hierarchical power of men over women, and indeed all hierarchical power, is diminished.[26]

I agree with Polikoff's description of the feminist critique of marriage, which has been made by many other prominent feminist theorists as well.[27]

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[22] Id. at 50–51; see also Cox, Alternative Families, supra note 2. See generally Cox, Choosing One's Family, supra note 1 (discussing the existing presumption that "family" means the traditional nuclear family).

[23] Nancy D. Polikoff, Why Lesbians and Gay Men Should Read Martha Fineman, 8 AM. U. J. GENDER SOC. POL'Y & L. 167 (1999) [hereinafter Polikoff, Read Martha Fineman] (referring to MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES (1995) (arguing that parent-child relationship should be the main family form protected by legal rules)).

[24] Polikoff, Read Martha Fineman, supra note 23, at 170.

[25] Id. at 170 (referencing works such as: Robin Morgan, Introduction to SISTERHOOD IS POWERFUL: AN ANTHOLOGY OF WRITINGS FROM THE WOMEN'S LIBERATION MOVEMENT 46 (R. Morgan ed., 1970); Confront the Whoremakers at the Bridal Fair, in SISTERHOOD IS POWERFUL: AN ANTHOLOGY OF WRITINGS FROM THE WOMEN'S LIBERATION MOVEMENT, supra, at 543–47; SHULAMITH FIRESTONE, THE DIALECTIC OF SEX 126–41 (1970)).

[26] Polikoff, Read Martha Fineman, supra note 23, at 171; see also Rosenbury, supra note 11, at 773 (discussing how family law mandated distinct roles for men and women in marriage).

[27] See, e.g., FINEMAN, supra note 23; see also Franke, Domesticated Liberty, supra note 11, at 1417–19 (questioning LGBT people "yearning for official recognition" instead of being "sodomitic outlaws"); Katherine M. Franke, Longing for Loving, 76 FORDHAM L. REV. 2685 (2008) (underscoring the need to

As Hunter noted, courts enforced "the precept that marriage necessitated not only an authority and dependence relationship, but one that was gendered."[28] She emphasized that "it is the social power relations between men and women, inside or outside of marriage, that have changed less significantly."[29]

Many of the laws that required these gender roles within marriage have been dismantled, with the significant help of feminists, over the past 40 years.[30] As Laura Rosenbury noted: "Thus, gender is now legally relevant to marriage only in the . . . states that limit marriage to mixed-sex couples, and the laws of those states are gender-specific only at the point of access to marriage."[31]

This critique of marriage also loses some of its persuasiveness when it is applied to the marriage of lesbian feminists. My spouse, Peg Habetler, and I are lesbian feminists who came of age in the 1960s and 1970s. We had a private commitment ceremony with the support of our friends and family and registered as domestic partners in Madison, WI in 1992; and we registered as domestic partners in California in both 2000 and 2005, receiving limited rights at first, followed by all the state rights that married couples receive. But we were amazed how meaningful it was for us to be able to marry legally in Windsor, Canada in 2003. [32] Despite having been together for over 13 years at that time, obtaining government recognition of our relationship as a marriage had a special impact on us. It allowed us to challenge the heterosexual norms in our society that restrict rights and benefits to those who normalize their relationships within traditional heterosexual boundaries. No longer were we relegated into an "alternative relationship" that clearly had less importance and status than a marriage. Instead, we were two feminists challenging those norms and claiming all of society's protections and benefits for ourselves, as lesbians, with no man involved.

extend marriage to same-sex couples who want it while not denigrating sexual liberty outside marriage); Paula Ettelbrick & Julie Shapiro, Are We on the Path to Liberation Now?: Same-Sex Marriage at Home and Abroad, 2 SEATTLE J. FOR SOC. JUST. 475, 476 (2004).

[28] Hunter, Marriage, supra note 15, at 15.

[29] Id. at 16.

[30] Rosenbury, supra note 11, at 774 (citing LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 60–61 (2006) and Jana B. Singer, The Privatization of Family Law, 1992 WIS. L. REV. 1443, 1517–22 (1992)). As Rosenbury points out, sexual activity is no longer restricted outside marriage, no-fault divorce has superseded fault grounds, and laws no longer assume women are dependent on men. Rosenbury, supra note 11, at 774.

[31] Rosenbury, supra note 11 at 774–75.

[32] See Barbara J. Cox, Using an "Incidents of Marriage" Analysis When Considering Interstate Recognition of Same-Sex Couples' Marriages, Civil Unions, and Domestic Partnerships, 13 WIDENER L.J. 699, 699, 703–06 (2004) (describing getting married in Canada).

Despite being legally married in Canada, our marriage was discriminated against in the U.S. It was not until 2009 that our marriage was recognized as legally valid in California,[33] and not until 2013 when the federal government finally recognized it.[34] However, our battle is not over, because we continue to encounter discrimination against our marriage every time we leave California and travel to any of the 31 states that refuse to recognize the validity of our marriage.[35]

Marriage equality for same-sex couples could "destabilize the culture meaning of marriage."[36]

> An argument that marriage can exist without sexual difference implies that gender polarity is not essential for a (perhaps the) primary social unit. Such dispensability indicates that gender's perceived salience and importance have been more the product of social structures and processes than of biology or nature. That notion can be simultaneously discomforting and liberatory for women (as well as for men).[37]

Some of my writing about marriage equality has been based on the themes of equality and choice that Polikoff thinks inaccurately describe the rhetoric surrounding these efforts, because marriage equality excludes recognition of non-marital families.[38] But my work and that of other lesbian feminists also criticizes patriarchal control of women's lives. We view lesbian marriage as a way of affirming feminism's challenge to society's privileging of heterosexual marriage and requiring that men must be part of

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[33] CAL. FAM. CODE § 308(b) (West 2014) ("Notwithstanding any other provision of law, a marriage between persons of the same sex contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state if the marriage was contracted prior to November 5, 2008.")

[34] United States v. Windsor, 133 S. Ct. 2674 (2013) (striking down Section 3 of the Defense of Marriage Act, which limited federal recognition of marriages only to those consisting of one man and one woman). See also After DOMA: What it Means for You, GLAD (July 3, 2013), http://www.glad.org/current/post/after-doma-fact-sheets and After DOMA: Information for Married Same Sex Couples, GLAD, http://www.glad.org/doma, for information on federal rights available to same-sex couples post-Windsor. The rights have not been extended to couples in domestic partnerships or civil unions, thus emphasizing the significant limitations on those statuses. See, e.g., Rev. Rul. 2013-17, 2013-38 I.R.B. 201(concluding that, for federal tax purposes, "the term 'marriage' does not include registered domestic partnerships, civil unions, or other similar formal relationships recognized under state law that are denominated as a marriage under that state's law."). But the Ruling also held that the I.R.S. would recognize a same-sex couple's valid marriage "even if the married couple is domiciled in a state that does not recognize the validity of same-sex marriages." See Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

[35] See Marriage Equality Moves Forward during May: Oregon and Pennsylvania are 18th and 19th Marriage Equality States after District Court Rulings Not Appealed, LESBIAN/GAY LAW NOTES June 2014 (listing the 19 states and the District of Columbia), available at http://www.nyls.edu/justice-action-center/wp-content/uploads/sites/140/2014/07/LGLN-06-2014.pdf.

[36] Hunter, Marriage, supra note 15, at 17.

[37] Nan D. Hunter, Fighting Gender and Sexual Orientation Harassment: The Sex Discrimination Argument in Gay Rights Cases, 9 J.L. & POL'Y 397, 415 (2000).

[38] POLIKOFF, BEYOND, supra note 21, at 7–8.

every legal relationship in order for women to obtain important rights and benefits from the state. As Appleton commented: "In the absence of any substantive difference between the meaning of 'wife' and 'husband,' how can marriage law require one of each and permit only women to serve as the former and only men to serve as the latter."[39]

In 1999, Polikoff noted that "gendered lives continue unabated" in family law today, referring to Martha Fineman's work in her book, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*.[40] But legally-valid, lesbian marriages provide important examples of women rejecting patriarchy in our lives today. When speaking to heterosexual women, such as those in my yearly Women and the Law classes, they always seem slightly amazed that Peg and I have structured our relationship to eliminate many of the gender roles that confine so many women in their own relationships with men.

Marriages of two women or two men directly challenge these gender roles. Two women living together without a man in the household exposes those still-lingering beliefs that women should be paid less than men because men have families to support.[41] When two women create a family and that family receives the privileged status given by our society to marriage, pressure increases to equalize women's wages for all families who do not have men's wages to provide increased income. In turn, challenging this norm will help single women and single-parent families raising children on the woman's salary alone. If salary disparities are exposed as supporting the myth of the male breadwinner, then all women will benefit, regardless of the types of relationships they create.

An even stronger challenge that may help all women occurs when two men who are married to each other are raising young children without any woman in that family. Women continue to be hindered in our work lives by the expectation that we will leave our careers to have and care for children or will be less dedicated to our careers than men, thus giving support for not

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[39] APPLETON, Missing in Action, supra note 13, at 116. Of course, this comment was written 15 years ago, without all of the legal and social changes that have occurred since then. Whether those legal changes have translated into social changes in couples' actual lives is the focus of Deborah A. Widiss's article, Changing the Marriage Equation, 89 WASH. U.L. REV. 721 (2012) (analyzing social science research on gender roles within marriage).

[40] Polikoff, Read Martha Fineman, supra note 23, at 172.

[41] Cf., Jessica Feinberg, Exposing the Traditional Marriage Agenda, 7 NW. J.L. & SOC. POL'Y 301, 320 (2012) (citing Allan C. Carlson & Paul T. Mero, The Natural Family: A Manifesto (2007)) (arguing that the father had a "natural right to a living wage that that would also sustain a mother and children at home" and that "women should become 'wives, homemakers, and mothers.'").

hiring us into important positions or promoting us.[42] But when society permits two men to marry legally and those men become parents, this directly challenges the view that women must care for children and that men cannot do as good a job in raising them.[43] This belief harms all mothers, especially those whose male partners or spouses avoid doing housework or child care because our society maintains the myth that men are unqualified to do so.

Two men raising children in a legally recognized marriage calls out this belief for the myth that it is. Men can raise children just as well as women. Men should be required to be equal partners in child-care and housework, and must be recognized by their employers and society as needing flexibility to do so, just as women need flexibility today. If men and women both take on these roles, then employers may realize that all parents need flexibility and support, whether married or not.[44] If men need something in the workplace, then it tends to happen. If women need it, it tends not to happen. Thus, marriage of male same-sex couples may actually help all working parents to receive the support they have needed all along.[45]

More recently, Polikoff argued that "if the state abolished marriage for everyone, or replaced 'marriage' with a new term for all intimate partnerships, such as civil union, civil partnership, or domestic partnership, that would be equality."[46] She explained that "'marriage' has a long history of exclusion: slaves, interracial couples, and same-sex couples have been denied it."[47] Explaining further, she stated that:

> As long as marriage exists as a legal institution, lesbian and gay couples must have access to it. The inability to marry is a badge of inferi-

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[42] See, e.g., SHERYL SANDBERG, LEAN IN 113–14 (2013) (recognizing that both mothers and fathers are penalized at work for prioritizing family).

[43] See id. at 107–09. Sandberg later quoted Gloria Steinem, noting that progress for women in the workplace has not been matched by a corresponding increase of men doing work in the house: "Now we know that women can do what men can do, but we don't know that men can do what women can do." Id. at 120.

[44] See Tara Siegal Bernard, Standing Up for the Rights of New Fathers, N.Y. TIMES, Nov. 8, 2013, http://www.nytimes.com/2013/11/09/your-money/standing-up-for-the-rights-of-new-fathers/html (stating that only 15% of U.S. employers provide paid paternity benefits, and many male employees receive negative repercussions for seeking parental leave, as do many females).

[45] I am not blind to the fact that what gay men need from their employers may not be privileged in the way that heterosexual men's needs are. But men are still privileged over women when it comes to structuring the workplace. See MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 235–37 (3d ed. 2013) (discussing women's economic subordination in the workplace). Having same-sex male couples seek this flexibility, along with a growing number of straight male parents, may well lead to changes in the workplace that women have not been able to obtain for ourselves.

[46] Nancy D. Polikoff, Equality and Justice for Lesbian and Gay Families and Relationships, 61 RUTGERS L. REV. 529, 545 (2009) [hereinafter Polikoff, Equality].

[47] Id. at 545.

> ority and validates discrimination against and disapproval of lesbians and gay men as well as bisexual and transgender individuals.[48]

She has also stated that she supports marriage equality "as a matter of civil rights law. But [she] oppose[s] discrimination against couples who do not marry . . ."[49]

This exclusionary history is exactly why marriage equality for same-sex couples is such an important, and feminist, step in the right direction. As one who helped lead the effort of drafting one of the first alternative families ordinances in the country in the early 1980s and the only ordinance that publicly supported recognizing families made up of "two or more adults. . . and their dependent children,"[50] I support legally recognizing all types of families, along a continuum of state involvement in relationships based on the choices and needs of the partners.[51] Thus, I would create a system that allows couples to have little or no legal regulation of their relationship, one that provides limited rights and easy dissolution (such as some domestic partnership registries today provide, including Wisconsin or Maine), one that allows the couple to create a relationship-status that provides the rights they prefer (such as the French PACS or Colorado civil unions), and one that allows marriage with full rights and court-supervised dissolution.[52] These options should be available to straight and gay/lesbian couples, as well as a variety of families such as those contained in the Hawaiian reciprocal beneficiaries law[53] or the proposed Madison alternative families ordinance.

As a feminist, however, I can think of little that negates the heterosexism and patriarchal control of women as much as two lesbian feminists claiming the legal status that is most exalted in our society without any man involved

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[48] 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, 593 (2005).

[49] Nancy D. Polikoff, Law That Values All Families: Beyond (Straight and Gay) Marriage, 22 J. AM. ACAD. MATRIMONIAL L. 85, 87 (2009).

[50] Cox, Alternative Families, supra note 2, at 38.

[51] See Mary Anne Case, Marriage Licenses, 89 MINN. L. REV. 1758, 1772 (2005) (stating that a continuum of options provides "recognition of a variety of supportive family forms offering persons of all sexes and orientations the opportunity to structure their families and live their lives as best suits them"); Hunter, Marriage, supra note 15, at 26 (arguing that neither marriage equality nor alternative relationship schemes are complete without the other); Aloni, supra note 13, at 599–601 (discussing the menu-of-options approach and explaining why he prefers "registered contractual relationships," similar to the "Pacte Civil de Solidarité" open to same-sex and opposite-sex couples in France and Belgium).

[52] Aloni, supra note 13, at 591–93, 632–43 (discussing various options available in different U.S. states, as well as the French PACS).

[53] Aloni, supra note 13, at 592 (citing HAW. REV. STAT. ANN § 572C-3-4 (LexisNexis 2010) (limiting the registration system only to those who are "prohibited from marrying one another," something no longer true for same-sex couples in Hawaii, since it adopted marriage equality in 2013)).

in their relationship. If two women can marry and receive legal recognition from the state, their employer(s), and the full range of individuals with whom one interacts as a married person, then the ideology that every woman needs a man and that she must adhere to a socially constructed gender role to have a meaningful, socially-validated relationship is fundamentally challenged.

Polikoff suggested, instead of advocating for marriage equality that allows for preferential treatment of one set of relationships over all others, gay rights advocates involved in the California marriage litigation should have told the California Supreme Court in the *In re Marriage*[54] cases:

> 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.[55]

I agree. I am more than happy, despite over 20 years of work seeking marriage equality for same-sex couples, to eliminate marriage, so long as it is eliminated for all couples, straight or gay/lesbian. But, to me, that seems to be a theoretical construct at best. The California Supreme Court, in that case, recognized that excluding same-sex couples from marriage and relegating them to an alternative status was unconstitutional.[56] It is unlikely that it would have accepted an argument in favor of eliminating marriage, given its extensive discussion of the importance of marriage to society.[57]

When Canada began allowing same-sex couples to marry, the Law Commission of Canada prepared a study, entitled *Beyond Conjugality: Recognizing and Supporting Close Personal Relationships Between Adults*, to consider whether the government should stop marrying couples and use a different registration system.[58] The Law Commission concluded that "creating a registration system that would permit all relationships, conjugal and other, to benefit from the characteristics of voluntariness, publicity, certainty, and stability now afforded only to marriage could eliminate the need for marriage."[59] In *Beyond Gay (and Straight) Marriage*, Polikoff lauds the Commission for its "valuing-all-families" approach, which she discusses

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[54] In re Marriage Cases, 183 P.2d 384 (Cal. 2008).

[55] Polikoff, Equality, supra note 46, at 546.

[56] In re Marriage Cases, 183 P.2d at 401.

[57] Id. at 423–26.

[58] LAW COMM'N OF CAN., BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS 1 (2001), available at https://ecf.cand.uscourts.gov/cand/09cv2292/evidence/DIX0093.pdf.

[59] Id. at 123.

throughout her book.[60] I agree that the *Beyond Conjugality* study is a model of how governments should broadly recognize the numerous family forms that exist and provide them with similar benefits and protections that married families receive.

But equally important is the fact that the Commission stated that, "while there are many principled advantages to this model, it is not likely an option that would appear attractive to a majority of Canadians" and thus it was not "a viable reform option at this time."[61]

One of Polikoff's important contributions is to envision and describe a family law system that ultimately would be more inclusive of family types and provide support to all families. But I am interested in winning marriage equality for same-sex couples now; something that many commentators think may be within reach within the next 5 or 10 years, or even sooner. [62] Polikoff's vision will not occur any time soon and ceasing the fight for marriage equality in order to achieve a broader equality seems impractical. Since the Supreme Court issued the *Windsor* opinion, more than 74 lawsuits have been filed by same-sex couples seeking an end to the marriage bans in the remaining 31 states, and 20 consecutive courts have ruled that these marriage bans are unconstitutional.[63] Achieving national marriage equality will be a long, difficult, and expensive proposition. From a policy perspective, I would seek to reach that goal rather than leave the country in the divided state that now exists where equality depends on the state in which one lives, rather than on the status of one's relationship.

I agree with Professor Jessica Feinberg, however, that marriage equality advocates need to exercise care not to harm a "valuing-all-families" approach when arguing in favor of marriage equality, as must those who support pluralistic relationship recognition.[64] But we must win these cam-

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[60] See Polikoff, Beyond, supra note 21, at 114, 123–26.

[61] LAW COMM'N OF CAN., supra note 58, at 124; see also Aloni, supra note 13, at 598 n.131 (citing Twila L. Perry, The "Essentials of Marriage": Reconsidering the Duty of Support and Services, 15 YALE J.L. & FEMINISM 1, 33 (2003) ("Despite such arguments in favor of the abolition of marriage, such a step is, quite frankly, unlikely to occur, at least in the foreseeable future.") and Edward Stein, Looking Beyond Full Relationship Recognition for Couples Regardless of Sex: Abolition, Alternatives, and/or Functionalism, 28 LAW & INEQ. 345, 371 (2010) ("I simply do not think that the United States is ready now, or would likely be ready anytime soon, to get rid of marriage.")).

[62] See e.g. Memorandum from FREEDOM TO MARRY to Interested Parties, available at http://freemarry.3cdn.net/73c8247b67d7083397_v2m6bn8il.pdf (providing a possible timeline for national resolution of marriage equality between 2015-2017 based on a critical mass of state victories and public support).

[63] See Marriage Litigation, FREEDOM TO MARRY, http://www.freedomtomarry.org/litigation; National Gay and Lesbian Task Force, supra note 9; MARRIAGE EQUALITY USA, supra note 9.

[64] Jessica R. Feinberg, Avoiding Marriage Tunnel Vision, 88 TUL. L. REV. 257, 294-296; 311–14 (2013) [hereinafter Feinberg, Tunnel Vision] (summarizing arguments on how positive results for the LGBT rights movement will result from pursuing both marriage equality and pluralistic relationship recogni-

paigns, whether through legislation, litigation, or popular vote, on behalf of all same-sex couples who want to marry. So, while caution is required, those who work in the trenches need our support as they seek to persuade the courts, the legislatures, and the public to open marriage nationwide to all same-sex couples.

As Professor Carlos Ball explained: "the struggle for same-sex marriage has led to the recognition of many different types of relationships . . . that have begun to weaken somewhat the hegemonic domination enjoyed by the institution of marriage over intimate relationships."[65] Even when states or private employers only extend protections to same-sex couples, rather than to all families, this expansion signals that "alternative families" do exist and helps support Polikoff's efforts to encourage recognition along a continuum of relationship types. But most of these alternative institutions were created, not due to concerns for unmarried straight couples or others precluded from receiving needed benefits, but instead to "block or slow" progress toward marriage for same-sex couples.[66] When same-sex couples are shunted into alternative relationships and not given access to marriage, these alternatives merely stand as legal ghettos of exclusion, rather than as models of pluralism. [67]

Additionally, Professor Suzanne Kim, a self-described "marriage equality skeptic," recognized that "the very process of talking about admission into marriage by members of the same sex is an inquiry into marriage's relationship to hierarchy and power."[68] She continued by making the same argument that I do above:

> Marriage equality may be viewed not just as an extension of marriage as it has traditionally operated, but as a possible answer to those problems of hierarchy. To the extent that sex-based difference, and its socially constructed counterpart, gender, have served as the bases for hierarchy in marriage, marriage equality may provide a means of reconstructing marriage in more egalitarian terms.[69]

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[65] Carlos A. Ball, This Is Not Your Father's Autonomy: Lesbian and Gay Rights from a Feminist and Relational Perspective, 28 HARV. J.L. & GENDER 345, 372 (2005) (discussing reciprocal beneficiaries in Hawaii, domestic partnerships in California, and civil unions in Vermont).

[66] Aloni, supra note 13, at 646.

[67] See Susannah W. Pollvogt, Unconstitutional Animus, 81 FORDHAM L. REV. 887, 916 (2012) (noting that separation has been used in the law " . . . to denote the inferiority of one social group to another by requiring their separation.").

[68] Suzanne A. Kim, Skeptical Marriage Equality, 34 HARV. J.L. & GENDER 37, 64 (2011) [hereinafter Kim, Skeptical].

[69] Id. at 65.

But some proponents of traditional marriage who oppose marriage equality are "significantly motivated by the desire to promote and protect traditional gender roles."[70] Thus, the movement for marriage equality shines a light on marriage's "exclusionary, heterosexual, and heteronormative construction,"[71] furthering feminist goals of destabilizing patriarchal control over women and enhancing women's choices.

B. Same-Sex Couples Must Have the Freedom to Choose Marriage

It is perhaps understandable why those who oppose marriage's privileged status in our society have taken this opportunity, when same-sex couples are challenging the requirement that marriage remain heterosexual, to recommend that our society rethink its over-emphasis on the exclusively privileged marital family. In many ways, society shows that it is increasingly open to considering ending this discrimination against same-sex couples and this may be a propitious time to push further to end marital privilege and value all families.

But trying to eliminate marriage's privileged status at the point when same-sex couples are finally receiving all of the state and federal rights, benefits, and responsibilities given by society to these privileged relationships is deeply flawed in its timing. As section III describes, marriage equality provides immediate assistance to those in our communities who are most vulnerable, such as those who are raising children, those who are members of communities of color, and those who are poor or low income and cannot afford attorneys to help protect their families.

Equally important to this analysis, however, is the feminist movement's support for law reforms that increase women's choices.[72] That some feminists would prefer a more profound challenge to the marriage regime should not negate the fact that tens of thousands of same-sex couples want marriage now after always having been excluded from it.[73] Perhaps we should acknowledge that some couples want marriage simply because we have never been received recognition of our relationships and have always been shunned for our sexual orientation.[74] Many other same-sex couples will not

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[70] Id. at 73.

[71] Id. at 70.

[72] See e.g., Chamallas, supra note 45, at 11–12 (discussing choice and the efforts by feminists to "unpack choice" so that discrimination against women is not "ascribed to women's own choices").

[73] Chamallas, supra note 45, at 276.

[74] See Windsor v. U.S., 699 F.3d 169, 181–82 (2nd Cir. 2012) (discussing how ". . . homosexuals as a group have historically endured persecution and discrimination.").

select marriage because they want to retain our outlaw status and prefer to express their queerness as a challenge to mainstream society. But some couples who choose marriage will be choosing it, as Peg and I have, with a radical and not assimilationist agenda.[75] Most importantly, for this section, supporting each couple's right to choose is inherently feminist.

Professor Lee Badgett, Research Director for the Williams Institute on Sexual Orientation, Law and Public Policy at UCLA Law School, has analyzed the demand for same-sex couples to marry in legal systems where they can choose to marry or choose an alternative status.[76] While I discuss some of the economic analysis in Badgett's research in the next section,[77] her analysis of 31,000 married couples across the U.S. is important here.[78] Looking at the proportion of couples who have married, her research found that 67% of Massachusetts' same-sex couples married between 2004-2009.[79] In Connecticut, 2109 same-sex couples entered into civil unions when those became available by June 2009, but those unions dropped off to single digits after same-sex couples could marry.[80] In the 8 months following marriage equality, however, 753 same-sex couples married.[81] In California, 18,000 couples married during the six-month window after marriage was legal before Proposition 8 was adopted: 17% of all same-sex couples in California married in only six months.[82] These figures show the importance of marriage to same-sex couples, many of whom grew up in a world that criminalized our sexual activity[83] and was openly hostile to our relationships.[84]

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[75] See Jodi O'Brien, Seeking Normal? Considering Same-Sex Marriage, 2 SEATTLE J. FOR SOC. JUST. 459, 468 (discussing how expanding marriage to include same-sex couples will cause "the institution, which stands as a citadel of normalcy, . . . [to] have its walls of inclusion stretched while simultaneously strengthening and polishing its standing as the ultimate icon of cultural belonging" and will thus " . . . be both radical and assimilationist.").

[76] M. V. Lee Badgett, The Economic Value of Marriage for Same-Sex Couples, 58 DRAKE L. REV. 1081, 1103 (2010).

[77] See infra Section III.

[78] Badgett, supra note 76, at 1103.

[79] Id. at 1103-104.

[80] Id. at 1104.

[81] Id.

[82] Id.

[83] Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that sodomy statutes violate the U.S. Constitution); Bowers v. Hardwick, 478 U.S. 186, 190 (1986) (rejecting that a right to privacy extended to homosexual sodomy). For an analysis of these cases, see Franke, Domesticated Liberty, supra note 11.

[84] This discrimination is evidenced by the federal Defense of Marriage Act and the fact that 31 states that continue to ban marriages for same-sex couples. United States v. Windsor, 133 S. Ct. 2675, 2680 (2013); Defining Marriage: State Defense of Marriage Laws and Same-Sex Marriage, NAT'L CONFERENCE OF STATE LEGISLATORS (May 20, 2014), http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx.

Unfortunately, some states have ended their alternative registration schemes after marriage equality for same-sex couples was obtained. For example, once Connecticut provided marriage to same-sex couples, its legislature repealed its civil unions law.[85] I would have advocated for this status to continue, but only if it were also available to opposite-sex couples who wanted to register their relationships but not receive federal benefits.[86] But its continuation as a separate status for same-sex couples would have simply underscored its history of providing a separate-but-(un)equal alternative for those denied equal access to marriage.

Perhaps more significantly for this discussion, Badgett studied the willingness of same-sex couples to enter into civil unions or domestic partnerships when those statuses were available, usually instead of marriage.[87] These statuses are inferior for many reasons, unrelated to marriage's privileged status in our society. They are usually not recognized in other states, except in those states that also provide alternative statuses for same-sex couples, and couples in these partnerships are ineligible for federal rights now that section 3 of DOMA has been struck down as unconstitutional.[88]

But many same-sex couples refused to embrace these alternatives because we viewed them as demeaning our relationships by giving them an inferior status. ". . . [M]any same-sex couples decline to register for a domestic partnership or civil union if marriage is unavailable. . . Overall, the evidence suggests same-sex couples view those alternatives as inferior to marriage, and that inferiority implies a lesser value for alternative statuses."[89]

> Collectively, only 12% of same-sex couples entered into civil unions in the first year their states—Vermont, New Jersey, and Connecticut—offered that status, and only 10% entered domestic partnerships in the first year their states—California, Washington, New Jersey, Maine, and the District of Columbia—offered that status. In sharp contrast, same-

[85] Feinberg, Tunnel Vision, supra note 64, at 270 (citing CONN. GEN. STAT. §§ 46b–38aa to –38oo (2005) (repealed 2010)).

[86] See, e.g., Josh Hicks, Federal Benefits Won't Extend to Domestic Partners under DOMA Ruling, WASH. POST, July 8, 2013, http://www.washingtonpost.com/blogs/federal-eye/wp/2013/07/07/federal-benefits-wont-extend-to-domestic-partners-under-doma-ruling/.

[87] Badgett, supra note 76, at 1083.

[88] Windsor, 133 S. Ct. at 2696.; see Hicks, supra note 86.

[89] Badgett, supra note 76, at 1109; see also Scott, supra note 61, at 544 (noting that by creating alternative institutions, states ensure that "the intangible benefits of marriage that adhere to its historical traditions as a core legal status are preserved for heterosexual couples."). This is why so many lesbian and gay couples seek marriage, not alternative registration options: we recognize these options are discriminatory.

> sex couples in Massachusetts married at a much more rapid pace, with 37% of couples marrying in the first year marriage was available.[90]

Badgett then analyzed data from the Netherlands where both same-sex couples and different-sex couples can marry or enter into domestic partnerships. ". . .[W]hen couples have a choice between marriage and domestic partnership, more couples will choose to marry than to register as domestic partners."[91]

> For each year both marriage and registered partnership were available, more same-sex couples and different-sex couples married than entered registered partnerships. The number of registered partnerships by same-sex couples dropped dramatically from 1,500-3,000 per year to around 400-500 per year once same-sex couples were allowed to marry in 2001, while the annual number of marriages of same-sex couples was twice that number. . . .By 2007, only 37,500 Dutch different-sex couples had registered a new partnership in 7 years, a fairly small number compared to 70,000-80,000 marriages per year.[92]

Badgett's research found that couples in the Netherlands viewed the registered partnerships as "inferior and as a marginalized status."[93] They also thought those partnerships lacked marriage's "deep emotional meaning" and were instead "dry and businesslike."[94]

Badgett analyzed these choices by couples through the lens of "rational-choice theory," which says that consumers pick the "bundle of qualities that is valued most highly" when choosing among options with similar attributes.[95] Under this analysis, same-sex and different-sex couples choose marriage, even when provided with an alternative status. She concluded that same-sex couples "vote with their feet" for marriage when given the opportunity, even if an alternative status exists, showing that they are "quite similar to different-sex couples in both the economic and social needs that lead them to seek the ability to marry."[96]

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[90] Badgett, supra note 76, at 1110.

[91] Id.

[92] Id. at 1112. See also Aloni, supra note 13, at 577–78, showing that both opposite-sex and same-sex couples register French PACS, and opposite-sex couples registered 146,030 PACS and 265,404 marriages in 2008. Thus, this option continues to be chosen by a significant number of opposite-sex couples instead of marriage. France adopted legislation permitting same-sex couples to marry in 2013. See The Freedom to Marry Internationally, FREEDOM TO MARRY, http://www.freedomtomarry.org/landscape/entry/c/international (last updated Jan. 2014).

[93] Badgett, supra note 76, at 1113.

[94] Id. at 1113.

[95] Id. at 1114.

[96] Id. at 1115.

Additionally, many same-sex couples view alternative relationships, such as civil unions or domestic partnerships, as being "based on the unequal status that results from different linguistic treatment."[97] As Professor Suzanne A. Kim explained:

> Language is important in the same-sex marriage context precisely because it is distributed and controlled by the state as a means of conveying recognition and privilege, or in other words, status. The state, in essence, has control over the status language that same-sex couples seek to engage.[98]

As feminists, if we are going to affirm individuals' and couples' right to choose what works best for them and their families, then winning marriage equality across the country and throughout the world is an important step. Creating a continuum is also important but opening marriage to same-sex couples may be more transformative for those who oppose the gender limitations within traditional marriage.

C. Opponents of Marriage Equality Want Marriage to Remain the Gendered System that Feminists Oppose

Feminists have successfully challenged the gendered nature of traditional marriage and that gendered nature has been almost completely eliminated. As Professor Susan Frelich Appleton aptly noted:

> Indeed, the laws governing the modern family have become increasingly gender neutral, thanks to the application of equality principles to many aspects of the traditional regime, including the old sex-specific role assignments in marriage. Under today's rules, husbands and wives alike can be responsible for financial support of spouses, former spouses, and children; fathers and mothers alike are involved parents and suitable caregivers for their children; and any assumptions that mothers of young children will stay home to concentrate on rearing the next generation have been uprooted by force of law.[99]

As noted above, the only remaining gender-specific aspect of marriage is the requirement that it consist of "one man and one woman," and many of

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[97] Suzanne A. Kim, Marital Naming/Naming Marriage: Language and Status in Family Law, 85 IND. L. J. 893, 902 (2010) [hereinafter Kim, Marital Naming].

[98] Id. at 905.

[99] Susan Frelich Appleton, Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era, 86 B.U. L. REV. 227, 238–39 (2006).

those who oppose marriage equality "embrace the rhetoric" that the state should only recognize the heterosexual, nuclear family.[100]

Many opponents of marriage equality advocate a return to the traditional, gendered institution that feminists vehemently oppose, rather than changing marriage to include same-sex couples.[101] If feminists fail to support marriage equality, the result will not be the end of marriage as an institution and the creation of alternative relationships that treat all families equally. Instead, it will embolden traditionalists to seek to re-impose gender inequality into marriage.

Professor Jessica Feinberg analyzed the arguments of marriage equality opponents during various state campaigns and found that their arguments emphasized marriage as a traditional, strongly gendered relationship.[102] The marriages these groups are "defending" in the "defense of marriage" acts that have been adopted in numerous states are ones that would limit women within their marriages. Feinberg explained that these opponents frequently "cite the maintenance of traditional marital gender roles as a primary reason for their opposition to same-sex marriage, as same-sex couples by definition would not be able to fulfill traditional marital gender roles."[103] Additionally, Appleton noted that opponents seem to "fear that straight spouses (and prospective spouses) will reject marriage's traditional gender script once they see same-sex couples living out their marriage free from the confines of 'husband' and 'wife.'"[104]

Traditionalists who oppose marriage equality frequently view marriage as rooted in sex differences between the spouses. By retaining marriage for heterosexual couples and placing same-sex couples into alternative institutions, traditionalists maintain "the view of marriage as a status rooted in sex difference" and "reinforce the marginalized social status of same-sex couples and LGBT individuals relative to heterosexuals."[105] If all couples and

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[100] Id. at 248–49. See also Audrey Bilger, Opponents of Marriage Equality Want to Control Straight Men, MS. MAGAZINE BLOG (Mar. 27, 2013), http://msmagazine.com/blog/2013/03/27/opponents-of-marriage-equality-want-to-control-straight-men/.

[101] See Feinberg, Exposing, supra note 41, at 317.

[102] Feinberg, Exposing, supra note 41, at 319–21.

[103] Id. at 321 (referencing the Family Research Council, for example, which opposes marriage equality because "marriages typically thrive when spouses specialize in gender-typical ways and are attentive to the gendered needs and aspirations of their husband or wife" and "women are happier when their husband earns the lion's share of the household income.").

[104] Appleton, Missing in Action, supra note 12, at 127. She also noted that many proponents of marriage equality insist that it will make all marriages "more egalitarian by eviscerating traditional gender roles." Appleton, Missing in Action, supra note 12, at 127–28, citing theorists William N. Eskridge, Jr., Nan Hunter, and Jennifer Wriggins.

[105] Kim, Marital Naming, supra note 97, at 906.

other relationships were given legal recognition through some alternative status and marriage were reserved for religious ceremonies,[106] perhaps this differential status would disappear.

But that type of reform seems highly unlikely, as traditionalists clamor for the need to "protect" marriage, not only from same-sex couples, but also from divorce, women working outside the home, and the elimination of traditional gender roles within marriage.[107] In fact, maintaining traditional gender roles for men and women and defining marriage as necessitating "one man and one woman" is a primary reason for these opponents of marriage equality.[108] Since marriages comprised of two women or two men would not incorporate gender roles within the family, these opponents also worry that children will not be taught distinctive gender roles for men and women.[109]

While I respect the arguments that feminists raise about marriage taking up too much space in our society's understanding of love, commitment, and involvement, it seems clear that if feminists do not support the marriage equality movement, they will not achieve their ideal result of ending marriage as we know it and expanding recognition of non-marital relationships. Instead, traditionalists will try to ensure that gendered marriage continues to flourish and confines women and our choices by reinforcing the traditionalists' protection of gender roles within marriage. As Nancy Polikoff famously noted, "we will get what we ask for."[110] Working to obtain marriage equality seems more immediately productive than imagining that marriage is likely to be eliminated anytime in the near future. Once all same-sex couples can marry, we may well see steps toward legally recognizing the full continuum of relationships that many feminists prefer. But retaining marriage's gendered requirement for admission will not lead to the end of marriage or the gender roles it has historically reinforced.

I agree with Polikoff about the importance of "valuing all families" and with other feminists who raise structural challenges to marriage as privileging that relationship at the cost of harming all others. But what gets lost in many feminist critiques is that marriage equality supports numerous feminist ideals. As feminists, we do not have to choose between opposing marriage because of its sexist, racist, and classist past and supporting marriage

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[106] Among the many authors who have discussed this possibility, see Scott, supra note 61, at 539.

[107] Feinberg, Exposing, supra note 41, at 311, 319–20.

[108] Id. at 351.

[109] Id. at 320.

[110] Nancy Polikoff, We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage, 79 VA. L. REV. 1535 (1993).

equality for same-sex couples. We can recognize marriage's oppressive history and work toward creating a system that values all families, rather than forcing individuals to embrace one relationship—marriage—as the optimal way to organize their lives. But an important step toward valuing all families includes providing all options, including marriage, to any couple who chooses that status as the way they want the government and society to recognize their families.

Polikoff explains that "[t]he valuing-all-families legal system keeps marriage and extends it to same-sex couples, although with a new official name—civil partnership."[111] But "extending it to same-sex couples" will not simply happen because it is the just and equitable thing to do. The marriage equality movement has been ongoing for more than twenty years since the Hawaii litigation reignited this issue in the U.S., and civil partnerships have been in existence in Europe for a similar length of time.[112] Freedom to Marry has estimated that obtaining marriage nationwide will probably cost more than $100 million to fund efforts to win more states, grow public support to over 60% approval, and end federal marriage discrimination.[113] It is disappointing that too many feminists and progressives stand on the sidelines during one of the most significant civil rights movements in our country. We need these dedicated theorists and activists to embrace marriage equality as a way to improve the lives of tens of thousands of families within the United States. We need to make it clear that an individual can retain his or her feminist and progressive ideals and still support the marriage equality movement. This movement will not succeed without the involvement of everyone who sees this as an important, although incomplete, step toward reducing sexism in people's daily lives and toward increasing the options for families who do not choose marriage for themselves.

In a world where conservatives led the effort to change federal policy from preventing or discouraging benefits for two-parent families to one that promotes marriage,[114] and where 31 states have statutes or constitutional amendments to "defend" marriage from same-sex couples so that it retains its "one man, one woman" make-up, it seems unrealistic not to advocate for

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[111] Polikoff, Beyond, supra note 21, at 132.

[112] Baehr v. Lewin, 852 P.2d 44, 48–49 (Haw. 1993), vacated as moot sub nom. Baehr v. Miike, 1999 Haw. LEXIS 391, at *8 (Haw. Dec. 9, 1999) (No. 20371). Denmark adopted its "registered partnership" law in 1989, making it the first country to adopt a national law recognizing same-sex couples. Kelly Kollman, Same-Sex Unions: The Globalization of an Idea, 51 INT'L STUD. Q. 329, 329 (2007).

[113] Roadmap to Victory: Finishing the Job, FREEDOM TO MARRY (2013), http://freemarry.3cdn.net/06aee68a69eb991bee_24m6ibicy.pdf.

[114] See Julie Nice, Promoting Marriage Experimentation: A Class Act?, 24 WASH. U. J.L. & POL'Y 31, 32 (2007).

marriage equality for same-sex couples in an attempt to reform marriage's privileged status in this society. I support efforts to end discrimination against non-marital families, but that cannot and should not happen until same-sex couples have finally received all of the protections and benefits provided under state and federal law that our families have long been denied. Once that has happened, the next step is to expand the families who receive those protections and benefits. But, first, it is symbolically and practically important to treat same-sex couples as deserving of marriage, in its privileged state, especially as feminists who want to end the gendered limitations imposed by traditional marriage.

III. MARRIAGE PROVIDES INSTANT RIGHTS TO THE MOST VULNERABLE COUPLES IN OUR COMMUNITIES

As progressives, we should also seek marriage equality, even though many feminists and other activists see marriage equality as non-progressive. These activists view marriage equality as improperly focused only on providing more benefits and resources to middle-class and upper-class couples while not benefitting low-income couples who often do not have access to the many benefits that marriage can provide.[115] While marital benefits do increase with full-time employment and higher incomes, these activists ignore that numerous benefits are available to all who marry, thereby helping those in the LGBTQ community who are most vulnerable. As Evan Wolfson, President of "Freedom to Marry" said, when receiving an award from the Empire State Pride Agenda, those living in states with marriage bans against same-sex couples are:

> disproportionately among the most vulnerable of our own: LGBT people raising kids, LGBT people of lesser means, LGBT people in more hostile communities, and a higher percentage of LGBT people of color.[116]

Too often, the role that marriage equality can play in helping the economically vulnerable is overlooked by those who reject it as only helping those who already have economic privilege.

Many of the benefits that are based on marital status available from employers or the government are only available to those with full-time jobs, or

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[115] See Susan B. Boyd, 'Marriage is More than Just a Piece of Paper': Feminist Critiques of Same Sex Marriage, 8 NAT'L TAIWAN U. L. REV. 263, 278–80 (2013) (discussing this critique).

[116] See Adam Polaski, WATCH: Tony Kushner presents Evan Wolfson with Pride Agenda Leadership Award, FREEDOM TO MARRY (Oct. 22, 2013, 8:00 AM), http://www.freedomtomarry.org/blog/entry/watch-tony-kushner-presents-evan-wolfson-with-pride-agenda-leadership-award.

those whose employers provide benefits at all. But marriage also provides access to hundreds of government benefits with one simple license. Poor people who are sexual minorities can access numerous benefits through marriage that are either unavailable or expensive to obtain in other ways.[117] These default protections for married individuals arise when the individual or the couple did not act prior to an event occurring, such as by not writing of a will or establishing durable powers-of-attorney for health care. These protections are now automatically provided to same-sex couples who are married.[118] These protections are important because most lower-income couples cannot afford legal documents to protect themselves, and obtaining them by default can save them hundreds or thousands of dollars.

Professor David Chambers detailed the numerous benefits that come with marital status in his 1996 article before any same-sex couples were permitted to marry within the United States[119] As has been regularly noted, it is impossible to list all of the laws that treat married people differently than they treat single people, but they include "taxation, torts, evidence, social welfare, inheritance, adoption, and on and on."[120] While recognizing that the federal government and the states differ in the range and specifics of these laws, he characterized them as falling into three broad categories:

> [S]ome laws recognize affective or emotional bonds that most people entering marriage express for each other; some build upon assumptions about marriage as creating an environment that is especially promising or appropriate for the raising of children; and some build on assumptions (or prescriptive views) about the economic arrangements that are likely to exist (or that ought to exist) between partners.[121]

For the purposes of this article, the distinctions matter little. What is important is that with marriage comes access to countless federal and state benefits that could help poor and low-income families, including social security survivor benefits, spousal and family health insurance when available, access to retirement benefits that are limited to surviving spouses, the ability to make medical decisions for one's spouse without obtaining health care directives, and immigration status for bi-national couples. Access to

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[117] But see Aloni, supra note 13, at 584 (stating that poor people are less likely to marry than those in the middle class, perhaps because they are waiting to achieve financial security before marrying). Also, combining incomes can lead to the loss of needed government benefits by raising the family's reportable income to levels that exclude them from the benefits the adults individually received on their own.

[118] See Aloni, supra note 13, at 586–87.

[119] David L. Chambers, What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples, 95 MICH. L. REV. 447 (1996).

[120] Id.

[121] Id. at 453.

marital benefits for sexual minority couples is a significant step forward in protecting some of society's most vulnerable.

For example, Article II of the Uniform Probate Code (UPC) excludes committed but unmarried same-sex couples from the "default protections embodied in intestacy laws."[122] Although this critique is valid for those in alternative relationships for whom these default protections would also be helpful,[123] same-sex couples can gain access to these default rules through marriage. This might save low-income couples from needing to spend already limited resources creating wills to take of their spouses and children (unless the default rules are not the ones that the couple wants to control). Numerous other default rules that are limited to married couples also harm low-income couples, excluding them from healthcare decision-making and guardianship.[124] Crawford and Infanti see marriage equality as simply adding more couples into "a privileged circle," further "skew[ing] and direct[ing] choices of family formation rather than leaving it to the affected individuals to choose the family form that best suits them."[125]

While I agree with Crawford and Infanti that more choice would be the better option, it seems clear that uniform default rules, such as the UPC, are very slow to change.[126] Waiting until marriage is abolished will not help same-sex couples who cannot afford lawyers to prepare the documents needed outside of default rules so they can protect their families today. Access to the important default rules that come with marriage would be an important step forward for the most vulnerable same-sex couples.

Crawford and Infanti also recognized the necessity to make it "easier and cheaper for these individuals to engage in estate planning while at the same time insulating them from collateral attack by disgruntled or disagreeable 'traditional' family members."[127] Members of the LGBTQ community cannot wait for this help until broader relationship recognition is a reality.

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[122] See Bridget J. Crawford & Anthony C. Infanti, A Critical Research Agenda for Wills, Trusts, and Estates 16 (Sept. 29, 2013) (unpublished working paper) (on file at http://ssrn.com/abstract=2333242) (citation omitted) (referring to Professor Gary Spitko's analysis of the UPC and the harm it causes same-sex couples by excluding them from these default laws). See Gary Spitko, The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion, 41 ARIZ. L. REV. 1063, 1067–99 (1999).

[123] See, e.g., Rosenbury, supra note 11, at 781–82 (discussing how states privilege marriage through intestacy laws and "stigmatize" relationships outside marriage as not deserving state recognition and support). I agree with this critique, but expanding marriage to same-sex couples will lessen the number of families that are excluded.

[124] Crawford & Infanti, supra note 122, at 17 (citing T.P. Gallanis, Default Rules, Mandatory Rules, and the Movement for Same-Sex Equality, 60 OHIO. ST. L.J. 1513, 1514–16 (1999)).

[125] Crawford & Infanti, supra note 122, at 18.

[126] Id.

[127] Id. at 18–19.

Most of us can recount numerous stories of surviving partners being evicted from their homes, being excluded from hospital decision-making, being prevented from planning or even participating in memorial services or ceremonies following a partner's death.[128] Help is needed now, not sometime in the future when a broader array of relationships may receive similar protection.

Additionally, following the New Jersey Supreme Court's refusal to order marriage equality for same-sex couples as long as the state provided them with equal state rights,[129] New Jersey created the Civil Union Review Commission to study whether civil unions, in fact, provided equal benefits to same-sex couples.[130] According to the Commission's final report, employers and hospitals frequently had not heard about civil unions and refused to recognize couples who entered into them.[131] That report emphasized that same-sex couples, especially those in traditionally-marginalized communities, were harmed by limiting them to civil unions, rather than granting them access to equal marriage rights.[132] When their rights were denied, these couples also lacked the resources to hire legal counsel and seek redress when they were harmed due to discrimination against their relationships.[133]

Even those of us who have spent thousands of dollars to create health-care directives or living wills know that our ability to use them is challenged on a regular basis.[134] As I described in a recent article, I spent several nervous hours with my spouse of 23 years while she was transferred between two hospitals in rural Wisconsin for an MRI exam with fears that she was bleeding in her brain and might require neurosurgery.[135] Despite being married in Canada in 2003 and recognized as married in our home state of California, we were living in rural Wisconsin where our marriage is

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[128] See, e.g., D. Kelly Weisberg, Karen Thompson's Role in the Movement for Marriage Equality, 25 HASTINGS WOMEN'S L.J. 3, 4–5 (2014); Karen D. Thompson, More than Same-Sex Marriage: Law, Health, and Defining Family, 25 HASTINGS WOMEN'S L.J. 13, 14–16, 18–19 (2014).

[129] See State v. Lewis, 908 A.2d 196, 224 (N.J. 2006).

[130] NEW JERSEY CIVIL UNION REVIEW COMM'N, THE LEGAL, MEDICAL, ECONOMIC & SOCIAL CONSEQUENCES OF NEW JERSEY'S CIVIL UNION LAW 3 (2008), available at www.nj.gov/lps/dcr/downloads/CURC-Final-Report-.pdf.

[131] Id. at 1.

[132] Id. at 2.

[133] Id. at 14.

[134] See O'Brien, supra note 75, at 459 (explaining that she and her partner spent thousands of dollars creating documents that would allow them to act on each other's behalf and grant decision-making power to each other).

[135] See Barbara J. Cox, "The Tyranny of the Majority is No Myth": Its Dangers for Same-Sex Couples, 34 HAMLINE J. PUB. L. & POL'Y 235, 236–237 (2013).

denied recognition. [136] I was unsure whether the doctors in the hospitals would allow me to make decisions for her if the need arose, even though we have health care powers-of-attorney created in California. As a lawyer, I knew that I could insist that they recognize my ability to make health care decisions, based on these documents, even if they refused to recognize my spousal right to make such decisions.

But most same-sex couples cannot afford to hire lawyers to create these documents or help them assert their document-based rights when challenged. As one married lesbian with children recently told me, despite being married in their home state of Washington, every time she and her spouse leave the state with their children, they must take along "the folder" full of documents that they created in an attempt to protect their family. Limiting ourselves to living in or traveling to the few states that recognize our marriages is not a reality that any family should have to endure. These limits are especially troubling for those in our communities who are most vulnerable because they cannot afford the expense of creating "the folder" for their own families.

Obtaining nationwide marriage equality is also important because many same-sex couples are now forced to travel to marriage equality states to receive federal benefits, something that poor and low-income couples cannot afford to do. Recently, military service members have been awarded leave to travel to states where they can marry and become eligible for federal benefits.[137] My nephew and his husband, Matthew and Anthony Howard-Ramon, had to travel from Virginia, where he was stationed, to D.C. in order to marry in October 2013. Just like Richard and Mildred Loving, of *Loving v. Virginia* fame, who had to leave Virginia and marry in D.C. because of Virginia's anti-miscegenation statute prevented their marriage,[138] Matthew and Anthony also had to travel to D.C. to marry because Virginia's anti-marriage ban prevented them from marrying at home.[139] Although

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[136] WIS. CONST. art. XIII, § 13 ("Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.").

[137] See Memorandum from Jessica L. Wright, Acting Undersec'y of Def., to Sec'ys of the Military Dep'ts. and Chiefs of the Military Servs. (Aug. 13, 2013), available at http://www.defense.gov/home/features/2013/docs/Further-Guidance-on-Extending-Benefits-to-Same-Sex-Spouses-of-Military-M.pdf (permitting leave to military members located 100 miles from a state/D.C. where marriages are allowed). But see, David S. Cloud, Gay Couples in Military Having Trouble Getting Leave to Get Married, L.A. TIMES, Oct. 2, 2013, http://www.latimes.com/nation/la-na-military-same-sex-20131002,0,4934740.story#axzz2thUSgHv9 (indicating implementation of the policy has been confusing and inconsistent).

[138] Loving v. Virginia, 388 U.S. 1, 2–3 (1967).

[139] Id. at 3; see also, Robert Barnes, Virginia to Fight Same-Sex Marriage Ban, WASH POST, Jan. 23, 2014, http://www.washingtonpost.com/politics/virginia-to-fight-same-sex-marriage-ban/2014/01/22/85a96a10-83ac-11e3-bbe5-6a2a3141e3a9_story.html. Oral arguments in Bostic v. Schaefer were heard in

it is important that the federal government now recognizes all same-sex couples who are legally married in any state, regardless of whether their domicile recognizes their marriage,[140] this also imposes a burden on low-income families who may have to travel long distances in order to marry and receive these benefits. For example, with D.C. being the closest jurisdiction that allows marriage for any same-sex couples living in the southeast, traveling this distance is a significant barrier for low-income couples wanting to receive federal benefits.

Further, lacking access to default rights that come with marital status significantly burdens same-sex couples who are people of color or who are mixed-race couples.[141] African-Americans are twice as likely as whites in the United States to live in poverty, with African-American families having only 62% of the median income of white families.[142] African-American same-sex couples report even lower median incomes than African-American opposite-sex couples, and African-American women in same-sex couples earn $21,000 less in median income than white women in same-sex couples.[143] At the same time, African-American same-sex households are twice as likely as white same-sex households to include children, and African-American women in same-sex relationships are three times as likely to have given birth as white women in same-sex relationships.[144]

Additionally, 45% of African-American female same-sex families and 32% of African-American male same-sex families include a biological child of one of the parents, while only 29% of white female same-sex families

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the 4th Circuit Court of Appeals on May 13, 2014. See Virginia, FREEDOM TO MARRY, http://freedomtomarry.org/litigation/entry/Virginia (last visited June 19, 2014). Unlike the Lovings, Matthew and Anthony were not subject to imprisonment of 1 year or exile from the state for 25 years, if they chose to remain in Virginia and live as a married couple. See Loving, 388 U.S. at 3.

[140] Hicks, supra note 86.

[141] See Aloni, supra note 13, at 583 (indicating that African-Americans and Latinos are less likely to marry than non-Hispanic whites).

[142] ALAIN DANG & SOMJEN FRAZER, NAT'L GAY & LESBIAN TASK FORCE & POL'Y INST. & NAT'L BLACK JUST. COAL., BLACK SAME-SEX HOUSEHOLDS IN THE UNITED STATES 16 (2d ed. 2005), available at http://www.thetaskforce.org/downloads/reports/reports/2000BlackSameSexHouseholds.pdf. See also the reports on Hispanic and Asian-American same-sex households on the Taskforce website. JASON CIANCIOTTO, NAT'L GAY & LESBIAN TASK FORCE & POL'Y INST. & NAT'L BLACK JUST. COAL., HISPANIC AND LATINO SAME-SEX HOUSEHOLDS IN THE UNITED STATES (2005), available at http://www.thetaskforce.org/downloads/reports/reports/HispanicLatinoHouseholdsUS.pdf; ALAIN DANG & CABRINI VIANNEY, NAT'L GAY & LESBIAN TASK FORCE & POL'Y INST. & NAT'L BLACK JUST. COAL., LIVING IN THE MARGINS: A NATIONAL SURVEY OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER ASIAN AND PACIFIC ISLANDER AMERICANS (2005), available at http://www.thetaskforce.org/downloads/reports/reports/API_ExecutiveSummaryEnglish.pdf.

[143] DANG, supra note 142.

[144] Id. at 22–23.

and 17% of white male same-sex couples families have children.[145] Additionally, 12% of African-American same-sex households also include non-biological children (defined in the report as those who are adopted, foster, grandchildren, nieces, or nephews). Many of these children cannot be adopted because many states do not permit same-sex couples to adopt or take care of foster children.[146] If progressives are serious about lessening the harms caused by income disparities and racism in our country, then providing free default legal benefits to these families may be an important step forward.

Statistics on Latina/Latino same-sex households are similar. There were over 100,000 self-identified Latina/Latino same-sex households in 2005.[147] Latina same-sex households earned over $24,000 less than white, non-Hispanic same-sex couples, and 38% of those households included Latina non-citizens.[148] This non-citizen status significantly impacts these couples because the ability to sponsor one's spouse to obtain legal resident status is based solely on marital status.[149] In almost 36,000 same-sex couples, only one member is a U.S. citizen;[150] without marriage, these couples are ineligible for conditional permanent resident status and subject to numerical limitations on immigration under federal law.[151]

Of the Latina households included in the study, 54% of households had at least one child living at home, compared to 70% of married, opposite-sex couples, and an additional 5% were parenting non-biological children as well.[152] Caring for these children would be improved if their parents had access to the default rights that come with marriage, such as adoption of one's partner's child(ren), recognition of one's parental status, ability to insure one's spouse and children, decision-making power for health care, intestacy inheritance rights, and countless other benefits that automatically come with marriage. Many of these families simply cannot afford the expensive route of trying to maneuver around discriminatory state laws through creation of parenting contracts, wills and trusts, and health care powers-of-attorney.

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[145] Id. at 23–24.
[146] Id.
[147] CIANCIOTTO, supra note 142.
[148] Id. at 5, 7.
[149] U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Same-Sex Marriage, http://www.uscis.gov/family/same-sex-marriages (last updated Sept. 26, 2013).
[150] Badgett, supra note 76, at 1097.
[151] Id. at 1097–98.
[152] CIANCIOTTO, supra note 142, at 4, 8.

While marriage is limited to only those couples who choose to involve the state in their relationships, it could provide immediate assistance to couples living in same-sex relationships who choose to marry. Marriage automatically enables spouses to visit each other or their children in the hospital, make each others' emergency medical decisions, share a family health plan, and take medical leave to care for a sick spouse or child.[153] It also enables spouses to be joint parents, covering situations such as making school or medical decisions, applying for passport, passing on inheritances, or being eligible for visitation rights and child support if the parents separate.[154] It also enables a survivor to continue to care for the deceased partner by making funeral arrangements, inscribing an epitaph, filing wrongful death cases, inheriting a lease, taking bereavement leave, and passing on property.[155] All of these rights come with marital status. Denying these rights to same-sex couples while working instead to detach them from marriage and make them available to other relationships causes real and immediate harm to these families. While not a perfect solution, marriage equality for same-sex couples will help many vulnerable families improve their situations.

IV. CONCLUSION

I understand that the marriage equality movement will lead to change in ways that are only "partial and contingent."[156] But they are also significant and important, especially for the tens of thousands of same-sex couples living in the U.S. in states that ban same-sex couples from marrying. The main purpose of the marriage equality movement may not be feminist, but its result will be.

Looking back over the more than 25 years since I spoke at the 1987 FLT conference, the family has been transformed and legal recognition of intimate lives has altered. I wrote this article as part of the 30th FLT conference so that I could discuss with the other participants whether these changes are moving us forward in ways that could not be envisioned in 1987. At that time, we never considered marriage equality as a possibility for sexual minorities and limited our dreams to obtaining city-wide rights as members of alternative families. Today, we can rejoice in the changes that have oc-

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[153] FREEDOM TO MARRY, Protections and Responsibilities of Marriage, http://www.freedomtomarry.org/pages/protections-and-responsibilities-of-marriage (last viewed Mar. 6, 2014).

[154] Id.

[155] Id.

[156] Doug NeJaime, The View from Below: Public Interest Lawyering, Social Change, and Adjudication, 6 UCLA L. REV. DISC. 182, 200 (2013).

curred that provide access to state and national recognition and benefits to married same-sex couples, while recognizing that we must continue to push forward to afford all families full recognition.