

1997

The Lesbian Wife: Same-Sex Marriage as an Expression of Radical and Plural Democracy

Barbara J. Cox
California Western School of Law, bjc@cwsl.edu

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/cwlr>

Recommended Citation

Cox, Barbara J. (1997) "The Lesbian Wife: Same-Sex Marriage as an Expression of Radical and Plural Democracy," *California Western Law Review*. Vol. 33 : No. 2 , Article 4.
Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol33/iss2/4>

This Article is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized editor of CWSL Scholarly Commons. For more information, please contact alm@cwsl.edu.

THE LESBIAN WIFE: SAME-SEX MARRIAGE AS AN EXPRESSION OF RADICAL AND PLURAL DEMOCRACY

BARBARA J. COX*

When asked to speak at this Symposium, I realized that the Symposium's focus complemented the work I am currently doing on gaining the right to marry for same-sex couples. Much of my time has been spent writing and speaking against the barrage of legislative expressions of "democracy" that would prevent recognition of marriages by same-sex couples. Immediately following this panel discussion, I travelled to New York City to join a roundtable advocacy discussion between civil rights activists and law professors to consider arguments for attorneys to use when bringing marriage recognition cases.

The need to develop these arguments is based on the assumptions that Hawaii will permit marriage by same-sex couples and that gay and lesbian couples will go to Hawaii to marry.¹ Following those marriages, same-sex couples will begin asserting their marital status by, for example, signing up for spousal benefits provided by one's employer or claiming marital status when filing tax returns. We anticipate countless suits around the country asking for recognition of these marriages as institutions grapple to determine their legality. The roundtable discussion in New York was to prepare for those suits, which ultimately will be brought once Hawaii (or some other state) permits marriages by same-sex couples.

As I prepared for both that roundtable discussion and this Symposium, I was struck with how the issues of same-sex marriage and the definition of the family in American society overlap with the issues being discussed here today. The idea of a "radical and plural democracy" in many ways is a necessary prerequisite to obtaining the right to marry for same-sex couples; in other ways, obtaining this right to marry will lead to a more "radical and plural democracy."

This Paper considers three ideas. The first is recognizing that a "reactionary and exclusionary democracy" exists in this country today. The second is considering the argument by some gay and lesbian activists that including gay men and lesbians under the rubric of state-sanctioned marriage will actually prevent a "radical and plural democracy" from occurring by removing the "outlaw" nature of the queer community and leading to the

* Professor of Law, California Western School of Law. I would like to thank Robert Chang for inviting me to speak at this symposium, Andrea Schneider Noriega, my research assistant, for providing invaluable assistance, and Peg Habetler, my spouse, for her love and support.

1. The Hawaii Supreme Court recently held that the state's voters rejected a plan to hold a Constitutional Convention in 1997. "Firm files lawsuit over decision on Con Con Vote," 1997 WL 2516856 (April 16, 1997). Following this decision, the Hawaii Legislature voted to send to the voters a constitutional amendment which would allow the legislature to define the participants in a state-recognized marriage. House Bill 117 (April 30, 1997).

wholesale movement of gays and lesbians from the "anti-subordination project" into the mainstream middle-class. The third argues that, despite this concern, the gay and lesbian community can help move the country toward a progressive, pluralistic democracy by embracing the radical notion of redefining the family. Redefinition is a way to displace "compulsory heterosexuality" from its location as the main state-recognized family in the country. In order to do that, however, it will be necessary to forge, as Chantal Mouffe argues, "a chain of equivalences between all the democratic demands to produce the collective will of all those people struggling against subordination."² Without the help of others working against subordination, the Right will be successful in its attempt to "redefine democracy in a restrictive way to reduce its subversive power."³ With a group as misunderstood and despised as gay men and lesbians, we will need the help of all people struggling against subordination to radicalize family and citizenship enough to include married gay men and lesbians.

I. THE CURRENT "REACTIONARY AND EXCLUSIONARY DEMOCRACY"

The legislative machine, in the name of democracy, is working full-tilt against including gay men and lesbians into the mainstream definition of marriage and family. Rather than "simply" being disinterested, lethargic, or not progressive in this area, Congress and the legislative bodies of the states are affirmatively working in an attempt to prevent the radical change that will result from including gay men and lesbians within the definition of those who can enter state-sanctioned marriages. During the late summer and fall, Congress passed only the third piece of legislation attempting to prescribe the meaning of the Full Faith and Credit clause and one of very few pieces of federal legislation ever concerning marriage. Euphemistically known as the "Defense of Marriage Act," this legislation not only claims to exempt states from a Full Faith and Credit clause requirement to recognize marriages by same-sex couples, but also redefines "spouse" for federal purposes to refer to only those marriages between a man and a woman.⁴ In the past, Congress never stepped into the state-by-state dispute concerning whether people of color could be legislatively prohibited from marrying whites. Despite the deep-seated beliefs underlying those restrictions on marriage and despite the fact that, at one point, over thirty states had passed anti-miscegenation statutes, Congress never entered into the interracial marriage debate the way it entered into the same-sex marriage debate this year. In

2. Chantal Mouffe, *Hegemony and New Political Subjects: Toward a New Concept of Democracy*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 89, 99 (1988).

3. *Id.* at 97.

4. Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996).

legislation that seems likely to be declared unconstitutional,⁵ Congress attempted to use the “democratic” process to prevent full citizenship for gay men and lesbians. Counting on middle-America’s fear of our community to insure that very few legislators would speak and vote on our behalf, the Right did as Mouffe warned it would: it “redefine[d] the notion of democracy itself so that it no longer centrally implies the pursuit of equality. . . . ”⁶

Congress is not the only body legislating against full citizenship for gay men and lesbians. As of December 4, 1996, sixteen states had passed anti-marriage bills.⁷ With the help of many supporters, we were able to prevent legislation from passing in twenty-one states,⁸ although two other states adopted same-sex marriage prohibitions through executive orders.⁹ Even though we were successful in more than half of these legislative battles, the mere fact that thirty-nine state legislatures spent time discussing whether same-sex couples should be allowed to marry makes clear that this is an issue that strikes fear in the hearts of middle-America.

The mere possibility of marriages by same-sex couples has led to this kind of legislative reaction. Under the guise of “democracy,” legislatures are trying to prevent *Baehr v. Lewin*¹⁰ (now renamed *Baehr v. Miike*¹¹) from redefining marriage in such a way as to make gay men and lesbians full citizens of our polity. Instead of being the gay and lesbian community’s *Loving v. Virginia*,¹² *Baehr* may simply be our community’s *Perez v.*

5. See Professor Larry Tribe’s letter to Senator Edward Kennedy (dated May 24, 1996) at 1-2:

[M]y conclusion is unequivocal: Congress possesses no power under any provision of the Constitution to legislate any such categorical exemption from the Full Faith and Credit Clause of Article IV. . . . The proposed legislation is thus plainly unconstitutional, both because of the basic ‘limited-government’ axiom that ours is a National Government whose powers are confined to those that are delegated to the federal level in the Constitution itself, and because of the equally fundamental ‘states’-rights’ postulate that all powers *not* so delegated are reserved to the States and their people.

6. Mouffe, *supra* note 2, at 97.

7. Susan Essoyan & Bettina Boxall, *Hawaii Ruling Lifts Ban on Marriage of Same-Sex Couples*, L.A. TIMES, Dec. 4, 1996, at A1.

8. *Id.*

9. *Id.*

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

11. As first decided by the Hawaii Supreme Court, the case was known as *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). That action was commenced against John C. Lewin, then State Director of Health. Following the 1994 general election, Governor Cayetano appointed Lawrence H. Miike to succeed Lewin as Director of Health and, pursuant to Appellate Procedure Rule 43(c) (1), Miike has been substituted for Lewin as a defendant in the case. *Baehr v. Miike*, 910 P.2d 112, 112 n.1 (1996). Trial in the case following the Hawaii Supreme Court’s remand began September 10, 1996 in front of Circuit Court Judge Kevin S.C. Chang. The trial resulted in a decision in favor of the plaintiffs and is now on appeal to the Hawaii supreme court, 1996 WL 694235 (Hawaii Cir. Ct.).

12. *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down Virginia’s anti-miscegenation statute as violating the U.S. Constitution’s equal protection and due process clauses).

Lippold.¹³ Rather than ending the state-imposed exclusions from marriage and full citizenship that exist today, *Baehr* may simply be a first legal victory in a long battle. It was nineteen years after *Perez* before the Supreme Court could finally acknowledge the inherent "white supremacist" beliefs that underlay the anti-miscegenation statutes.¹⁴ So too it may take many more battles before the courts and our society reach the same conclusion: preventing same-sex couples from marrying treats us as second-class citizens. As long as this society refuses to legally recognize our relationships, gay men and lesbians cannot be equal members of the polity. Our citizenship is devalued by the regressive and exclusionary nature of our democracy today.

II. SOME ACTIVISTS BELIEVE THAT RETAINING OUR OUTLAW STATUS IS THE ONLY WAY TO OBTAIN TRUE CITIZENSHIP FOR MEMBERS OF THE GAY AND LESBIAN COMMUNITY

For quite some time, there has been a significant debate within the gay and lesbian community on whether seeking the right to marry is the best alternative for obtaining recognition of the committed family relationships of gay and lesbian couples. In its best known, but certainly not only, expression of the community's internal debate, Tom Stoddard (executive director of Lambda Legal Defense and Education Fund) and Paula Ettelbrick (Lambda's legal director) presented arguments for and against seeking the right to marry for members of our community.¹⁵ As Stoddard argued, "marriage is the political issue that most fully tests the dedication of people who are not gay to full equality for gay people, and it is also the issue most

13. *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948).

14. The U.S. Supreme Court noted that "[Virginia's] legitimate purposes [behind its anti-miscegenation statute] were 'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride,' obviously an endorsement of the doctrine of White Supremacy." *Loving*, 388 U.S. at 7. Striking down the anti-miscegenation statutes meant "that legislative bigotry based upon social, economic, political, religious, or historical beliefs about racial supremacy cannot restrict an individual's right to freely choose his or her sexual partners or spouses." Kenneth J. Lay, *Sexual Racism: A Legacy of Slavery*, 13 NAT'L BLACK L.J. 165, 178 (1993).

15. Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, and Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?* [hereinafter *Path to Liberation*] in *OUT/LOOK, NAT'L GAY AND LESBIAN Q.*, Fall 1989, issue 6, at 8, reprinted in SHERMAN, LESBIAN AND GAY MARRIAGE, 13-26. Compare William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993) (arguing that historical acceptance of same-sex marriage indicates its appropriate place in modern society) with Nancy D. 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) (arguing in contrast that same-sex marriage will neither liberate lesbians or gay men nor heterosexual marriage) [hereinafter *We Will Get*]. See also, Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men, and the Intra-community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1994-95) (responding to Polikoff); Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL'Y 107 (1996) [hereinafter *Wedlock Alert*]; and WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 51-85 (1996) [hereinafter *The Case for Same-Sex Marriage*] and references cited therein.

likely to lead ultimately to a world free from discrimination against lesbians and gay men."¹⁶ Ettelbrick responded that marriage is not a path to liberation but instead "would force our assimilation into the mainstream," moderate the gay liberation movement, and halt the slow, but growing, acceptance of alternative forms of commitment, such as domestic partnership.¹⁷

More recently, Ettelbrick reiterated her concerns about same-sex marriage, arguing that "[o]ver the past two decades, advocates for lesbian and gay equality have propelled lesbian and gay families from their erstwhile status of oxymoron to a solid position within the fringes of the definition of the term 'family.'"¹⁸ Reviewing the progress made over those years, Ettelbrick points to the struggle against the outlandish stereotypes courts have used when rejecting custody of and visitation by gay men and lesbians with their children: getting courts to recognize that sexual orientation is not a predictor of parental ability, having employers and courts recognize gay and lesbian families by using concepts such as second-parent adoption and domestic partnership, and expanding the definition of "family" to include lesbian and gay couples and the non-biological relationships between lesbian co-parents and the children they help to raise.¹⁹ Ettelbrick believes the point of these solutions was not to require all of us to get married.²⁰ Instead, "the point was to uncover solutions for families who do not fit within the laws and policies defining family relationships as requiring marriage or biology."²¹ She explains the most dramatic impact of the work of "family definition advocates" has been "their questioning of the policy justifications for providing . . . economic and social benefits to marital and blood families while denying them to functional families."²² She argues, "as long as legally recognized family status is the gateway to benefits and privileges,"²³ access to those benefits and privileges "should be guided by a desire to fulfill the purpose for which those benefits are provided, not by rigid definitions of family."²⁴

Similarly, Nancy Polikoff believes "the desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism."²⁵ Using

16. Stoddard, *supra* note 15.

17. Ettelbrick, *Path to Liberation*, *supra* note 15.

18. Ettelbrick, *Wedlock Alert*, *supra* note 15, at 109.

19. *Id.* at 109-112.

20. *Id.* at 132.

21. *Id.*

22. *Id.* at 139.

23. *Id.*

24. *Id.*

25. Polikoff, *We Will Get*, *supra* note 15, at 1536.

the examples of the movement to increase women's access to abortions and the campaign to end the military's practice of excluding gay men and lesbians, Polikoff argues:

Demands for social change often have begun with a movement at first articulating the rhetoric of radical transformation and then later discarding that rhetoric to make the demands more socially acceptable. The movement's rhetoric is modified or altered when those opposing reform explore the radical and transformative possibilities of that rhetoric, causing its advocates to issue reassurances promising that such transformation is not what the movement is about at all.²⁶

She then explains that working toward the right to marry for gay men and lesbians will "detract from, even contradict, efforts to unhook economic benefits from marriage and make basic health care and other necessities available to all."²⁷ Even more troubling for today's discussion, Polikoff believes that "[i]t will also require a rhetorical strategy that emphasizes similarities between our relationships and heterosexual marriages, values long-term monogamous coupling above all other relationships, and denies the potential of lesbian and gay marriage to transform the gendered nature of marriage for all people."²⁸

Perhaps fulfilling Polikoff's worst fears in his new book, *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment*, William Eskridge states his thesis that "same-sex marriage is good for gay people and good for America, and for the same reason: it civilizes gays and it civilizes America."²⁹ Noting that for most of the twentieth century we have been outlaws, he discusses the legal system's gradual decriminalization of homosexuality and our increasing integration into larger society.³⁰ Continuing that "law's civilizing movement will not be complete until the same-sex married couple replaces the outlawed sodomite as the paradigmatic application of law to gay people,"³¹ Eskridge asserts his belief that marriage will contribute to this integration by allowing us to establish common ties with straight people. By being allowed to marry, "we should also share the aspirations, joys, anxieties, and disappointments that straight couples find in matrimony."³²

He also believes gay and lesbian marriage will civilize American society. Using the experience of various racial, ethnic and religious outsiders, he notes that group hatred has ultimately been replaced with group acceptance

26. *Id.* at 1541.

27. *Id.* at 1549.

28. *Id.*

29. Eskridge, *The Case for Same-Sex Marriage*, *supra* note 15, at 8.

30. *Id.*

31. *Id.*

32. *Id.* at 9.

and cooperation.³³ Although Americans tend to point with pride to our history of "accommodation and inclusion,"³⁴ he recognizes that "[t]he history we Americans would rather forget, and should try to correct, is our history of prejudice and exclusion."³⁵ As a group that has been traditionally excluded from full citizenship in America, and whose contributions have until recently been suppressed by laws requiring us to remain closeted, Eskridge argues the country "would be edified—civilized, if you will—if it would end all vestiges of legal discrimination against its homosexual population. Essential to this project is the adoption of laws guaranteeing equal rights for lesbian and gay couples."³⁶ As citizens of the country, gay men and lesbians have contributed to its flourishing and we are entitled to the same rights as other citizens, including the right to marry. "A civilized polity assures equality for all its citizens."³⁷ In conclusion, Eskridge argues:

When the state recognizes a couple's right to marry, it offers a recognition of the couple's citizenship, not a seal of approval for their lifestyle. Citizenship in a heterogeneous polity entails state tolerance of a variety of marriages, and states are not a bit choosy about who receives a marriage license. Convicted felons, divorced parents who refuse to pay child support, delinquent taxpayers, fascists, and communists—all receive marriage licenses from the state. The Supreme Court stands ready to discipline any state that denies their citizens their right to marry, yet no one believes that the license constitutes state approval of felony, default on support obligations, tax delinquency, communism, or fascism. . . . Gay people constitute virtually the only group in America whose members are not permitted to marry the partner they love. This is intolerable.³⁸

Ettelbrick and Polikoff resist the movement for equal marriage rights for lesbians and gay men because they fear that it will derail other efforts that have more likelihood to radicalize American society, and are opposed to supporting one of our most restrictive, gendered, and regressive institutions. Eskridge believes that equal marriage rights will civilize both the lesbian and gay community and America, as well as challenge the gendered sex-roles inherent in marriage. Noting that lesbian and gay activists fear that "civilizing gays would domesticate and tame us," he believes this fear is overstated, because "the old-fashioned marriage of breadwinner husband and housekeeper wife cannot be replicated by same-sex couples; at least one of the husbands will be a housekeeper, and at least one of the wives will be a breadwinner."³⁹ I agree with Ettelbrick and Polikoff that the movement for

33. *Id.* at 10.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 9.

equal marriage rights may impact other movements which could result in more radical challenges to traditional norms. Although I am unsettled by Eskridge's notion of becoming more "civilized," I believe with him that the fear of domestication is overstated. As explained below, obtaining full citizenship for sexual outlaws will have an ultimately transformative impact on our society. The image of thousands of gay and lesbian couples marrying, at least from my point of view, promises a chance for a truly "radical and plural" democracy.

III. REDEFINING THE FAMILY BY DISPLACING "COMPULSORY HETEROSEXUALITY" THROUGH EQUAL MARRIAGE RIGHTS FOR LESBIANS AND GAY MEN COULD TRANSFORM OUR SOCIETY

Paula Ettelbrick and Nancy Polikoff are wise to recognize that our society resists embracing an expansive definition of family and thereby restricts allocation of benefits that are based on one's family status to those individuals who fit within a limited vision of what family comprises. My experience in working for recognition of non-biological parents in lesbian relationships and of extended alternative families has shown me that society's openness to an expansive definition of family is limited. From these experiences, I have concluded that working for the right of same-sex couples to marry will not negatively impact these other efforts and may, in fact, have more potential to transform society progressively than any other redefinition could.

Ettelbrick fears that allowing same-sex couples to marry will limit societal recognition of families to those couples who are married. However, even her preferred options, such as second-parent adoption, can lead to recognizing only those families whose relationships fit the preferred model. We have seen recently that the effort to allow second-parent adoptions, while having been embraced by some courts, has led to the same confining results that Ettelbrick fears will occur once marriage for same-sex couples is permitted. From this, I conclude that it is the requirement of fitting within some recognized definition of family, rather than the definition of family itself, that controls whether our legal system will recognize any particular family. For example, in 1993, the Vermont Supreme Court construed the state's adoption statute to allow adoptions by same-sex couples.⁴⁰ That was a major step in validating this legal option, which many lesbians have used to provide legal protection for the relationship between a child and the non-biological partner of the child's mother. But the same court has recently indicated that this initial step, which expanded the definition of family, could later be used to exclude a slightly different definition of family. In *Titchenal v. Dexter*, the Court held that it would not recognize the relationship between a non-biological parent in a lesbian relationship and her partner's child, in

40. *Adoptions of B.L.V.B. and E.L.V.B.*, 628 A.2d 1271 (Vt. 1993).

part, because the couple had not obtained a second-parent adoption legally establishing the parental relationship.⁴¹

This court's opinion simply reaffirms my belief that our society, and the courts we have established, are limited in their ability to embrace an expansive definition of family. In fact, each time we expand the prevailing definition of family to include yet another of the countless variations that can, and do, exist today, we find courts and other institutions using that new definition to preclude an ever more expansive vision. Same-sex marriage is no more likely to have this impact than any other expansion of the family definition. And, as I argue below, the potential for radical transformation of our society's definition of family may be best served by permitting same-sex marriage.

I also cannot disagree with Polikoff when she argues that movements seeking societal change do become more conservative as their efforts proceed to convince the mainstream of the correctness of their cause. My experience in working to obtain domestic partner benefits has convinced me that is true. Let me provide two examples. First, I was co-chair of the Madison, Wisconsin, Alternative Families task force which was charged with researching the issue of providing alternative family benefits (now widely known as "domestic partner" benefits) and drafting a statute for consideration by the Madison Common Council. Recognizing that restricting domestic partner benefits to those who confined their relationships to monogamous coupling would exclude the numerous other "families of choice" that are not based on the nuclear family model,⁴² the task force recommended to the Common Council that the definition of "alternative family" consists of "two or more adults . . . together with their dependent children."⁴³ We were attempting to be inclusive of all groups that provide the support, caring, love and involvement with other family members that is assumed to exist in the traditional family. We were particularly concerned with providing recognition for "extended alternative families" because extended families have repeatedly helped individual family members deal with the pressures and problems associated with living in a classist and racist society.⁴⁴ "Rather than simply adopting society's preference for the nuclear family. . . , the task force determined that meaningful social change and reform in this area required recognition of all types of alternative families."⁴⁵

41. 1997 WL 82730, 23 FAM. L. REP. (BNA) 1224 (Feb. 28). For an excellent discussion of why the state Supreme Court's decision should have used the doctrine of "equitable adoption" to recognize the parent-child relationship, see the dissent by Justices Morse and Johnson.

42. Barbara J. Cox, *Choosing One's Family: Can the Legal System Address the Breadth of Women's Choice of Intimate Relationship?*, 8 ST. LOUIS U. PUB. L. REV. 299, 329 (1989).

43. *Id.* at 332.

44. *Id.* at 330. See e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 500-503 (1977).

45. *Id.* at 332.

Contrary to our recommendation, the Madison Common Council limited the definition of alternative family to "two adults . . . plus dependents."⁴⁶ At the time, such "pragmatic" excuses as problems in providing health insurance coverage to an expanded alternative family and fears about huge alternative families invading quite, peaceful nuclear family neighborhoods were raised.⁴⁷ However, I have always believed that the major stumbling block was an inability of the Madison Common Council, speaking for society, to envision family as something beyond the traditional nuclear family.⁴⁸

The second example of society's inability to use domestic partner benefits as a means of expanding the accepted definition of family comes from the exclusion of heterosexual, unmarried couples from domestic partner benefits. Many, if not most, employers have extended domestic partner benefits solely to same-sex couples, not to their heterosexual counterparts. California Western School of Law is one such employer, reasoning that domestic partner benefits are provided to same-sex couples because we cannot marry and thus become eligible for traditional spousal benefits. If heterosexual couples want to receive similar benefits, they must marry. The City Council of Tucson, Arizona recently reached the same conclusion. While agreeing to extend medical insurance benefits to gay and lesbian domestic partners of city employees, the Council refused to do the same for unmarried heterosexual couples.⁴⁹ Such refusals make clear that providing domestic partner benefits does not necessarily mean that the provider is "unhooking" economic benefits from traditional visions of the family. Instead, providing domestic partner benefits can be just as limiting as providing spousal benefits. Same-sex domestic partners receive benefits because they are unable to marry and the employer is simply treating them as if they were married. People who can marry, but choose not to, are not entitled to benefits because those benefits are provided to (a) married couples and (b) same-sex couples who would marry if they were permitted to do so. Presumably, once same-sex marriage is allowed, same-sex couples who choose not to marry will be denied benefits just as their heterosexual counterparts are currently and, I expect, those employers will discontinue their domestic partner policies.

Thus, I reach the underlying disagreement I have had with Ettelbrick and Polikoff for quite some time concerning the radical nature of same-sex marriage. As I argued in my 1994 University of Wisconsin Law Review article on same-sex marriage, I believe that it is profoundly transformative

46. *Id.*

47. *Id.* at 332-333.

48. *Id.*

49. *Benefits Ok'd for Gay Partners*, SAN DIEGO UNION-TRIB., Apr. 30, 1997, at A3.

to speak openly about lesbian love and commitment.⁵⁰ Referring to the many small victories in coming out and acceptance that resulted from the commitment ceremony my partner and I had, I argued:

Yes, we must be aware of the oppressive history that weddings symbolize. We must work to ensure that we do not simply accept whole-cloth an institution that symbolizes the loss and harm felt by women. But I find it difficult to understand how two lesbians, standing together openly and proudly, can be seen as accepting that institution. What is more anti-patriarchal and critical of an institution that carries the patriarchal power imbalance into most households than clearly stating that women can commit to one another with no man in sight?—to commit to one another with no claim of dominion or control, but instead with equality and respect? I understand the fears of those who condemn us for our weddings, but I believe they fail to look beyond the symbol and cannot see the radical claim we are making.⁵¹

Fighting to obtain the right to marry seems to me to be an enterprise as expressive of seeking a “radical and plural democracy” as exists today. Our fight against subordination cannot be successful as long as we work for change outside our families, and do not challenge and make changes to the institutionalized racism, sexism, and homophobia that is bound up in today’s definition of the family. Requiring compulsory heterosexuality as the cost of having the right to claim that one is in a “family” relationship with another emphasizes the limited nature of our vision of who can be family. Obtaining the right for two men to marry one another and for two women to marry one another challenges, more than any other way, the notion that gendered hierarchy has a place in society today. By claiming that two men or two women can marry one another, we are claiming that the family can be freed from those who would limit those relationships that are valued by society only to those where procreation is a possibility and where heterosexuality is required.

Every time I assert that I am married, I am claiming that the norm of heterosexuality cannot control me. I am maintaining my sexual outlaw status and, in fact, am making a lifetime commitment to it. Making a lifetime commitment to my partner, who is a woman, translates into a lifetime commitment to being a lesbian, politically and sexually. Although I may be misunderstanding something, I cannot grasp how that claim in any way supports society’s norms which insist that a woman cannot find happiness in her life without connecting to a man.

Every time I speak to another group about equal marriage rights for lesbians and gay men, I am asserting the right for my relationship, as it is,

50. Barbara J. Cox, *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, 1037 n. 12.

51. *Id.*

to be recognized by a society that has never recognized my existence. Every time I testify before a state legislative committee, as I did last year in opposition to California's A.B. 1982 which would have refused recognition of out-of-state same-sex marriages,⁵² I am participating in an attempt to make our democracy more radical and plural. By believing that this society must recognize me, as a lesbian in a committed relationship with another woman, and by insisting on this recognition, I am insisting that my sexual outlaw status not deprive me of full citizenship. Contrary to what Eitelbrick and Polikoff conclude, I believe that I am maintaining my sexual outlaw status when I claim the right to marry. I am insisting that the polity deal with me as I am, not as someone seeking assimilation by claiming the title of "wife," but as someone seeking to transform society by claiming to be the "wife" of another woman. I am making a profoundly radical political statement every time I stand in the drugstore aisle looking for a Valentine's Day card for "my wife."⁵³ As the men looking for cards stand there with me, watching me read and consider which card I want to buy for my spouse, they are forced to reckon with the challenge that my existence as a married woman makes to their view of the institution of marriage. While some may believe my presence in that aisle represents the "civilization" or "domestication" of lesbian outlaw status, I think it represents the ultimate challenge to a society that restricts family to those relationships that incorporate heterosexuality and all the gendered baggage that comes with it.

Forcing society and our legal system to grapple with my status as a lesbian wife seems to me one of the more radical enterprises that I could be involved with today. Standing in that aisle, testifying before the Senate Judiciary Committee, and reserving the "honeymoon" suite at a Hawaiian resort, as Chantal Mouffe notes, "must be seen as resistances to the growing uniformity of social life," resistance to "imposition of a homogenized way of life, of a uniform cultural pattern. . . ."⁵⁴ As she says, this is being challenged by different groups that "reaffirm their right to their difference, their specificity. . . ."⁵⁵

I agree with Mouffe that people struggle for equality, including equal marriage rights, not "because of some ontological postulate, but because they have been constructed as subjects in a democratic tradition that puts those values at the center of social life."⁵⁶ As she notes, "[d]emocratic discourse questions all forms of inequality and subordination" since "[d]emocracy is our most subservise idea because it interrupts all existing discourses and

52. See Barbara J. Cox, *Are Same-Sex Marriage Statutes the New Anti-Gay Initiatives?*, 2 (No. 2) NAT'L J. OF SEXUAL ORIENT. L. 89 (1996) (on-line journal available at <<http://sunsite.unc.edu/gaylaw>>). That legislation was not passed.

53. For a further discussion of this experience, see Barbara J. Cox, *Coming Out: Practical Battles from Being Visible as a Lesbian*, 5 REV. OF L. & WOM. STUD. 89, 93-94 (1995).

54. Mouffe, *supra* note 2, at 93.

55. *Id.*

56. *Id.* at 95.

practices of subordination.”⁵⁷ Just as Mouffe says that we must “rethink and reformulate the notion of democracy itself, for the view we have inherited does not enable us to grasp the amplitude of the democratic revolution,”⁵⁸ so too must we rethink and reformulate the notion of same-sex marriage itself in order to grasp the amplitude of the transformation it can make on our society.

57. *Id.* at 96.

58. *Id.* at 100.

