

Looking Beyond Full Relationship Recognition for Couples Regardless of Sex: Abolition, Alternatives, and/or Functionalism

Edward Stein†

Introduction

Almost forty years ago, Jack Baker and Michael McConnell went to the clerk of the court's office in Minneapolis, Minnesota to file an application for a marriage license.¹ At the time, Baker was finishing his first year of law school at the University of Minnesota² and was a leader of the University's gay student group.³ McConnell, who had been romantically involved with Baker for just under three years, had recently moved to the Twin Cities and received an offer to work as a University librarian.⁴ They knew that Minnesota's marriage law did not explicitly say that a man could only marry a woman and that a woman could only marry a man,⁵ and hoped to take advantage of this omission and be married in Hennepin County, Minnesota.⁶ Their application for a marriage license was denied by the county attorney, who opined that granting Baker and McConnell such a

†. Vice Dean, Professor of Law, and Director of the Program for Family Law, Policy and Bioethics, Cardozo School of Law; J.D., Yale University; Ph.D., Massachusetts Institute of Technology; B.A., Williams College. This Essay was prepared for a keynote address for the *Law and Inequality* Symposium at the University of Minnesota Law School on April 9, 2010 titled "Family Values: Law and the Modern American Family." Thanks to Joanna Grossman, Solangel Maldonado, and Steve Lin for their helpful comments on earlier drafts of this Essay. Portions of this Essay are reprinted, with permission, from Edward Stein, *Marriage or Liberation?: Reflections on Two Strategies in the Struggle for Lesbian and Gay Rights and Relationship Recognition*, 61 RUTGERS L. REV. 567 (2009).

1. Jack Star, *The Homosexual Couple*, LOOK, Jan. 26, 1971, at 69, 70.

2. *Id.* at 69.

3. *Id.* at 71.

4. *Id.* at 70.

5. MINN. STAT. § 517.02 (1967) (amended 1973) ("Every male person who has attained the full age of 21 years, and every female person who has attained the full age of 18 years, is capable in law of contracting marriage, if otherwise competent.") Minnesota law now explicitly prohibits same-sex marriage. MINN. STAT. § 517.03 (2008).

6. *Baker v. Nelson*, 191 N.W.2d 185, 185 (Minn. 1971).

license would “result in an undermining and destruction of the entire legal concept of our family structure in all areas of law.”⁷

Baker and McConnell were undeterred. They wanted to get married and thought it was unjust that they were unable to, so despite the social stigma associated with gay marriage, the two men enlisted the help of an attorney affiliated with the Minnesota Chapter of the American Civil Liberties Union and filed an action to force the state to issue them a marriage license.⁸ Not surprisingly, they lost at trial, they lost on appeal to the Minnesota Supreme Court,⁹ and the U.S. Supreme Court dismissed their appeal “for want of a substantial federal question.”¹⁰ Not only did they lose their case, but the University rescinded the offer to hire McConnell because of his gay activism.¹¹ McConnell’s suit to force the University to hire him as promised, although successful at trial, ultimately failed on appeal.¹²

In the 1970s, same-sex marriage was not a universal goal for advocates of lesbian, gay, bisexual, and transgender (LGBT) rights. While Baker and McConnell were members of a University

7. Star, *supra* note 1, at 70 (quoting George Scott, Hennepin County Attorney).

8. Baker, 191 N.W.2d at 185.

9. *Id.*

10. Baker v. Nelson, 409 U.S. 810 (1972) (mem.). Interestingly, various courts hearing cases related to same-sex marriage still discuss the U.S. Supreme Court’s decision to dismiss Baker’s appeal. Some courts, in decisions that have ruled against lesbian, gay, bisexual, and transgender (LGBT) relationship recognition, have found that when the Supreme Court dismissed Baker’s and McConnell’s challenge to Minnesota’s marriage law “for want of a substantial federal question,” the Court was taking a position on whether prohibiting same-sex marriages violated the U.S. Constitution. See, e.g., Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 870–71 (8th Cir. 2006) (praising the Supreme Court’s dismissal of Baker, and stating there is “good reason for this restraint,” as public sentiment can be relevant to the creation of a new constitutional right); Wilson v. Ake, 354 F. Supp. 2d 1298, 1304–05 (M.D. Fla. 2005) (holding that the Supreme Court’s dismissal of Baker is binding precedent that mandates dismissal of a lesbian couple’s suit for marriage recognition in Florida). Other courts have found that when the Supreme Court summarily denies an appeal, as it did in Baker, the Court is not expressing a view on the underlying issue. See, e.g., Hernandez v. Robles, 794 N.Y.S.2d 579, 590–91 (Sup. Ct. 2005), *aff’d*, 855 N.E.2d 1, 12 (N.Y. 2006) (“While the Supreme Court’s dismissal of an appeal is a ruling that the judgment appealed from is correct, it does not reflect agreement as to the merits of the constitutional question addressed. Accordingly, the dismissal of an appeal lacks the precedential value of decisions reached after briefing and oral argument on the merits.” (citations omitted)).

11. Star, *supra* note 1, at 70.

12. See McConnell v. Anderson, 316 F. Supp. 809 (D. Minn. 1970), *rev’d*, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972). This was not the end of Baker and McConnell’s legal battles. See also McConnell v. United States, 188 F. App’x 540, 542 (8th Cir. 2006) (denying McConnell’s request for a federal tax refund arising from his alleged marital status).

of Minnesota gay student group, some members of this group disagreed with the couple's legal strategy, and many members of the group opposed their focus on marriage.¹³ In fact, in the 1970s, the more vocal advocates of LGBT rights were so-called gay liberationists, who wanted more than equal treatment: gay liberationists wanted to change the very structure of society, to liberate the "homosexual in everyone."¹⁴ For example, shortly before Baker and McConnell sought a marriage license, a leader of the Gay Liberation Front denounced marriage "as one of the most insidious and basic sustainers of the system [that oppresses sexual minorities]."¹⁵ Also, around that same time, another gay liberationist took a similar position: "Traditional marriage is a rotten, oppressive institution Gay people must stop gauging their self respect by how well they mimic straight marriages [S]howing the world that 'we're just the same as you' is avoiding the real issues, and is an expression of self-hatred."¹⁶

Gay liberationists' negative view of marriage was, in part, connected to feminist critiques of marriage. The Stonewall-era LGBT rights movement had deep connections with the contemporaneous women's rights movement (as well as the civil rights movement more generally), a movement with significant anti-marriage and marriage reform sentiments.¹⁷ Marriage was seen as an institution that, both legally and socially, disempowered women and treated men and women differently.¹⁸ The anti-marriage attitudes of gay liberationists were thus influenced by the fact that same-sex couples were not allowed to marry, but also by the connection to the women's rights movement.

Despite opposition to marriage for same-sex couples in the general public and even within the gay community, when Baker

13. See KEN BRONSON, A QUEST FOR FULL EQUALITY 6 (2004), <http://www.may-18-1970.org>.

14. Steven Epstein, *Gay Politics, Ethnic Identity: The Limits of Social Construction*, SOCIALIST REV., May–Aug. 1987, at 9, reprinted in FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY 239, 256 (Edward Stein ed., 1990). See *id.* at 252–53 (discussing the liberationists and their goals).

15. *Gay Revolution Comes Out*, RAT, Aug. 12–26, 1969, at 7, quoted in WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 231 n.6 (1996).

16. Carl Wittman, *A Gay Manifesto (1969–70)*, in OUT OF THE CLOSETS: VOICES OF GAY LIBERATION (Karla Jay & Allen Young eds., 1972), reprinted in WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS 380, 383 (Mark Blasius & Shane Phelan eds., 1997).

17. See DAVID A. J. RICHARDS, WOMEN, GAYS, AND THE CONSTITUTION 337–46 (1998).

18. Wittman, *supra* note 16, at 383.

and McConnell began their quest for a marriage license, they were publicly confident about the likelihood that they would be allowed to marry, but they must have known that their lawsuit was a long shot.¹⁹ Today, in contrast, it is quite plausible to say that full marriage equality²⁰ is inevitable, even though I am far from certain that same-sex couples throughout the United States will have equal access to legal recognition in my lifetime.²¹ Despite my hesitance to predict when there will be full marriage equality for LGBT people across the country, I am confident that now is an appropriate moment to reflect on whether full access to marriage regardless of the sex of the parties is the ideal end state for the reform of the law of adult domestic relations, in light of the demand by LGBT people for legal recognition for their relationships. So my question is the following: should advocates of justice, fairness (both generally and for LGBT people specifically), and good family law be striving for marriage equality, or for something else? Of course, no advocate of LGBT rights would say that marriage is the be-all and end-all of LGBT rights; every LGBT rights advocate would agree that there is much to accomplish outside the law of adult domestic relations. My thesis is more radical: even with respect to relationship recognition for same-sex couples, we should look past same-sex marriage.²² In this

19. The preceding discussion of Baker and McConnell's lawsuit is adapted from my Essay in the book *Family Law Stories*. See Edward Stein, *The Story of Goodridge v. Department of Public Health: The Bumpy Road to Marriage for Same-Sex Couples*, in *FAMILY LAW STORIES* 27 (Carol Sanger ed., 2008).

20. The project of attaining equal access for LGBT people to marriage and the associated rights, benefits, duties, and obligations is often referred to as the quest for marriage equality. When marriage equality is achieved, there will be no restrictions on entrance to marriage indexed to the sex of the people who are marrying. The locution "same-sex marriage" is problematic because (1) it elides important issues related to relationship recognition for transgender people and (2) it makes it seem like the marriage that LGBT people want access to is somehow a different kind of marriage. Despite these problems, I will sometimes use that locution because, in many contexts, it is more felicitous than alternatives.

21. Some jurisdictions have embraced equal benefits for same-sex couples without embracing marriage equality. For example, some courts that have ruled in favor of legal recognition of same-sex relationships have held that giving equal benefits without giving the name marriage satisfies the constitutional principles of equality and liberty. See *Lewis v. Harris*, 908 A.2d 196, 223–24 (N.J. 2006); *Baker v. Vermont*, 744 A.2d 864, 886–87 (Vt. 1999). Other courts have held that creating an alternative relationship-recognition scheme for same-sex couples does not comport with the principle of equality. See *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 481–82 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 906–07 (Iowa 2009); *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 571–72 (Mass. 2004).

22. Other LGBT rights activists, allies, and scholars have argued for looking past marriage for same-sex couples, although they have not embraced the proposal that I do here. See, e.g., NANCY POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE*:

Essay, I survey three alternative proposals to full relationship recognition for same-sex couples or marriage equality. Briefly, the three alternatives are: (1) the abolition of marriage, (2) the development of a “menu” of alternatives to marriage, and (3) the embracing of a functionalist approach to relationship recognition. In the end, I favor a combination of functionalism and the menu approach rather than abolition or the more straightforward goal of marriage equality.²³

Before I turn to a discussion of these three alternative projects, some context is appropriate. The legal situation for LGBT people in the United States has changed dramatically in the past forty years. In 1970, forty-eight states and the District of Columbia criminalized sodomy, which included most forms of consensual sex between two men and some sex acts between two women.²⁴ Discrimination against LGBT people was legal under the law of every jurisdiction in the country—it was not until 1977 that the District of Columbia passed the first anti-discrimination law that protected LGBT people.²⁵ In addition, at the time, no state or other jurisdiction provided any form of legal recognition for couples consisting of two men or two women—in 1984, Berkeley, California adopted the first domestic partner policy that allowed a city employee to get health benefits for his or her registered partner.²⁶

VALUING ALL FAMILIES UNDER THE LAW 8–10 (2008) (advocating a “valuing-all-families strategy” that reexamines “laws that distinguish between married couples and everyone else” by “demanding a good fit between a law’s purpose and the relationships subject to its reach”); *Beyond Same-Sex Marriage: A New Strategic Vision For All Our Families and Relationships*, <http://www.beyondmarriage.org> (last visited Apr. 16, 2010) (displaying a statement signed by activists, scholars, and others that looks beyond the goal of same-sex marriage to broader societal reforms).

23. My goal in this Essay is neither to fully develop nor defend my proposed alternative to the simple quest for marriage equality. Rather, I here sketch my proposal and some of its virtues and vices relative to some other proposals. I do not discuss two other proposals for change in marriage law, namely, altering the rights, benefits, duties, and obligations that go with marriage and alterations related to incest and polygamy.

24. WILLIAM N. ESKRIDGE, JR., *DISHONORABLE PASSIONS* 161 (2008). The exceptions were Illinois, which repealed its sodomy law in 1961, and Connecticut, which did so in 1969. *Id.* at 124–27, 161–63. In 1971, Idaho repealed its sodomy laws, but upon learning that gay rights advocates cheered this repeal, reinstated the laws in 1972. IDAHO CODE ANN. § 18-6605 (2004); *see* ESKRIDGE, *supra*, at 182–84.

25. D.C. CODE § 1-2501 (1977) (current version at § 2-1401.01 (2008)). Five years later, Wisconsin was the first state to pass such a law. WIS. STAT. § 101.22 (1982) (current version at § 106.50 (2008)).

26. ESKRIDGE, *supra* note 15, at 59.

Today, no state criminalizes adult consensual sex between two people of the same sex after *Lawrence v. Texas*²⁷ held such laws to be unconstitutional.²⁸ Twenty-one states and the District of Columbia now have laws that protect against sexual-orientation discrimination, and sixteen of these also protect against discrimination on the basis of gender identity and/or gender expression (that is, they protect transgender people against discrimination).²⁹ Fifteen states and the District of Columbia provide some legal recognition for same-sex relationships,³⁰ and in six states, the majority of justices of the highest courts have held that the failure to give equal benefits to same-sex couples as compared to different-sex couples violates their state constitutions.³¹ Although the liberationist approach to LGBT rights has waxed and waned in popularity over the past forty

27. 539 U.S. 558 (2003).

28. *Id.* at 578; see also *id.* at 579 (O'Connor, J., concurring) (agreeing with the result in *Lawrence* without overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)). The next two paragraphs of this Essay are adapted from Stein, *supra* note †, at 568–69 (citations added).

29. The jurisdictions that ban discrimination on the basis of sexual orientation and gender identity/expression are California, Colorado, Connecticut, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. Human Rights Campaign, State Laws, http://www.hrc.org/laws_and_elections/state.asp (last visited Apr. 11, 2010). The states that ban discrimination on the basis of sexual orientation—but not gender identity/expression—are Delaware, Maryland, Nevada, New Hampshire, New York, and Wisconsin. *Id.*

30. The list of those jurisdictions legally recognizing same-sex relationships is: Connecticut (marriage); the District of Columbia (marriage); Iowa (marriage); Massachusetts (marriage); New Hampshire (marriage); Vermont (marriage); New Jersey (civil union); California (“robust” domestic partnership—from May to November 2008, California allowed same-sex marriages, and still recognizes these marriages); Nevada (“robust” domestic partnership); Oregon (“robust” domestic partnership); Washington (“robust” domestic partnership); Maine (limited domestic partnership); Maryland (limited domestic partnership); Wisconsin (limited domestic partnership); Colorado (designated beneficiary, which is the equivalent of a limited domestic partnership); and Hawaii (reciprocal beneficiary, which is the same as a limited domestic partnership). *Id.* While Maryland, New York, and Rhode Island do not allow same-sex couples to marry or obtain civil unions, they recognize (or at least probably would recognize) valid same-sex marriages from other jurisdictions. *Id.*

31. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Baker v. State*, 744 A.2d 864 (Vt. 1999); *cf.* *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (holding that the failure to allow same-sex couples to marry raised serious equal protection concerns and remanding the case to determine whether the state could satisfy the associated heavy burden of justifying differential treatment of same-sex couples).

years, in light of the prominence and success of the quest for marriage equality, even many LGBT activists previously opposed to such a focus have come to embrace the quest for marriage equality.³²

Socially, the changes have been more dramatic. Whereas same-sex sexual attraction was once called “the love that dare not speak its name,”³³ many LGBT people are now open about their desires, relationships, families, and sexual behavior. LGBT concerns are widely discussed in the national and local media; LGBT people are often favorably and compellingly portrayed in films and on television; and Americans in general, and younger generations in particular, have dramatically more positive attitudes towards LGBT sexuality, LGBT people, and their relationships and families.³⁴ For those of us who experienced the virulent homophobia and heterosexism that was the norm in the not-so-distant past, it is hard to believe how much the situation for LGBT people has improved.

Since 1970, marriage itself has also changed dramatically, even setting aside the advent of the legal recognition for same-sex couples in some jurisdictions. Over the past forty years, divorces have become easier to obtain, due primarily to the move from fault to no-fault divorce;³⁵ most gender asymmetries in the formal family law—that is, statutory, regulatory, and common law—have

32. See Carlos A. Ball, *Symposium: Updating the LGBT Intracommunity Debate over Same-Sex Marriage*, 61 RUTGERS L. REV. 493, 497 (2009). Ball explains: [T]he LGBT community during the 1970s and 1980s was divided, as it is today, on the issue of whether the institution of marriage should be expanded to include same-sex couples or whether its social, legal, and economic significance should instead be minimized. What is different today is that the movement's leaders, including its lawyers, now almost uniformly support the pursuit of marriage equality as a civil rights goal.

Id.

33. Lord Alfred Douglas, *Two Loves*, THE CHAMELEON (1894), available at <http://www.law.umkc.edu/faculty/projects/ftrials/wilde/poemsofdouglas.htm>. This phrase became vital in the trials of literary giant Oscar Wilde, when a prosecutor asked Wilde to define the “love that dare not speak its name.” Lucy McDiarmid, *Oscar Wilde's Speech From the Dock*, 15 TEXTUAL PRAC. 447, 453 (2001).

34. See, e.g., Dennis A. Golden, *The Policy Considerations Surrounding the United States' Immigration Law as Applied to Bi-National Same-Sex Couples: Making the Case for the Uniting American Families Act*, 18 KAN. J.L. & PUB. POL'Y 301, 312 (2009) (“[S]ince 2000[,] Americans have become more accepting of homosexuality. Within the next two years, the majority of Americans will hold the opinion that homosexuality is morally acceptable . . .”).

35. See generally J. HERBIE DIFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA* (1997) (describing the historical changes in Americans' feelings on the morality of divorce and the move towards divorce on demand).

disappeared;³⁶ cohabitation is now recognized for some legal purposes;³⁷ and procreation is no longer seen as the sole (or even central) justification for marriage.³⁸ Some of the changes in the institution of marriage are the result of other forces besides the LGBT movement, such as the advent of new reproductive technologies, the sexual revolution, and the improved position of women in society.³⁹ These societal changes are not, however, disconnected from the LGBT rights movement—rather, such aspects of society have evolved synergistically with changes relating to LGBT rights. Women's rights, sexual mores, and LGBT rights, although distinct, are in many ways interconnected.

The social and legal situation for LGBT people is still, however, far from perfect.⁴⁰ Seventy years since the earliest rumblings of a gay political movement in the United States and forty-one years since the Stonewall rebellion—the so-called birth of the contemporary gay rights movement⁴¹—the legal situation for LGBT people, especially from a national perspective, remains problematic. Hate crimes against LGBT people are still

36. See, e.g., *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (holding that a Louisiana statute allowing a husband to unilaterally dispose of jointly held property violated the Fourteenth Amendment); *Orr v. Orr*, 440 U.S. 268 (1979) (holding that the gender-based scheme exempting wives, but not husbands, from any requirement to pay alimony violated the Equal Protection Clause of the Fourteenth Amendment). *But see* *Nguyen v. I.N.S.*, 533 U.S. 53 (2001) (upholding different citizenship requirements for children of unmarried women who are U.S. citizens as compared to children of unmarried men who are U.S. citizens). Gender asymmetry remains present, however, in how courts, legislatures, and society think about families and in how family law operates in practice.

37. See, e.g., *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) (enforcing oral or implied cohabitation contracts); *Ireland v. Davis*, 957 S.W.2d 310 (Ky. Ct. App. 1997) (interpreting domestic violence laws to include same-sex couples); *Dunphy v. Gregor*, 642 A.2d 372 (N.J. 1994) (applying bystander liability to an unmarried different-sex cohabitant); *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (N.Y. 1989) (recognizing a same-sex cohabitant as a family member under housing law); *Gormley v. Robertson*, 83 P.3d 1042 (Wash. Ct. App. 2004) (applying equitable distribution to the property accumulations of an unmarried same-sex couple).

38. Elsewhere, I have discussed this shift in the way some courts talk about the significance of procreation in marriage. See Edward Stein, *The "Accidental Procreation" Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 CHI.-KENT L. REV. 403 (2009).

39. See Harbour Fraser Hodder, *The Future of Marriage: Changing Demographics, Economics, and Laws Alter the Meaning of Matrimony in America*, HARV. MAG., Nov.–Dec. 2004, at 39, 39, available at <http://harvardmagazine.com/2004/11/the-future-of-marriage.html>.

40. See Stein, *supra* note †, at 569–70.

41. For a history of this event, see generally MARTIN DUBERMAN, *STONEWALL* (1993). For a questioning of the conventional belief that Stonewall was a “founding event” of the LGBT rights movement in the United States, see generally JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940–1970* (1983).

disturbingly common,⁴² LGBT youth are still verbally and physically harassed in school, often with the knowledge and willful acceptance of teachers and administrators,⁴³ and LGBT people are disproportionately targeted for arrest by law enforcement officials.⁴⁴ Public opinion polls still reflect strong negative attitudes towards LGBT people.⁴⁵ Although the legal situation has improved, it is still legally permissible in the majority of states and under federal law to discriminate on the basis of sexual orientation (or gender identity) in employment, housing, and other important contexts.⁴⁶ The U.S. military, the largest employer in the United States,⁴⁷ discriminates on the basis of sexual orientation,⁴⁸ although that ban is supposedly on its way out.⁴⁹ A

42. In 2007, 1265 of the 7624 reported incidents of hate crimes were motivated by sexual orientation. See Federal Bureau of Investigation, Hate Crime Statistics: Incidents, Offenses, Victims, and Known Offenders, http://www.fbi.gov/ucr/hc2007/table_01.htm (last visited Apr. 11, 2010). Of these, ninety-eight percent were directed at lesbians, gay men, or bisexuals. *Id.* Additionally, in 2007, while the number of reported bias incidents nationwide decreased, there was a more than five percent increase in reported hate crimes based on the victim's sexual orientation. *Hate Crimes: Good News on Bias Incidents Based on Race and Religion; Bad News on Those Based on Sexual Orientation*, WASH. POST, Nov. 5, 2008, at A22.

43. See EMILY A. GREYTAK ET AL., HARSH REALITIES: THE EXPERIENCES OF TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS 9–24 (2009), available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1375-1.pdf. In a national survey of school climates, “less than a fifth of students said that school personnel intervened most of the time or always when hearing homophobic remarks (16%) or negative remarks about someone's gender expression (11%). In contrast, students were more likely to report that staff intervened when hearing sexist or racist remarks . . .” *Id.* at 11.

44. AMNESTY INT’L, STONEWALLED: POLICE ABUSE & MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL & TRANSGENDER PEOPLE IN THE U.S. 12–37 (2005), available at <http://www.amnestyusa.org/outfront/stonewalled/report.pdf>.

45. See, e.g., PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, MOST STILL OPPOSE GAY MARRIAGE, BUT SUPPORT FOR CIVIL UNIONS CONTINUES TO RISE (2009), <http://pewresearch.org/pubs/1375/gay-marriage-civil-unions-opinion> (noting that forty-nine percent of Americans surveyed say homosexual behavior is morally wrong); Lydia Saad, *Americans Evenly Divided on Morality of Homosexuality*, GALLUP, June 18, 2008, <http://www.gallup.com/poll/108115/Americans-Evenly-Divided-Morality-Homosexuality.aspx> (finding that only fifty-seven percent of those polled consider homosexuality an acceptable “alternative lifestyle” and forty-eight percent consider homosexuality “morally wrong”).

46. See *supra* note 29 and accompanying text.

47. See U.S. Department of Defense, DoD 101: An Introductory Overview of the Department of Defense, <http://www.defenselink.mil/pubs/dod101/> (last visited Apr. 10, 2010).

48. The military's official policies and the regulations that implement them include 10 U.S.C. § 654 (2006); U.S. DEP’T OF DEF., DIRECTIVE NO. 1332.30: SEPARATION OF REGULAR COMMISSIONED OFFICERS (1993), amended by CHANGE 1 TO DOD DIRECTIVE 1332.30 (1994); U.S. DEP’T OF DEF., DIRECTIVE NO. 1304.26: QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION, (1993), amended by CHANGE 1 TO DOD DIRECTIVE 1304.26 (1994); U.S. DEP’T OF

significant majority of the states not only prohibit same-sex couples from marrying, but they also explicitly deny recognition to same-sex relationships that have been validly celebrated in other jurisdictions.⁵⁰ And, for purposes of federal law, marriage is explicitly defined as a relationship between one man and one woman,⁵¹ which means that legally recognized same-sex relationships (for instance, Massachusetts marriages, New Jersey civil unions, and Nevada domestic partnerships⁵²) are not recognized, for example, for purposes of federal income tax law and immigration law.⁵³

Although there is room for improvement, both the law of adult domestic relations and the legal landscape for LGBT people have changed for the better. The question remains, from the perspective of where we are today, whether advocates of equality and reform of laws relating to family law and LGBT people should be content with the goal of marriage equality. To help answer that question, I discuss, in turn, the three aforementioned alternatives.

I. Abolition

Some commentators and scholars have suggested that *abolishing* marriage is, on the one hand, a way of achieving marriage equality, while also, on the other hand, an end-state that

DEF., DIRECTIVE NO. 1332.14: ENLISTED ADMINISTRATIVE SEPARATIONS (1993), *amended by* CHANGE 1 TO DoD DIRECTIVE 1332.14 (1994). For discussion, see JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY (1999).

49. See, e.g., Elisabeth Bumiller, *A Call to Topple Policy for Gays in Armed Forces*, N.Y. TIMES, Feb. 3, 2010, at A1.

50. Forty-one states have either a law or a constitutional amendment (or both) explicitly restricting marriage in that state to one man and one woman. The list of such jurisdictions excludes Connecticut, the District of Columbia, Iowa, Massachusetts, New Hampshire, New Jersey, New York, New Mexico, Rhode Island, and Vermont. Human Rights Campaign, State Laws, http://www.hrc.org/laws_and_elections/state.asp (last visited Apr. 11, 2010). Almost all of the states that restrict marriage to different-sex couples also deny recognition to same-sex marriages from other jurisdictions. *Id.* The exceptions are New York and Maryland. Human Rights Campaign, Relationship Recognition Laws Map, http://www.hrc.org/documents/relationship_recognition_laws_map.pdf.

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

52. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); A3787, 212th Gen. Assem., 1st Ann. Sess., 2006 N.J. Laws 975; S. 283, 2009 Leg., 75th Sess. (Nev. 2009).

53. See, e.g., Thomas Prol & Daniel Weiss, *Lifting a Lamp: Will New Jersey Create a Safe Harbor for Gay and Lesbian Immigration Rights?*, N.J. LAW. MAG., Apr. 2004, at 22, 23 ("[T]he U.S. Citizenship and Immigration Services . . . currently maintains the interpretation that a same-sex marriage does not confer spousal status for immigration purposes.").

is preferable and/or more feasible compared to marriage equality.⁵⁴ Some abolitionists favor getting rid of the legal institution of marriage and replacing it with the ten-year-old institution known as the civil union.⁵⁵ According to this proposal, marriage would have religious and social significance, but the state would not license marriages, solemnize marriages, or give legal recognition to marriages.⁵⁶ Instead, on this proposal, the state would license, solemnize, and recognize civil unions (or some other legal institution *not* called marriage).⁵⁷ Marriage would no longer be a public institution; it would become *privatized*.⁵⁸ Couples in civil unions would have the same benefits, rights, and duties as married couples under the current legal regime, but the respective sexes of parties seeking a civil union would not matter. In other words, same-sex couples and different-sex couples would have equal opportunities to get a civil union and would be treated the same under the law once they obtained such a union. Couples could still get married in a church, in a private ceremony, or through whatever process they wanted to, but whether or not two people were married would have no legal consequence. This approach would achieve equality, rid state-sponsored relationship recognition from the sexist baggage associated with marriage—based, in part, on the history of marriage involving a woman's legal identity being swallowed up by her husband upon marriage⁵⁹—and separate the religious aspects from the legal aspects of relationship recognition.

The more radical abolitionist proposal is that the state should get out of the relationship-recognition business altogether. My

54. See, e.g., Tamara Metz, *Why We Should Disestablish Marriage*, in JUST MARRIAGE 99, 102–04 (Mary Lyndon Shanley ed., 2004) (“Removing the veil of marriage would increase the likelihood that benefits and protections aimed at caregiving units would serve their primary functions more effectively.”).

55. See, e.g., Amitai Etzioni, *A Communitarian Position for Civil Unions*, in JUST MARRIAGE, *supra* note 54, at 63, 65–66 (advocating civil unions as a “reasonable middle ground” for a society divided on the issue of gay marriage); Alan M. Dershowitz, *To Fix Gay Dilemma, Government Should Quit the Marriage Business*, L.A. TIMES, Dec. 3, 2003, at B15 (arguing that the government should only administer civil unions, leaving marriage for religious institutions). In the United States, civil unions were first created in Vermont in 2000. VT. STAT. ANN. tit. 15, §§ 1201–1207 (2009).

56. Dershowitz, *supra* note 55.

57. *Id.*

58. See generally Daniel A. Crane, *A “Judeo-Christian” Argument for Privatizing Marriage*, 27 CARDOZO L. REV. 1221 (2006) (arguing for the privatization of marriage from the perspective of traditional Judeo-Christian theology).

59. See Janet M. Calbo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593, 595–597 (1991).

colleague Ed Zelinsky, for example, argues that marriage should be *deregulated*: the government should give up its "monopoly" over marriage and thereby allow religious groups, private organizations, and any other entities to create "alternative versions of marriage."⁶⁰ This deregulation would lead to the emergence of a competitive marketplace for choosing among the newly-developed alternative forms of relationship recognition.⁶¹ Zelinsky bases his abolitionist proposal on the claim that deregulation would actually strengthen marriage, as well as on two other pragmatic claims: (1) the abolition/deregulation of marriage fits with the legal and cultural reality that legal marriage does not much matter because the rules applied to married couples are increasingly also applied to unmarried couples, and (2) the abolition of marriage would provide an equitable solution to the divisive political debate about marriage for same-sex couples.⁶²

This deregulation approach to the abolition of marriage has many of the same virtues as the civil union approach to the abolition of marriage; namely, it provides equality with respect to state recognition of same-sex and different-sex relationships, it frees the state from the sexist traditions associated with marriage, and it separates the religious aspects from the legal aspects of relationship recognition. According to Zelinsky, deregulation has a further pro-marriage benefit: abolishing civil marriage would create "a robust and competitive market" for relationship recognition, which would strengthen the institution of marriage.⁶³ Further, deregulation would allow couples whose relationships are being recognized to customize their marriages or other forms of relationship recognition.⁶⁴ While states currently allow couples to customize their marriages to some extent through prenuptial (or postnuptial) agreements, the sorts of changes couples can make through such agreements are somewhat limited,⁶⁵ and such

60. Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1163–64 (2006).

61. *Id.* Although their theoretical aims are quite different, Zelinsky's proposal is somewhat similar to the landmark abolitionist proposal in MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER: THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 228–30 (1995). See also Zelinsky, *supra* note 60, at 1196–99 (discussing differences between his proposal and Fineman's). For another early abolitionist proposal along the lines of Zelinsky's, see LEONORE J. WEITZMAN, *THE MARRIAGE CONTRACT* 227–54 (1981).

62. Zelinsky, *supra* note 60, at 1165.

63. *Id.* at 1164.

64. *Id.* at 1176–77.

65. WEITZMAN, *supra* note 61, at 338; Ira Mark Ellman, "Contract Thinking"

agreements are still fairly rare, especially among couples who are marrying for the first time.⁶⁶ For the most part, even though couples are allowed to enter prenuptial agreements, marriage remains a “one size fits all” form of relationship recognition. Deregulation would allow couples to move beyond the limitations of the present single-option relationship-recognition framework.

Both proposals for abolition have problems. First, regarding the civil union proposal for abolishing marriage, achieving marriage equality by abolishing marriage is somehow morally unsatisfying. Suppose that after *Loving v. Virginia*,⁶⁷ in which the U.S. Supreme Court ruled that laws prohibiting interracial marriages were unconstitutional,⁶⁸ the state of Virginia had responded by getting out of the marriage business altogether by creating civil unions that were available to both *interracial* and *intra-racial* couples. In so doing, Virginia would have, in effect, been saying that it preferred allowing no one to marry in Virginia to allowing interracial couples to marry in Virginia.⁶⁹ While this response to the Supreme Court’s ruling in *Loving* would have achieved equality in some sense of the term, it would have failed to address the underlying racism of Virginia’s pre-*Loving* prohibition on interracial marriages. Second, the word marriage currently has

Was *Marvin’s Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1369 (2001). For example, prenuptial agreements are not binding in terms of child support and child custody. WEITZMAN, *supra* note 61, at 339.

66. Ellman, *supra* note 65, at 1367–68 n.17.

67. 388 U.S. 1 (1967).

68. *Id.* at 11.

69. This hypothetical example is like three real world examples. The first comparison is to the so-called massive resistance to desegregation of public schools whereby some counties in Southern states simply shut down their public schools rather than desegregate. Most famously, in 1956, Prince Edward County in Virginia closed all of its public schools in reaction to *Brown v. Board of Education*, 347 U.S. 483 (1954), until the Supreme Court held, in *Griffin v. County School Board*, 377 U.S. 218 (1964), that such closings were unconstitutional. The second comparison is to a city’s decision to close all swimming pools rather than desegregate them. The Supreme Court held, in *Palmer v. Thompson*, 403 U.S. 217 (1971), that there was no constitutional violation involved in closing swimming pools rather than racially integrating them, in part because substantial evidence supported the city’s claim that the pools were closed to maintain peace and order and because the pools could not be operated economically on an integrated basis. A third and more direct comparison is how Benton County, Oregon refused to issue any marriage licenses for some weeks in 2004 because county officials believed that the state marriage law, which allowed different-sex—but not same-sex—couples to marry, was unconstitutional. See, e.g., Kate Zernike, *Gay? No Marriage License Here. Straight? Ditto.*, N.Y. TIMES, Mar. 27, 2004, at A8. For a discussion of the general problem of achieving equality by bringing down the group that is better off to the level of those that are worse off, see Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513 (2004).

legal implications that mean something important to many people.⁷⁰ While this is something that could be changed over time with the advent of civil unions for all couples, the centuries-old picture of marriage as being both a legal and spiritual institution would be hard to change. Third, while the civil union proposal for abolishing marriage makes two changes to existing marriage laws—it changes the name of the state's legal institution for relationship recognition (that is, from "marriage" to "civil union") and, in jurisdictions where same-sex couples cannot already get married, it allows same-sex couples access to the same legal institution that different-sex couples have access to, with the exact same benefits, rights, and duties⁷¹—it does not address the current "one size fits all" nature of relationship recognition in the United States.

Deregulation, the more radical version of the abolition proposal, shares the first problem of the civil union proposal but does not share the two other problems. Under the more radical abolition proposal, couples can pick from a plethora of types of marriages and other relationships that the marketplace would presumably develop and make available.⁷² If the word marriage means something to them, two people can decide to get married; if they want to avoid the term marriage because of its sexist baggage (or for any other reason), then they can get their relationship recognized through some other non-marital relationship-recognition contract.

The concern, however, is that this embrace of contracts in place of state-recognized marriage would create greater problems than it would solve. Two of the biggest problems for the proposal to deregulate marriage are the increased importance of "default rules" under this approach,⁷³ and the enforcement problems that

70. See, e.g., Andrew Sullivan, *State of the Union*, NEW REPUBLIC, May 8, 2000, at 18, 18–23 (regarding marriage as a fundamental right, and civil unions a "second-class" institution that stigmatizes same-sex couples). It is, in part, for this reason that same-sex couples and their advocates are sometimes unsatisfied with civil unions or domestic partnerships. *Id.* at 22.

71. Dershowitz, *supra* note 55.

72. Zelinsky, *supra* note 60, at 1177.

73. Zelinsky acknowledges the importance of default rules under his proposal, but, as two commentators on his paper argued, he does not adequately deal with their implications. *Id.* at 1183; see Carol Sanger, *A Case for Civil Marriage*, 27 CARDOZO L. REV. 1311, 1314–15 (2006) (wondering if default rules would "operate as a shadow regime" such that "the law of marriage contracts" would eventually evolve to be indistinguishable from the current "law of civil marriage"); Nancy J. Knauer, *A Marriage Skeptic Responds to the Pro-Marriage Proposals to Abolish Civil Marriage*, 27 CARDOZO L. REV. 1261, 1266 (2006) (suggesting "that existing inequities" could be "reproduced" even if marriage is deregulated).

deregulation would produce.⁷⁴ While an increasing number of couples today opt for cohabitation rather than marriage,⁷⁵ deregulation may lead more couples to just cohabit. If relationship recognition is deregulated, some couples—faced with so many options for relationship recognition—may choose to simply not get married. The situation under deregulation may end up like the present situation regarding prenuptial agreements: couples are allowed to enter contracts that deal with various financial and related issues between them both during marriage and upon divorce, but few people marrying for the first time in fact decide to enter into such agreements.⁷⁶ Similarly, default rules will be especially important under deregulation if couples select marriage contracts that incompletely resolve various issues (particularly related to divorce and annulment) presently dealt with by the legal regime surrounding marriage.

The enforcement problem involved in deregulation may be even greater. What should courts do with wildly unequal marriage contracts? For example, in a case from Washington, D.C., a husband and wife signed a postnuptial agreement that required the wife, among other things, (1) to do precisely what the husband told her to do, (2) to never dispute in public anything the husband said, (3) to never withdraw any money from the couple's, the husband's, or her own bank account without the express consent of the husband, and (4) to generally be completely subservient to the needs and desires of the husband.⁷⁷ The court refused to enforce that contract.⁷⁸ It is not at all clear if a court would be able to do that under a deregulation regime. Similarly, what would courts do with marriage contracts that have especially strict liquidated damage clauses? For example, imagine a contract under which a spouse who commits adultery gives up all claims to marital property.⁷⁹ Generally, the deregulation approach to abolition encounters problems dealing with relationships in which one party is much more powerful and/or more sophisticated than the other.

74. See Sanger, *supra* note 73, at 1315–16 (worrying that enforcing marriage contracts under contract law might not be practical).

75. Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & FAM. STUD. 1, 2 (2007); Pamela J. Smock, *Cohabitation in the United States: An Appraisal of Research Themes, Findings, and Implications*, 26 ANN. REV. SOC. 1, 1 (2000).

76. Ellman, *supra* note 65, at 1367 n.17.

77. *Spires v. Spires*, 743 A.2d 186, 188 n.2 (D.C. App. 1999).

78. *Id.* at 191.

79. Cf. *Diosdado v. Diosdado*, 118 Cal. Rptr. 2d. 494 (Ct. App. 2002) (invalidating a liquidated damages clause requiring the adulterous spouse to pay \$50,000 upon divorce).

Relatedly, the time and energy courts must spend dealing with the dissolution of relationships would increase dramatically under deregulation because of the countless different marriage contracts that courts would need to interpret.

Finally, as Carl Schneider argued in his classic article, marriage law has a “channeling function.”⁸⁰ The state, by creating the legal institution of marriage and offering certain rights, benefits, duties, and responsibilities to go along with it, provides incentives for people to marry. Even though few people know the details of the package of benefits that go along with marriage and few people marry for any particular benefit, the state—by creating the legal institution of marriage and giving incentives for participating in it—channels people into this particular relationship form and, by so doing, the state advances a particular (although perhaps unarticulated) social policy agenda. Whatever agenda the state is advancing by channeling people into marriage—whether it benefits the couple, their future children, or the state generally—would be lost if marriage is deregulated.

II. The “Menu” of Alternatives Approach

Another alternative to the straightforward quest for marriage equality is to work towards the development of a plurality of relationship-recognition alternatives that includes, but is not limited to, marriage. William Eskridge and Darren Spedale have talked about this pluralist alternative as a “*menu of regulatory options* [for relationship recognition] offered by the state.”⁸¹ Among the choices on such a menu could be: (1) domestic partnership limited to employment benefits (like the status offered, starting in the early 1980s, by some cities, counties, municipalities, and the like),⁸² (2) cohabitation status, like that available in Canada and some European countries, which involves some economic obligations and additional benefits when a couple lives together for a substantial period,⁸³ (3) “cohabitation-plus” which, in addition to the obligations and benefits that go with cohabitation, provides

80. Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992).

81. WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE’VE LEARNED FROM THE EVIDENCE 252 (2006); see Stein, *supra* note †, at 585.

82. See *supra* note 26 and accompanying text.

83. See generally LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN, AND INTERNATIONAL LAW (Robert Wintemute & Mads Andenaes eds., 2001) (discussing the global developments in same-sex relationship recognition).

state benefits (in part, to encourage and support economic and psychological coupling), health-care proxies, leave from work for when one's cohabitant/partner is sick, and the like (such as Hawaii's reciprocal beneficiary law⁸⁴ or state domestic partnership laws like those in Maine and Maryland),⁸⁵ (4) civil unions or robust domestic partnerships that give the full complement (or almost all) of the rights, benefits, and obligations associated with marriage under state law,⁸⁶ (5) marriage, and (6) covenant marriage, namely, marriage with only a fault-based path to divorce (adopted by a handful of states).⁸⁷ Some commentators argue that some of these options (perhaps marriage, covenant marriage, or both) should be open to different-sex couples only,⁸⁸ while others argue that all such forms of relationship recognition should be open to couples regardless of the sex of the parties.⁸⁹

The main virtue of the menu approach is that it moves away from the "one size fits all" approach to relationship recognition. The menu approach allows couples to choose the type of recognition they want for their relationships: not only do they get to call their relationships what they want to call them, but, more importantly, they get to pick—to some extent—what legal implications (that is, what rights, benefits, duties, etc.) they want to flow from having their relationships recognized. The menu approach may seem to lead to a legal regime like the deregulation version of abolition, but there are important differences. While both approaches are pluralistic, the menu approach is a much more constrained pluralism and the state plays a significant role in this legal regime: under the menu approach, couples can opt for

84. HAW. REV. STAT. § 572C-1 to -7 (2005).

85. See ME. REV. STAT. ANN. tit. 22, § 2710 (Supp. 2009); MD. CODE ANN., HEALTH-GEN. §§ 6-101, 6-202, 6-203 (LexisNexis 2009).

86. For those jurisdictions that currently offer these types of relationship recognition, see *supra* note 30.

87. See ARIZ. REV. STAT. ANN. §§ 25-901 to -906 (2007); ARK. CODE ANN. §§ 9-11-803 to -811 (2009); LA. REV. STAT. ANN. §§ 9:275, 9:307 (2000). These menu choices are adopted from ESKRIDGE & SPEDALE, *supra* note 81, at 252-57. See also WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 121-26 (2002) (listing a similar menu of options arranged by the "degree of unitive commitment expected or entailed in the partners' relationship"). For a detailed menu proposal, see, for example, Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CAL. L. REV. 1479, 1479-548 (2001).

88. See, e.g., GÖRAN LIND, COMMON LAW MARRIAGE: A LEGAL INSTITUTION FOR COHABITATION 1083 n.30 (2008) (indicating that some argue for a new institution rather than the right to marry).

89. *Id.* at 1083.

only the relationship forms that are defined by and offered by the state.

In practice, however, even though more types of relationships are being legally recognized than in the past, most couples do not have many state-sanctioned relationship-recognition options, many couples have only one option, and some couples have no such options.⁹⁰ Further, no state currently offers anything close to the above-listed menu of legal statuses and only a handful of states offer any couples a choice. In Louisiana, Arizona, and Arkansas, different-sex couples have a choice between *covenant marriage*, which is marriage with only fault-based paths to divorce,⁹¹ and “regular” marriage. In these jurisdictions, same-sex couples have no options for getting their relationships recognized.⁹² In Colorado and Maine, same-sex couples and different-sex couples can register as *designated beneficiaries* or *domestic partners*, respectively, and get some limited benefits.⁹³ Different-sex couples also have the alternative of getting married, while same-sex couples do not.⁹⁴ The law in Nevada is similar to that of Colorado, but same-sex couples in Nevada can register as *domestic partners*, which gives them civil-union-type legal recognition.⁹⁵ Like New Jersey,⁹⁶

90. Note that I am not here counting common law marriage or cohabitation formalized through contracts as alternative forms of relationship recognition. Common law marriages are alternative pathways to marriage, not alternatives to marriage. See *infra* notes 122–123 and accompanying text. Cohabitation agreements, although they will be enforced in some states, do not count as state sanctioned. Furthermore, cohabitation agreements between same-sex couples may not be enforced in some states. See ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES 143–45 (2006) (discussing laws in Virginia, Montana, and Michigan that seem to prohibit same-sex couples from using contracts to confer any marriage-like rights to each other).

91. See *supra* note 87.

92. See *supra* note 30.

93. Colorado’s designated beneficiary status gives couples who register the right to inheritance benefits, enables them to become each others’ health care proxies, make decisions about each others’ remains after death, visit each other in the hospital, and sue for wrongful death, and gives them certain financial protections. COLO. REV. STAT. § 15-22-101 to -112 (2009). In Maine, domestic partners get certain limited health insurance benefits and certain inheritance rights. See, e.g., ME. REV. STAT. ANN. tit. 22, § 2710 (Supp. 2009) (domestic partner registry); ME. REV. STAT. ANN. tit. 18-A, § 2-101 (1998) (intestate succession); ME. REV. STAT. ANN. tit. 24-A, § 2741-A (2000) (health insurance benefits). Different-sex couples in Hawaii can, in certain circumstances, so long as they are not able to marry in Hawaii, register as reciprocal beneficiaries, which entails a similar subset of rights and benefits. HAW. REV. STAT. §§ 572C-1 to -7 (2005).

94. See *supra* note 30.

95. Compare NEV. REV. STAT. §§ 122A.100, 122A.200 (2009), with COLO. REV. STAT. § 14-2-104 (2008).

96. N.J. STAT. ANN. § 26:8A-4 (West 2007).

California,⁹⁷ Washington,⁹⁸ and Oregon,⁹⁹ same-sex couples in Nevada can obtain marriage-like legal recognition, but in Nevada, different-sex couples can also get their relationships recognized without getting married, because they also have the option of registering as domestic partners.¹⁰⁰ In these six U.S. jurisdictions that have adopted a menu approach to relationship recognition, only different-sex couples are given a choice; at best, same-sex couples are stuck with just one way to get their relationships recognized.

Some commentators have suggested that more menu options will emerge gradually through a process of sedimentation.¹⁰¹ The idea is that when the law is reformed, a new legal rule or institution is added on top of the earlier one rather than the new legal rule simply replacing the earlier form.¹⁰² With respect to relationships, when a new relationship form is created and more benefits are given to certain non-married couples, the old relationship that gave fewer benefits continues to exist; in other words, it remains as sediment.¹⁰³ However, even in jurisdictions where new forms of relationship recognition have emerged, sedimentation in fact rarely occurs. In jurisdictions where same-sex couples were able to obtain domestic partnerships or civil unions and then subsequently obtained the right to marry, they almost always, at that time, lost the option of obtaining non-marital recognition for their relationship.¹⁰⁴ Thus, sedimentation has not as yet been a robust phenomenon in the law of adult domestic relations in the United States.

One small exception to this pattern involves domestic partnerships in New Jersey for senior-citizen couples. In 2004, New Jersey enacted a domestic partnership law, which provided a subset of the benefits associated with marriage to same-sex couples as well as to different-sex couples consisting of two people aged sixty-two or older.¹⁰⁵ After the New Jersey Supreme Court

97. CAL. FAM. CODE § 297 (West 2004 & Supp. 2010).

98. WASH. REV. CODE § 26.60.010 to .901 (2008).

99. OR. REV. STAT. § 106.300 to .340 (2009).

100. NEV. REV. STAT. § 122A.100 (2009).

101. ESKRIDGE, *supra* note 87, at 121.

102. *Id.*

103. See Stein, *supra* note †, at 586–87.

104. See, e.g., CAL. FAM. CODE § 299.3 (West 2004 & Supp. 2010) (requiring domestic partners to either “upgrade” their relationship status or dissolve their domestic partnership).

105. N.J. STAT. ANN. § 26:8A-4 (West 2007). Similar provisions related to senior-citizen couples exist in other jurisdictions with domestic partnership laws. A slight variation is used in California, for example, where different-sex couples can

held that the state constitution requires that same-sex couples be able to obtain the same rights and benefits that are available to different-sex couples who marry,¹⁰⁶ New Jersey enacted a civil union law that provides same-sex couples access to benefits that are equal to the benefits associated with marriage in New Jersey.¹⁰⁷ After civil unions were legalized, a sediment of New Jersey's old domestic partnership law remained for older couples regardless of the sexes involved, although no such sediment remained for same-sex couples generally (that is, unless they were sixty-two years old or older, a same-sex couple could no longer register as domestic partners; they could only register for a civil union).¹⁰⁸ The advent of civil unions in New Jersey left only a little bit of sediment in the form of domestic partnerships for senior citizens. This small amount of sedimentation is one of the few examples of this phenomenon in the United States.

One might justifiably argue that these problems—(1) that there are only a handful of jurisdictions that have more than one item on the menu and (2) that, even in those jurisdictions, some couples have only one menu option available to them—are implementation problems. Over time, more jurisdictions will offer more than one relationship type to choose from and more

register as domestic partners if one of them is over the age of sixty-two. CAL. FAM. CODE § 297(5)(B) (West 2004 & Supp. 2010). California (and presumably, New Jersey) included senior-citizen couples in its domestic partner legislation out of concern for retired couples who are cohabitating but who do not marry in order to avoid reductions in one or both of their Social Security (or other similar) benefits. See Carl Ingram, *Davis Signs 3 Bills Supporting Domestic Partners, Gay Rights*, L.A. TIMES, Oct. 3, 1999, at A24.

106. *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

107. See N.J. STAT. ANN. § 37:1-28 (West Supp. 2009). For a discussion about whether civil unions in fact provide equal benefits, see N.J. CIVIL UNION REVIEW COMM'N, FIRST INTERIM REPORT OF THE NEW JERSEY CIVIL UNION REVIEW COMMISSION (2008), available at <http://www.nj.gov/oag/dcr/downloads/1st-InterimReport-CURC.pdf>. The study finds, in part, that the state's civil union law creates "second-class status" for same-sex couples. *Id.* at 10, 17.

108. See N.J. STAT. ANN. § 26:8A-4(b)(5). Note, however, that same-sex couples who had previously registered as domestic partners in New Jersey could retain that status rather than "upgrade" to a civil union. *Id.* § 26:8A-4.1 ("This act shall not alter the rights and responsibilities of domestic partnerships existing before the effective date of th[e] act [establishing civil unions], except that eligible domestic partners shall be given notice and opportunity to enter into a civil union pursuant to the provisions of this act."). So, in this limited sense, the domestic partner status remained as sediment. When California, however, changed its domestic partnership law from a status that involved a limited number of benefits to a status that involved a more robust, civil-union-like set of benefits, there was not even this limited sediment; same-sex couples who had registered for the limited domestic partnership were given, when the more robust domestic partner benefits were passed, the choice of "upgrading" to the more robust domestic partnership status or dissolving their domestic partnerships. See CAL. FAM. CODE § 299.3.

jurisdictions will provide equal access to these choices. But even if these implementation problems disappear, there may be problems with the menu approach. As I mentioned in discussing the deregulation version of the abolition approach, it is sometimes a problem to give people too many choices. Further, people may not understand the differences among the relationship options available to them. Finally, it seems that when offered the opportunity to choose alternative relationship forms, most U.S. families opt for basic marriage, not an alternative to it.¹⁰⁹

III. Functionalism

The final alternative approach to relationship recognition that I want to discuss is functionalism. Under this approach, the characteristics of a relationship—rather than, or in addition to, its formal legal status—determine how a relationship should be treated under the law.¹¹⁰ Consider the following examples. Miguel Braschi, whose partner died from complications due to AIDS, was threatened with eviction from the rent-controlled apartment that the two men shared because the lease was in his deceased partner's name.¹¹¹ In *Braschi v. Stahl Associates Co.*, New York's highest court held that Braschi should have a chance to prove that he was a "family member" of his deceased partner.¹¹² A Minnesota court took the functional approach in the case of Sharon Kowalski, who suffered severe brain injuries in a car accident.¹¹³ Kowalski's partner, Karen Thompson, wanted to help with Kowalski's physical therapy and to help make medical decisions for her.¹¹⁴

109. See Rick Lyman, *Trying to Strengthen an "I Do" With a More Binding Legal Tie*, N.Y. TIMES, Feb. 15, 2005, at A1 (reporting that studies have estimated that only one to two percent of couples marrying in Arkansas, Arizona, and Louisiana since covenant marriage was legalized have chosen that option). See generally Heather Mahar, *Why Are There So Few Prenuptial Agreements?* 1 (Harvard Law Sch. John M. Olin Ctr. for Law, Econ. & Bus. Discussion Paper Series, Paper No. 436, 2003), available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1224&context=harvard_olin ("Legal commentators and practitioners estimate that only 5-10% of the population enter into prenuptial agreements, and one study suggests that only 1.5% of marriage license applicants would consider entering into such agreements." (citations omitted)).

110. For a particular attempt to apply a functional approach to a specific benefit of marriage, see Edward Stein, *A Functional Approach to the Spousal Evidentiary Privilege*, 5 EPISTEME 374 (2009).

111. *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 50–51 (N.Y. 1989).

112. *Id.* at 54–55. The author's analysis of these cases is reprinted with permission. Stein, *supra* note †, at 583–84.

113. *In re Guardianship of Kowalski*, 478 N.W.2d 790, 791–92 (Minn. Ct. App. 1991). For a detailed discussion of this case, see CASEY CHARLES, *THE SHARON KOWALSKI CASE: LESBIAN AND GAY RIGHTS ON TRIAL* (2003).

114. *Kowalski*, 478 N.W.2d at 791–92.

Kowalski's father tried to block Thompson's involvement.¹¹⁵ The Minnesota court in *In re Guardianship of Kowalski* held that the two women were a "family of affinity."¹¹⁶ In both *Braschi* and *Kowalski*, the courts held that, even though the couples in question were not married, they should be treated in the way a married couple would be treated in the specific contexts involved, that is, housing law and guardianship law, respectively.¹¹⁷ By looking to the features of a relationship—for example, the emotional and financial commitment and entanglement involved; the mutual reliance for shelter, food, and health care; and how the two people in the relationship have conducted themselves in their personal life—the functional approach to relationship recognition determines whether a relationship should get a benefit typically associated with marriage.¹¹⁸ The functional approach has also been applied to unmarried different-sex couples. For example, in *Dunphy v. Gregor*,¹¹⁹ Dunphy, a woman who had been cohabitating for more than two years with a man to whom she was engaged to be married, was allowed to bring an action for bystander liability after she witnessed her fiancé being struck by Gregor's car and then had him die in her arms.¹²⁰ Although Dunphy and her fiancé were not married, the court granted her a legal remedy previously available only to spouses or close relatives in New Jersey.¹²¹

Functionalism could be construed as a specific way to implement abolition. Under this construal of functionalism, marriage as a legal status would be abolished and the benefits and duties previously associated with marriage would be doled out in virtue of whether the couple in question exhibited appropriate functional characteristics. But this abolitionist version of functionalism is not what I have in mind. Functionalism as I am imagining it here supplements, rather than replaces, marriage (and also civil unions). Functionalism would thus create a path for unmarried/unregistered couples to get some benefits associated with relationship recognition.

Functionalism is not unheard of in marriage law more generally. Eleven U.S. jurisdictions recognize *common law*

115. *Id.* at 791.

116. *Id.* at 797.

117. *Braschi*, 543 N.E.2d at 54–55; *Kowalski*, 478 N.W.2d at 791–92.

118. *See also* Gormley v. Robertson, 83 P.3d 1042, 1047 (Wash. Ct. App. 2004) (holding that the property accumulations of an unmarried same-sex couple should be equitably distributed in the way such property of a married couple would be).

119. 642 A.2d 372 (N.J. 1994).

120. *Id.* at 373.

121. *Id.* at 380.

marriages,¹²² legally valid marriages that are not solemnized in the usual ceremonial manner but instead come into existence when two people capable of marrying (1) cohabitate, (2) intend and agree to be married, and (3) hold themselves out to their community as married.¹²³ Part of the contemporary justification for recognizing common law marriages is that such marriages share many of the functional attributes of standard (ceremonial) marriages.¹²⁴

Another functional aspect of marriage law is evident in the *sham marriage doctrine*. This doctrine says that even though a couple has gone through all the formal requirements of a marriage, including filing the appropriate documents with the state, having a ceremony, and the like, their marriage is void if the couple has no intention of living together as husband and wife, but rather are getting married only for health benefits, the legitimization of children, immigration or naturalization purposes, or some other limited purpose.¹²⁵

122. Common law marriage is recognized in Alabama, Colorado, the District of Columbia, Iowa, Kansas, Montana, Oklahoma, Rhode Island, South Carolina, Texas, and Utah. LIND, *supra* note 88, at 9–10. Note that although the doctrine of common law marriage is an example of how marriage law makes use of functional characteristics, common law marriage is *not* an example of functionalism as an alternative to marriage. Common law marriages are *marriages*; they are marriages obtained without marriage licenses and the other standard formal procedures for marrying. *Id.* at 5–8, 259–62.

123. See *In re Marriage of Winegard*, 278 N.W.2d 505, 510 (Iowa 1979).

124. See David S. Caudill, *Legal Recognition of Unmarried Cohabitation: A Proposal to Update and Reconsider Common-Law Marriage*, 49 TENN. L. REV. 537, 566 (1982) (“Although many of the traditional reasons for recognizing common-law marriage are no longer relevant, society may benefit from specific legal recognition of essentially marriage-like relationships . . . [b]ecause many of the state’s interests in marriage are substantive, not formal . . .” (footnote omitted)).

125. See *United States v. Rubenstein*, 151 F.2d 915, 919 (2d Cir. 1945) (upholding the conviction of a man who brought an illegal alien into the country through a sham marriage). The Second Circuit explained:

If the spouses agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has served its purpose to deceive, they have never really agreed to be married at all. They must assent to enter into the relation as it is ordinarily understood, and it is not ordinarily understood as merely a pretence, or cover, to deceive others.

Id. See also *Garcia-Jaramillo v. I.N.S.*, 604 F.2d 1236, 1238 (9th Cir. 1979) (finding sufficient evidence of a sham marriage where the husband approached the wife three months before the marriage and offered to pay her two hundred dollars to marry him, the husband sought legal residency, and the parties never lived together); *United States v. Mathias*, 559 F.2d 294 (5th Cir. 1977) (holding that an exception to spousal privilege exists when the marriage is a sham, and the spouse may be forced to testify).

Common law marriage and the sham marriage doctrine exhibit, respectively, what I call *positive* and *negative functional factors*. A *positive* functional factor is involved if a relationship that does not count as marriage under the traditional/bright-line definition of marriage is nonetheless treated like a marriage in some way or context in virtue of functional considerations. Thus, a positive functional factor is involved in common law marriage because under this approach to relationship recognition, if a couple holds themselves out as married, intends to be married, and so on, then they are counted as married even though they were not married in the standard ceremonial manner, because their relationship has certain functional characteristics. A *negative* functional factor is involved if a relationship that satisfies the traditional/bright-line definition of what qualifies as a marriage is not treated as a marriage for some purposes in virtue of functional considerations. Thus, a negative functional factor is involved in the sham marriage doctrine because if a couple that was otherwise capable of marrying got married in the standard ceremonial manner but did not have certain functional characteristics—for example, if they only married so one of them could get a green card and not because of an emotional, romantic, or other bond—then they would not qualify as married.

Although marriage law does have certain functional characteristics, for the most part, the law of adult relations follows the bright-line approach rather than the functional approach; in general, courts are hesitant to apply the functional approach. Consider as an illustrative example, the case of *People v. Fields*.¹²⁶ William and Alice Fields, although legally married, had not been living together for six months and William had been living with another woman.¹²⁷ After shooting two people, William called Alice, told her about the shootings and said he was coming to her home.¹²⁸ When he arrived, he suggested he was going to kill Alice, but then fell asleep.¹²⁹ While William slept, Alice went to the police.¹³⁰ At William's trial, when the prosecution asked Alice what William told her when he called her that day, William tried to invoke the adverse testimonial privilege, which precludes testimony against a person by his spouse.¹³¹ The prosecutor argued

126. 328 N.Y.S.2d 542 (App. Div. 1972), *aff'd*, 289 N.E.2d 557 (N.Y. 1972).

127. *Id.* at 544.

128. *Id.*

129. *Id.* at 545.

130. *Id.*

131. *Id.* at 544.

that the court should take a negative functional approach to the privilege because there was no marriage left to preserve, as evidenced by the couple's separation, William's cohabitation with another woman, and William's plan to murder Alice.¹³² The majority of the court refused to take this functional approach, holding firm to the bright-line test, namely, that the testimonial privilege applied because Alice and William were still legally married.¹³³

The main virtue of functionalism as an alternative to having full marriage equality as the ultimate goal is that it provides actual relationships with the benefits and protections that they deserve, rather than embracing a legal formalism that recognizes only those relationships that are registered. Conversely, by rejecting a bright-line test (either one is married or one is not), functionalism is inefficient and hard to administer, both for judges and in practice. Functionalism, although it has the virtue of scratching only where the itch is, may lead to uncertainty and indeterminacy.

Conclusion

Having articulated and developed these three alternatives, and briefly considered some of their virtues and vices, I now return to the question of whether marriage equality is an appropriate ultimate goal for family law reformers and advocates of LGBT rights. For both strategic and principled reasons, we should shift our theory and our advocacy from simple marriage equality to developing and implementing both functionalism and a menu of relationship-recognition alternatives.

As an advocate for LGBT rights, I feel strongly that we should not lose the movement's "liberationist" and feminist roots. For decades, LGBT people have been—especially when open about our sexual orientations—social outcasts and rebels. Part of the heritage of that distinctive social position makes us well suited to drive change with respect to social institutions, for ourselves, but also for others. This change can be achieved within existing social structures in some jurisdictions, namely, LGBT people can marry people of the same sex and thereby change the norms concerning what a legal spouse is. Social change can and should also occur outside existing legal institutions. Such change can be accomplished by working for recognition of relationship forms that

132. *Id.*

133. *Id.* at 545–46.

emerged in the LGBT communities before same-sex marriage was a possibility (as well as relationship forms that emerged in other contexts for other people), both by creating legal statuses that fit these alternative relationship forms and by recognizing, for certain purposes, functional relationships.

Further, as a society, we should offer and buttress protections for people who choose not to marry. Relationship recognition need not and should not be a “one size fits all” and a “take it or leave it” proposition. Just as some people—including some LGBT people and feminists—want to embrace marriage because of its social meaning, tradition, and religious importance, others—also including some LGBT people and feminists—want to reject marriage for precisely these reasons, namely because marriage has been a central site of the oppression of women, inequality, racial separation, and heteronormativity. For these and other theoretical and ideological reasons, I think the quest for marriage equality should not be our ultimate goal for reforming the law of adult domestic relations.

Additionally, from a practical perspective, there is no avoiding the fact that forty-two states now have a law or a constitutional amendment (or both) specifically prohibiting legal recognition of marriages between people of the same sex.¹³⁴ These legal prohibitions can be challenged through litigation, legislation, and voter referenda. But further, in those states, the menu approach has promise, as is demonstrated by recent laws for relationship recognition passed in Colorado¹³⁵ and Nevada.¹³⁶ Both of these states have constitutional amendments prohibiting marriages between people of the same sex.¹³⁷ Also, the menu approach, because it offers alternatives to different-sex couples as well as same-sex couples, provides potential for social and political coalitions for change in the legal recognition of relationships other than marriage. The functionalist approach also has promise for building coalitions in states that have strong prohibitions against marriage for same-sex couples, especially, as in *Braschi* and *Kowalski*, when functionalism is piecemeal and when it emerges in specific legal contexts.¹³⁸

134. See *supra* note 50.

135. COLO. REV. STAT. §§ 15-22-101 to -112 (2009).

136. NEV. REV. STAT. §§ 122A.010 to .510 (2009).

137. COLO. CONST. art. II, § 31 (“Only a union of one man and one woman shall be valid or recognized as a marriage in this state.”); NEV. CONST. art. 1, § 21 (“Only a marriage between a male and female person shall be recognized and given effect in this state.”).

138. See *supra* Part III.

Of the three alternative approaches discussed above, I would reject abolition, at least in the form of deregulation, as both impractical and theoretically problematic. I simply do not think that the United States is ready now, or would likely be ready anytime soon, to get rid of marriage. Further, deregulation would take away the various protections (in particular, for the less powerful) that exist in marriage law and open up a Pandora's box of limitless, unknown, and uncertain options.

On the other hand, for reasons discussed above, functionalism and the menu approach are viable and valuable approaches. Additionally, these two approaches complement each other: the menu approach gets away from the "one size fits all" aspect of the current legal regime by offering some "prescreened" options for relationship recognition, while functionalism provides a safety net for couples who have not had their relationships legally recognized. Further, these two approaches are not in tension with marriage equality. Under the menu approach, marriage is one of the available alternatives for couples, regardless of the sex of the people in them. Functionalism supplements and complements marriage and the other options on the relationship-recognition menu.

There are implementation problems for functionalism, but I think these problems can be solved, as courts already address these issues when dealing with the functionalist aspects of family law that presently exist. Elsewhere I have started to develop what I call *sophisticated functionalism* to address these implementation problems.¹³⁹ Under sophisticated functionalism, to determine whether a relationship qualifies for some benefit or distinctive treatment, a court (or other entity) faced with making a decision about how to treat a relationship will look to the relevant aspects of the relationship. Depending on the benefit at issue, such aspects could include: emotional commitment and involvement; financial commitment and entanglement; mutual reliance for personal services including shelter, food, clothing, utilities, health care, etc.; how parties in a relationship have conducted themselves in their personal lives and held themselves out to society; their level of intimacy; and the totality of the relationship as evidenced by the dedication, caring, and self-sacrifice of the parties. The presence or absence of one or more of these factors is not alone determinative of whether a relationship qualifies for the benefit in question. Rather, the question is whether the character of the couple's

139. See Edward Stein, *Spousal Secrets*, in *SECRETS OF LAW* (Austin Sarat et al. eds., forthcoming); see also Stein *supra* note 110.

intimate relationship is, on the whole and all things considered, deserving of the benefit. If so, then the benefit should be granted. Under sophisticated functionalism, the burden is on the couple with the “unregistered” relationship to show that their relationship has the relevant functional attributes. Fiancés on their way to their wedding could, if they have the appropriate functional characteristics, be granted a benefit typically associated with marriage or another relationship status, but they would have the burden of establishing that they have such functional characteristics. Further, under this sophisticated functionalism, a married couple, or a couple who has registered for a recognized relationship, has a strong but rebuttable presumption that they can claim a benefit typically associated with that relationship status. This presumption can be rebutted if their relationship was a sham or is now moribund, but the burden of rebutting the presumption is on the party who thinks that the married or registered couple does not deserve the privilege.¹⁴⁰

My conclusion, which is admittedly just a sketch of an approach that needs to be developed in greater detail, is that compared to simple marriage equality, a better end-state for the law of adult domestic relations that would provide both equality and quality for LGBT people would be a combination of sophisticated functionalism and a menu of at least several legal statuses. The range of legal statuses should recognize relationships open to couples regardless of the sex of the people in them—including marriage (or a status like marriage) and a legal status, such as the newly created non-marital relationships in Nevada or Colorado, which involve a smaller subset of the benefits associated with marriage.¹⁴¹ This combination approach would recognize the plurality of relationship forms that exist and acknowledge that one size does not fit all, while providing a safety net for those who will not sign up for any option offered by the state.

We are near the cusp of a revolutionary moment in family law. Rather than let this revolutionary moment pass by simply reproducing what already exists, we should try to seize this moment and work for the creation of new legal options for relationship recognition and the associated human flourishing.

140. See *supra* note 139 and accompanying text.

141. See *supra* notes 93–100 and accompanying text.