

Questioning the Marriage Assumptions: The Justifications for “Opposite-Sex Only” Marriage as Support for the Abolition of Marriage

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INTRODUCTION

The controversy of marriage is everywhere these days. Some same-sex couples obviously desire the right to marry.¹ Some feel opposite-sex² couples should continue to possess exclusive access to

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1. See, e.g., *Baker v. State*, 744 A.2d 864, 867-68 (Vt. 1999) (“Plaintiffs [were] three same-sex couples who [had] lived together in committed relationships for periods ranging from four to twenty-five years”) Each couple was refused a marriage license because the applicable state marriage laws only allowed marriage licenses for opposite-sex couples. *Id.*

2. The author adopts the reasoning of the Supreme Court of Hawaii in *Baehr v. Lewin*, 852 P.2d 44, 51 n.11 (Haw. 1993). The *Baehr* court appears to view “homosexual” and “heterosexual” as describing the nature of a person, as opposed to a person’s ability or inability to marry. See *id.* Therefore, “[p]arties to a ‘union between a man and a woman’ may or may not be homosexuals.” *Id.* By the same reasoning, “[p]arties to a same-sex marriage could theoretically be either homosexuals or heterosexuals.” *Id.* That an individual is married, therefore, does not mean the individual is heterosexual. The *Baehr* court went on to adopt definitions of “homosexual” and “heterosexual” that focus on sexual attraction and the gender of the people to whom an individual is sexually attracted. *Id.* In this Article, however, the author adopts definitions of “homosexual” and “heterosexual” that focus on emotion, as opposed to sexual attraction. Thus, individuals who tend to fall in love with members of the same sex are “homosexual” and individuals who tend to fall in love with members of the opposite sex are “heterosexual.” Similarly, “bisexual” individuals are those who fall in love with members of both sexes. The author selected these definitions not only for their accuracy, but to highlight the

marriage.³ Some commentators publish articles suggesting ways the President should promote it.⁴ Congress passed a law purporting to define marriage.⁵ The Bush Administration's 2003 budget proposal included a \$100 million attempt to induce women on welfare to enter into it.⁶ Tracing these facts backwards leads to an assumption: Marriage is a good thing.⁷ This Article questions the validity of that assumption.

Additionally, this Article argues that the justifications offered in support of marriage as a purely opposite-sex institution actually support marriage's abolition. This Article also argues that elimination of the legal institution of marriage would accomplish the social goals and objectives of marriage more successfully than marriage currently does. Thus, by abolishing marriage, society

point that individuals who engage in sexual relations exclusively with members of the opposite sex may, in fact, be homosexual, just as individuals who only engage in sexual relations with members of the same sex may, in fact, be heterosexual.

3. Gerard V. Bradley, *Same-Sex Marriage: Our Final Answer?*, 14 NOTRE DAME J. L. ETHICS & PUB. POL'Y 729, 751-52 (2000) ("[M]arriage is a *unique* type of friendship, specified by the capacity to engage in reproductive type acts, which is simply unavailable to same-sex couples.").

4. David Orgon Coolidge & William C. Duncan, *Reaffirming Marriage: A Presidential Priority*, 24 HARV. J.L. & PUB. POL'Y 623, 643-51 (2001). Coolidge and Duncan urge the President to promote opposite-sex marriage in general, as well as marriage as an exclusively opposite-sex institution. See *id.* To do so, Coolidge and Duncan suggest the following: (1) appointing "[j]udges who believe that marriage requires a man and a woman"; (2) creating "a federal constitutional amendment defining marriage as the union of one man and one woman"; (3) supporting the policy of the Boy Scouts in not allowing gay troop leaders and thereby "stand[ing] up for the right of Americans to associate for the well-being of youth in an organization that promotes traditional sexual morality"; (4) interpreting "sexual orientation" in such a way that any law including the term "preserves the distinction between married couples and unmarried persons, and upholds the right of private organizations to support this view of marriage in their programs"; (5) "instruct[ing] the Internal Revenue Service not to accept tax returns that attempt to use Vermont 'civil unions' as a basis for claiming marital status or its equivalent"; and (6) "mak[ing] it clear to all countries and international bodies that the official position of the United States is that marriage is the union of a man and a woman. *Id.* Therefore, federal law will not give marital status or its equivalent to same-sex couples, regardless of the law of another country." *Id.* Thus, Coolidge and Duncan claim that "[b]y setting legislative, regulatory and funding priorities for his Administration, and taking advantage of the ever-present 'bully pulpit,' President Bush can certainly do much to promote marriage." *Id.* at 624.

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

6. See Charity Vogel, *Family Matters; President Bush Has a Proposal for Single Mothers on Welfare: Marry the Fathers of Your Children and Get Federal Dollars. But Few Are Falling Head over Heels for the Idea*, BUFF. NEWS, February 7, 2002, at A1, available at LEXIS, News Library, Allnews File.

7. See NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 2 (2000) ("From the founding of the United States to the present day, assumptions about the importance of marriage and its appropriate form have been deeply implanted in public policy....").

would reap significant social benefits.⁸

While this Article addresses arguments made in support of the perpetuation of marriage as a purely opposite-sex institution, this is not an article in favor of same-sex marriage. Although a number of the arguments, analyses, and examples contained within support same-sex marriage by countering arguments made in opposition to such marriages, legal recognition of same-sex marriage is not the objective of the argument below. The intent of this Article is to show that while limiting legal marriage to opposite-sex couples is completely unjustifiable, marriage itself is unjustifiable – whether opposite-sex, same-sex, or both – albeit less so than the perpetuation of marriage as a purely opposite-sex institution.

I. A BRIEF HISTORY OF MARRIAGE IN AMERICA

A. *EARLY AMERICA CONTINUING THE ENGLISH IDEAL*

In colonizing the New World, Europeans held and perpetuated Christian marital ideals.⁹ The European concept considered marriage an Earthly representation of Christian divinity and social order.¹⁰ As God's rule over man was a foregone conclusion, so too was the rule of kings over subjects and husbands over wives.¹¹ So complete was this rule, that the law treated women as completely absorbed into their husbands.¹² In marriage, women surrendered not only their property, but the very right to

8. This Article neither advocates for the abolition of religious, spiritual, or cultural ceremonies, traditions, or doctrines nor argues against commitment ceremonies. This Article does not champion a less committed society, nor does it support polygamy, polygyny or any other form of plural legal institution. This Article suggests only that the legal institution of marriage – as it currently exists in the United States with all of its concomitant rights, obligations, benefits, and privileges – should be abolished for the reasons given.

9. See generally COTT, *supra* note 7, at 9-10 (noting that the Christian marital ideal is a permanent, monogamous, opposite-sex union).

10. See JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 131 (1997). This structure "helped to substantiate the traditional hierarchies of husband over wife, parent over child, church over household, state over church, and to integrate the sundry biblical duties that attached to each of these offices." *Id.*

11. *Id.*

12. See *Keister's Adm'r v. Keister's Ex'rs*, 96 S.E. 315, 316 (Va. 1918) (finding that Virginia's married women's statute did not alter the common law of the day, as the statute did not confer upon married women the substantive civil right of a legal existence and legal personality separate and apart from that of the husband).

hold it at all.¹³

Historically, American common law reflects this marital structure as a trade of sorts.¹⁴ Husbands bore responsibility for feeding, housing, clothing, and otherwise providing for the wife and any children.¹⁵ In return, wives owed their husbands the performance of all domestic duties, fulfillment of sexual desires,¹⁶ conversion to the husband of any and all property possessed by the wife as a single woman, and surrender of the right of possession.¹⁷

While wives remained decidedly subordinate to their husbands, American revolutionaries took a different view of marriage than their European ancestors. Some Americans saw marriage more as a contract between two parties.¹⁸ Husbands had

13. See *infra* note 17 and accompanying text (discussing the married women's acts of the late 1800s to the mid-1900s that changed this point of law).

14. See Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239, 247 n.23 (2001) (citing MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* (1981)). "Wives owed husbands their sexual and domestic services and, in exchange, their husbands were required to provide for them economically." *Id.*

15. *Id.*

16. *Id.*

17. From the mid-1800s to the early 1900s, most states passed some form of married women's act. These acts allowed women to remain seized of property held prior to marriage and acquire exclusive title to additional property during the marriage. See, e.g., An Act To Secure To Married Women Their Rights In Property, 1844 Me. Laws 117, construed in *Southard v. Plummer*, 36 Me. 64, 64-66 (1853). At "common law the husband has a freehold estate in the real property of the wife, and the use and control of it, and by the marriage the title to personal chattels in her possession passes to him." *Id.* at 69-70. Under § 2 of the Act, however, the "right of [wives in] property and control over it should remain, not only against the creditors and contracts of the husband, but against the husband himself." *Id.* at 70. Tennessee's, "A Bill For An Act To Be Entitled 'An Act To Remove Disabilities Of Coverture From Married Women, And To Repeal All Acts And Parts Of Acts In Conflict With The Provisions Of This Act' states:

[M]arriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and do all acts in reference to property which she could lawfully do if she were not married; but every woman now married, or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of, all property, real and personal, in possession, and to make any contract in reference to it, and to bind herself personally, and to sue and be sued with all the rights and incidents thereof, as if she were not married.

1913 Tenn. Pub. Acts 26, quoted in *Lillienkamp v. Rippetoe*, 179 S.W. 628, 628-29 (Tenn. 1915).

18. See generally *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 600 (1819) The defendant's attorney argued the implications of U.S. CONST. art. I § 10 with respect to various types of contracts, stating "marriage is a contract, and a private contract; but relating merely to a matter of civil institution.... See *id.* Therefore, if either party breached the agreement, the other could terminate it. See, e.g., *Inhabitants of Milford v. Inhabitants of Worcester*, 7 Mass. (1 Tyng) 48, 51 (1810) (implying that while the nature of a marriage contract is permanent, the contract may be "dissolved for causes which defeat the object of marriage").

power and control over their wives because their wives gave it of their own free will.¹⁹ The old European model of marriage paralleled the social and political structure of the monarchies of Europe. Similarly, the American construction paralleled the political and social thought of the nascent democracy.²⁰

B. MARRIAGE AND RACE IN THE YOUNG DEMOCRACY

Even though early Americans considered marriage important for individuals and the State alike,²¹ they also felt some situations warranted exception. The very young United States did not consider slaves "people of the United States."²² As only "people of the United States" had legal rights, slaves had none.²³ Therefore, slaves could not enter into legal marriages.²⁴

Originally, the requirements for dissolution of the marital union were fairly rigid. See Ira Mark Ellman & Sharon Lohr, *Marriage As Contract, Opportunistic Violence, And Other Bad Arguments For Fault Divorce*, 1997 U. ILL. L. REV. 719, 722-23 (1997) (describing the shift from the "full-fault" law of divorce first used in most states, to the adoption by every state of "part-fault" or "no-fault" divorces). These requirements, however, lessened and changed as the needs and perceptions of society changed and grew. *Id.*

19. See COTT, *supra* note 7, at 16-17.

20. See *id.* In the European system, husbands were analogous to kings, and wives the loyal subjects. *Id.* In the American system, husbands were analogous to elected officials whose power derived from election by the people. *Id.* Wives, therefore, were analogous to the people. *Id.* Thus, husbands headed families as elected officials headed the state, with and because of consent given in the form of marriage and election, respectively. *Id.*

21. See *id.* at 32.

22. *Dred Scott v. Sandford*, 60 U.S. 393, 404-05 (1856) (finding that slaves and their descendants could not be classified as "people of the United States" because the Framers considered them "a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, remained subject to their authority.").

23. *Id.* at 403 (finding that *Dred Scott*, as a slave descended from Africans who were brought to America in a condition of slavery, was not a "person of the United States"). Scott "had no rights or privileges but such as those who held the power and the Government might choose to grant [him]." *Id.* at 405.

24. *Id.* at 599. "If, in Missouri, [Scott] were held to be a slave, the validity and operation of his contract of marriage must be denied. He can have no legal rights; of course, not those of a husband and father." *Id.* *Accord* *State v. Samuel*, 19 N.C. 177, 182 (1836) ("[T]he marriage of slaves, then, is wholly pretermitted, and hence a legal marriage cannot be contracted between them."). Slaves were unable to enter into any contract including those for marriage "upon the presumption of the want of free consent, and upon the further ground of the difficulty of giving legal validity to the marriage, in respect to its most important legal incidents, without essentially curtailing the rights and powers of the masters." *Id.* Consideration of the psychological and emotional impact upon any given group that results from systematically and institutionally denying them entrance into a coveted social class is beyond the scope of this Article. However, it is worth noting that "[t]he denial of legal marriage to slaves quintessentially expressed their lack of civil rights." COTT,

After the Civil War, most states permitted and recognized intra-racial marriages between former slaves.²⁵ Inter-racial marriages between "White"²⁶ individuals and "Black" individuals, however, were illegal and even criminalized until the Supreme Court struck down all such statutes in *Loving v. Virginia*.²⁷

Interestingly, the federal government gave marriages between Native Americans and "White" individuals considerably different treatment.²⁸ Federal policy reflected that marriage was an excellent tool for the assimilation and "civilization" of Native Americans.²⁹ The federal government also benefited from such marriages because they encouraged the married Native American individual to sever his or her ties to the tribe.³⁰ In this way, interracial marriages between Native Americans and "White" individuals smoothed the expansion of the Union into formerly

supra note 7, at 33. Certainly, the experience of modern Gay-Lesbian-Bisexual-Transgendered ("GLBT") individuals does not equal a condition of slavery, yet the inability of gay, lesbian, and in some cases, transgendered and bisexual people to marry the person they love is a constant reminder of their status as second-class human beings.

25. See *Ferrall v. Ferrall*, 69 S.E. 60, 61 (N.C. 1910) (implying that under North Carolina law in 1910, while "Black" individuals could marry each other, "Black" individuals could not marry "White" individuals).

26. The social and legal construct of "separate but equal" created the need to define the terms "White" and "Colored" employed in that period. As an example, in *Wall v. Oyster*, the D.C. Circuit adopted the reasoning and definitions provided by the lower court that:

Actual color seems to the public mind to be important only as one of the several evidences which, if sufficiently pronounced, serve to identify the subject as of the negro race; and this consideration, that is to say, the consideration of racial status, seems to my mind to measure an ultimate conception to which the mind of the people has arrived. It is this, — putting away for the moment particular instances which might present more refined complications, — persons of whatever complexion, who bear negro blood in whatever degree, and who abide in the racial status of the negro, are "colored" in the common estimation of the people.

36 App. D.C. 50, 55-56 (1910).

While the passage above may over-simplify the point, it illustrates that racial identity is a complex and difficult issue. After much consideration, and in an attempt to use the least offensive but most accurate terms available, the author placed the words "White" and "Black" in quotations. The author also selected the term "Native American" to describe individuals indigenous to the area currently encompassed by the boundary of the United States and their descendants. The author hopes this will allow for a clear conveyance of ideas without connotation, and that this course of action is not racially insensitive.

27. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.").

28. See COTT, *supra* note 7, at 27.

29. See *id.*

30. See *id.*

Native American lands.³¹ However, state governments had the final say in marriage.³² Despite federal encouragement of the practice, many states nullified marriages between Native Americans and "White" individuals by statute.³³

C. THE INFLUENCE OF SUFFRAGE

The women's suffrage movement also shaped the contours of American marriage.³⁴ Women's rights advocates felt that women could never achieve equality if they were obliged to surrender their property and their bodies to their husbands.³⁵ Eventually, the natural progression of this thinking caused the steady and continual social revolution that ultimately ended coverture, secured women the vote, required equal pay for equal work, and brought husbands and wives closer to equality within their marriages and men and women closer to equality in the greater arena of society.³⁶

II. MARRIAGE DEFINED?

A. STRUGGLING FOR A DEFINITION OF MARRIAGE

Considering the extent and variety of material written on the subject, finding an acceptable definition of marriage is surprisingly difficult.³⁷ While even the staunchest supporters of marriage admit the need for a clear definition,³⁸ they too are unable to agree

31. *See id.*

32. *See Baehr v. Lewin*, 852 P.2d 44, 58 (Haw. 1993) ("[T]he state's monopoly on the business of marriage creations has been codified by statute for more than a century.").

33. *See COTT, supra* note 7, at 27-28.

34. *See id.* at 63.

35. *See id.* at 64-67.

36. *See id.* at 156-68 (describing the effect of suffrage on marriage and the position of women in society in general).

37. *See, e.g., Fineman, supra* note 14, at 242.

Marriage has various meanings to individuals entering into it. Marriage can be experienced as: a legal tie, a symbol of commitment, a privileged sexual affiliation, a relationship of hierarchy and subordination, a means of self-fulfillment, a societal construct, a cultural phenomenon, a religious mandate, an economic relationship, a preferred reproductive unit. A way to ensure against poverty and dependency, a romantic ideal, a natural or divined connection, a stand-in for morality, a status, or a contractual relationship.

Id.

38. *See Lynn D. Wardle, "Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771, 780 (2001) [hereinafter *Multiply and Replenish*]. "Marriage is of such profound importance to society that there is great danger if its meaning and

upon a single meaning. For example, Gerard V. Bradley posits that a legal marriage does not exist until the would-be spouses perform the act of genital consummation, even if all other elements of a marriage are present and the participants satisfy all of the legal requirements.³⁹ On the other hand, Professor Lynn D. Wardle, claims, "the *integrations* of the universe of gender differences (profound and subtle, biological and cultural, psychological and genetic) associated with sexual identity constitutes the core and essence of marriage. The heterosexual dimensions of the relationship are at the very core of what makes 'marriage' what it is."⁴⁰ Exactly what it is that this makes marriage, however, remains unclear.

Congress embodied its attempt in the Defense of Marriage Act ("DOMA").⁴¹ This legislation stated that "[m]arriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."⁴² Black's Law Dictionary defines marriage as:

[T]he civil status or relationship existing between a man and a woman who agree to and do live together as spouses. The essentials of a valid marriage are (1) parties legally capable of contracting marriage, (2) mutual consent or agreement, and (3) an actual contracting in the form prescribed by law.⁴³

Black's third subsection accentuates the point that marriage laws may differ in each state. Therefore, to be clear about what one means by "marriage," one must specify the particular state law used to define the marital "status or relationship."

Some scholars claim that "[m]arriage is the joining of the two sexes into a community that connects the generations."⁴⁴ However, these scholars fail to explain exactly how this connection between the generations occurs.⁴⁵ These same scholars further

definition become ambiguous." *Id.*

39. See Bradley, *supra* note 3, at 749. "Nothing less (or more) than an act of genital union consummates a marriage; and such an act consummates even if it is not particularly pleasurable." *Id.* Under this definition, a union between one man and one woman is not a marriage until the man and woman engage in genital sex. *Id.*

40. Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 748 (1998) [hereinafter *Legal Claims for Same-Sex Marriage*].

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

42. *Id.*

43. BLACK'S LAW DICTIONARY 986 (7th ed. 1999).

44. Coolidge & Duncan, *supra* note 4, at 639.

45. *Id.* at 638-51.

claim that if members of society believe that marriage creates a community that is "the general ideal for society,"⁴⁶ and "the central social institution that brings men, women and children together," then they should have a right to support marriage in public policy.⁴⁷ However, they never reveal how or why this is so for marriage, but not for other forms of unions. Ironically, these scholars state that if marriage does not achieve these goals, then society should "simply abolish [marriage] and let people create their own contracts."⁴⁸

1. THE TRANSEXUAL CURVEBALL

The issue of transsexualism further complicates the issue. The available marital definitions do not address the issue of a committed, monogamous, sexual union between a transsexual individual and another individual, transsexual or otherwise.⁴⁹ The status of transsexual relationships remains questionable, even after these individuals perform all of the requirements for entrance into legal marriage.

In *Littleton v. Prange*,⁵⁰ Lee Cavazos, Jr., born an anatomical male, underwent sex reassignment surgery so that her body would reflect what she felt was her true female gender.⁵¹ Having changed her name to "Christie," she later married Jonathon Littleton under the laws of Kentucky.⁵² The two lived as husband

46. *Id.* at 635.

47. *Id.* at 638.

48. *Id.* at 639. See *infra* notes 283-291 and accompanying text for a discussion of replacing marriage with contracts.

49. See, e.g., *In re Declaratory Relief for Ladrach*, 513 N.E.2d 828, 832 (Ohio Misc. 1997) The court refused to grant the transgendered petitioner a license to marry a man. "There was no evidence that the applicant at birth had any physical characteristics other than those of a male and he was thus correctly designated 'Boy' on his birth certificate. There also was no laboratory documentation that the applicant had other than male chromosomes." *Id.* Accord *Littleton v. Prange*, 9 S.W.3d 223, 225 (Tex. App. 4th 1999), *cert. denied* 531 U.S. 872 (2000); *M.T. v. J.T.*, 355 A.2d 204, 211 (N.J. Super. 1976), *cert. denied*, 364 A.2d 1076 (N.J. 1976) (finding that a post-operative transsexual could enter into a valid marriage with an individual who is of the opposite sex at the time of the marriage); cf. *In re Estate of Gardiner*, 22 P.3d 1086, 1110 (Kan. App. 2001) *aff'd in part, rev'd in part*, 42 P.3d 120, 137 (Kan. 2002). The court rejected the reasoning of the Littleton majority as "a rigid and simplistic approach to issues that are far more complex than addressed in that opinion," and concluded that "a trial court must consider and decide whether an individual was male or female at the time the individual's marriage license was issued and the individual was married, not simply what the individual's chromosomes were or were not at the moment of birth." *Id.*

50. 9 S.W.3d at 223.

51. *Id.* at 224.

52. *Id.* at 224-25.

and wife until Jonathon's death seven years later.⁵³ As a result of Jonathon's death, Christie filed an action for medical malpractice "under the Texas Wrongful Death and Survival Statute in her capacity as Jonathon's surviving spouse."⁵⁴ The defendant in the suit moved for summary judgment, asserting that "Christie is a man and cannot be the surviving spouse of another man."⁵⁵ Even though the trial court found that "[s]ome physicians would consider Christie a female; other physicians would consider her still a male," the court apparently found no question of material fact existed in the case.⁵⁶ The Appeals Court of Texas affirmed the trial court's grant of summary judgment in favor of the defendant.⁵⁷ In so doing, the Appeals Court concluded "as a matter of law, that Christie Littleton is a male."⁵⁸ Further, the court stated, "As a male, Christie cannot be married to another male."⁵⁹ The court thus held that Christie's marriage to Jonathon was invalid, and that she could not bring a cause of action as his surviving spouse.⁶⁰

The Appeals Court affirmed summary judgment against Christie Littleton despite finding that Christie and Jonathon Littleton performed all of the requirements of marriage under Kentucky law.⁶¹ Christie and Jonathon Littleton lived together as man and wife for seven years.⁶² According to medical science, there are "individuals whose sexual self-identity is in conflict with their biological and anatomical sex," and Christie Littleton was one such person.⁶³ As the court noted, "Christie Littleton made every conceivable effort to make herself a female, including a surgery that would make most males pale and perspire to contemplate."⁶⁴ Also, Christie Littleton amended her birth certificate so that it would reflect her gender and the current state of her body.⁶⁵ *Littleton* may raise more questions than it answers. The court identified one such question, "When is a man a man,

53. *Id.* at 225.

54. *Id.*

55. *Id.*

56. *Id.* at 231.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 225.

62. *Id.*

63. *Id.* at 230.

64. *Id.* at 230-31.

65. *Id.* at 231.

and when is a woman a woman?"⁶⁶ As this question remains unanswered, perhaps unanswerable,⁶⁷ using gender to define marriage does little to advance our understanding of what "marriage" actually means.

B. PROBLEMS RESULTING FROM THE LACK OF A CLEAR DEFINITION OF MARRIAGE

Marriage, even if inconsistently defined, exists with numerous benefits, both tangible⁶⁸ and intangible,⁶⁹ as well as various obligations.⁷⁰ If society wishes to distribute these benefits only to individuals who obtain a particular status, but that status is undefined, then the distribution of benefits is most likely under- and over-inclusive.

Consider the hypothetical scenario of a childless couple consisting of a biological man and a biological woman married under the laws of the Commonwealth of Massachusetts.⁷¹ The relationship fails, and the wife moves out. The couple lives separate lives but do not divorce because the wife works for a small company with no health insurance for its employees, and she cannot afford an individual plan. As a married individual, however, she is covered under her husband's plan as a benefit of his employment. Additionally, their marital status confers upon them significantly lower insurance rates on the car the husband uses to get to and from work. They both begin to see other people.

Under DOMA, the couple is married and entitled to all of the

66. *Id.* at 223.

67. "On its surface, the question of whether a person is male or female seems simple enough. Complicated with the issues of surgical alteration, sexual identity, and same-sex marriage, the answer is not so simple." *Id.* at 233 (Lopez, J., dissenting).

68. See, e.g., GEN. ACCOUNTING OFFICE, OFFICE OF GEN. COUNSEL, GAO/OGC-97-16, DEFENSE OF MARRIAGE ACT 1-2 (1997) (listing 1049 laws in the United States Code in which marital status is a factor) [hereinafter GAO Report]. For example, preferential treatment is given under the federal income tax system, spousal death benefits, and employment benefits. See *id.* See also *Baker v. State*, 744 A.2d 864, 883-84 (Vt. 1999) (citing numerous Vermont statutes that benefit and protect married couples, such as the right to make emergency medical decisions for an incapacitated spouse, marital testimonial privilege, and receipt of a share of the spouse's estate should the spouse die intestate). See *infra* note 280.

69. Some examples are not having to dread answering questions from nosy relatives as to why one is still unmarried at age thirty, satisfying the expectation of parents that their child will marry, the additional financial security incurred through marriage, and knowing there are legal deterrents to one's partner throwing some underwear in a bag, starting the car, and making a break for it.

70. See, e.g., GAO Report, *supra* note 68 (noting the tax policy issue, "the so-called marriage penalty").

71. MASS. ANN. LAWS ch. 207 (Law. Co-op. 1994 & Supp. 2002).

benefits this status confers.⁷² This conflicts with the definition in Black's Law Dictionary however, because the couple is not "liv[ing] together as spouses."⁷³ Additionally, this "marriage" neither connects generations,⁷⁴ nor, with the possible exception of the financial collusion, "brings men, women and children together."⁷⁵

As a second hypothetical example, consider a biological man and a biological woman living together for fifteen years, yet not married under the laws of any state. The couple has a child, in addition to one child each from prior relationships. All the children are treated equally and raised as a family. According to both Congress⁷⁶ and Black's,⁷⁷ the couple is not married and therefore not entitled to the rights, privileges, and protections afforded married couples.

This second hypothetical family, while not headed by a legally married couple, is creating inter-generational connections.⁷⁸ This family is "bring[ing] men, women and children together," a benefit "opposite-sex only" marriage advocates claim marriage provides.⁷⁹ Yet a state may be able to force this couple and their children out of a home they own via zoning ordinances.⁸⁰ The members of this couple may not be entitled to coverage under each other's employer offered health insurance plans.⁸¹

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

73. See BLACK'S LAW DICTIONARY, *supra* note 43.

74. See Coolidge & Duncan, *supra* note 4, at 639. See also *supra* notes 44-47 and accompanying text.

75. See Coolidge & Duncan, *supra* note 4, at 638. See also *supra* notes 44-47 and accompanying text.

76. Defense of Marriage Act, 110 Stat. 2419.

77. See *supra* note 43 and accompanying text.

78. See Coolidge & Duncan, *supra* note 4, at 639 and accompanying text. See also *supra* notes 44-47 and accompanying text.

79. See Coolidge & Duncan, *supra* note 4, at 638 and accompanying text. See also *supra* notes 44-47 and accompanying text.

80. See *City of Ladue v. Horn*, 720 S.W.2d 745 (Mo. App. 1986) (holding that the zoning ordinance upon which the city of Ladue relied to enjoin the defendants from occupying the home they jointly owned was not unconstitutional). The defendants in *Horn* were two unmarried adults with three children between them from prior relationships. *Id.* at 747. The defendants shared a bedroom, maintained a joint checking account, ate together, and disciplined each other's children. *Id.* The zoning ordinance in question classified the area in which the home was located as "one family residential." *Id.* The ordinance defined "family" as "one or more persons related by blood, marriage or adoption, occupying a dwelling unit as an individual housekeeping organization." *Id.* Because defendants did not fit this definition of "family," the city said they could not occupy any house in the one family zone. *Id.*

81. See *Irizarry v. Bd. of Educ.*, 251 F.3d 604 (7th Cir. 2001) (holding that the Chicago Board of Education was not obliged to provide the same domestic partner

Additionally, some states deny such couples "hospital visitation and other medical decision making privileges."⁸² As shown in the discussion that follows, the denial of these rights and benefits to unmarried couples is unjustifiable.

In response to the second hypothetical couple above, some might wonder why they do not choose the marriage option. The answer to the question is irrelevant. Financial or social pressures should not force couples into marriage. As the above examples demonstrate, however, this coercion is exactly the result of the current legal institution of marriage.

III. SOCIAL DISPARITIES CREATED BY MARRIAGE AND THE CURRENT SYSTEM OF BENEFITS DISTRIBUTION VIA MARRIAGE

The following refutation of the ostensible justifications for "opposite-sex only" marriage will demonstrate how these justifications fail to achieve their intended purpose. In turn, this failure leads to a series of conclusions. Initially, it is unjustifiable to exclusively recognize opposite-sex unions as marriages. Next, the current American legal institution of marriage itself is unjustifiable, as is the distribution of privileges, benefits, and protections according to marital status. Additionally, marriage fails to achieve the goals and objectives cited as justification for limiting legal marriage to opposite-sex couples. Therefore, if society truly needs and intends to achieve those goals and objectives, then society should abolish marriage and enact a system that will successfully achieve them.

The abolition of marriage – and replacement thereof with an alternative system for achieving the stated social goals and objectives of marriage – would also eliminate the social and economic inequality perpetuated by marriage. Thus, the abolition of marriage would not only accomplish the social goals and objectives of marriage that currently are lacking, but would also create a more equal and just society.

A. *DO NOT ASK TO WHOM THE BENEFITS FLOW – THEY FLOW TO THEE*

In connection with DOMA's enactment, Congress asked the General Accounting Office ("GAO") to "identify federal laws in

benefits to unmarried employees in committed opposite-sex relationships that it provided to employees in committed same-sex relationships).

82. *Baker v. State*, 744 A.2d 864, 870 (Vt. 1999).

which benefits, rights and privileges are contingent on marital status.”⁸³ More than three months after President Clinton signed DOMA into law, the GAO reported back to Congress.⁸⁴ In its search, the GAO found “1049 federal laws classified to the United States Code in which marital status is a factor.”⁸⁵ The GAO only addressed marital status impacting individuals under federal law.⁸⁶ The GAO report does not address, and does not relate to, the interplay between marital status and the laws of each individual state.⁸⁷ What the GAO report does show, however, is that the way in which many federal laws affect an individual is dependant upon the individual’s marital status.⁸⁸ Moreover, far more often than not, the law treats married individuals considerably better than similarly situated unmarried individuals.⁸⁹

83. GAO Report, *supra* note 68, at 1.

84. *Id.* DOMA became law on Sept. 26, 1996, and the GAO reported to Congress on Jan. 31, 1997. *Id.*

85. *Id.* at 2. The GAO added a few “caveats.” *Id.* at 2-3. First, while this “collection of laws is as complete and representative as can be produced by a global electronic search of the kind [the GAO] conducted,” the GAO methodology had limitations. *Id.* at 2-3. Thus, while “the probability is high that [the GAO] has identified those *programs* in the Code in which marital status is a factor,” a general electronic search “cannot capture every individual law in the United States Code in which marital status figures.” *Id.* Second, the GAO clearly stated that the data contained in the report “include[d] only laws classified to the United States Code,” which is a “compendium of ‘general and permanent’ laws.” *Id.* “Although appropriations and annual authorizations, for example, might contain references to marital status, they are typically in effect for a single year and therefore do not appear in the code.” *Id.* “[N]o conclusions can be drawn, from our identification of a law as one in which marital status is a factor, concerning the effect of the law on married people versus single people.” *Id.* The GAO suggested that while married individuals may benefit from many of the laws, other laws might work to their detriment. *Id.*

86. *Id.*

87. *See, e.g., infra* note 280 and accompanying text (showing the ways Vermont state law provides protection and benefits to married people).

88. *See supra* notes 83-87 and accompanying text (discussing the benefits of marriage under federal and state statutory law).

89. *See supra* notes 83-87 and accompanying text.

**B. PROBLEMS RESULTING FROM THE
DISTRIBUTION OF BENEFITS IN ACCORDANCE
WITH MARITAL STATUS**

**1. THE OVER- AND UNDER-INCLUSIVE
DISTRIBUTION OF BENEFITS COLLAPSE THE
MARRIAGE JUSTIFICATIONS**

Currently, marriage provides rights, benefits, privileges, protections, and social status to some permanent, monogamous, heterosexual couples. Simultaneously, the legal institution of marriage denies these benefits to other permanent, monogamous, heterosexual couples.⁹⁰ Additionally, some individuals in non-monogamous, non-permanent, and even non-heterosexual relationships also receive these benefits by virtue of marital status.⁹¹ In this way, the distribution of benefits via marriage is both under- and over-inclusive.

The inconsistency in the distribution of benefits, when distributed according to marital status, causes the series of assumptions that form the basis for marriage, and purportedly justify the distribution of benefits through marriage, to fail. Initially, society assumes that permanent, monogamous, heterosexual unions are socially beneficial.⁹² Society then assumes, and in some ways legislatures attempt to mandate,⁹³

90. *See, e.g.,* Irizarry v. Bd. of Educ., 251 F.3d 604 (7th Cir. 2001) (upholding denial of health benefits to female plaintiff's male domestic partner, even though they had lived together for more than twenty years and had two children together). *See also infra* note 238 (citing cases involving permanent, monogamous, heterosexual, unmarried couples).

91. *But see infra* note 218 and accompanying text (describing cases in which non-monogamous, non-permanent, or non-heterosexual couples fraudulently obtained marital benefits).

92. William C. Duncan, "Don't Ever Take a Fence Down": The "Functional" Definition of Family – Displacing Marriage in Family Law, 3 J.L. FAM. STUD. 57, 78 (2001). *See infra* notes 138-143 and accompanying text.

93. *See* Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (1996)) (defining marriage as "a legal union between one man and one woman"). DOMA assumes that by limiting marriage to opposite-sex couples only heterosexuals will marry. This is not necessarily the case. *See supra* note 32 and accompanying text (noting that both homosexuals and heterosexuals may marry, so long as they marry an individual of the opposite sex). States also attempt to maintain marriage as monogamous by making adultery grounds for divorce and by prohibiting bigamy and polygamy. *See, e.g.,* IDAHO CODE § 32-202 (Michie 2002) (stating that only "unmarried males" and "unmarried females" may marry); IND. CODE ANN. § 31-11-1-3 (Michie 1997) ("Two (2) individuals may not marry each other if either individual has a husband or wife who is alive."); OHIO REV. CODE ANN. § 2919.01(A) (Anderson 1999) ("No married person shall marry another or continue to cohabit with such other person in this state"). *See also* Cleveland v. United States, 329 U.S. 14, 19-20 (1946)

that marriages are permanent, monogamous, heterosexual unions.⁹⁴ Society therefore encourages marriages by according benefits to the marital status on the assumption that this will encourage permanent, monogamous, heterosexual coupling.

As shown above, however, some permanent, monogamous, heterosexual couples receive the benefits of marriage while others do not based solely on differences in marital status.⁹⁵ Some non-permanent, non-monogamous, and even non-heterosexual couples make efforts to receive the marital benefits.⁹⁶ This inconsistency in benefit distribution defeats its intended purpose of encouraging a specific type of coupling because marriages need not be permanent, monogamous, or even composed of heterosexual individuals. Furthermore, untold numbers of unmarried permanent, monogamous, heterosexual couples exist. Unless these couples enter into a legal marriage, the state and federal governments deny these couples the benefits of marriage.⁹⁷ It follows that the justifications for marriage fail to justify the benefits accorded the status. Further, it follows that the assumptions that supposedly justify the existence of legal marriage fail to justify the institution at all.

2. CALLING MARRIAGE GOOD MAKES PEOPLE BE BAD: THE BENEFITS OF MARRIAGE PROVIDE INCENTIVE TO FRAUDULENTLY MARRY

Distributing benefits and status through marriage creates a perverse incentive for individuals to marry, even when they have no intention of maintaining a permanent, monogamous, heterosexual relationship. "Sham" or "fraudulent" marriages between U.S. citizens and citizens of other countries are

(describing polygamy as "immoral in the law" and holding that "religious creed affords no defense in a prosecution for bigamy").

94. These assumptions about the nature of the marital contract are evident in wedding vows themselves. Assuming society takes the vow of marriage at face value, then "til death do you part" and "forsaking all others" creates a strong inference that parties to a marriage intend the union to be permanent and monogamous.

95. See *Irizarry*, 251 F.3d at 604 (upholding denial of some benefits to an unmarried monogamous, heterosexual couple). See also *Boyter v. Comm'r*, 668 F.2d 1382 (4th Cir. 1981) (describing the Boyters, a permanent, monogamous, heterosexual couple who received the benefits of marriage until they divorced without separating). In other words, the Boyters, though they were demonstrably a permanent, monogamous, heterosexual couple, could no longer receive the benefits of marriage.

96. See *infra* note 218 and accompanying text.

97. See *infra* note 238 (listing a number of permanent, monogamous, heterosexual, unmarried couples).

noteworthy examples.⁹⁸ For example, the non-U.S. citizen will marry a U.S. citizen to acquire U.S. citizenship, or the U.S. citizen will purchase mail-order catalogs and services to select a non-citizen bride.⁹⁹ The facts of *United States v. Lee*¹⁰⁰ provide an example of the former.

In *Lee*, "the appellant entered into a 'marriage of convenience' in Las Vegas with a Filipino national for the purpose of preventing her deportation."¹⁰¹ In exchange, Lee "received compensation," and "[a]ccording to plan, both he and his new wife then went their separate ways immediately after the wedding and were divorced about 6 months later."¹⁰² Additionally, "[n]ot being satisfied with the money he received for the sham marriage and the fraud perpetrated on immigration authorities, [Lee] also decided to defraud the Navy" by applying for and accepting benefits the military provides to married service members.¹⁰³ While "[a] sham marriage is void under the law of this country as against public policy,"¹⁰⁴ authorities must first discover such marriages. The fact that fraudulent marriages occur in the military, under the nose of U.S. authorities and in a setting defined by "honor, courage, and commitment"¹⁰⁵ demonstrates the temptation provided by the benefits of marriage and the simplicity of perpetrating such frauds.¹⁰⁶

98. See generally Linda Kelly, *Marriage for Sale: The Mail-Order Bride Industry and the Changing Value of Marriage*, 5 J. GENDER RACE & JUST. 175 (2001). "In its report to Congress in 1999, the [Immigration and Naturalization Service] acknowledged and addressed the traditional concerns regarding the mail-order bride industry – that it promotes both physically abusive and 'fraudulent' marriages." *Id.* at 177. Kelly points out that there is a heightened likelihood of abuse in these marriages. *Id.* at 183-84. This heightened likelihood of abuse is due to the unequal distribution of power and information inherent in such relationships, as well as the transitional difficulties faced by the transplanted bride. *Id.* Additionally, the wife in such a marriage has limited ability to seek help. *Id.* at 184. The chances that she would seek available help are also lessened. *Id.*

99. See *id.* at 178. The "mail-order bride" industry, accentuates power disparities between the sexes. *Id.* While not entirely analogous, male foreign-nationals could conceivably purchase citizenship and protection from deportation by purchasing a marriage to a female U.S. citizen.

100. 43 M.J. 794, 796 (N-M Ct. Crim. App. 1995).

101. *Id.*

102. *Id.*

103. *Id.*

104. *United States v. Bolden*, 28 M.J. 127, 129 (C.M.A. 1989).

105. United States Navy Recruiting Command: Personal Development, at <http://www.navy.com/personaldev/index.jsp?hasFlash=true> (last visited Sept. 16, 2002) ("Honor, courage, and commitment. These are the core values of the Navy").

106. See 43 M.J. at 796. Another possible incentive for military personnel to

3. COSTS CREATED BY PROVIDING BENEFITS BASED ON MARITAL STATUS

The "sham" marriage cases demonstrate that the blind distribution of economic benefits based on marital status creates additional costs for society by encouraging individuals to enter into marriages for economic reasons alone.¹⁰⁷ Individuals who marry solely to reap one or more of the benefits of marriage commit a fraud upon society.¹⁰⁸ However, the legal institution of marriage creates an incentive for individuals to defraud society because the cost of entering into marriage is so small and the benefits of marriage are so great.¹⁰⁹ Perhaps making entrance into marriage more difficult or reducing the benefits of marriage would solve this problem. However, it is contradictory to claim marriage is a preferred social condition encouraged by society while simultaneously making the condition difficult to obtain and reducing its value. Instead, society should eliminate the legal institution of marriage and, with it, the distribution of benefits according to marital status.¹¹⁰ In place of marriage, society should implement a system wherein the distribution of benefits actually relates to the achievement of social goals.¹¹¹

enter into "sham" marriages may be to hide their sexual orientation. Homosexual conduct is grounds for military discharge under 10 U.S.C. § 654 (2002). Therefore, service members may marry not only for the benefits they obtain upon marriage, but also to reduce or eliminate suspicions about their sexuality. *See, e.g., United States v. Phillips*, 52 M.J. 268, 273 (C.M.A. 2000) (Effron, J., dissenting) (noting that in the military, homosexual conduct "is subject to mandatory discharge with very limited exceptions" and that there is a "high degree of antipathy to homosexuality in the armed forces.").

107. *See, e.g., Bolden*, 28 M.J. at 130-31 (upholding the defendant's conviction for stealing benefits granted to married service members remarking that "there is nothing unfair in imposing criminal liability on a servicemember who seeks to obtain allowances from the Government by entering into a fake marriage."); *United States v. Soto*, ACM No. 28407, 1990 CMR LEXIS 662, at *1 (A.F.C.M.R. June 13, 1990) (affirming defendant's conviction for "conspiring with [another] to steal government benefits ... by orchestrating a sham marriage between [another] and a foreign national").

108. *See, e.g., Bolden*, 28 M.J. at 130-31. The same is true for individuals who divorce to receive the benefits of unmarried individuals. For example, in *Boyer v. Commissioner*, the Boyters, a happily married couple, divorced solely for the purpose of avoiding the "marriage penalty" in federal tax law. 668 F.2d 1382, 1384 (4th Cir. 1981).

109. *See* JUDITH AREEN, *FAMILY LAW: CASES AND MATERIALS* 78 (4th ed. 1999) (citing Mary Ann Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 677-82 (1976)).

110. *See infra* notes 280-299 and accompanying text (discussing the abolition of marriage and replacement thereof with contracts, statutory law, and common law).

111. *See infra* notes 302-308 and accompanying text (discussing a merit-based system of rewards and benefits).

C. CONSIDERATION OF THE BENEFITS OF ABOLISHING MARRIAGE

Admittedly, suggesting the "aboli[tion] of marriage as a legal category and with it any privilege based on sexual affiliation,"¹¹² will likely "be viewed as quite radical."¹¹³ Abolishing marriage, however, is a meritorious means to a just end. Viewed in light of the struggle for the equal rights of gay, lesbian, bisexual and transgendered ("GLBT") individuals, abolition of the legal institution of marriage equalizes these members of society in ways that same-sex marriages¹¹⁴ and "civil unions" will not.¹¹⁵ For example, Vermont's "civil unions"¹¹⁶ represent the legal status closest to marriage available to same-sex couples.¹¹⁷ Yet, the title itself reveals that a "civil union" is not the legal equivalent of a "marriage."¹¹⁸ Indeed, Vermont's "civil unions" law simultaneously limits "marriage" to "the legally recognized union of one man and one woman"¹¹⁹ and creates "civil unions" for couples "of the same sex and therefore excluded from the marriage laws of this state."¹²⁰ It is unclear whether this legal distinction stems from a perception that same-sex couples are somehow inferior to opposite-sex couples or whether the perception comes from the distinction.¹²¹ Yet it is clear that creating one legal class

112. MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 228 (1995).

113. *Id.* at 230.

114. See *infra* notes 123-135 and accompanying text (discussing the ways in which same-sex marriage will not only fail to create equality but will perpetuate inequality).

115. "Not until same-sex couples obtain the freedom to marry will what remains 'a condition of legal inferiority' be lifted from us." Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate But (Un)Equal*, 25 VT. L. REV. 113, 135 (2000). "Just as Louisiana gave blacks and whites separate and (assertedly) equal railroad cars, so Vermont gives gays and straights separate and (assertedly) equal legal forms for their committed relationships." William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Union*, 64 ALB. L. REV. 853, 860 (2001).

116. VT. STAT. ANN. tit. 15, § 1202(2) (2001).

117. See Cox, *supra* note 115, at 116. Vermont's "civil unions" law "includes same-sex couples in civic society to an extent not seen before in this country." *Id.*

118. See *id.* at 134. Cox describes a civil union as "an institution that (at least at its very inception) remains only a 'thin disguise' of equality and 'a pale shadow' of the institution of heterosexual marriage." *Id.*

119. VT. STAT. ANN. tit. 15, § 1201(4).

120. *Id.*

121. See Cox, *supra* note 115, at 134. "Our society's experiences with 'separate but equal' have repeatedly shown that separation can never result in equality because the separation is based on a belief of distance necessary to be maintained between those in the privileged position and those placed in the inferior position." *Id.*

for same-sex couples while reserving the more privileged class for opposite-sex couples perpetuates the inequality between the two groups.¹²²

D. SAME-SEX MARRIAGE AND THE PERPETUATION OF INEQUALITY

Currently, the struggle for equal treatment of GLBT individuals focuses on the right to marry and thereby reap the benefits of marriage, as well as incur the accompanying obligations.¹²³ Many gay-rights advocates view the decision of the Vermont Supreme Court in *Baker v. State*,¹²⁴ at least to some degree, as both a moral and legal victory.¹²⁵ This may not be the case. In 2001, the divorce rate for the United States was approximately half the marriage rate.¹²⁶ Marriage as an institution, therefore, is not functioning the way the (presumably) heterosexual community that enjoys it would like.¹²⁷ As the

122. See *id.* "Restricting same-sex couples to civil unions is reminiscent of the racism that relegated African-Americans to separate railroad cars and separate schools and of the sexism that relegated women to separate schools." *Id.*

123. See Toni Broaddus, *Vote No If You Believe in Marriage: Lessons from the No on Knight/No on Proposition 22 Campaign*, 15 BERKELEY WOMEN'S L.J. 1 (2000) (describing the failed campaign to defeat Proposition 22, which added language to the California Family Code so that California now recognizes only opposite-sex unions as marriages). See also *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (considering the validity of a challenge to a state's refusal to grant same-sex couples a marriage license). See also *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999) (finding that the state of Vermont has a state constitutional "obligation to extend to plaintiffs [three same-sex couples] the common benefit, protection, and security that Vermont law provides opposite-sex married couples").

124. 774 A.2d at 886 (requiring that benefits for opposite-sex married people under Vermont law be extended to same-sex couples).

125. See, e.g., Mark Strasser, *Equal Protection at the Crossroads: On Baker, Common Benefits, and Facial Neutrality*, 42 ARIZ. L. REV. 935, 935 (2000) ("The *Baker* decision represents a milestone in the movement to secure equal rights for lesbians, gays, and bisexuals ... and helps clarify why reserving marriage for different-sex couples involves an arbitrary distinction that violates state and federal constitutional guarantees.").

126. CTRS. FOR DISEASE CONTROL AND PREVENTION, DEPT OF HEALTH AND HUMAN SERV., Vol. 50, Number 1, NATIONAL VITAL STATISTICS REPORT 1 tbl. 1 (2001) (indicating that the divorce rate for the twelve-month period ending with January, 2001 was 4.1 per 1000 total population, excluding California, Colorado, Louisiana and Indiana; the marriage rate for the entire United States for the same time period was 8.5 per 1000).

127. See Susan Hager, *Nostalgic Attempts to Recapture What Never Was: Louisiana's Covenant Marriage Act*, 77 NEB. L. REV. 567, 567 (1998). Susan Hager observes, "There are widespread concerns nationwide about the impact of the towering divorce rate currently plaguing this nation." *Id.* Hager also notes that even though the divorce rate is no longer climbing, "many Americans, and especially their lawmakers, are extremely interested in curbing the American divorce rate." *Id.* at 568.

institution of marriage is failing those with continued exclusive access, there is no reason to believe the institution will better serve same-sex couples.

Furthermore, the institution of marriage creates inequality not only between opposite-sex couples and same-sex couples, but also between unmarried and married individuals and between unmarried couples and individuals.¹²⁸ The American institution of marriage creates inequality because it creates a system of caste.¹²⁹ Both intentionally and unintentionally, the institution of marriage is the social standard by which all individuals in society are measured.¹³⁰ It follows that securing actualization of their right to marry the person they love will not guarantee individual members of the GLBT community equal social and factual treatment.¹³¹ Granted, the abolition of marriage would also likely fail in this regard. However, the abolition of marriage would create a more equal society, whereas same-sex marriage would further stratify society.¹³² Therefore, the abolition of marriage would, on balance, confer greater equality on the GLBT community and all individuals than same-sex marriages. Thus, the abolition of marriage is the more worthy goal.

Currently, the second-class "unmarried" or "single" status affects the GLBT population and the unmarried straight population alike. Allowing same-sex marriages would merely shift this burden to a smaller group of unmarried people both gay and straight. For example, a single man is either an "unmarried, straight man" or a "gay man." One social stigma attaches to the former, and another, entirely separate, social stigma attaches to the latter. Same-sex marriages would stigmatize a single man as either a "single, gay man" or a "single, straight man," with the accompanying social stigma.¹³³

128. See David L. Chambers, *For the Best of Friends and For Lovers of All Sorts, A Status Other Than Marriage*, 76 NOTRE DAME L. REV. 1347, 1349 (2001). "The Census categories for marital status capture how we Americans think. Unmarried is missing something. Unmarried is suspect, regrettable, correctable." *Id.* "Two-thirds of Americans over thirty are married. The Census Bureau divides everyone else into one of three groups, all defined in relation to marriage. They are the 'never married,' the 'divorced,' and 'the widowed.' They are the hopeful, the failed, and the bereaved." *Id.* at 1347 (citing the U.S. CENSUS BUREAU, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 52, tbl. 55 (120th ed. 2000)).

129. See *id.*

130. See *id.*

131. See *infra* note 133.

132. See *supra* notes 123-135 and accompanying text (discussing the inequality same-sex marriage would perpetuate).

133. Unpleasant as the fact is to consider, Matthew Shepard, Barry Winchell,

Choosing to remain unmarried, failing to find a suitable mate, nor rejecting all acceptable suitors should form the basis for inequitable social, economic, and legal treatment. As shown in the discussion below, unmarried individuals do not inherently contribute less to society simply because they are unmarried.¹³⁴ Unmarried individuals, both gay and straight, maintain committed loving relationships, raise children, work, and pay taxes.¹³⁵ Therefore, these individuals and their children deserve the benefits and protections of marriage. These individuals do not deserve the stigma, economic inequities, and emotional strain forced upon them by their "unmarried" or "single" status.

and Billy Jack Gaither, as examples, would all likely still be dead even if they were legally married to a same-sex partner at the time of their murder. See Tom Kenworthy, *2nd Man Is Convicted Of Killing Gay Student*, WASH. POST, Nov. 4, 1999, at A1, A17 (reporting that it took a jury less than 10 hours to find a second man guilty of beating 21-year-old Matthew Shepard to death in a crime believed to be motivated, at least in part, by sexual orientation bias); Sue Anne Pressley, *Hate May Have Triggered Fatal Barracks Beating*, WASH. POST, Aug. 11, 1999, at A1, A10 (reporting that the other men in U.S. Army Private First Class Barry Winchell's company called him a "faggot" and other hate-related derogatory names on an almost daily basis for months). Winchell was beaten to death with a baseball bat on a U.S. military base while Winchell's Army roommate "encouraged the attack." *Id.* at A10. A fellow soldier has been charged with Winchell's murder. See also Chuck Barney, *'Frontline' Episode Explores the Prevalence of Crimes Against Homosexuals*, THE HOUSTON CHRONICLE, Feb. 15, 2000, available at LEXIS, News Library, AllNews File ("In February of last year, 39-year-old openly gay Billy Jack Gaither of Sylacauga, Ala., was brutally beaten with an ax handle. His throat was slashed and then his body was set on fire."). Support for this contention exists in the equally unpleasant fact that the 13th, 14th, and 15th Amendments to the United States Constitution, the "equal rights amendments," failed to prevent untold incidents of violence arising out of the "race bias" of the attacker. See U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV. See UNIF. CRIME REPORTING PROGRAM, FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: HATE CRIME STATISTICS 14 tbl. 7 (2000) (reporting that 5171 "incidents" motivated by "race bias" – including ten "murders and nonnegligent manslaughters" – occurred in the United States in the year 2000 alone), available at http://www.fbi.gov/ucr/cius_00/hate00.pdf (last visited Sep. 24, 2002). In comparison, that same year the FBI reported two incidents of "murder or nonnegligent manslaughter" resulting from "sexual orientation bias." *Id.* In the prior year the FBI reported nine incidents of "murder or nonnegligent manslaughter" resulting from "race bias" and three from "sexual orientation bias." UNIF. CRIME REPORTING PROGRAM, FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: HATE CRIME STATISTICS 10 tbl. 4 (1999), available at <http://www.fbi.gov/ucr/99hate.pdf> (last visited Sep. 24, 2002). The year 1998 saw eight from race bias and four from sexual orientation bias. UNIF. CRIME REPORTING PROGRAM, FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: HATE CRIME STATISTICS 10 tbl. 4 (1998), available at <http://www.fbi.gov/ucr/98hate.pdf> (last visited Sep. 24, 2002). Thus, we know from history that even when groups receive facially equal treatment in law, they often receive strikingly different treatment in fact.

134. See *infra* notes 149-279 and accompanying text (showing that unmarried individuals achieve many of the ostensible justifications of marriage).

135. See *infra* note 238 and accompanying text.

Furthermore, marriage is not the solution to these inequalities. The solution is the elimination of marriage and its accompanying caste system.

In advocating the abolition of legal marriage in order to create social equality, gay-rights advocates could gain support from at least two groups of unlikely allies: married individuals uncomfortable with the privileges afforded them by their marital status, and unmarried individuals motivated by the inequality the legal institution of marriage creates.

IV. THE OSTENSIBLE JUSTIFICATIONS FOR EXCLUSIVELY OPPOSITE-SEX MARRIAGE

In 1996 Congress passed DOMA.¹³⁶ An examination of the floor debates relating to DOMA, however, reveals no substantive reasons to defend the institution of marriage.¹³⁷ The justifications articulated by members of Congress for the maintenance of marriage as a purely opposite-sex institution include: social ramifications,¹³⁸ tradition,¹³⁹ history,¹⁴⁰ economics,¹⁴¹ child

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

137. 142 CONG. REC. H7270, H7480 (1996) (House of Representative debates on the Defense of Marriage Act). *See also* 142 CONG. REC. S10100 (1996) (Senate debates on the Defense of Marriage Act).

138. *See, e.g.*, 142 CONG. REC. H7480, H7493 (1996) (statement of Rep. Ensign). "The time-honored and unique institution of marriage between one man and one woman is a fundamental pillar of our society and its values." *Id.* *See also* 142 CONG. REC. H7270, H7275 (1996) (statement of Rep. Barr). "[M]arriage [is] a basic institution, an institution basic not only to this country's foundation and to its survival but to every Western civilization." *Id.*

139. *See, e.g.*, 142 CONG. REC. H7480, H7490 (1996) (statement of Rep. Bryant).

I think it is very important that we remember much of our history lessons, that I am sure have already been discussed here before. Without our action, this would be the first time that any religious or civil marriage ceremony recognized this type of marriage. It would be against the traditional marriage of husband and wife.

Id. *See also* 142 CONG. REC. H7480, H7495 (1996) (statement of Rep. Lipinski). "Homosexual marriages would destroy thousands of years of tradition which has upheld our society." *Id.* *See also* 142 CONG. REC. H7270, H7273 (1996) (statement of Rep. McInnis).

I think it is particularly important to take a look at the traditional marriage If we look at any definition, whether it Black's Law Dictionary, whether it is Webster's Dictionary, a marriage is defined as union between a man and a woman, and that should be upheld, there is no reason to be ashamed of that tradition. It is a long-held tradition.

Id.

140. *See, e.g.*, 142 CONG. REC. H7480, H7487 (1996) (statement of Rep. DeLay). "We need to protect our social and moral foundations." *Id.* *See also* 142 CONG. REC. H7480, H7488 (1996) (statement of Rep. Stearns). "[S]ame-sex marriages] threaten the future of families which have traditional marriage at their very heart.

rearing,¹⁴² and that opposite-sex marriage is what God wants for humanity.¹⁴³

Outside of Congress, some supporters of purely opposite-sex marriage also attempt to justify their opinion that "the preferred legal status and benefits of marriage should not be extended to unions other than traditional marriages."¹⁴⁴ These scholars make brief reference to a number of social interests,¹⁴⁵ before reaching

If [Congress fails to pass the Defense of Marriage Act] traditional marriage is thrown by the wayside, brought down by ... manipulation of the definition that has been accepted since the beginning of civilized society." *Id.* See also 142 CONG. REC. H7480, H7489 (1996) (statement of Rep. Lewis). "[Two hundred twenty] years of history in this Nation where we have not had to define what marriage is. It has been pretty common knowledge and it has been understood by most people." *Id.*

141. See, e.g., 142 CONG. REC. H7480, H7488 (1996) (statement of Rep. Barr). "[I]f you do not believe that it is fiscally responsible to throw open the doors of the U.S. Treasury to be raided by the homosexual movement [vote for the Defense of Marriage Act]." *Id.* See also 142 CONG. REC. H7480, H7489 (1996) (statement of Rep. Canady).

We have a responsibility as the Congress to determine how Federal funds will be spent, and I believe that it is certainly within our prerogative to determine that those funds will not be used to support an institution which is rejected by the vast majority of the American people.

Id. See also 142 CONG. REC. H7480, H7493 (1996) (statement of Rep. Weldon).

[T]he Federal Government generally recognizes State documents in granting benefits and privileges to married individuals. Veterans' benefits, labor policies, Federal health and pension benefits, and Social Security benefits are just a few of the areas that would be subjected to substantive revision if Congress does not act soon. I think it would be wrong to take money out of the pockets of working families across America and use those tax dollars to give Federal acceptance and financial support to same sex-marriages.

Id. See also 142 CONG. REC. H7480, H7495 (1996) (statement of Rep. Lipinski).

[I]f the Federal Government does not act now, and Hawaii legalizes homosexual marriage, the Federal Government would then be obliged to provide the same benefits that heterosexual marriages currently receive. Unless this bill is passed establishing a Federal definition of marriage, all Americans will then be paying for benefits for homosexual marriages.

Id.

142. See, e.g., 142 CONG. REC. H7480, H7487 (1996) (statement of Rep. DeLay). "Children do best in a family with a mom and a dad." *Id.* See also 142 CONG. REC. H7480, H7488 (1996) (statement of Rep. Stearns). "[Without DOMA] children will suffer because family will lose its very essence." *Id.* See also 142 CONG. REC. H7480, H7493 (1996) (statement of Rep. Weldon). "The marriage relationship provides children with the best environment in which to grow and learn." *Id.*

143. See, e.g., 142 CONG. REC. H7480, H7486 (1996) (statement of Rep. Seastrand). "We as legislators and leaders for the country are in the midst of a chaos, an attack upon God's principles. God laid down that one man and one woman is a legal union. That is marriage, known for thousands of years. That God-given principle is under attack." *Id.* Considerations of divine intentions and/or desires are well beyond the scope of this Article. The author leaves these matters to those far better equipped to make such determinations.

144. *Legal Claims for Same-Sex Marriage*, *supra* note 40, at 772.

145. See *id.* at 800. The eight interests listed by Wardle are as follows: (1) safe sexual relations; (2) responsible procreation; (3) optimal child rearing; (4) healthy

the conclusion that the primary societal interests in marriage are those related to procreation,¹⁴⁶ and the procreative potential of male-female genital sex.¹⁴⁷ The discussion below groups, addresses, and refutes the justifications members of Congress offered during the DOMA debates for enacting a federal law defining marriage as purely opposite-sex. The discussion also addresses and refutes the justifications of legal and social scholars mentioned above.

A. ENCOURAGING STABLE AND LOVING
RELATIONSHIPS – “LOVE AND MARRIAGE, LOVE
AND MARRIAGE...”¹⁴⁸

Supporters of marriage attempt to justify the institution by citing the social goal of encouraging stable and loving relationships.¹⁴⁹ This justification is inadequate, however, as stable and loving relationships are naturally occurring.¹⁵⁰ If the institution of marriage were eliminated, people would continue to fall in love, form stable relationships, and create family units.¹⁵¹ Legal marriage is also unnecessary to achieve the goal of stable and loving relationships because people form such relationships even when denied access to marriage. The stable and loving relationships formed by numerous same-sex couples supports this statement,¹⁵² as do the relationships between slaves in the early

human development; (5) protecting those who undertake the most vulnerable family roles for the benefit of society, especially wives and mothers; (6) securing the stability and integrity of the basic unit of society; (7) fostering civic virtue, democracy, and social order; and (8) facilitating inter-jurisdictional compatibility. *Id.* at 779-80.

146. *See id.* at 782. The procreation-specific interests listed by Wardle are “(1) perpetuation and survival of the species, (2) public health and child welfare, (3) linking procreation with child rearing and connecting parents to offspring, and (4) protecting the social order and social institution that best fosters responsible procreation.” *Id.*

147. *See id.*

148. Sammy Cohn & Jimmy Van Heusen, *Love and Marriage* (1955).

149. *See* George W. Dent, *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 590 (1999) (identifying the justification of encouraging stable and loving relationships and classifying it as false and unpersuasive).

150. *See id.* at 591.

151. Sadly, American history provides substantial evidence for this contention. Young America denied slaves entrance into the institution of marriage. *See* COTT, *supra* note 7, at 33. Despite this, slaves continued to maintain loving relationships, form families whenever possible, and have children whom they raised to the best of their abilities under the circumstances. *Id.*

152. Examples of these couples include the plaintiffs in *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999) (“Plaintiffs are three same-sex couples who have lived together in committed relationships for periods ranging from four to twenty-five years. Two of the couples have raised children together.”). *See also* Weigand v. Houghton, 730

days of the Union¹⁵³ and the relationships of unknown numbers of inter-racial couples when states criminalized such marriages.¹⁵⁴

An incredible variety of stable and loving relationships exist outside of the marital context, as well as between married individuals and individuals other than their spouse.¹⁵⁵ The relationships between partners of the same sex, unmarried opposite-sex partners, friends, and family members are just a few examples. Furthermore, love is not a legal prerequisite to, or requirement of, legal marriage.¹⁵⁶ Therefore, legal marriage does not guarantee the existence of love in any given relationship.

Considering the rate at which marriages end, either because of divorce or the death of one partner,¹⁵⁷ marriage does not make a relationship particularly stable. An examination of the rhetoric of "opposite-sex only" marriage also reveals that the definition of "stability" is rather pliable. The American Heritage Dictionary defines "stability" as, "resistance to change, deterioration, or displacement."¹⁵⁸ However, experience tells us that with respect to marriage, "stability" is often used interchangeably with "keeping up appearances."¹⁵⁹ Given the benefits of marriage¹⁶⁰ and the

So.2d 581, 584 (Miss. 1999) Petitioner and his male partner had been together for eight years, jointly owned their home and "entered into a living trust agreement and domestic partnership agreement [and held] themselves out as a couple and describ[ed] their relationship as monogamous." *Id.*

153. See COTT, *supra* note 7, at 32-49 (describing the laws, social behaviors, and issues arising from the formation of marriage-like relationships and families between slaves).

154. The Lovings, defendants in *Loving v. Virginia*, are a single, brave example. 388 U.S. 1,3 (1967). The Lovings pled guilty to the charge of marrying interracial and were sentenced to one year in jail. *Id.* However, the trial judge suspended the sentence on the condition that "the Lovings leave the State and not return to Virginia together for [twenty-five] years." *Id.*

155. See Dent, *supra* note 149, at 591 (noting that the state prohibits a number of loving relationships from becoming marriages, including love between relatives, the love married individuals have for people other than their spouse, the love of children, and the love people feel for their pets).

156. See *id.*

157. See CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 126, at 1 tbl. 1. See Arland Thornton, *Comparative and Historical Perspectives on Marriage, Divorce, and Family Life*, 1994 UTAH L. REV. 587, 595 (noting that divorce has over-taken mortality as the cause of most marital dissolutions).

158. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1687 (Houghton Mifflin Company 4th ed. 2000).

159. William E. Nelson, *Patriarchy or Equality: Family Values or Individuality*, 70 ST. JOHN'S L. REV. 435, 445 (1996) (describing various ways tried by the state of New York to keep people married despite the desire of at least one of the spouses to divorce).

160. See *supra* notes 83-94 and accompanying text (discussing the benefits of marriage under federal statutory law).

social stigma and financial consequences of divorce,¹⁶¹ reasonable individuals should attempt to stay married as long as possible. Those in favor of marriage would likely cite this as support for the institution and proof of the stability the institution creates. This reasoning, however, is faulty.

Although considerable pressure exists to remain married, half of all marriages still end in divorce.¹⁶² The inference is that many dissatisfied or truly unhappy individuals remain married.¹⁶³ This is not to imply that the majority of marriages are unhappy. However, because reasonable individuals will only divorce when their dissatisfaction with their marriage exceeds the sum of the benefits of being married and their aversion to the consequences of divorce, it follows that at least some individuals remain married despite some level of unhappiness.¹⁶⁴ While outwardly this may create the appearance of stability, two people unhappily wed do not represent a socially stable or desirable ideal. Unhappy marriages may lead to socially undesirable behaviors like adultery, alcohol abuse, and domestic violence.¹⁶⁵ Additionally, by remaining in "loveless" marriages for the sake of "stability," individuals are prevented from developing other truly loving and, therefore, more stable relationships. In other words, in marriage, "loving" relationships are often forsaken for "stable" ones.

161. See, e.g., Raymond C. O'Brian, *The Reawakening of Marriage*, 102 W. VA. L. REV. 339, 355-56 (1999) (discussing the emotional, psychological and economic ramifications of divorce).

162. See CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 126 and accompanying text.

163. See generally Richard B. Goldbloom, *Back to the Kitchen*, 36 CLINICAL PEDIATRICS 373 (1997). Dr. Goldbloom's experiences support this contention. In asking his patients to describe their marriage in one word Dr. Goldbloom notes: "[t]he occasional instant smile and an unhesitating 'Great!', but too often a puzzled silence, a frown, averted eyes, or outright tears speak volumes about the quality of the union." *Id.* at 376.

164. If this assumption is correct, individuals will divorce at different levels of dissatisfaction depending on the value they place on the variables within the equation. Examples of the working variables include the value to the individual of the economic benefits of marriage, aversion to the social stigma of divorce, the egos of the individuals involved and importance to the individuals of being happy within their marriage.

165. See Michael F. Myers, *Treating Troubled Marriages*, 29 AM. FAM. PHYSICIAN 221, 226 (1984). Myers states:

Marital distress inevitably touches all members of the family and can have profound effects on both physical and mental health. Among the symptoms or situations that may be associated with marital problems are bodily complaints (frequent headaches, low back pain, gastrointestinal disorders), depression, anxiety states, alcoholism, sexual dysfunction, extramarital activity, wife abuse, physical and/or sexual abuse of children, juvenile delinquency and adolescent suicidal behavior.

Id.

Consider cases involving domestic abuse within marriage. Such cases may seem extreme, yet experts estimate abuse occurs in approximately one quarter of all relationships,¹⁶⁶ including marriages.¹⁶⁷ Undoubtedly, abusive marriages are not the “stable and loving relationships” advocates cite in support of legal marriage. In addition to myriad other factors that act to keep victims in abusive relationships,¹⁶⁸ abused wives and husbands experience the additional pressures felt by all married couples to preserve their legal union. Although this makes marriage more “stable” than similarly situated unmarried relationships, such twisted stability is not something society should advocate. In abusive marriages many of the justifications cited in support of marriage – including the economic consequences of divorce¹⁶⁹ and the belief that children benefit from the marital status of their parents¹⁷⁰ – work to trap individuals in cycles of abuse. Ironically, the justifications for marriage work to prevent individuals in abusive marriages from leaving the abuser and gaining the ability and opportunity to develop truly healthy and loving relationships. In these cases, the justifications of marriage prevent individuals

166. See Pamela M. Jablow, *Victims of Abuse and Discriminations: Protecting Battered Homosexuals Under Domestic Violence Legislation*, 28 HOFSTRA L. REV. 1095, 1105 (2000). “Researchers approximate that heterosexual domestic violence occurs in twenty-five percent of all such couples. The incidence of battering in homosexual relationships is estimated to occur at the same rate.” *Id.* See also Patricia Tjaden & Nancy Thoennes, U.S. Department of Justice, Office of Justice Programs National Institute of Justice, and Center for Disease Control, *Findings from the National Violence Against Women Survey: Extent Nature and Consequences of Intimate Partner Violence*, NJC 181867 at 9, Exhibit 1 (July 2000) (reporting that 22.1% of women and 7.4% of men – a total of 1.3 million women and 834,732 men in the preceding 12 months of the survey – are the victims of “intimate violence” in their lifetime) available at <http://www.ncjrs.org/txtfiles1/nij/181867.txt>. See also Virginia H. Murray, *A Comparative Survey of the Historic Civil, Common, and American Indian Tribal Law Responses to Domestic Violence*, 23 OKLA. CITY U. L. REV. 433, 433 (1998) “By some estimates, there are as many as four million incidents of domestic violence per year in the United States.” *Id.* Also, the FBI “reports that a woman is beaten every eighteen seconds, that domestic violence is a leading cause of injury to women in the United States, and that one-half of all homeless women are refugees from domestic violence.” *Id.*

167. See Michelle J. Anderson, *A License To Abuse: The Impact of Conditional Status on Female Immigrants*, 102 YALE L.J. 1401, 1402-03 (1993). “Studies vary widely in estimating the percentage (between 12-50%) of all married women who experience some form of domestic battery in their lives.” *Id.*

168. See *State v. Kelly*, 478 A.2d 364, 372-73 (N.J. 1984) (discussing the reasons women abused by their intimate partners remain in the relationships).

169. See *infra* notes 194-202 and accompanying text (discussing the economic implications of divorce).

170. See *infra* notes 177-206 and accompanying text (refuting the contention that married couples provide the best environment in which to raise children).

from developing truly stable relationships.

If society truly has an interest in encouraging stable and loving relationships, then society should encourage people to love, not to marry. If stable and loving relationships are truly at issue, society should reward all such relationships equally. If the societal goal is stable and loving relationships, then society should afford stable and loving gay, straight, polygamous, and incestuous¹⁷¹ relationships the same social, economic and legal treatment.¹⁷² Therefore, in restricting marriage to a single form and then encouraging marriage by according married people

171. Advocates of opposite-sex only marriage often imply, and in some cases expressly make, the argument that recognition of same-sex marriage is a slippery slope to demands for legal recognition of polygamous relationships, incestuous relationships, and "relationships" between individual humans and animals that involve sexual acts. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 195-96 (1986) (claiming that if the Court were to find homosexuals have a fundamental right to engage in private, consensual homosexual sex, "it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home."); U.S. NEWSWIRE, *Derby Citizen Advises Parents of Their Right To Opt Out*, at <http://www.usnewswire.com/topnews/search3/0802-108.html> (Aug. 2, 2001) (reporting that a group campaigned for Vermont's parents to demand that schools "specifically refrain from addressing issues of homosexuality, bisexuality, lesbianism, transvestitism, transexuality, sado-masochism, pedophilia, bestiality or other alternatives to monogamous heterosexual sex within marriage in any manner which would convey the message to [a] child that such orientations/behaviors are immutable, unchangeable, natural, normal, or harmless"). See also Roger D. Willis, *Letter to the Editor*, VENTURA COUNTY STAR, March 30, 1999, available at LEXIS, News Library, AllNews File. Willis urged Californians to vote against California Bills AB 222, SB1260, AB 1001, AB 26, AB 107, SB 75, SB 118, which Willis claimed were "designed to require special status to sodomites, and will require your public schools to teach things you neither believe to be true nor condone." *Id.* Willis argued, "[I]f we, as a society, allow these bills to pass, can you guess what might be next? ... Can bestiality [sic] be far behind?" *Id.* See also James G. Callahan, *Letter to the Editor: Same-Sex Marriage*, ST. LOUIS POST-DISPATCH, December 14, 1996 at 35. In arguing against same-sex marriage, Callahan implied a slippery slope by asking, "Should polygamy be approved? How about bestiality? Is any perversion to be approved because we are so enlightened in the '90s?" *Id.* With the single exception that follows, the author makes no comment on, does not speak to, and offers no opinion with respect to the current or future legal status of polygamous or incestuous relationships. The author notes only that these types of relationships often include power disparities as well as a host of other factors that make them extremely complicated and controversial subjects. Respecting references to bestiality, the author will only go so far as to state that such "relationships" are so far afield from relationships between human beings that they are inapplicable and inappropriate in rational discussions of romantic, intimate, or committed human relationships. The author will not substantively address such references further as doing so would give such references undeserved validity.

172. This is not to advocate, condemn, or condone any or all of these forms of relationships. This is only to make the point that it is the feelings, behavior, and circumstances of the individuals within a relationship, not the legal status of the relationship, that makes the relationship stable and loving.

benefits and privileges, society: (1) provides less incentive for individuals uninterested in marriage or unable to marry to form stable and loving relationships, assuming marriage does in fact create such relationships; (2) fails to reward individuals who create stable and loving relationships outside of marriage, thereby creating unjustified social and economic inequality; and (3) wastes social resources by rewarding married individuals on the assumption that their marriage is stable and loving, even when that assumption is false.¹⁷³ Abolishing the legal institution of marriage and instead enacting general laws that confer the rights, privileges, and obligations currently afforded marriage upon those within stable and loving relationships would accomplish this goal far more effectively and equitably.¹⁷⁴

Furthermore, it is impossible to know whether the longevity of any given relationship would change with marital status. Thus, it is impossible to determine the actual effectiveness of marriage in encouraging "stable" relationships. One can only know the outcome of a single series of events; proof of "what would have been" is impossible to obtain. Therefore, we cannot know whether a couple whose marriage lasted five years would have remained together for six, ten, or twenty years if they had never married. Likewise, we can never know whether an unwed couple that breaks up after three years would have lasted four, five, fifteen, or thirty years had they been legally wed. However, unless we define

173. Take, for example, same-sex couples who travel to Vermont to enter into a civil union. See *supra* notes 119-120. Despite the fact that a number of these couples travel considerable distances to obtain the closest available substitute to a legal marriage, they receive none of the legal benefits of marriage in any state but Vermont. Thus, while two opposite-sex individuals can meet in a Las Vegas casino at 9:00 a.m. and have every state in the union regard them as legally married by midnight, a same-sex couple that has lived together for twenty-five years and traveled from San Diego, California to Burlington, Vermont for a "civil union" is still "unmarried" under the laws of every state. While society, the federal government, and all of the states would immediately confer the benefits of marriage upon the Las Vegas couple, the Burlington couple would receive only those benefits accorded married individuals under Vermont statutory law, and even then only in Vermont. This example highlights the failings of this particular justification of marriage. See generally Mark Strasser, *Mission Impossible: On Baker, Equal Benefits, and the Imposition of Stigma*, 9 WM. & MARY BILL RTS. J. 1, 2 (2000) (observing that one of the primary failings of civil unions is their "lack of portability"). Strasser observes that "[a] civil union alternative for same-sex couples, while better than what any other state has offered thus far, nonetheless cannot offer equal benefits, protections, and security, precisely because civil unions are less likely than marriages to be recognized in other jurisdictions." *Id.* Such a system can hardly serve to create or encourage stable and loving relationships.

174. See *infra* notes 302-308 and accompanying text (discussing a merit-based system of benefit distribution).

an institution with a failure rate of 50% as "stabilizing,"¹⁷⁵ marriage does not make relationships particularly stable. We will more equitably and more effectively achieve the stated goal of creating stable relationships by abolishing marriage and instead encouraging and rewarding those aspects of relationships that do enhance their stability.¹⁷⁶

B. GOALS RELATED TO CHILD REARING

Proponents of opposite-sex only marriage offer a few offspring related justifications for according benefits and privileges to marriage, and by implication, perpetuation of the institution. They argue that the opposite-sex institution of marriage is the best for children¹⁷⁷ and that society should reward the procreative potential of marriage.¹⁷⁸

Studies confirm that children raised by gay and lesbian individuals are just as healthy and happy as children raised by heterosexual individuals.¹⁷⁹ However, marriage advocates continue to argue that purely opposite-sex marriage is necessary to serve society's interest in protecting children.¹⁸⁰ These

175. See CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 126 and accompanying text.

176. See *infra* notes 302-308 and accompanying text.

177. See, e.g., Massachusetts Citizens for Marriage at <http://www.marriagematters.org/FAQ> (last visited July 29, 2002). The Massachusetts Citizens for Marriage wish to change the Massachusetts Constitution such that the Commonwealth of Massachusetts would recognize only opposite-sex unions as marriages. *Id.* In support of their goal, the Citizens claim that "children need to be raised, whenever possible, by a mother and a father in a committed marriage. This provides a stable foundation protecting the child from neglect and has been supported throughout history by common sense and scientific studies." *Id.* The Citizens cite no authority for their claim, but go on to conclude that "[a]ny other relationship, such as civil unions, gay marriages, or domestic partnerships, seeking to redefine the meaning of marriage or family, will be detrimental to society and to our children." *Id.*

178. See Teresa Stanton Collett, *Should the Government Recognize Same-Sex Marriage?: Legal, Equitable, and Political Issues*, 7 U. CHI. L. SCH. ROUNDTABLE 33, 36 (2000). See also Duncan, *supra* note 92, at 78. Duncan believes that "the marriage-based family deserves preferred legal status precisely because it is the best forum for providing all of the contributions to children and to society that are offered only in part by other relationships." *Id.*

179. See Ellen C. Perrin, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341 (2002). See also Ellen C. Perrin & Heidi Kulkin, *Pediatric Care for Children Whose Parents Are Gay or Lesbian*, 97 PEDIATRICS 629 (1996). Perrin and Kulkin state that "[a] growing number of children have at least one parent who is gay or lesbian. There is no evidence that these children experience any particular difficulties as a result of their parent's sexual orientation." *Id.* at 629.

180. See, e.g., Massachusetts Citizens for Marriage, at <http://www.marriagematters.org> (last visited July 29, 2002). See also *supra* note

advocates claim that child rearing within same-sex relationships is inherently harmful because it denies children the combination of mother and father.¹⁸¹ While typically applied exclusively to gay and lesbian couples, confining this argument in such a manner is unnecessary. Single heterosexual parents may also deny their children the right of parenting by both a mother and a father.¹⁸² This argument is ineffective regardless of the application because "conscientious gay parents, like conscientious straight single parents, take steps to ensure their children have male and female role models."¹⁸³ Medical research also supports this contention.¹⁸⁴ Additionally, "[e]vidence exists that the ways in which a family supports the growth and development of its children is far more important than its particular structural characteristics."¹⁸⁵

The cases of *Weigand v. Houghton*¹⁸⁶ and *Pèople v. Silva*¹⁸⁷ provide examples of cases where, despite the presence of a legal marriage, the home of a married couple was far from an ideal situation in which to raise a child. In *Weigand*, the Supreme Court of Mississippi upheld a denial of a gay father's request for

177 and accompanying text (describing the claims of the Massachusetts Citizens for Marriage that a man and a woman legally wed is the best family form in which to raise children).

181. See Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547, 1551 (1998). "The most recent empirical evidence now available establishes what Americans instinctively know – a child benefits measurably by having a married mother (a female) and father (a male) in the home. The benefits are physical, emotional, psychological, and economic." *Id.* at 1552.

182. See Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 21-22 (1995). "Single-parent families now constitute twenty-six percent of all families with minor children and are the most rapidly growing family form in America." *Id.* The contention that single parents do their children injustice is also patently racist. See *id.* "When family households are broken down by race, single-parent households are the dominant family form for African-Americans and a significant and growing alternative family form for Hispanics (thirty-three percent) and whites (twenty-three percent)." *Id.* As Dowd notes, "[m]any commentators use the racialization of unwed single parenthood to reserve the highest level of stigma for black single mothers." *Id.*

183. DAN SAVAGE, THE KID: WHAT HAPPENED AFTER MY BOYFRIEND AND I DECIDED TO GO GET PREGNANT, AN ADOPTION STORY 58 (1999).

184. See Perrin, *supra* note 179, at 342. Perrin states that "[l]esbian mothers strongly endorse child-centered attitudes and commitment to their maternal roles and have been shown to be more concerned with providing male role models for their children than are divorced heterosexual mothers." *Id.*

185. Ellen C. Perrin, *Children in Diverse Family Constellations*, 99 PEDIATRICS 881 (1997). Perrin states, "Neither advantage nor disadvantage for a child comes automatically with any specific type of family. Families of diverse makeup are capable of supporting the healthy development of their children and meeting their physical and emotional needs." *Id.* at 881-82.

186. 730 So.2d 581 (Miss. 1999).

187. 33 Cal. Rptr. 2d 181 (Cal. App. 4th 1994).

residential custody of his son¹⁸⁸ even though the mother's home was "an explosive environment in which the unemployed stepfather is a convicted felon, drinker, drug-taker, adulterer, wife-beater, and child-threatener, and in which the mother has been transitory, works two jobs, and has limited time with the child."¹⁸⁹ The court made "such a decision despite the fact that [the child]'s father has a good job, a stable home and does all within his power to care for his son."¹⁹⁰

In *Silva*, the defendant married the woman who became his wife shortly after learning she was pregnant.¹⁹¹ The defendant then set out on a course of extremely violent abuse of his wife, including raping her on no less than four occasions.¹⁹² On these occasions, his wife "did not want to have intercourse because her doctor had warned her it might endanger her pregnancy."¹⁹³ Despite the fact that the Silvass were legally married, one can infer that the Silva home was a less than ideal environment in which to rear a child.

Case law is rife with cases like *Weigand* and *Silva* in which children live in homes where, despite the "married" legal status of the primary care givers, the home is an unsupportive, unhealthy, neglectful, and even abusive environment for a child. From these cases it is abundantly clear that legal marriage alone fails to make an individual or couple better equipped to raise a child than an unmarried individual or couple, and that the married individual or couple cannot necessarily provide the best environment available for the child. Thus, in addition to failing to justify "opposite-sex only" marriage, the justifications for marriage relating to the creation of healthy or ideal environments for childrearing fail to justify marriage at all.

Many of the arguments supporting child rearing within marriage focus on the higher rate of poverty among divorced women and their children.¹⁹⁴ This implies that the solution to this problem is to remain married. Considering, however, that "more childhood poverty occurs within two-parent families than one-

188. *Weigand*, 730 So.2d at 587-88. (deciding that the father retained joint custody, but not residential custody of his son).

189. *Id.* at 588 (McRae, J., dissenting).

190. *Id.*

191. 33 Cal. Rptr.2d at 183.

192. *Id.* at 182.

193. *Id.* at 183.

194. See, e.g., O'Brian, *supra* note 161, at 355-57 (noting that divorced women and their children, especially women and children of color, are more likely to be impoverished than their married counterparts).

parent families," marriage is not the solution to poverty.¹⁹⁵

Additionally, advocating marriage as the solution to poverty among single women and their children neglects the underlying causes of the elevated poverty rate within these particular demographic populations.¹⁹⁶ Contributing factors include the lower earning potential of women compared to men in general,¹⁹⁷ child care expenses,¹⁹⁸ lack of support for single mothers from the fathers of their children,¹⁹⁹ and the absence of insurance benefits in jobs traditionally held by women.²⁰⁰ Attempting to use the institution of marriage to provide for women and children instead of addressing the underlying causes of poverty of single women and their children, therefore, does little to further the stated goal of protecting children. Other solutions, such as the enactment of general laws forcing non-custodial parents to financially assist the custodial parents of their children, are already in place.²⁰¹ Increased enforcement of these laws would eliminate, or at least alleviate, the poverty of mothers and their children regardless of marital status. Furthermore, the mere fact that a family's earnings exceed the poverty level does not prove that the family adequately cares for its children, that the family spends an adequate sum on necessities for the children, or that the home is a particularly healthy environment in which to raise children.²⁰²

195. Dowd, *supra* note 182, at 27.

196. See *id.* Dowd writes, "The poverty of single-parent families is tied not to family form but rather to the disadvantaged economic position of the mothers heading most of these families." *Id.*

197. See Kathy R. Davis, *Bankruptcy: A Moral Dilemma for Women Debtors*, 22 LAW & PSYCHOL. REV. 235, 239-40 (1998) (discussing why women file for bankruptcy) (quoting Karen Gross, *Revision of the Bankruptcy System: New Images of Individual Debtors*, 88 MICH. L. REV. 1506, 1527 (1990)).

198. See *id.*

199. See *id.* at 241.

200. See *id.* This fact reveals gender inequality in two distinct ways. The first is that traditional women's jobs are deemed less valuable than traditional men's jobs and, therefore, come with less compensation in the form of both benefits and pay. The second gender inequality is that marriage is a condition precedent to coverage, for many women, under the medical insurance plans offered as a benefit of jobs historically classified as men's. In this manner, society makes marriage a necessity for women, while creating no such need in the male population. Thus, women are kept dependent upon marriage and – under DOMA and similar laws – men, for access to medical care for themselves and their children.

201. See Nat'l Women's Law Center, *As Amici Curiae in Support of Petitioners: In the Supreme Court of the United States*, 10 S. CAL. REV. L. & WOMEN'S STUD. 343, 368 (2001).

202. See, e.g., Kate Hollenbeck, *Between a Rock and a Hard Place: Child Abuse Registries at the Intersection of Child Protection, Due Process, and Equal Protection*, 11 TEX. J. WOMEN & L. 1, 39-40 (2001) (noting that child abuse and child neglect are likely considerably under-reported in White, affluent families and that the

Moreover, the stigma of divorce, not the end of their parent's marriage, can have a profound mental and emotional impact on children.²⁰³ Just as society historically stigmatized children born outside of marriage as "illegitimate", society currently stigmatizes the "children of divorce."²⁰⁴ Without marriage, there would be no divorce. Instead, the relationships of all parents would share the same legal status.²⁰⁵ The elimination of marriage would eradicate illegitimacy as well as prevent children from suffering the stigma of divorce.²⁰⁶

C. THE MORALITY JUSTIFICATION

Proponents of marriage claim that marriage enhances the morality of society.²⁰⁷ This implies that entering into and existing within the legal institution of marriage is morally superior to existing outside of the institution.²⁰⁸ The condition of "married" is not morally superior to other conditions.²⁰⁹ These claims, therefore, rest upon a critical assumption: by entering into and remaining within the legal institution of marriage, individuals achieve, or at least gain the ability to achieve, certain social goals.²¹⁰ However, married individuals are not the only members

socioeconomic position of these families can help hide incidents of abuse and neglect).

203. See generally Marcia Lipman Lebowitz, *Divorce and the American Teenager*, 76 PEDIATRICS 695, 695-98 (1985) Lebowitz described the effects of divorce on children, noting, "The term, 'children of divorce' has become part of our every-day language, but unfortunately it carries a subtle negative connotation, an association of problems and failure." *Id.* at 697.

204. *Id.* "These attitudes are subtle but pervasive, and their impact on 'children of divorce' may be as important as the impact of divorce itself." *Id.* at 698.

205. See FINEMAN, *supra* note 112, at 229.

206. *Cf. id.* at 230 (asserting that the end of legal marriage would preclude "differential treatment of children based on their parents' marital status").

207. Bradley, *supra* note 4. See also *infra* note 214 and accompanying text; *supra* note 140 and accompanying text (remarks of Rep. Delay).

208. Bradley, *supra* note 4. See also *infra* note 214 and accompanying text; *supra* note 140 and accompanying text (remarks of Rep. Delay).

209. If this were so, then all married people, including adulterers, child and spousal abusers, and individuals who abandoned their families but did not divorce, would be morally superior to all unmarried people. It is doubtful that even Bradley, Coolidge, Duncan, Wardle, or the members of Congress that supported DOMA on some assumption of the heightened morality of marriage would endorse such a conclusion.

210. See, e.g., Duncan, *supra* note 92 and accompanying text (claiming that entrance into the legal status of "married" allows couples to contribute more to society than single individuals and unmarried couples). Examples of the assumptions about the ability of marriage to achieve, or provide couples the ability to achieve, certain social goals include the assumptions that marriage enhances the love and stability of a relationship and encourages procreation and childrearing.

of society to achieve these goals, and not all marriages achieve these goals.²¹¹ If marriage fails to achieve specified social goals and thus fails to increase the morality of society, then the assumption necessary to conclude that being married is morally superior to being unmarried is false. Therefore, the morality justification for the existence of opposite-sex only marriage is invalid. It follows that supplanting the institution of marriage with a system that rewards individuals and relationships proportionally to their success in achieving the specified social goals will increase the morality of society.

If marriage is the moral foundation of our society, yet half of all marriages end in divorce,²¹² then society is on very shaky moral ground indeed. Accordingly, there is no shortage of suggestions for potential ways to fix the current marriage situation.²¹³ Considering the flawed nature of the institution of marriage, scholars would better serve society by contemplating the elimination of marriage and generating ideas for the form and function of alternatives.²¹⁴

Additionally, reasonable minds disagree on whether the current American legal institution of marriage actually enhances the morality of American society.²¹⁵ Even those most passionate about the marital ideal of a legally and socially recognized permanent, monogamous, heterosexual union concede that in order for the institution to contribute to the morality of society, the institution must actually work.²¹⁶ In other words, for marriage to strengthen the moral foundation of society, those unions recognized as legal marriages must be permanent, monogamous,

211. See *supra* notes 68-82 and accompanying text (discussing the over- and under-inclusive nature of benefit distribution through marriage).

212. CTRS. FOR DISEASE CONTROL, *supra* note 126.

213. See Hager, *supra* note 127, at 570 (noting that the "battle cry" of the Louisiana legislature in enacting the Covenant Marriage Act of that state was "strengthening marriage").

214. See, e.g., *infra* notes 302-308 and accompanying text (discussing a merit-based system of benefit distribution).

215. Compare Bradley, *supra* note 3, at 748 (arguing that marriage is morally superior to other relationships because of the ability of the married couple to perform "reproductive-type acts" within the marriage), with Chai R. Feldblum, *Constructing Family, Constructing Change: Shifting Legal Perspectives on Same-Sex Relationships: Religion, Morality and Sexuality: A Progressive Moral Case for Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 485, 493 (1998) (questioning whether marriage actually contributes a "moral good" to society).

216. See generally Collett, *supra* note 178 (addressing the status of individuals who divorce and then remarry during the lifetime of their prior spouse, stating that "the people in those marriages are recognized in the law, but that's not taken to be legal repudiation of the moral and theological beliefs of, for example, Catholics who hold the position of the Church").

and heterosexual.²¹⁷ Yet, individuals can marry, reap the benefits of marriage, and then break the marital vows without incurring the stigma of divorce simply by choosing not to divorce. For example, individuals can fail to be monogamous by committing adultery. They can even fail to be heterosexual, yet remain married.²¹⁸ Even if a marriage fails, individuals can mitigate their damages by re-marrying and re-achieving the legal and social status of marriage as many times as they wish.²¹⁹ This ability to string together permanent, monogamous unions makes each union non-permanent. If permanent, monogamous unions deserve reward for their contribution to the morality of society, then society should reward permanent, monogamous unions, not marriages.²²⁰

D. THE ECONOMIC JUSTIFICATION

With the exception of the social status that accompanies marriage and the social stigma that accompanies being unmarried, many of the benefits and protections of marriage are economic.²²¹ Many economic benefits resulting from marriage relate to the federal income tax system. While the so-called "marriage penalty"

217. See Bradley, *supra* note 3, at 731-32 (contending that the "moral truth [is] that a valid marriage is indissoluble" and monogamous). See also *Legal Claims for Same-Sex Marriage*, *supra* note 40, at 750 ("The legal status of marriage has been reserved exclusively for special covenant heterosexual unions because those unions are unique and uniquely beneficial.").

218. See *United States v. Phillips*, 52 M.J. 268 (C.A.A.F. 2000). In *Phillips*, the defendant married in order to receive military benefits that would allow him to live in civilian housing with his male partner. *Id.* at 269. It also appears that the defendant's legal wife and his partner's legal wife may have been involved in a lesbian relationship. *Id.* at 271. See also *RGM v. DEM*, 410 S.E.2d 564, 565 (S.C. 1991) (The respondent attempted to salvage his marriage despite the fact that his wife was having an extra-marital affair with a woman. *Id.*

219. Most states have statutes similar to that of either Massachusetts or Minnesota. See MASS. ANN. LAWS ch. 208, § 24 (2002) ("After a judgment of divorce has become absolute, either party may marry again as if the other were dead."); MINN. STAT. § 517.03 (2001) ("A marriage entered into before the dissolution of an earlier marriage of one of the parties becomes final" is prohibited). These statutes effectively prohibit bigamy, but not infinite re-marriages. See *id.*

220. As noted, this is not currently the case. See *supra* note 218 and *infra* notes 68-82 and accompanying text (discussing the ways in which according benefits to marital status unjustifiably rewards some relationships and unjustifiably denies benefits and protections to others).

221. See generally GAO Report, *supra* note 68, at 1-3 (describing the ways in which various federal statutes economically benefit married couples). For example, "[t]he surviving spouse of a public safety officer killed in the line of duty is eligible for a death benefit of up to \$100,000." *Id.* at 5. The United States Code also contains laws "that provide for continuation of employer-sponsored health benefits after events like the death or divorce of the employee; and that give employees the right to unpaid leave in order to care for a seriously ill spouse." *Id.*

and "marriage bonus" cause unmarried individuals to benefit more than their married counterparts in one instance and extract less from the U.S. Treasury in the other,²²² when considered simultaneously with the provisions below, the federal income tax system treats many married couples markedly better than similarly situated unmarried individuals.²²³

For example, unmarried couples may not transfer property between themselves without incurring tax consequences.²²⁴ Yet "[t]he law permits transfers of property from one spouse to another (or to a former spouse if the transfer is incident to a divorce) without any recognition of gain or loss for tax purposes."²²⁵ Additionally, "[g]ifts from one spouse to a third party are deemed to be from both spouses equally."²²⁶ Together, "[t]hese provisions permit married couples to transfer substantial sums to one another, and to third parties, without tax liability in circumstances in which single people would not enjoy the same privilege."²²⁷ Moreover, "[f]or estate tax purposes, property transferred to one spouse as the result of the death of another is deductible for purposes of determining the value of the decedent's estate."²²⁸

Therefore, while all U.S. taxpayers share the financial burden of maintaining the Republic, the individuals in one readily

222. See Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787, 789 (1997) (stating that "[t]he marriage penalty is greatest when a total household income is split equally between the spouses," and that the "marriage bonus is greatest when total household income is earned by only one wage earner").

223. See Patricia A. Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465, 467 (2000) (noting that "approximately half the married couples filing tax returns report bonuses and half report penalties") (citing the Cong. Budget Office, 105th Cong., *For Better or for Worse: Marriage and the Federal Income Tax*, 31 tbl.5 (1997)). The so-called "marriage penalty" and "marriage bonus" may represent the most controversial and debated interfaces between the federal income tax system and marriage. Despite all of the analysis, the precise economic effect the combination marriage and taxes will have on a couple depends on the economic position of the couple. See Ann F. Thomas, *Forum on Married Women and the Income Tax: Marriage Penalties and Marriage Bonuses of the 105th Congress: Observing Money, Marriage and Taxation*, 16 N.Y.L. SCH. J. HUM. RTS. 127, 153-59 (1999). Therefore, married couples whose financial situation allows and encourages them to utilize these provisions of the Internal Revenue Code experience the benefits of marriage related to taxation most acutely. By the same reasoning, unmarried couples in the same financial position will experience this disparity in treatment, and exemplify this inequality, most acutely.

224. See GAO Report, *supra* note 68, at 4.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

identifiable group, married people, receive significantly better treatment for the purpose of taxation than the individuals in another readily identifiable group – unmarried people. As similarly situated individuals within these two groups do not contribute more or less to the Republic by virtue of their marital status alone, the state cannot justify these differences in treatment.²²⁹

During the DOMA debates, the fact that all taxpayers contribute financially to married couples was foremost in the minds of many Congress members. For example, Representative Barr claimed that without DOMA, Congress would have no choice but to “throw open the doors of the U.S. Treasury to be raided by the homosexual movement.”²³⁰ Representatives Weldon²³¹ and Lipinski²³² supported this implication by essentially stating that, should the federal government or any number of states recognize same-sex marriages, these couples would receive money contributed to the U.S. Treasury by all Americans. Yet the current system of taxation obligates unmarried individuals to pay for the economic benefits married couples receive. Therefore, the legal institution of marriage “throws open the doors of the U.S. Treasury to be raided”²³³ by married people.

Ultimately, this certain amplification of the unfairness inherent in the current institution of marriage with respect to same-sex couples failed to prevent DOMA from becoming law.²³⁴ The DOMA debate did, however, bring to light numerous economic facts that call the value and validity of marriage into question, not only as an exclusively opposite-sex institution, but as a legal institution at all.

Justifying the economic benefits of marriage with the social contributions of marriage begs the question of whether marriage actually achieves its purported social goals. If marriage fails to achieve those goals, and the goals are legitimate, then society should find an alternative to marriage that will successfully

229. See Darren Bush, *Moving to the Left by Moving to the Right: A Law & Economics Defense of Same-Sex Marriage*, 22 WOMEN'S RTS. L. REP. 115, 137 (2001) (suggesting that under a law and economics analysis, same-sex marriages may be economically beneficial to society).

230. *Supra* note 141, 142 CONG. REC. H7480, H7488 (statement of Rep. Barr).

231. *Supra* note 141, 142 CONG. REC. H7480, H7493 (statement of Rep. Weldon).

232. *Supra* note 141, 142 CONG. REC. H7480, H7495 (statement of Rep. Lipinski).

233. *Supra* note 141, 142 CONG. REC. H7480, H7488 (statement of Rep. Barr).

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

achieve those goals.²³⁵ The alternative of abolishing marriage and instead evaluating the social contributions of any given relationship or individual is much more closely related to the achievement of specific social goals.²³⁶ Under such a system, the state would provide or deny a couple or individual the economic rewards currently afforded marriage based on the merits and achievements of the relationship or the individual.²³⁷ A system granting economic benefits according to the actual social contribution of an individual or couple would not only encourage achievement of the social benefits of marriage, but would grant the benefits to those most deserving.²³⁸ As a merit-based system would accomplish the goals of marriage and distribute the economic benefits more accurately and equitably than the current system of marriage, such a system is superior to the current institution of marriage. Thus, society should eliminate marriage and replace it with such a system.²³⁹

E. THE TRADITION JUSTIFICATION – “TRADITION, TRADITION!”²⁴⁰

The comments of various members of Congress during the DOMA debates exemplify the misconception that marriage consisting of one man and one woman is the American marital tradition.²⁴¹ American tradition with respect to marriage, however, turns on how one defines tradition.²⁴² One way to define

235. See *infra* notes 302-308 and accompanying text (discussing the possibility of a merit-based system of benefit distribution).

236. See *infra* notes 302-308 and accompanying text.

237. See *infra* notes 302-308 and accompanying text.

238. Case law confirms that numerous unmarried couples achieve the cited social goals and benefits of marriage to at least some degree. See, e.g., *Irizarry v. Bd. of Educ.*, 251 F.3d 604, 606 (7th Cir. 2001) (observing that the unmarried plaintiff “lived with the same man for more than two decades and they have two (now adult) children”). See also *Baker v. State*, 744 A.2d 864, 867-68 (Vt. 1999) (describing the level of commitment and length of the relationships of the same-sex plaintiffs before the court). See also *Goode v. Goode*, 396 S.E.2d 430, 431-32 (W. Va. 1990) (reciting plaintiffs’ apparently uncontroverted allegation that she and her male partner pooled their assets, lived together for twenty-eight years, begat and raised four children together, and held themselves out as married despite the lack of a valid marriage license).

239. See *infra* notes 302-308 and accompanying text (discussing the possibility of a merit-based system of benefit distribution).

240. Jerry Bock and Sheldon Harnick, *Tradition* FIDDLER ON THE ROOF (1965).

241. See *supra* notes 139 (quoting Congress members’ arguments regarding tradition in favor of DOMA).

242. See, e.g., Milton C. Regan, Jr., *Reason, Tradition, and Family Law: A Comment on Social Constructionism*, 79 VA. L. REV. 1515, 1529-33 (1993) (discussing the relativism and interpretations necessary for arguments made

the tradition of marriage in America is the systematic elimination of all other forms of unions.²⁴³ In *Cleveland v. United States*,²⁴⁴ the Supreme Court upheld, over vigorous dissent, the criminal conviction of Mormon defendants under the Mann Act²⁴⁵ for "transport[ing] at least one plural wife across state lines, either for the purpose of cohabiting with her," or so that another married individual could cohabit with her.²⁴⁶ After *Cleveland*, the practice of any form of polyamorous relationship would likely receive similar treatment. Similarly, consanguineous marriages were legal in most states²⁴⁷ until banned by statute.²⁴⁸ Further, state legislatures across the country passed "mini-DOMAs" limiting marriage to opposite-sex unions in order to head-off potential attempts by same-sex couples to enter into legal marriages.²⁴⁹

regarding tradition and suggesting that "a better interpretation of our marital tradition is as the provision of social support for those who wish to make a commitment to emotional interdependence").

243. See COTT, *supra* note 7, at 3 (noting that throughout early American history those in power "endorsed and aimed to perpetuate nationally a particular marriage model: lifelong, faithful monogamy, formed by the mutual consent of a man and a woman, bearing the impress of the Christian religion and the English common law"). Under this model, the expectation was "for the husband to be the family head and economic provider, his wife the dependent partner." *Id.*

244. 329 U.S. 14 (1946).

245. 18 U.S.C. § 398 (current version at 18 U.S.C. § 2421 (2000)).

246. *Cleveland*, 329 U.S. at 16.

247. See, e.g., *Weisberg v. Weisberg*, 112 A.D. 231, 232 (N.Y. App. Div. 1906) (refusing to grant the Weisbergs a divorce on the "bald fact that [Mrs. Weisberg's] husband is her uncle" because "[m]arriages between uncles and nieces are now prohibited, but they were not prohibited until after" the Weisbergs were married).

248. See, e.g., MO. REV. STAT. § 451.020 (1978) ("All marriages between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the half as well as the whole blood, between uncles and nieces, aunts and nephews, [and] first cousins ... are prohibited and declared absolutely void.").

249. Most state laws expressly defining marriage as an exclusively opposite-sex institution. See ALA. CODE § 30-1-19 (2001); ALASKA STAT. § 25.05.013 (Michie 2001); ARIZ. REV. STAT. § 25-101 (2001); ARK. CODE ANN. § 9-11-208 (Michie 2001); CAL. FAM. CODE § 308.5 (West 2001); DEL. CODE ANN. tit. 13 § 101 (2001); FLA. STAT. ANN. § 741.212 (2001); GA. CODE ANN. § 19-3-3.1 (2001); HAW. REV. STAT. § 572-1 (2001); IDAHO CODE § 32-209 (Michie 2001); § 750 ILL. COMP. STAT. ANN. 5/213.1 (2001); IND. CODE ANN. § 31-11-1-1 (2001); KAN. STAT. ANN. § 23-101 (2001); KY. REV. STAT. ANN. § 402.045 (Michie 2001); LA. CIV. CODE ANN. art. 89 (West 2002); ME. REV. STAT. ANN. tit. 19-A § 701 (West 2001); MD. CODE ANN., FAM. LAW § 2-201 (2001); MICH. COMP. LAWS ANN. § 551.271 (West 2001); MINN. STAT. § 517.03 (2001); MISS. CODE ANN. § 93-1-1 (2001); MO. REV. STAT. § 451.022 (2001); MONT. CODE ANN. § 40-1-401 (2001); NEV. REV. STAT. ANN. 122.020 (2001); N.H. REV. STAT. ANN. §§ 457:1, 457:2 (2000); N.C. GEN. STAT. § 51-1.2 (2000); N.D. CENT. CODE, § 14-03-01 (2001); OHIO REV. CODE ANN. 3101.01 (West 2001); OKLA. STAT. tit. 51 § 255 (2000); 23 PA. CONS. STAT. § 1704 (2001); S.C. CODE ANN. § 20-1-15 (Law. Co-op. 2001); S.D. CODIFIED LAWS § 25-1-38 (Mischie 2001); TENN. CODE

If forcing all members of society to maintain a single form of relationship that some consider the "ideal" demonstrates tradition worthy of preservation, then marriage should continue as a legal institution consisting of a single member of each sex, and society should prevent and repudiate all other forms of unions.²⁵⁰ However, such a course of action will either force assimilation of minority groups into the dominant culture,²⁵¹ perpetuate inequality,²⁵² or both. Therefore, such a course of action is ill advised, and society should avoid it.

Alternatively, one may consider American marital tradition as the expanding and contracting of marriage consistent with changes in social values.²⁵³ *Loving v. Virginia*²⁵⁴ showcases the beauty of this tradition. In *Loving*, the Supreme Court struck down a Virginia statute criminalizing interracial marriages.²⁵⁵

ANN. § 36-3-113 (2001); TEX. FAM. CODE ANN. § 2.001 (Vernon 2002); UTAH CODE ANN. § 30-1-2 (2001); VT. STAT. ANN. tit. 15 § 8 (2001); VA. CODE ANN. § 20-45.2 (Michie 2001); WASH. REV. CODE § 26.04.010 (2002); W. VA. CODE § 48-2-603 (2001); WYO. STAT. ANN. § 20-1-101 (Michie 2001). The states of Alaska and Hawaii also amended their Constitutions to prohibit same-sex marriages. ALASKA CONST. art. I, § 25 (2001); HAW. CONST. art. I, § 23 (2001). Nebraska amended its constitution to expressly delegate the authority to prohibit same-sex marriages to the legislature. NEB. CONST. art. 1, § 29 (2001).

250. See, e.g., *Legal Claims for Same-Sex Marriage*, *supra* note 40 (contending that only unions between one man and one woman can make a marriage, as only these unions have been historically recognized).

251. Perhaps those opposing same-sex marriage believe that limiting the most privileged and protected places in society to individuals in legal marriages, and then limiting legal marriages to opposite-sex couples will cause individuals to "choose" heterosexuality, or at least an outward appearance thereof. Or perhaps opposite-sex only advocates believe that the limitation of marriage to heterosexuals combined with considerable social pressure to marry will "cure" homosexuals. Consideration of these possibilities is beyond the scope of this Article. However, the sheer number of individuals who identify as GLBT despite the degree and extent of homophobia, discrimination, violence, hate-speech, and social pressure to the contrary (as evidenced by multiple citations within this Article) strongly implies that if such beliefs exist, they are ill-founded.

252. See *supra* notes 123-135 and accompanying text (discussing the inequality inherent in caste systems like that created by marriage and which same-sex marriage would perpetuate).

253. The idea of evolving social institutions alongside social values is observable in other contexts as well. As stated in *City of Cleburne v. Cleburne Living Center, Inc.*:

Moral philosophers may debate whether certain inequalities are absolute wrongs, but history makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a "natural" and "self-evident" ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom.

473 U.S. 432, 466 (1985) (Marshall, J., concurring).

254. 388 U.S. 1 (1967).

255. *Id.* at 12.

The Supreme Court quoted the following paragraph from the opinion of the trial court that convicted the Lovings under Virginia's miscegenation statute: "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages."²⁵⁶ The parallel between this statement and the phrase "Adam and Eve, not Adam and Steve," often recited by those condemning homosexuality, and assumedly same-sex marriages, is all too clear.²⁵⁷ Historically and currently, Americans use a human determination of God's will to justify their prejudices.²⁵⁸ Initially, the law reflected these prejudices.²⁵⁹ As society evolves, these justifications become either unbelievable or unpersuasive.²⁶⁰ Subsequently, the law changes to reflect the new social perception of what is just.²⁶¹ More recent examples of this tradition include no-fault divorces,²⁶² covenant marriages²⁶³ and civil unions.²⁶⁴

256. *Id.* at 3.

257. See, e.g., Geoff Dutton, *Gay People Show Their Pride at Parade*, THE COLUMBUS DISPATCH, June 30, 2002, available at LEXIS, News Library, AllNews File (reporting that anti-gay protesters at a gay pride parade carried a sign reciting this phrase). See also *supra* note 171 and accompanying text (Roger D. Willis arguing that "it's Adam and Eve, not Adam and Steve," and therefore states should prohibit same-sex marriages and any education that portrays homosexual relationships in a positive light).

258. See, e.g., *Loving*, 388 U.S. at 3 (quoting the trial court in *Loving v. Virginia* which claimed miscegenation laws maintained the will of God that people of different races would not intermingle); *Ex parte H.H.*, 2002 Ala. LEXIS 44, at *13 (February 15, 2002) ("Homosexual conduct is, and has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God upon which this Nation and our laws are predicated.") (Moore, C.J., specially concurring).

259. As an example, consider the legal prohibition on marriages between slaves prior to abolition. See COTT, *supra* note 7, at 4. The miscegenation statutes common in the states before *Loving* are additional examples. *Id.* Time will tell whether history will view the "mini-DOMAs" codified in the laws of many states in the same light. See *supra* note 249 and accompanying text (listing the "mini-DOMAs" of many states).

260. See, e.g., Vermont's, An Act Related to Civil Unions, 2000 Vt. Acts & Resolves 91. See also *infra* note 264 and accompanying text. While Vermont's law does not recognize same-sex marriages, such a law was inconceivable twenty years ago.

261. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (upholding a Louisiana statute that provided separate but equal accommodations in railroad cars for members of different races), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). See also *State v. Gibson*, 36 Ind. 389, 405 (1871) (holding that Indiana's miscegenation statute was constitutional because "neither the fourteenth amendment nor the civil rights bill has impaired or abrogated the laws of this State on the subject of marriage of whites and negroes"), *impliedly overruled by* *Loving v. Virginia*, 388 U.S. 1 (1967).

262. See Ellman & Lohr, *supra* note 18, at 722-23 (contrasting no-fault divorces

As shown above, American marital tradition evolves parallel to social values. An intellectually rigorous and unflinching evaluation of current American society and the legal institution of marriage shows society's evolution such that marriage is now socially undesirable. Thus, under the analysis above, American marital tradition dictates the abolition of marriage because: (1) marriage fails to accomplish social goals and society would more efficiently accomplish these goals through other means; and (2) marriage creates inequality that we should now recognize as unjustifiable.

with classic full-fault divorces). Under a full-fault divorce system a state will not grant a divorce "except on the petition of an 'innocent' spouse who could prove the other spouse guilty of marital misconduct." *Id.* While the exact requirements vary from state to state, under a generalized no-fault system, "either spouse [can] terminate the marriage unilaterally" and without showing fault on the part of the other spouse. *Id.* See also Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: A Search for Definitions and Policy*, 31 FAM. L.Q. 613, 663 tbl.4 (1998) (showing that each of the fifty states have some form of no-fault divorce provision).

263. See, e.g., Covenant Marriage Act, LA. REV. STAT. ANN. § 9:272-75 (West 2002) (allowing couples to choose to enter into, or change their current marriage to, a covenant marriage). In order to enter into a covenant marriage individuals must provide the state with a notarized "declaration of intent" to enter into a covenant marriage. *Id.* Couples opting for a covenant marriage legally commit themselves "to take all reasonable efforts to preserve [their] marriage, including marital counseling." § 9:273.1(A).

264. A civil union is a legal status distinct from that of marriage but that ostensibly confer the same statutory benefits and protections upon civilly united couples and married couples. See, e.g., An Act Relating to Civil Unions, 2000 Vt. Acts & Resolves 91 (creating "civil unions" for same-sex couples). Same-sex couples that enter into civil unions receive the same treatment as married couples under applicable Vermont statutes. *Id.* However, a civilly united couple is not legally married. *Id.* How states without civil union laws will treat civilly united couples on the whole remains to be seen. However, the first few cases to address the issue confirm the fears of commentators who indicated that outside of the state in which a couple is civilly united, the legal status of a civil union would be meaningless. See, e.g., *Rosengarten v. Downes*, 802 A.2d 170, 174-84 (Conn. App. Ct. 2002) (affirming dismissal of plaintiff's petition for a dissolution of his civil union for lack of subject matter jurisdiction because the trial court only had jurisdiction over marriages and a civil union is not a marriage under Vermont and Connecticut law). See also *Burns v. Burns*, 560 S.E.2d 47, 49 (Ga. Ct. App. 2002) (holding that the Full-Faith and Credit Clause did not require Georgia to recognize a civil union as a marriage, as a civil union is not a marriage under Vermont law). The *Rosengarten* court went on to state that even if a civil union were a marriage under Vermont law, the Georgia statute limits marriages in Georgia to one man and one woman and would render a Vermont same-sex marriage void in Georgia. *Rosengarten*, 802 A.2d at 174-84.

*F. MARRIAGE AS A NECESSITY FOR THE SURVIVAL
OF THE SPECIES – “SHE BLINDED ME WITH
SCIENCE!”²⁶⁵*

In addition to the purported economic, moral, and sociological benefits of exclusively opposite-sex marriage with respect to children, proponents of marriage also attempt to justify their position with biology.²⁶⁶ The would-be biological argument that marriage ensures the survival of the human race is less persuasive than any of the other “opposite sex marriage only” arguments. The claim that marriage ensures procreation and survival of the species ignores history,²⁶⁷ current fact,²⁶⁸ and basic biology.²⁶⁹

Marriage is not necessary for reproduction as humans reproduced long before the legal institution of marriage²⁷⁰ and currently reproduce outside of marriage with considerable efficiency.²⁷¹ Additionally, the human being is the only known species with a legal system. Marriage is, by definition, a legal institution.²⁷² Yet, all species reproduce. Furthermore, not all married couples are capable of reproduction,²⁷³ and not all couples

265. THOMAS DOLBY, *She Blinded Me With Science*, on THE GOLDEN AGE OF WIRELESS (Capitol Records 1982).

266. Professor Wardle claims the “social interest[s] in responsible procreation” support the contention that marriage should continue as a purely opposite-sex institution. *Multiply and Replenish*, *supra* note 38, at 781-82. Wardle goes on to claim, “The first social interest in responsible procreation is the perpetuation of human society: survival through reproduction. New generations must be procreated if any society is to continue, and human procreation requires the union of male and female.” *Id.* at 783.

267. RICHARD G. KLIEN & BLAKE EDGAR, THE DAWN OF HUMAN CULTURE 224 (2002). Klien and Edgar report fossil evidence indicates that modern humans, *Homo sapien sapien*, first existed in Africa 90,000 to 120,000 years ago. The earliest known written records of a marriage ritual, on the other hand, are those of the early Sumerians. WOMEN’S EARLIEST RECORDS: FROM ANCIENT EGYPT AND WESTERN ASIA 75-77 (Barbara Lesko ed. 1987). Archeologists approximate the Sumerians lived during the third-millennium B.C., or 5000 to 6000 years ago. *Id.* at 71. Therefore, physical evidence suggests that modern humans existed and reproduced without marriage for at least 85,000 years.

268. See Thornton, *supra* note 157, at 595 (noting that “about one child in four is now born outside of marriage”) (citing the Nat’l Ctr. for Health Statistics, Pub. Health Serv., Monthly Vital Statistics Report 39, 4 Advance Report of Final Natality Statistics, 1988 (1990)).

269. See Perrin, *supra* note 179, at 341 (“The desire for children is a basic human instinct and satisfies many people’s wish to leave a mark on history or perpetuate their family’s story.”).

270. See *supra* note 267 and accompanying text.

271. See Thornton, *supra* note 157, at 595 and accompanying text.

272. See BLACK’S LAW DICTIONARY, *supra* note 43.

273. See Thornton, *supra* note 157, at 595 and accompanying text.

capable of reproduction are married.²⁷⁴ If a primary objective of marriage is reproduction, then the state should deny marriage licenses to couples that cannot reproduce.²⁷⁵ Similarly, the legal marriages of fertile couples should automatically terminate when the couple is no longer capable of reproduction.²⁷⁶

If the procreative potential of a union is what society rewards, then society should accord the greatest rewards to those unions with the greatest procreative potential.²⁷⁷ While same-sex couples cannot currently blend their genetic material and create another life from their union, same-sex couples do have children through prior relationships, alternative insemination, adoption, and as surrogate parents.²⁷⁸ Similarly, single individuals both gay and straight adopt, bear, and raise children through alternative insemination, unplanned pregnancy, tragedy, divorce, and choice.²⁷⁹ Therefore, if couples that procreate and raise children deserve the benefits of marriage, then same-sex couples, unmarried opposite-sex couples, and single individuals who engage in these activities deserve the benefits married couples

274. See *Baker v. State*, 744 A.2d 864, 881 (Vt. 1999). The *Baker* court noted that "many opposite-sex couples marry for reasons unrelated to procreation, that some of these couples never intend to have children, and that others are incapable of having children." *Id.*

275. See *id.* at 882 (stating that "it is undisputed that most of those who utilize nontraditional means of conception are infertile married couples").

276. See *id.* at 881. The *Baker* court concluded that with respect to the goal of procreation, Vermont's law limiting marriage to opposite-sex couples "extends the benefits and protections of marriage to many persons with no logical connection to the stated governmental goal." *Id.*

277. A skeletal picture of such a system includes the determination and quantification of the value of the certain acts and processes. For example, in order to distribute rewards in proportion to achievement, society would have to determine whether child bearing is more valuable than, less valuable than, or equally as valuable as, child rearing. Once society made such a determination, society would need to quantify the acts accordingly in order to accurately distribute the benefits to, as examples, adoptive parents, natural parents, surrogate mothers, and foster parents. Similarly, in order to reward scientists performing *in vitro* fertilization and cloning, surrogate mothers, natural parents, accidental and unplanned pregnancies resulting from chance encounters, and pregnancies within committed relationships, society would have to rank and quantify the acts of child bearing, combining genetic material to create a new life, and combining genetic material to create a new life within a committed, monogamous relationship. This exemplifies the complication and subtleties implementation of such a system would require, and displays the ineffective nature of marriage to truly achieve this goal. Marriage is far too simple a system to fairly and justly accomplish the objective of rewarding procreation and procreative potential because marriage observes no such subtleties and makes no reasonable distinctions. See *supra* notes 266-269.

278. See Perrin, *supra* note 179, at 341-42. While gay and lesbian couples also act as foster parents, this activity is not mentioned as it is conceptually distinct from the more permanent activities listed.

279. See *id.*

receive.

As perpetuation of the institution of marriage denies unmarried childbearing and childrearing individuals the benefits and protections accorded married couples, the legal institution of marriage discourages unmarried individuals from having children. Some would say that is exactly the point. However, if society is concerned with the possibility of extinction, then society should encourage every capable individual to reproduce with or without marriage. Distributing benefits via marriage and stigmatizing single parents and their children encourages only certain members of society to reproduce. Thus, justifying marriage and the provision of benefits according to marital status with the state's interest in the survival of the species is inherently contradictory.

V. ALTERNATIVES TO MARRIAGE

Abolition of marriage raises the question of what would replace the instantaneous vesting of rights and responsibilities that currently occurs upon marriage.²⁸⁰ Immediate possibilities include contracts, property law, tort law, and criminal law.²⁸¹ In other words, couples would simply rely upon the laws utilized to govern and regulate most other interactions between people,

280. See, e.g., *Baker*, 744 A.2d at 883.

[T]he benefits and protections incident to a marriage license under Vermont law ... include, for example, the right to receive a portion of the estate of a spouse who dies intestate and protection against disinheritance through elective share provisions, under 14 V.S.A. §§ 401-404, 551; preference in being appointed as the personal representative of a spouse who dies intestate, under 14 V.S.A. § 903; the right to bring a lawsuit for the wrongful death of a spouse, under 14 V.S.A. § 1492; the right to bring an action for loss of consortium, under 12 V.S.A. § 5431; the right to workers' compensation survivor benefits under 21 V.S.A. § 632; the right to spousal benefits statutorily guaranteed to public employees, including health, life, disability, and accident insurance, under 3 V.S.A. § 631; the opportunity to be covered as a spouse under group life insurance policies issued to an employee, under 8 V.S.A. § 3811; the opportunity to be covered as the insured's spouse under an individual health insurance policy, under 8 V.S.A. § 4063; the right to claim an evidentiary privilege for marital communications, under V.R.E. 504; homestead rights and protections, under 27 V.S.A. §§ 105-108, 141-142; the presumption of joint ownership of property and the concomitant right of survivorship, under 27 V.S.A. § 2; hospital visitation and other rights incident to the medical treatment of a family member, under 18 V.S.A. § 1852; and the right to receive, and the obligation to provide, spousal support, maintenance, and property division in the event of separation or divorce, under 15 V.S.A. §§ 751-752.

Id.

281. See FINEMAN, *supra* note 112, at 229-30 (noting that after the abolition of marriage, children would remain "protected by incest [laws] and other laws, and rape would continue to be subject to criminal sanctions" and suggesting the abolition of marriage and replacement thereof with contracts).

instead of the default of marriage. In such a system, "[w]omen and men would operate outside of the confines of marriage, transacting and interacting without the fetters of legalities they did not voluntarily choose."²⁸²

A. CONTRACTS

The development of alternatives to marriage such as civil unions, no-fault divorces, and covenant marriages indicates that Americans greatly desire the ability to choose the nature and extent of their intimate relationships.²⁸³ Instead of the additional social stratification these options create, society should abolish marriage and replace it with contracts. While marriage does contain elements of contract, such as mutual consent and reciprocal promises, marriage also differs from a contract in that the state defines a number of the terms and obligations of the parties within a marriage.²⁸⁴ As such, the parties entering into the status of marriage are not free to define its terms or scope. This constriction limits the choices and freedom of the individuals within marriage.²⁸⁵ Abolishing marriage and replacing it with contracts would lift this limitation on the ability of individuals to freely negotiate their rights, remedies, obligations, and degree of commitment with respect to their intimate relationships.

Currently, couples can employ contracts in the form of prenuptial, or antenuptual, agreements to circumvent many of the negative aspects of marriage.²⁸⁶ Prenuptial agreements refine and express the scope and extent of the rights and obligations of the individuals within a marriage.²⁸⁷ However, these agreements still fail to give the parties to a marriage complete control over the relationship because the State still defines many of the aspects of marriage.²⁸⁸ By replacing marriage with contracts, the individuals

282. *Id.* at 229.

283. See *supra* notes 262-264 and accompanying text (describing the particularities of these marital alternatives).

284. See Fineman, *supra* note 14, at 260 ("[A]lthough one may have 'choice' when entering marriage, when it comes to the terms and consequences of that status, there is no free marketplace in which private ordering is the rule.").

285. See FINEMAN, *supra* note 112, at 228-30 (implying that the "special legal rules governing the relationships between husband and wife or defining the consequences of the status of marriage" limits of the freedom of married individuals to define their relationship).

286. See *id.* at 229 ("We already encourage antenuptual agreements that are contractual deviations from state-imposed marriage consequences.").

287. *Id.*

288. See Fineman, *supra* note 14 and accompanying text (discussing the limitations of contractual agreements in marriages).

entering into agreements that are similar to prenuptial agreements would contract for every provision of their relationship, instead of negotiating only the specific provisions of marriage the state allows them to adjust when combining statutory marriage and a prenuptial agreement.²⁸⁹ Using contractual agreements to govern all relationships would fill the gaps the abolition of marriage would create. Also, it would give individuals considerably more control over their rights and obligations both within, and upon the termination of, their intimate relationships.²⁹⁰ Marriage is thus unnecessary because contract law is an adequate and preferable substitute for the legal securities and recourses currently ensured by marriage.²⁹¹

B. STATUTORY AND COMMON LAW

Ideally, all individuals would have access to the legal means and resources to create complex contracts. However, economics prevent such a reality. Therefore, if society truly has an interest in accomplishing the stated goals of marriage, then it should do so through statutes and common law. In some instances, laws of this nature are already functioning.²⁹² Expanding these laws to include the non-biological parent in same-sex relationships where the couple bears and raises a child through mutual consent would further the social interest of protecting children economically by protecting the children of same-sex couples to the same extent as the children of opposite-sex couples.²⁹³

289. FINEMAN, *supra* note 112, at 229.

290. *Id.* In describing the result of replacing marriage with contracts, Fineman notes, "Women and men would operate outside of the confines of marriage, transacting and interacting without the fetters of legalities they did not voluntarily choose." *Id.*

291. *Id.* at 229. In suggesting the abolition of legal marriage, Fineman argues, "Opportunities for individual bargaining about economic and other aspects of sexual relations typically now occur at the termination of the relationship" but that abolishing marriage and replacing the legal status with contracts "would merely mandate that such bargaining occur *prior* to the termination of the relationship." *Id.*

292. For example, in order to help prevent poverty for unmarried women and their children, general laws mandate child support from the non-custodial opposite-sex parent in opposite-sex relationships. See Nat'l Women's Law Center, *supra* note 201, at 368 (citing § 402(a)(2) of the Social Security Act, 42 U.S.C. § 602(a)(2), requiring states to provide assistance to individuals in enforcing child support as a precursor to receiving federal Temporary Assistance to Needy Families funding).

293. Some courts recognize this principle and grant the non-biological parent in failed same-sex relationships the same rights and responsibilities as parents in failed opposite-sex relationships. *V.C. v. M.J.B.*, 748 A.2d 539, 555 (Pa. 2000) (granting visitation to the non-biological parent in a failed lesbian relationship). *Accord T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001). *But cf. Alison D. v. Virginia M.*, 572

In abolishing marriage, the statutory intestacy laws would also require a revision that is long overdue.²⁹⁴ Currently, intestacy laws distribute the assets of a deceased individual in accord with the unstated assumption that an individual with a committed intimate partner can, and will, marry that partner.²⁹⁵ Following this assumption, intestacy laws take spouses into account but not committed unmarried partners.²⁹⁶ As large numbers of Americans do in fact have a committed, intimate, yet unmarried partner,²⁹⁷ the current structure of these laws does not accurately reflect the donative intent of these individuals.²⁹⁸ Thus, revision of these laws would not only more accurately reflect the donative intent of these individuals, but would also economically protect and provide for the surviving partner in these relationships in ways marriage cannot since marriage is unavailable to many of these couples.²⁹⁹

C. EVALUATION OF THE MERITS

Another option for the distribution of benefits is to accord benefits based on the needs and/or virtues of the individual relationship. If society decides some goals are so critically important as to warrant encouragement with a system of rewards, then society should reward the couples or individuals that actually accomplish them. According the benefits of marriage to couples that fail to achieve the purported goals of marriage — the goals

N.E.2d 27, 28 (N.Y. 1991) (rejecting petitioner's request of a writ of habeas corpus for visitation even though together, plaintiff and defendant, a former lesbian couple, "planned for the conception and birth of the child and agreed to share jointly all rights and responsibilities of child-rearing" and the parties did in-fact jointly raise the child both emotionally and economically for a total of six years).

294. See generally Mary Louise Fellows, et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 15-31 (1998) (reporting that intestacy laws do not accurately reflect the donative intent of a considerable portion of the population).

295. See *id.* at 13 (discussing the intent of the structure of intestacy laws and noting that "for the purposes of intestacy, [family] has meant a married couple and children of the marriage").

296. See *id.* at 14. Under prevailing statutory law, the surviving committed intimate partner does not share in the decedent's intestate estate. See *id.* The property of the decedent passes to the decedent's lineal descendants or next of kin. See *id.* at 15.

297. See *id.* at 3 ("In 1994, approximately 7% of the nation's couples were in unmarried committed relationships.").

298. *Id.* at 89 (observing that, contrary to the distribution of the estate of an unmarried individual in a committed, intimate relationship under the intestacy statutes, in an empirical study a substantial majority of individuals in committed, intimate yet unmarried, relationships "preferred the partner to take a share of the decedent's estate").

299. See *id.* at 3 (reporting that in 1994 the number of households likely to be headed by same-sex couples was approximately 1.7 million).

that supposedly justify the benefits of marriage — creates a social cost, without the social benefit that assumedly justifies that cost. In other words, married couples receive benefits on the assumption that their marriage achieves social goals. Society never validates that assumption, however. For instance, on the assumption that monogamous unions are superior to non-monogamous unions, society restricts marriages to monogamous unions by prohibiting polygamy.³⁰⁰ Society then provides married couples benefits in order to encourage people to marry and, thus, enter into monogamous unions.³⁰¹ However, society provides the benefits regardless of whether the couple actually remains monogamous. As long as the couple remains married the benefits continue. As long as the marital status remains unchanged, society pays, even if the couple fails to accomplish the goals for which society is paying.

Additionally, numerous same-sex couples and unmarried opposite-sex couples achieve the social goals of marriage.³⁰² Consider the social goal of child rearing. "Estimates of the number of children who are being raised in gay or lesbian families in the United States range from six million to fourteen million,"³⁰³ and "[s]ingle-parent families now constitute twenty-six percent of all families with minor children and are the most rapidly growing family form in America."³⁰⁴ By raising children, members of these groups are accomplishing at least one of the goals that ostensibly justify the benefits of marriage. Therefore, society should provide the marital benefits to these individuals. A merit-based system of benefit distribution would assure these families receive the benefits and protections they deserve.

Professor Lawrence W. Waggoner describes a merit-based system system in the context of the revision of intestacy laws.³⁰⁵ In order to divide the estates of unmarried individuals who die intestate consistent with the presumed donative intent of these individuals,³⁰⁶ Waggoner suggests determining whether a

300. See *supra* notes 243-246 and accompanying text.

301. See *supra* notes 83-87 and accompanying text.

302. See, e.g., *supra* note 238 (listing cases involving unmarried couples who achieved at least some of the ostensible goals of marriage).

303. Charlotte Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025, 1026 (1992).

304. Dowd, *supra* note 182, at 21.

305. Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 79-80 (1994).

306. See *id.* at 29-34 (discussing the demographic characteristics of persons dying intestate).

surviving individual is a "de facto partner" of the decedent.³⁰⁷ Waggoner's suggestions show that an evaluation of the virtues of any given relationship is not only possible, but desirable. Waggoner's "de facto partner" considerations outline a system in which the evaluation of the merits, structure, and social contributions of individuals and relationships would determine the extent to which society rewarded the relationship or individual with the benefits currently linked to marriage.³⁰⁸

Admittedly, the specifics and administration of such a system would be complex. However, such a system would ultimately ensure that only those couples achieving social goals receive the various benefits provided in exchange for the achievement of those goals. Thus, society would actually receive the benefits currently paid for through provision of marital benefits. This contrasts the current system wherein society pays by providing marital benefits regardless of whether a couple actually achieves the goals for which society pays. Additionally, it would ensure that all couples achieving society's objectives receive the benefits they deserve.

CONCLUSION

Marriage is a legal institution with no clear definition. Nevertheless, the legal status of "married" confers upon those within the status considerable, yet unjustifiable, benefits. As the benefits and preferred status of "married" are unjustified, existence of the legal institution of marriage creates unjustifiable social inequality. Marriage also fails to achieve the social goals and interests that purists offer in its support and in support of the provision of benefits to the legal status of "married." While this is

307. *Id.* at 79. To make such determinations Waggoner suggests courts consider:

- (1) [T]he purpose, duration, constancy, and exclusivity of the relationship;
- (2) the degree to which the parties pooled their financial resources, such as by maintaining joint checking or other types of accounts, sharing a mortgage or lease on the household in which they lived or on other property, titling the household in which they lived or other property in joint tenancy, or naming the other as primary beneficiary of life insurance or employee benefit plans;
- (3) the procreation or adoption of children and the degree of mutual care and support given them;
- (4) whether the couple went through a marriage ceremony; and
- (5) the degree to which the couple held themselves out to others as married or the degree to which the couple held themselves out to others as emotionally and financially committed to one another on a permanent basis, as exhibited by their acknowledging mutual rights, duties, and obligation toward one another.

Id.

308. *Id.*

especially true with respect to marriage as a purely opposite-sex institution, it is also true with respect to the existence of legal marriage at all. If society truly needs and desires the accomplishment of certain goals and interests, society should accomplish these goals and interests through other means such as contracts, statutes, and common law. Similarly, if society determines that individuals require incentive to achieve certain social goals, then society should distribute the benefits currently accorded the legal status of "married" proportionally to the success of an individual or relationship in achieving the stated social goals.

The creation of alternative legal institutions such as "civil unions" and "domestic partnerships" only serve to accentuate and perpetuate the social inequality inherent when multiple social statuses exist, but society prefers one to all others and limits entrance into that status to members of a certain group. Similarly, same-sex marriages would also perpetuate inequality between married and unmarried individuals and couples. Therefore, in order to achieve true social equality society should work for the abolition of the legal institution and privileged status of marriage.