

Journal of Law and Policy

Volume 5

Issue 1

SYMPOSIUM:

Youth, Family and the Law: Defining Rights and
Establishing Recognition

Article 3

1996

Wedlock Alert: A Comment on Lesbian and Gay Family Recognition

Paula L. Ettelbrick

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>

Recommended Citation

Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J. L. & Pol'y (1996).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol5/iss1/3>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

WEDLOCK ALERT: A COMMENT ON LESBIAN AND GAY FAMILY RECOGNITION

*Paula L. Ettelbrick**

INTRODUCTION

As a result of the Hawaii Supreme Court's decision in *Baehr v. Lewin*,¹ the issue of same-sex marriage has been catapulted onto the national stage as a matter for discussion and legislative action.²

* Legislative Counsel, Empire State Pride Agenda; Adjunct Lecturer in Law, University of Michigan Law School. J.D., Wayne State University Law School, 1984; B.A., Northern Illinois University, 1978. Sincere thanks to Lisa Bennett, Katherine Franke and my dearest family member, Suzanne Goldberg, for their ever thoughtful comments and suggestions. Special thanks to Ross Levi for research assistance, and to Linda Giardino, Joe Hoefflerle and the editorial staff of Brooklyn Law School's *Journal of Law and Policy* for their patience, tenacity and efforts beyond the call of duty. Finally, thanks to two particularly special colleagues who for many years have nurtured me, my thinking and my work through their eloquent advocacy, brilliant strategies and life-long devotion to creating a world that dignifies the love and families of lesbians and gay men: Nancy Polikoff and Tom Stoddard.

¹ 852 P.2d 44, 55-60 (Haw. 1993) (holding that marriage laws prohibiting same-sex couples from marrying violate state constitutional proscription against sex discrimination).

² The Hawaii Supreme Court's decision in *Baehr v. Lewin* has prompted both national debate and national backlash to the effort to extend legal marriage to same-sex couples. See Jeffrey Schmalz, *In Hawaii, Step Toward Legalized Gay Marriage*, N.Y. TIMES, May 7, 1993, at A14 (noting that Hawaii is very close to becoming the first state in the nation to recognize same-sex marriages because its highest court ruled that a ban on such marriages violated the state constitution's prohibition against sex discrimination). The Republican presidential primaries were tarnished by a rally against same-sex marriage that was supported by most of the contenders for the Republican nomination for President of the United States. See Richard L. Berke, *With the Field Now Scrambled, Iowans Prepare to Vote*, N.Y. TIMES, Feb. 11, 1996, § 1, at 26 (noting that Republican presidential candidates Patrick J. Buchanan, Phil Gramm and Alan Keyes

participated in a rally held in Iowa, entitled "The National Campaign to Protect the Sanctity of Marriage," sponsored by a Christian right group to oppose the legalization of same-sex marriages; candidates Senator Bob Dole, Lamar Alexander and Steve Forbes sent letters of support in lieu of attendance at the rally). State legislatures across the country, fearing that they might be forced to eventually recognize the marriages of lesbian and gay couples who will undoubtedly flock from across the country to Hawaii to get married, are responding by passing laws prohibiting recognition of such marriages. See Kristina Campbell, *California Bill Succumbs*, WASH. BLADE, Sept. 13, 1996, at 23 (noting that, to date, 38 states legislatures have proposed anti-gay marriage laws—21 died, 15 passed into law and 2 pending); Sue Fox, *Marriage Bill Sails Through the Senate*, WASH. BLADE, Sept. 13, 1996, at 1, 23 (describing reaction to the Senate's passage of the Defense of Marriage Act which "allows states to ignore same-sex marriages approved by other states and limits the federal definition of marriage to a union between one man and one woman"). For example, an amendment to the Illinois Marriage and Dissolution of Marriage Act prohibiting "a marriage between 2 individuals of the same sex," became effective May 24, 1996. 1996 Ill. Legis. Serv. P.A. 89-459 (West) (codified as 750 ILL. COMP. STAT. 5/212(5)). See, e.g., ARIZ. REV. STAT. ANN. § 25-101(c) (West 1991 & Supp. 1996) (declaring marriages between persons of the same sex void and prohibited); GA. CODE ANN. § 19-3-3.1 (Supp. 1996) (prohibiting same-sex marriages and declaring void any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state); LA. CIV. CODE ANN. art. 89 (West 1993) ("Persons of the same sex may not contract marriage with each other."); S.C. CODE ANN. §§ 20-1-10, -15 (Law. Co-op. Supp. 1996) (prohibiting and deeming void same-sex marriages as against public policy); UTAH CODE ANN. § 30-1-2(5) (1995) (prohibiting and declaring void marriages between "persons of the same sex").

The U.S. Congress has also taken the unprecedented step of defining marriage, rather than deferring to state's definitions as had been the practice. The Defense of Marriage Act ("DOMA") was signed into law on September 21, 1996 by President Clinton. DOMA provides:

No state, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other state, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Defense of Marriage Act, Pub. L. No. 104-199, § 2, 110 Stat. 2419 (1996) (codified as 28 U.S.C. § 1738C) (DOMA is "an Act to define and protect the

As the first state court in the country to question the constitutionality of laws that deny lesbian and gay couples access to marriage, the court unleashed a rabid reaction from those deeply opposed to lesbian and gay equality. The decision has also released the longing and expectations of many lesbians and gay men who wish to marry. This Article is prompted not by the fury of the right wing backlash to the possibility of same-sex marriage, but by the reaction of some within the lesbian and gay community who have latched onto marriage as the panacea for homophobia. I do not argue with the sincerity of their desire to marry nor with their right to participate in the institution of marriage. Instead, I am prompted to write based upon my concern that we will short change our lives and our families by adopting marriage as the sole family recognition strategy. I am also troubled by the trends of trivializing the important gains of domestic partnership, of dismissing the complexities of many lesbian and gay families who do not, and never will, fit neatly into the marriage model and of failing to acknowledge and build on the history of lesbian and gay family advocacy that has provided the context for serious discussion of same-sex marriage.

Over the last two decades, advocates for lesbian and gay equality have propelled lesbian and gay families from their erstwhile status of oxymoron to a solid position within the fringes of the definition of the term "family."³ The struggle of lesbian and

institution of marriage"). DOMA limited the definition of marriage by adding the following:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" 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.

Id. § 3 (codified as amended at 1 U.S.C. § 7).

³ The elements of family are complex, intangible and incapable of full discussion within the boundaries of this Article. Love and commitment, caregiving, a shared journey, a guiding hand, companionship, economic security, sexual desire and responsibility are some of the elements, though admittedly they are the most romanticized. Being a family member is hard work, occasionally thankless, and often frustrating. Whether it be financial, emotional or physical,

gay parents to hold on to custody of and visitation with their children has moved many courts to reject outlandish stereotypes and to acknowledge that one's sexual orientation is not a predictor of parental ability.⁴ A growing number of courts and employers

caretaking among family members is indispensable to the functioning of society. Parents take care of young children; adult children take care of elderly parents; spouses take care of each other; and aunts, uncles, cousins, siblings and grandparents are all part of this caretaking network. Without such networks society would be ill-equipped to perform the functions of home health aid, counselor, chauffeur, physical therapist, advocate, babysitter, maid and nurse for each person who needed those services.

Professor Stephanie Coontz begins her course on family history by asking her students to write down what "traditional family" means to them. STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 8 (1992). One of the more frequent responses

is of extended families in which all members worked together, grandparents were an integral part of family life, children learned responsibility and the work ethic from their elders, and there were clear lines of authority based on respect for age. Another is of nuclear families within which nurturing mothers sheltered children from premature exposure to sex, financial worries, or other adult concerns, while fathers taught adolescents not to sacrifice their education by going to work too early. Still another image gives pride of place to couple relationship. In traditional families, [her] students write . . . men and women remained chaste until marriage, at which time they extricated themselves from competing obligations to kin and neighbors and committed themselves wholly to the marital relationship, experiencing an all-encompassing intimacy that our more crowded modern life seems to preclude.

Id. "The modern family is, in fact, a number of different families." JAN E. DIZARD & HOWARD GADLIN, *THE MINIMAL FAMILY* 23 (1990).

The specific form a given family takes is a function of what the individuals involved bring to their relationship, the sum of their convictions, their ethnic traditions, and their own, personal desires and aspirations. But these individual qualities do not exist in a vacuum. At any moment in time, society makes some relationships more likely or more durable, by virtue of the resources it makes available as well as the kinds of aspirations it encourages.

Id.

⁴ There are still many chilling exceptions to this trend, as evidenced by the recently expressed views of South Dakota Supreme Court Justice Frank E. Henderson, in a case in which the court restricted a lesbian mother's visitation

have begun to acknowledge the integrity of lesbian and gay family relationships⁵ by embracing concepts such as "second parent adoption"⁶ and "domestic partnership."⁷ Furthermore, courts have extended the definition of "family" to include lesbian and gay

rights because she lived with her partner:

Lesbian mother has harmed these children forever. To give her rights of reasonable visitation so that she can teach them to be homosexuals, would be the zenith of poor judgment for the judiciary of this state. Until such time that she can establish, after years of therapy and demonstrated conduct, that she is no longer a lesbian living a life of abomination (see Leviticus 18:22), she should be totally estopped from contaminating these children.

Chicoine v. Chicoine, 479 N.W.2d 891, 896 (S.D. 1992) (Henderson, J., concurring in part and dissenting in part).

⁵ See generally Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1187 (1992) (discussing how domestic partnership laws can compensate for defects in domestic relations laws that fail to recognize nontraditional relationships); Robert Cenicerros, *Domestic Partners Offered Broader Range of Benefits*, BUS. INS., June 12, 1995, at 2 (noting that, as of 1995, more than 200 entities offer employment benefits for unmarried partners).

⁶ "Second parent adoption" is a term of art developed by lesbian and gay family advocates to identify the process whereby the unmarried partner of a biological or adoptive parent may adopt the child. See Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 467 n.27 (1990) [hereinafter Polikoff, *Redefining Parenthood*]; Elizabeth Zuckerman, Comment, *Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother*, 19 U.C. DAVIS L. REV. 729, 731 n.8 (1986) (defining second parent adoption as "the adoption of a child by [his or] her parent's non-marital partner, without requiring the first parent to give up any rights or responsibilities to the child").

⁷ "Domestic partnership" refers to the relationship of unmarried cohabitants. See Bowman & Cornish, *supra* note 5, at 1164 n.3 ("Domestic partnership generally refers to two people living together in a committed, mutually interdependent relationship."). The term was developed and is primarily used to designate the non-spousal relationships that are appropriate for receiving employer-provided health benefits. As such, domestic partnership is not a substitute for marriage, as it has little practical application outside of the workplace, but is a term of art developed within the employment benefit context.

couples,⁸ and the relationships between non-biological lesbian parents and the children they raise with their partners have increasingly gained recognition in the contexts of adoption, guardianship and custody.⁹

Yet, within the lesbian and gay community, debate has simmered for years over the strategies for seeking recognition of the committed family relationships of lesbian and gay couples.¹⁰ Two basic strategies prevail: (1) that which seeks the right to same-

⁸ See, e.g., *In re Kowalski*, 478 N.W.2d 790, 794 (Minn. Ct. App. 1991) (considering lesbian couple a "family by affinity"); *Braschi v. Stahl Assocs.*, 74 N.Y.2d 201, 212-13, 543 N.E.2d 49, 54-55, 544 N.Y.S.2d 784, 789-90 (1989) (ruling that surviving gay partner is a family member under rent control laws).

⁹ See, e.g., *In re Astonn H.*, N.Y. L.J., Nov. 1, 1995, at 33 (Fam. Ct. Nov. 1, 1995) (awarding guardianship to natural mother's partner and not to estranged husband because she was the "only stable loving presence in child's life"); see also *J.A.L. v. E.P.H.*, No. 02456, 1996 Pa. Super. LEXIS 3215, at *20 (Pa. Super. Ct. Sept. 19, 1996) (holding that non-biological lesbian co-parent had standing to seek partial custody on grounds that she functioned as a parent with the encouragement of the biological mother); *infra* note 153 (setting forth cases supporting second parent adoption).

¹⁰ While many have participated in the public discussion, this debate is most often considered to be framed by a pair of articles written by Tom Stoddard and I when we worked together at Lambda Legal Defense and Education Fund—he as the executive director and I as the legal director. See Thomas B. Stoddard, *Why Gay People Should Have the Right to Marry*, OUT/LOOK NAT'L GAY & LESBIAN Q., Fall 1989, reprinted in LESBIAN AND GAY MARRIAGE 13-19 (Suzanne Sherman, ed., 1992) [hereinafter LESBIAN AND GAY MARRIAGE]; Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK NAT'L GAY & LESBIAN Q., Fall 1989, reprinted in LESBIAN AND GAY MARRIAGE, *supra*, at 20-26. For further discussion of the community's debate about marriage, see WILLIAM N. ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE 51-85 (1996). For other community viewpoints, see Symposium, *Debating the Fight for Same-Sex Marriage*, GAY COMMUNITY NEWS, Winter-Spring 1996, at 4, including the following articles: Cathy Cohen, *The Price of Inclusion in the Marriage Club*, GAY COMMUNITY NEWS, Winter-Spring 1996, at 27; Lisa Duggan, *The Marriage Juggernaut*, GAY COMMUNITY NEWS, Winter-Spring 1996, at 5; Paula Ettelbrick, *Marriage Must Not Eclipse Other Family Organizing*, GAY COMMUNITY NEWS, Winter-Spring 1996, at 25; Letitia Gomez, *Marriage Latino Style*, GAY COMMUNITY NEWS, Winter-Spring 1996, at 5; Jeff Nickels, *Equality Through Marriage*, GAY COMMUNITY NEWS, Winter-Spring 1996, at 25; Nancy D. Polikoff, *Marriage as a Choice? Since When?*, GAY COMMUNITY NEWS, Winter-Spring 1996, at 26.

sex marriage¹¹ as the primary means of recognizing and extending benefits to lesbian and gay relationships, and (2) that which advocates for broader family definitions¹² and the right to family benefits that are not contingent upon the existence of a marital or blood relationship. Both strategies focus on the central vision of family that should prevail in the law, and both form a dialogue about the role of the lesbian and gay community in developing that vision. Should marriage continue its role as the central definitional component of family for the purpose of receiving civic benefits? Or, is it possible to open the definition of family to include those who function as family, regardless of whether marriage or blood relationships form the core of their union?¹³

¹¹ Those promoting this strategy are referred to in this Article as "marriage rights advocates" or "pro-marriage advocates."

¹² Those promoting this strategy are referred to generically and in this Article as "family definition advocates" or "functional family advocates."

¹³ Lesbian and gay families are not the only ones who would benefit from continued expansion of the meaning of family. The experiences of straight, unmarried couples show that they, too, lack a true choice; they, too, are given the sole option of marriage if they want their family relationships recognized. This lack of choice is exemplified by most domestic partner benefits policies adopted by private employers who extend benefits to lesbian and gay employees because they cannot marry, but insist that straight employees marry their partner if they are to receive the same benefits. For example, International Business Machines Corporation ("IBM") recently became the "largest employer yet to extend healthcare coverage to couples of the same-sex." David W. Dunlap, *Gay Partners of I.B.M. Workers to Get Benefits*, N.Y. TIMES, Sept. 20, 1996, at A18.

Under [IBM's] new benefits policy, a lesbian or gay worker who wishes to enroll a partner must sign a notarized affidavit stating that the couple live together in the same home, have a "committed relationship" and are "financially interdependent." The policy does not cover unmarried heterosexual couples [because] . . . [h]eterosexual couples have the option of getting married

Id. The growing numbers of unmarried, straight couples and other kinds of undefined familial units strengthens the imperative to find alternatives to marriage and blood as the core definitional components of family.

Over 3.5 million unmarried cohabiting couples live in the United States, and approximately one million of them live with children under the age of 15. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 45 (1992); Elizabeth Fenner & Roberta Kirwan, *Sizing Up the Risks of Living Together*, MONEY, July 1, 1995, at 96. An estimated 370,000 people

From either perspective, lesbian and gay family advocacy prompts provocative questions about the central elements of family: the relevance of gender and gender roles, the commonality of love and commitment, the best interests of children, the policy benefits of economic and social interdependence, the role of marriage on the cusp of the twenty-first century and the validity of legal boundaries for the most intimate human relationships called family, particularly when those boundaries deny basic economic benefits to groups of people who function as families. Either way, the goal is to provide lesbians and gay men with full rights as human beings, including the right to form and be recognized as a family.

This Article briefly sets forth the two visions of family promoted within the lesbian and gay community. Lest the history behind and purposes for functional family advocacy be overshadowed by the whirlwind around marriage, this Article makes the modest attempt to serve as a reminder of the many reasons why lesbian and gay family advocates ignored marriage challenges in favor of divorcing the requirement of marriage and blood from the central legal definition of family. I argue, still very firmly, for more inclusive social and legal policies that would bestow respect and benefits upon all who assume the responsibility for and functions of family—whether they are married or not.

I. DIFFERENCES IN VISION FOR LESBIAN AND GAY FAMILIES

It would be unfair to assume that all family definition advocates are necessarily anti-marriage, just the same as it would be unfair to claim that all same-sex marriage advocates are insensitive to the merits of extending benefits and recognition beyond those who

over the age of 65 cohabit with a partner, in some cases to avoid increased taxes on Social Security, forfeiture of a deceased spouse's pension benefits or decreased Medicaid benefits. *Id.* at 100. The percentage of cohabiting, unmarried couples between the ages of 35 and 39 increased 34% since 1980 and has doubled for couples between the ages of 50 and 54. Gary Robertson, *Taxes on Marriage Seen to Discourage Weddings*, RICHMOND TIMES DISPATCH, Jan. 22, 1996, at D6. Straight couples who choose not to marry face the same economic and legal disadvantages as gay couples. Jay Romano, *Unmarried Partners: Let the Buyers Beware*, N.Y. TIMES, Aug. 27, 1995, § 9, at 1.

are married. Similarly, it would be unwise to conclude that all of those who argue for same-sex marriage share the same motivation for doing so. The perspectives of the participants in this grand debate are not so easily categorized. In the end, however, all of these advocates share the same passionate goal of equal treatment and respect for lesbian and gay families, despite the different means by which they would accomplish that goal.

A. The Vision of Same-Sex Marriage

Lesbian and gay couples want to get married for two primary reasons: (1) for the social acceptance and acknowledgement of their humanity that would be accorded their relationships through marriage, and (2) to receive the same benefits exclusively bestowed upon married couples. As a step toward satisfying the first need, many lesbian and gay couples, in fact, have gotten married in churches, synagogues and backyards around the country without waiting for society's sanction.¹⁴ Some gay weddings are extraordinarily traditional and are officiated by clergy.¹⁵ Others are more informal, calling simply for family and friends to gather as witnesses to the exchange of vows between two people. Still others are decidedly unique, drawing on many traditions.¹⁶ To all who have witnessed such ceremonies, these couples are married.

¹⁴ See generally CEREMONIES OF THE HEART: CELEBRATING LESBIAN UNIONS (Becky Butler ed., 1990) [hereinafter CEREMONIES] (compiling the separate accounts of 27 lesbian couples who created ceremonies to symbolize and acknowledge their lifetime commitment to each other); LESBIAN AND GAY MARRIAGE, *supra* note 10 (compiling the stories of lesbian and gay couples who have openly declared their commitments to each other through public ceremonies).

¹⁵ For example, a pastor presided over a gay wedding ceremony which was held in a church and involved the traditional exchange of vows and rings. LESBIAN AND GAY MARRIAGE, *supra* note 10, at 185-86. In another example of a traditional ceremony, a rabbi performed a gay marriage ceremony under a *chuppah*. LESBIAN AND GAY MARRIAGE, *supra* note 10, at 104-05.

¹⁶ For example, a lesbian commitment ceremony held in the privacy of the couple's home combined Native American and multi-cultural rituals and symbolism. CEREMONIES, *supra* note 14, at 281-84.

The goal of marriage rights advocates has been to give legal meaning to these religious or social marriages.

It is certainly difficult to argue against the basic principle so eloquently articulated by several colleagues: that lesbian and gay couples deserve the same rights as heterosexual couples.¹⁷ To them, the fact that the law could ban same-sex couples from legal marriage and its privileges is constitutionally unacceptable. Marriage is a fundamental right which cannot be denied to any couple absent a compelling state interest.¹⁸ Additionally, lesbian and gay couples are discriminated against on the basis of sex in that women can marry men, but not women; men can marry women, but not men.¹⁹

¹⁷ Tom Stoddard, a New York City lawyer and former executive director of Lambda Legal Defense and Education Fund, argues that equality in marriage for gays and lesbians will provide the foundation for the end of discrimination against gays and lesbians. Stoddard, *supra* note 10, at 17; see ESKRIDGE, *supra* note 10, at 7-8 (explaining that for many straight Americans, "state recognition of same-sex marriages would represent a stamp of approval for homosexual relationships"); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 604-08 (1995) (stating that adoption of domestic partnership ordinances by localities is not equal to state recognition of same-sex marriage because the economic and employment benefits of the two are not equal, nor is the emotional symbolism the same).

¹⁸ ESKRIDGE, *supra* note 10, at 124-52. See *Baehr v. Lewin*, 852 P.2d 44, 55-60 (Haw. 1993) (rejecting a fundamental rights argument).

¹⁹ *Baehr v. Lewin* is the only marriage challenge case that has achieved at least preliminary success. 852 P.2d 44 (Haw. 1993). Prior attempts to challenge the marriage laws resulted in unmitigated losses as courts held fast to the intractable definition of marriage as being only between a man and a woman. See *Dean v. District of Columbia*, 653 A.2d 307, 308 (D.C. Cir. 1995) (Terry, J., concurring) (noting that "it is impossible for two persons of the same sex to marry" and that such a denial is not a violation of equal rights if based upon the definition of marriage as a legal status between "a man and a woman as husband and wife"); *Jones v. Hallahan*, 501 S.W. 2d 588, 589 (Ky. Ct. App. 1973) (citing the definition of marriage from three dictionaries as being between "a man and a woman," and holding that two female appellants are prevented from marrying each other, "not by the statute of Kentucky or the refusal of the County Court Clerk . . . to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined"); *Baker v. Nelson*, 191 N.W.2d 185, 186 & n.1 (Minn. 1971) (holding that a Minnesota statute "does not authorize

Nevertheless, there are arguments beyond the legal realm that give marriage advocacy its potency, and at times its controversy, within the lesbian and gay community. For some, marriage is the preeminent civil rights issue for lesbians and gay men,²⁰ the "highest public recognition of personal integrity."²¹ It is "the political issue that most fully tests the dedication of people who are not gay to full equality for gay people, and it is also the issue most likely to lead ultimately to a world free from discrimination against lesbians and gay men."²² One observer has sought to deliberately provoke discussion by maintaining that "same-sex marriage is good for gay people and good for America, and for the same reason: it civilizes gays and it civilizes America."²³

marriage between persons of the same sex and that such marriages are accordingly prohibited" based on the common usage and definition of the term marriage as a union between "one man and one woman"); *Singer v. Hara*, 522 P.2d 1187, 1189 (Wash. Ct. App. 1974) (stressing that "it is apparent from a plain reading of [Washington's] marriage statutes that the legislature has not authorized same-sex marriages"). The *Baehr* court broke from tradition and held that the state constitution's provision banning sex discrimination prohibits the state from excluding same-sex couples from marriage absent a compelling reason. *Baehr*, 852 P.2d at 67.

²⁰ See Steven A. Holmes, *Civil Rights Dance Lesson: The Tiny Step Forward*, N.Y. TIMES, Sept. 15, 1996, § 4, at 5 (referring to Andrew Sullivan's comment that gay marriage would be a fundamental statement of equality). See also Andrew Sullivan, *Here Comes the Groom: A Conservative Case for Gay Marriage*, NEW REPUBLIC, Aug. 28, 1989, at 20 (stating that legalizing gay marriage "could do as much to heal the gay-straight rift as any amount of gay rights legislation").

²¹ ANDREW SULLIVAN, *VIRTUALLY NORMAL* 179 (1995).

²² Stoddard, *supra* note 10, at 17.

²³ ESKRIDGE, *supra* note 10, at 8. A portion of Eskridge's support for his pro-marriage argument is sure to provoke concern about the goals of marriage, and reinforce the myth that marriage, per se, decreases promiscuity:

Since at least the nineteenth century, gay men have been known for their promiscuous subcultures. Promiscuity may be a consequence of biology . . . or it may be the result of acculturation In the world of the closet, furtive behavior that is not only practically necessary but also addictively erotic may increase the likelihood of promiscuity. Whatever its source, sexual variety has not been liberating to gay men. In addition to the disease costs, promiscuity has encouraged a cult of youth worship and has contributed to the stereotype of homosexuals as

The strongest feminist pro-marriage argument has been articulated by Professor Nan Hunter, a critic of what she observes to be a tendency by feminists to attribute an essential nature to marriage.²⁴ By referring to marriage as patriarchal per se, rather than critiquing marriage as a tool that reinforces patriarchy, feminists sometimes ignore the important point that marriage is a socially constructed institution capable of being reshaped by social forces. As evidenced by *Loving v. Virginia*,²⁵ marriage is capable of new social definitions as old views of marriage die away. Hunter asserts that same-sex marriage holds the potential to destabilize the gendered definition of marriage.²⁶ Her goal, it seems, is to allow access to marriage, not for its own sake, but for the purpose of breaking down the gendered roles forced upon women and men through marriage.

people who lack a serious approach to life A self-reflective gay community ought to embrace marriage for its potentially civilizing effect on young and old alike.

ESKRIDGE, *supra* note 10, at 9-10.

²⁴ Nan D. Hunter, Marriage Pros and Cons, Address at the National Gay and Lesbian Task Force Creating Change Conference (Nov. 1995) (on file with *Journal of Law and Policy*).

²⁵ 388 U.S. 1 (1967). The Supreme Court held that a Virginia statutory scheme prohibiting marriage based on race violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *Id.* at 2. The Virginia statutes banning interracial marriage were tested by the Lovings, an interracial couple from Virginia who married in the District of Columbia. *Id.* Upon return to Virginia, the Lovings were charged and convicted of violating the state's ban on interracial marriages. *Id.* at 3. The trial judge, however, suspended the jail sentence provided that the Lovings leave the state and never return as a couple for 25 years. *Id.* After eight years of court battles and appeals, the Supreme Court found the statutes unconstitutional and reversed the convictions. *Id.* at 12.

²⁶ Nan D. Hunter, *Marriage, Law and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 16 (1991). *But see* Nancy D. Polikoff, Symposium, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1537-43 (1993) [hereinafter Polikoff, Symposium] (arguing that Hunter's thesis is "unpersuasive" and that lesbians and gays should not make gay marriage the focus of their movement for risk of losing sight of their aim to combat gender hierarchies).

B. The Vision for Broad Family Definition

Family definition proponents, on the other hand, argue that marriage and biological relationships are merely one form of family and should not be the sole determinants for whether a family receives legal privileges and benefits. Marriage holds little appeal for this group due to its history of subordination of and ownership over women and children, its regulation of sexuality for civilizing purposes and its severe restrictions on gender roles.²⁷ While the meaning of and purposes for marriage have historically been capable of change,²⁸ these proponents are wary of using the “master’s tools”²⁹ to work from within.

Several other arguments inform the family definition advocates’ vision. From a feminist perspective, gender roles have been an impervious feature of marriage for so long that it seems very unlikely that the institution will ever change.³⁰ Furthermore, on a

²⁷ See Polikoff, Symposium, *supra* note 26, at 1536 (advocating that “the desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation”); Cohen, *supra* note 10, at 38 (urging society to promote relationships that are “positive and rooted in equality” by engaging in political campaigns that “demand the provision of basic rights and resources to everyone, independent of their marital status”); see also LESBIAN AND GAY MARRIAGE, *supra* note 10, at 85-95 (interviewing Harry Hay and John Burnside of Los Angeles, California, a gay couple content not to participate in mainstream marriage rituals). Despite a 17-year relationship with her partner, Patt Denning expresses a view of marriage not uncommon among lesbian and gay people: “People are attempting to squeeze themselves into what I consider an abhorrent ritual, where one person is basically made the property of the other. As much as you try to pull that ritual apart and make it equal, it really doesn’t seem equal.” LESBIAN AND GAY MARRIAGE, *supra* note 10, at 31 (profiling Patt Denning and Kathie Cinnater).

²⁸ See generally JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE (1994); JOHN D’EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA (1988).

²⁹ Use of the term “master’s tools” refers to poet and writer Audre Lorde’s admonition: “The master’s tools will never dismantle the master’s house.” AUDRE LORDE, SISTER OUTSIDER: ESSAYS AND SPEECHES 114 (1984).

³⁰ See generally BOSWELL, *supra* note 28, at 281 (referring to remarks made

more fundamental level, it is male and female relationships generally that are in need of degendering, not just marriage. The extension of family recognition to unmarried couples and the visibility of same-sex couples raising children are equally, if not more powerfully, capable of degendering family relationships as the extension of marriage to same-sex couples.³¹ Mutuality and personal autonomy within relationships are more likely accomplished outside of the social strictures of marriage.³² Marriage, in

by a "well-known prelate" to Boswell that "heterosexual matrimony had become such a ragged institution . . . that it hardly constituted a useful model for same-sex couples").

³¹ The core resistance of courts to same-sex couples becoming parents is the fear that the children will not have an appropriate set of gendered role models. See *In re Opinion of the Justices*, 530 A.2d 21, 26 (N.H. 1987). The New Hampshire Supreme Court Justices opined that a proposed bill excluding gay men and lesbians from foster parentage and adoption does not violate the Equal Protection or Due Process clauses of the federal and state constitutions. *Id.* The court concluded that, in the absence of a "right to adopt [or] to be a foster parent," the bill's proposed means were "rationally related" to the bill's purpose of providing a healthy environment and proper role models for children. *Id.* at 24-25. The court accepted legislative findings that living in a homosexual environment could produce "social and psychological complexities" for children. *Id.* (referring to House Resolution 70). Further, the court noted that a person's sexual orientation is determined by a combination of genetic and environmental factors, despite available studies indicating no connection. *Id.* at 25. As parents are the primary role models after whom children pattern themselves, the court concluded that the legislature "rationally act[ed]" in the best interest of children by excluding gays and lesbians from adoptive or foster parent roles. *Id.* See also *Florida Dep't of Health & Rehabilitative Servs. v. Cox*, 627 So. 2d 1210, 1214-18 (Fla. Dist. Ct. App. 1993) (holding that a Florida statute prohibiting adoptions by lesbians and gay men was not unconstitutional).

³² See FRANK BROWNING, *THE CULTURE OF DESIRE* 87 (1993) (stating that radical feminists who believe "men use [marriage] to reduce the personhood of women to a status of disposable property" also accept the idea that the means by which "we enter one another's lives and bodies should reflect common values of equity, mutuality, and personal autonomy"); Frank Browning, *Why Marry?*, N.Y. TIMES, Apr. 17, 1996, at A23 (arguing that because the institution of marriage can be stifling and can lead to isolation, gay couples should not be too quick to embrace marriage).

sum, is too conservative an institution for the social goals of these advocates.³³

In addition to the problems presented by marriage per se, there are other arguments in favor of a broader definition of family. Mainly, marriage rights are not necessarily a priority to all lesbians and gay men. Some believe that a basic right to a job and an end to anti-gay violence are necessary precedents to marriage rights.³⁴ More fundamentally, marriage does not adequately address the full range of family relationships that equally deserve recognition. Straight or gay, romantic or platonic, sexually monogamous or non-monogamous, with children or without, the range of family possibilities are endless. True choice comes from recognizing this diversity, not in opening the door solely to lesbian and gay couples who choose or desire to conform to a conservative norm.³⁵

³³ The number of socially conservative non-gay commentators arguing for same-sex marriage lends support to this concern. See, e.g., James P. Pinkerton, *A Conservative Argument for Gay Marriage*, L.A. TIMES, June 3, 1993, at B7 (suggesting that supporting gay marriage may be helpful to the Republican Party because "[homosexuals] are organizing, fundraising and voting"); Jonathan Rauch, *A Pro-Gay, Pro-Family Policy*, WALL ST. J., Nov. 29, 1994, at A22 (urging Republicans to adopt a pro-family policy which includes all responsible citizens, including gays and lesbians); *Let Them Wed*, ECONOMIST, Jan. 6-12, 1996, at 13 (arguing that gays and lesbians should be entitled to marriage because government should not discriminate between classes of citizens, and that gays and lesbians also need the emotional and economic security that marriage provides). Ironically, while pointing out the conservative appeal of same-sex marriage, some within the gay community nonetheless argue that same-sex marriage is a component of "the progressive struggle." Gabriel Rotello, *To Have and To Hold: The Case for Gay Marriage*, NATION, June 24, 1996, at 11, 18.

³⁴ See Holmes, *supra* note 20, at 5 (noting that some gays and lesbians argue that workplace equality should be the priority: "[w]ithout such rights, some say, gay people will not be secure enough financially and psychologically to move into the mainstream and take on issues like marriage").

³⁵ The number of couples, mostly heterosexual, who have chosen to live together rather than marry has risen 80% between 1980 and 1991, according to census data. Jennifer Steinhauer, *No Marriage, No Apologies*, N.Y. TIMES, July 6, 1995, at C1. Where employers have provided domestic partner benefits to all of their unmarried employees, the majority of couples who have sought them are heterosexual. Jennifer Steinhauer, *Increasingly Employers Offer Benefits to All Partners*, N.Y. TIMES, Aug. 20, 1994, § 1, at 25.

II. IDENTIFYING THE PROBLEM

The problem in this area is not so much that lesbian and gay couples cannot marry. Rather, it is that all of the legal and social benefits and privileges constructed for families are available only to those families joined by marriage or biology. Those who are not married but function as family by caring for and supporting one another on a daily basis receive no support for the essential role they play. Singular pursuit of same-sex marriage serves to reinforce the primacy of marriage in family definitions, rather than furthering the nearly two-decade battle, often led by lesbians and gay men, to open the door to family benefits for those who function as family as well as for those who have formalized their relationships.

A. *Absence of Recognition*

The best example of the harm and indignity caused by failing to give credence to lesbian and gay relationships is found in the harrowing experiences of Sharon Kowalski and Karen Thompson, a lesbian couple in Minnesota.³⁶ Their saga begins with a near fatal accident in November 1983 that left Sharon in a coma.³⁷ In the terrorizing hour in the hospital emergency room immediately after the accident, Karen tried desperately to get someone to tell her simply whether Sharon was dead or alive.³⁸ She was coldly told, however, that such information could only be revealed to immediate family, not to a "close friend," as Karen referred to herself.³⁹ It was the intercession of a kindly priest who overheard Karen's frantic attempts to discover Sharon's fate that brought Karen the information she wanted: Sharon was alive, but had suffered a

³⁶ The facts of this case are more fully recounted in KAREN THOMPSON & JULIE ADRZEJEWSKI, *WHY CAN'T SHARON KOWALSKI COME HOME?* (1988). See *In re Kowalski*, 478 N.W.2d 790 (Minn. Ct. App. 1991).

³⁷ THOMPSON & ADRZEJEWSKI, *supra* note 36, at 3.

³⁸ THOMPSON & ADRZEJEWSKI, *supra* note 36, at 4.

³⁹ THOMPSON & ADRZEJEWSKI, *supra* note 36, at 4.

severe closed head injury that would dramatically change her life.⁴⁰

Throughout the weeks following the accident, Karen spent hours each day at Sharon's side in the hospital, talking to her, massaging her limbs and praying for recovery.⁴¹ Confrontations with Sharon's family, who did not understand the extreme devotion of Sharon's "roommate" and who were resistant to Karen's desire to assist in Sharon's treatment, ensued due to the length and intensity of Karen's hospital visits.⁴² Until that point, the nature of Karen and Sharon's relationship was known only to a handful of trusted friends.⁴³ To explain herself, Karen wrote a letter to Sharon's parents telling them of her love for Sharon and of their lesbian relationship.⁴⁴ Instead of easing tensions, the letter prompted a hostile denial from the Kowalski family, who viewed Karen's revelations as preposterous.⁴⁵ As tensions mounted, Karen filed a claim to become Sharon's guardian,⁴⁶ and the Kowalski's banned her from seeing Sharon.⁴⁷ What would become almost a decade long legal battle to reunite these two women and to gain respect for the family relationship they shared had begun.

Sharon Kowalski and Karen Thompson's experiences with the system exposed the false predicates of family as defined by law. Theirs was not only a story of two gay people. Central to the story were the additional facts that Sharon was unmarried, a woman and, now, disabled. This combination of factors allowed the courts, hospital personnel, court appointed lawyers and friends to concede that Sharon Kowalski, a thirty-year-old adult who no longer lived with her parents, would forever be subject to the decisionmaking

⁴⁰ THOMPSON & ADRZEJEWSKI, *supra* note 36, at 4-5.

⁴¹ THOMPSON & ADRZEJEWSKI, *supra* note 36, at 8-9.

⁴² THOMPSON & ADRZEJEWSKI, *supra* note 36, at 17-18.

⁴³ THOMPSON & ADRZEJEWSKI, *supra* note 36, at 24.

⁴⁴ THOMPSON & ADRZEJEWSKI, *supra* note 36, at 22-25.

⁴⁵ THOMPSON & ADRZEJEWSKI, *supra* note 36, at 26. In response to Karen's "coming out," Sharon's sister gave voice to the family sentiment: "You are a sick, crazy person who has made up this whole story. There is no way Sharon is a lesbian. You have written a bunch of trash. My parents never want to set eyes on you again!" THOMPSON & ADRZEJEWSKI, *supra* note 36, at 26.

⁴⁶ THOMPSON & ADRZEJEWSKI, *supra* note 36, at 33.

⁴⁷ THOMPSON & ADRZEJEWSKI, *supra* note 36, at 41.

power of her father—legally, socially and culturally.⁴⁸ Sharon's independence, her love for and desire to see Karen and her ability to speak for herself despite a disabling injury went unrecognized by most of those with power over her care and her future.

Karen Thompson fought for eight years so that Sharon could be moved from the nursing home where she languished at her family's direction to a rehabilitation center with medical expertise in closed head injuries. Karen fought for eight years to prove that Sharon could still voice her wishes, and for a guardian to be appointed who would respect those wishes and take the time to understand Sharon's needs.⁴⁹ When the Minnesota Court of Appeals finally ruled that Karen and Sharon are a "family of affinity, which ought to be accorded respect,"⁵⁰ it signalled a victory for lesbian and gay couples.⁵¹

⁴⁸ See T. A. Tucker Ronzetti, Comment, *Constituting Family and Death Through the Struggle with State Power: Cruzan v. Director, Missouri Department of Health*, 46 U. MIAMI L. REV. 149, 182-83 (1991) (discussing *In re Kowalski*, 478 N.W.2d 790 (Minn. Ct. App. 1991), and explaining that Sharon Kowalski's relationship with her father was presumptively legitimate as compared to her relationship with Karen Thompson). Naturally, rules need to be constructed for the care of adults unable to care for themselves. Often a parent will be the obvious person to which the medical provider and the courts will turn. However, once another familial relationship is asserted, procedures should allow for the relationship to be substantiated and given preference.

⁴⁹ See Tamar Lewin, *Disabled Woman's Care Given to Lesbian Partner*, N.Y. TIMES, Dec. 18, 1991, at A26. Karen Thompson fought and won the legal battle, which began in 1984, for guardianship over her lesbian lover, Sharon Kowalski. *Id.* The highly publicized legal battle became a "rallying cause for gay rights groups" across America. *Id.*

⁵⁰ *In re Kowalski*, 478 N.W.2d 790, 797 (Minn. Ct. App. 1991).

⁵¹ Upon victory, Karen Thompson's lawyer noted: "This seems to be the first guardianship case in the nation in which an appeals court recognized a homosexual partner's rights as tantamount to those of a spouse." Lewin, *supra* note 49, at A26. In the author's tear-filled conversation with Karen Thompson just hours after the court handed down its decision, Karen challenged the perception that the case was an unequivocal victory. As she saw it, each moment she spent battling for access to and better care for her lover was a moment lost in Sharon's rehabilitative care—for the year and a half after a closed head injury is apparently the most critical time period for rehabilitation. As Karen stated in that phone conversation, "Sharon did not win here."

Karen's battle was not one for marriage, but for respect for her relationship with Sharon. Legal marriage probably would not have saved Karen from the years of expensive and debilitating legal battles she fought to retain contact with Sharon. Karen and Sharon were desperately closeted. They married privately by exchanging rings, and were known as a couple to only a small group of close friends. They certainly would not have risked the public declaration required by marriage. Yet, regardless of whether they could or would have married, their relationship should have been accorded greater respect, and Sharon's desire to retain contact with Karen should have been inferred.⁵² As a consequence of Karen's very public struggle for control of her relationship with Sharon,⁵³ lesbian couples in particular are more aware of the need to protect themselves against family members and a judicial system that may not always be counted on to respect lesbian and gay relationships.⁵⁴

⁵² As one advocate has stated it, the law should be developed to "serve lesbian relationships instead of having lesbian relationships serve the law." Ruthann Robson, *Our Relationships and Their Laws*, in DYKE LIFE: FROM GROWING UP TO GROWING OLD, A CELEBRATION OF THE LESBIAN EXPERIENCE 127, 130 (Karla Jay ed., 1995).

⁵³ See generally Steven N. Hargrove, *Domestic Partnership Benefits: Redefining Family in the Workplace*, 6 LOY. CONSUMER L. REP. 49, 51-52 (1994) (noting that Kowalski prompted a gradual change in the legal status of nontraditional family arrangements by acknowledging that two lesbian women in a committed relationship constitute a family); Arthur S. Leonard, *Lesbian and Gay Families and the Law: A Progress Report*, 21 FORDHAM URB. L.J. 927, 946 (1994) (referring to Kowalski as an important case for the recognition of same-sex couples as a family); Martha L. Minow, *All in the Family & In All Families: Membership, Loving, and Owing*, 95 W. VA. L. REV. 275, 331 (1993) (stressing that Kowalski "implicates the contemporary, unresolved questions about who is in the family and who should be eligible for the benefits of family membership").

⁵⁴ Karen waged a one-woman educational campaign, using her experience to encourage lesbians, whether single or in couples, to use the legal tools available for making their wishes known and empowering partners or friends to assist with medical decisionmaking. See Paula L. Ettelbrick, *Legal Issues in Health Care for Lesbians and Gay Men*, 5 J. GAY & LESBIAN SOC. SERVS. 93, 94 (1996) (arguing that heterosexist assumptions about family structure require lesbians and gay men to take overt measures to let their relationships and decisions be known within healthcare settings); Brooke Oliver, *Contracting for*

B. Absence of Benefits

The dearth of social benefits for nontraditional families is the second factor at the core of the struggle to broaden the definition of family. The benefits provided to family members fall into two basic categories: (1) tangible economic benefits, either privately or publicly provided, and (2) legal privileges.

The first category includes the range of family-oriented benefits provided by employers which, along with salary, are part of an employee's compensation. Healthcare benefits,⁵⁵ paid bereavement leave, parenting leave, sick leave, discounts or tuition waivers and death benefits are among the many employer-provided benefits extended to employees for the benefit of a spouse and children, and are among the benefits sought by unmarried employees for their partners under the "equal pay for equal work" rubric.⁵⁶

Cohabitation: Adapting the California Statutory Marital Contract to Life Partnership Agreements Between Lesbian, Gay or Unmarried Heterosexual Couples, 23 GOLDEN GATE U. L. REV. 899, 913-16 (1993) (setting forth a checklist of rights and duties advisable to be included in life partnership agreements between lesbian, gay and unmarried heterosexual couples in California); Ruthann Robson & S. E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMP. L. REV. 511, 515-16 (1990) (noting that Karen Thompson advocates the use of durable powers of attorney, and other legal documentation, to protect rights of lesbian partners in times of medical crisis).

⁵⁵ Employer-provided health insurance provides families, including spouses and children, tax-free health coverage. See I.R.C. § 105(b) (West Supp. 1996) (dealing with amounts received for medical care under accident and health plans, including taxpayer's spouse and dependents); *id.* § 152 (West Supp. 1996) (setting forth definition of dependents for purposes of receiving tax-free employee health insurance benefits).

⁵⁶ Until recently, advocacy to extend employment benefits to unmarried partners has met with resistance in the courts. See *Rovira v. AT&T*, 817 F. Supp. 1062, 1069-72 (S.D.N.Y. 1993) (holding that a lesbian life partner of a deceased employee and the partner's children were not "beneficiaries" entitled to benefits under decedent's death benefit plan, and that a provision in ERISA-covered pension plan limiting class of eligible beneficiaries to spouses married according to state law was not per se unreasonable or discriminatory); *Hinman v. Dep't of Personnel Admin.*, 213 Cal. Rptr. 410, 419-20 (1985) (holding that denial of dental care benefits to partners of gay or lesbian state employees does not violate

In addition, there are other sources of tangible economic benefits for families. Businesses and institutions provide many family-oriented benefits to the public, such as family memberships to museums and health clubs, frequent flier awards and discounted family travel and home insurance coverage.⁵⁷ The government

the California constitution's equal protection clause because denial was based on statutorily defined marital status, and California has a legitimate interest in promoting marriage); *Phillips v. Wisconsin Personnel Comm'n*, 482 N.W.2d 121, 129 (Wis. Ct. App. 1992) (holding that denial of family health insurance coverage to partners of gay or lesbian state employees does not violate equal protection clause of Wisconsin constitution since denial was based on reasonable interpretation of marital statute as applied to state's Fair Employment Act, which distinguishes marital status, not sexual orientation, of employees). *But see* Victoria Slind-Flor, *Oregon AG Weighs Gay Benefits Issue*, NAT'L L.J., Sept. 2, 1996, at A8 (contemplating whether Oregon State Attorney General will appeal finding by Multnomah County Civil Court in *Tanner v. Oregon Health Sciences University* (docket no. 9201-00369) that Oregon Health Sciences University discriminated against gay and lesbian employees by not extending spousal benefits to their domestic partners); *see also Judge OKs Coverage for Gays*, ROCKY MTN. NEWS, Sept. 8, 1996, at 24A (referring to Judge Stephen L. Gallagher's recent decision in *Tanner*: "For the first time in the United States, a judge has required a public agency to extend to homosexual couples the medical, life and dental insurance benefits that married couples often have."). Aside from a handful of private employers, city governments were early leaders in recognizing the need to provide family benefits to unmarried workers. *See* Bowman & Cornish, *supra* note 5, at 188-90 (noting that in 1984 Berkeley, California passed the first domestic partnership ordinance providing employee benefits to domestic partners of municipal employees). A number of major private employers and universities have joined in providing such benefits, though many have chosen to extend them only to gay employees. *See* M. V. Lee Badgett, *Equal Pay for Equal Families*, ACADEME, May-June 1994, at 26 (noting that as of 1994, "[t]wenty-four colleges and universities offer healthcare benefits to [gay and lesbian] employees' domestic partners"); David J. Jefferson, *Gay Employees Win Benefits for Partners at More Corporations*, WALL ST. J., Mar. 18, 1994, at 1 (noting that as of 1994, "more than 70 major companies offer[ed] domestic-partner benefits" limited to gay employees). *But see Domestic Partner Benefits*, CENSUS OF CERTIFIED EMPLOYEE BENEFIT SPECIALISTS, (Int'l Society of Certified Employee Benefit Specialists, Brookfield, Wis.), May 1995 (noting that among census respondents, 44% indicated that domestic partnership benefits are limited to same-sex partners, as opposed to a 51% indication that such benefits are available to same-sex and unmarried, opposite-sex partners).

⁵⁷ Increased social consciousness and acceptance of unmarried couples has

also provides a wide range of economic privileges to families related by marriage or blood.⁵⁸ Tax breaks, including reduced taxes for inheritance and income tax,⁵⁹ social security benefits,⁶⁰ inheritance rights,⁶¹ survivor's benefits upon the death of a spouse in public service, such as police officers, firefighters and military veterans,⁶² and family medical leave⁶³ are among the many.

The second category of social benefits for families is comprised of the many legal privileges allowed to families joined by marriage,

led many businesses to discard the family requirement for discounts. For example, some frequent flyer programs allow awards for "companion" travel. Other airlines permit frequent fliers "to assign their awards to anyone they choose regardless of relationship." *Travel Advisory: Delta Air Awards for Gay Partners*, N.Y. TIMES, June 6, 1993, § 5, at 3. In 1993, Delta changed its policy to allow gay and lesbian partners to assign awards to each other if they are legally certified as partners by the city in which they reside. *Id.*; see James T. Yenckel, *Travel Options for Gays*, WASH. POST, July 30, 1989, at E1 (discussing the increasing travel options for gays and lesbians).

⁵⁸ See ESKRIDGE, *supra* note 10, at 66-67 (listing some of the many legal rights and benefits provided to married couples and their children).

⁵⁹ See generally Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY 97, 99-102 (1991) (noting that none of the specifically enacted tax benefits bestowed upon spouses married according to state law are available to lesbian and gay couples, and arguing that the Internal Revenue Code should be restructured to recognize the existence of lesbian and gay families). Lesbian and gay employees who do receive partner benefits such as healthcare discover, to their dismay, that the cost of their benefits are taxed to them under federal law; whereas they are provided tax-free to married employees. See *supra* note 55 (providing some examples of tax benefits available to the traditional family).

⁶⁰ Under the Social Security Act, married persons are entitled to survivor's benefits. See 42 U.S.C. § 402 (1988).

⁶¹ A spouse is automatically entitled to a share of the estate of his or her deceased spouse. See N.Y. EST. POWERS & TRUSTS LAW §§ 4-1.1, 5-1.1 (McKinney 1981 & Supp. 1996).

⁶² See 38 U.S.C. §§ 1310-1318 (1994) (veteran's benefits).

⁶³ See generally 29 U.S.C.A. §§ 2601-2654 (1985 & West Supp. 1996). The Family and Medical Leave Act provides the substantial economic benefit of being able to return to one's job after taking time to care for, among others, an ill spouse. Unmarried partners are not included in the law, though it appears that the non-biological, non-adoptive parent-child relationships were covered by Congress.

blood or adoption.⁶⁴ Spouses may seek the services of the family court for domestic violence.⁶⁵ Spouses may adopt each other's children,⁶⁶ and they may sue for the wrongful death of the other.⁶⁷ They receive preference in appointments as guardian,⁶⁸ personal representative for an intestate spouse⁶⁹ and for consultation in medical decisionmaking.⁷⁰ Legally recognized parents are also allowed the privilege of custody and visitation⁷¹ and the right to notice before the child may be adopted.⁷² Legally recognized spouses and children also receive preferential treatment for immigration.⁷³

Both social recognition that a relationship is one that falls under the umbrella of family, and recognition that tangible family benefits and privileges should thereby attach to such relationships, are central to the functioning and well-being of family units. It is the desire and need for this basic social support that motivates lesbian and gay family advocates to open access to these benefits. As the Sharon Kowalski case illustrates, however, focusing solely on marriage as the means to do so will assist only those families joined by marriage. Those who have not married, regardless of the reason, should not be penalized for their decision; and their decision not to marry should not be interpreted as a lack of commitment. We need only look at the present in order to predict

⁶⁴ There are also unofficial privileges associated with marriage, such as admittance to an intensive care unit to visit with an ill partner, access to fertility clinics for reproductive services, attendance at the birth of a child or preference for sharing a room in a nursing home.

⁶⁵ New York's domestic relations law provides that spouses may seek court orders and other services through the family court, which is better equipped to handle family violence than the criminal court. *See* N.Y. FAM. CT. ACT § 812(1), (5) (McKinney 1990 & Supp. 1996).

⁶⁶ *See* N.Y. DOM. REL. LAW § 110 (McKinney 1988 & Supp. 1996).

⁶⁷ *See* N.Y. EST. POWERS & TRUSTS LAW § 5-4.1 to 4.4.

⁶⁸ *See id.* § 5-1.1 (right of election by surviving spouse).

⁶⁹ *See id.*

⁷⁰ *See* N.Y. PUB. HEALTH LAW § 2981(3)(d) (McKinney 1993 & Supp. 1996) (stating that "[n]o person who is not the spouse, child, parent, brother, sister or grandparent of the principal" may be appointed "healthcare agent").

⁷¹ *See* N.Y. DOM. REL. LAW § 70 (McKinney 1988 & Supp. 1996).

⁷² *See id.* § 111 (McKinney 1988 & Supp. 1996).

⁷³ *See* 8 U.S.C. §§ 1151(b)(2)(A)(i), 1430(a)-(b), (d) (1994).

the future. Most private domestic partner benefits policies are extended only to gay and lesbian employees, on the grounds that they *could not* marry in order to get the benefits.⁷⁴ Unmarried straight couples are left without benefits. Once marriage is available, gay and lesbian couples will most certainly be required to marry in order to receive benefits. Gay couples, like straight couples now, will be forced to marry in order to get the benefits. Those who are not married would once again struggle without healthcare, bereavement leave and all of the other workplace benefits finally extended to unmarried workers. One step forward, two steps back.

III. THE ARGUMENT FOR THE FAMILY DEFINITION APPROACH TO FAMILY RECOGNITION

Challenging marriage laws to include lesbian and gay couples was a choice that advocates could have made to extend the privileges of family to lesbian and gay couples. Most of these advocates, having been informed by the feminist and gay liberation movements and the progressive politics of narrowing the gap between the "haves" and the "have-nots," chose instead to use their marginal status as lesbians and gay men to broaden the definition of family and to challenge the role of marriage in disbursing such necessary benefits as healthcare. These advocates drew on the fact that most people define familial caretaking networks well beyond marriage and biology.⁷⁵ Gay families were not the first to advocate for functional definitions of family,⁷⁶ but their existence on

⁷⁴ See, e.g., Dunlap, *supra* note 13, at A18 (describing IBM's newly enacted domestic partnership policy).

⁷⁵ Most people instinctively define family beyond marriage and blood relationships. A 1989 poll of 1200 adults nationwide revealed that 74% defined family as a group of people who love and care for each other, while only 22% said a family was a group of people related by blood, marriage or adoption. *Survey Reveals Role of Family in American Life*, PR NEWSWIRE, Oct. 10, 1989, available in LEXIS, News Library, Pnews File.

⁷⁶ The concept of functional parenthood has been examined by courts addressing the visitation or custody rights of step-parents or other extended family members. See, e.g., *Bryan v. Bryan*, 645 P.2d 1267, 1273 (Ala. Ct. App. 1982) (visitation granted to stepfather); *Collins v. Gilbreath*, 403 N.E.2d 921,

the periphery of marriage provided compelling grounds for questioning the policy of extending economic benefits and legal privileges to only marital and blood family members. In this effort, marriage becomes but one form of family, joining other relationships, such as functional families,⁷⁷ domestic partnerships⁷⁸ and co-parents under the umbrella of family.

Four premises have fueled the movement for broader definitions of family. First, cultural views of family already include relationships not bound by marriage or biology that should be given legal effect. Second, extension of critical economic and legal benefits to only a narrow group of legally defined family is discriminatory and interferes with strong public policy goals of supporting families.

923 (Ind. Ct. App. 1980) (stepfather granted visitation while biological father had custody); *Atkinson v. Atkinson*, 408 N.W.2d 516, 519 (Mich. Ct. App. 1987) (developing theory of "equitable parenthood" to protect parental expectations of man who discovered at divorce that he was not the child's biological father); *In re D.M.M.*, 404 N.W.2d 530, 536-37 (Wis. 1987) (aunt granted parental standing as functional parent despite statutes limitation to parents and grandparents). Though the California case of *Marvin v. Marvin* was not a family definition case per se, it certainly broke ground at the time for allowing an unmarried partner to make a claim for spousal support by proving an implied or express contract to provide for her well-being after the break up of the relationship. 557 P.2d 106, 113 (Cal. 1976).

⁷⁷ The functional family form is applicable to any group of people who care for each other. But, finding that the group is a functional family in some contexts does not necessarily mean that they must be so designated in all contexts. For example, two elderly friends who live together for economic and companionship reasons may be considered each other's family for the limited purposes of hospital visitation, landlord-tenant relationships or medical decisionmaking, because they are likely to know more about each other's needs than blood family who may be hours away. Depending on the circumstances and the extent of their family, however, it may not be appropriate to extend to them the complete range of family benefits. *See, e.g., Baer v. Brookhaven*, 73 N.Y.2d 942, 942, 537 N.E.2d 619, 619, 540 N.Y.S.2d 234, 234 (1989) (finding members of group home not related by blood, adoption or marriage considered to be functional family for purposes of zoning ordinance); *McMinn v. Oyster Bay*, 66 N.Y.2d 544, 551, 488 N.E.2d 1240, 1244, 498 N.Y.S.2d 128, 132 (1985) (holding unconstitutional the definition of family in zoning ordinance limiting the age of unrelated persons who could dwell in a single-family home pursuant to due process clause of state constitution).

⁷⁸ *See supra* note 7 (defining "domestic partnership").

Third, insofar as government controls the benefits and legal rights of family, function, not morality, should govern family definitions and legal access to such benefits. Fourth, the traditional marriage model of two-person couples and their children is inadequate to meet the needs of the growing number of families within the lesbian and gay community.

A. Cultural Inclusion As Family

The idea that family exists beyond marriage and blood certainly pre-existed the work of lesbian and gay family advocates.⁷⁹ Through the stories of Karen Thompson, Miguel Braschi⁸⁰ and numerous gay couples raising children, the public has been confronted with the unfairness of a system that did not give credit to their relationships. Employers' restructuring of employment benefits and courts' willingness to extend equal parental status to two women raising children together have proven that solutions can be found to ease the disparity between families. But, the point of these stories and solutions was not to require that all get married. To the contrary, the point was to uncover solutions for families who do not fit within the laws and policies defining family relationships as requiring marriage or biology. To accomplish their goal of including lesbians and gay men within the definition of family, advocates culled the essence of what it means to be family by emphasizing its many functions. They created terminology to accurately describe the function and, eventually, to serve as terms of art which, much like the term spouse, would become universally understood. Terms like "domestic partner" and "second parent adoption" allow one to readily visualize the family relationships at issue.

Most of the functional characteristics of family were easily identifiable: emotional interdependence, commitment to the long

⁷⁹ See DIZARD & GADLIN, *supra* note 3, at 7 (noting that citizens were encouraged to value both community and family in colonial America).

⁸⁰ Referring to the plaintiff in *Braschi v. Stahl Assocs.* who challenged his landlord's attempt to evict him after his gay lover died. 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 790 (1989). See *infra* notes 90-96, 106-14 (discussing the *Braschi* case).

term, caretaking and responsibility for each other's well-being and some financial intermingling, all of which are meant to distinguish family members from roommates. For the most part, cohabitation is required, or at least helpful, to establish a family relationship.⁸¹ The weight given to any particular family function usually correlates to the benefit or privilege sought. Cohabitation, for example, may not be an expendable element in a case in which one's home is the center of controversy.

Many of the terms developed to describe lesbian and gay family relationships, such as "domestic partnership," have become both part of the culture's vernacular and terms of art within the law. While many terms may very well have pre-existed lesbian and gay family advocacy, most have taken a more definite form with the visibility of lesbian and gay relationships. Generically, families not joined by marriage or blood are referred to as alternative,⁸²

⁸¹ Some argue, however, that the emphasis on family functions such as cohabitation fails to reflect the broader family networks that many lesbians and gay men have formed with friends in response to cultural alienation, hostility and estrangement from blood family members who refuse to accept a gay family member. See BROWNING, *supra* note 32, at 134-59 (suggesting that the gay family, most of which have substituted friends for blood relations, will have deeper meaning if it moves from a bond of private affection to one posed in civic participation); KATH WESTON, *FAMILIES WE CHOOSE* 202-13 (1991) (arguing that marriage does not adequately define lesbian and gay relationships and will not satisfy the need for social recognition and state administered benefits); see also Duggan, *supra* note 10, at 5 (arguing that assumptions about marriage and family—that "a sexual relationship is the basis for a household, that reproduction takes place through such relationships, that economic dependence and property transmission is best structured through such household"—fail to define the way gay men and lesbians actually live). In the author's experience, universities have been most sympathetic to loosening the cohabitation requirement for receipt of domestic partner benefits because they constantly confront the dilemmas of spouses who have committed relationships because one of them could not find suitable employment in a college town. Ironically, some have suggested dropping the cohabitation requirement in, of all things, *domestic partnership*. See Bowman & Cornish, *supra* note 5, at 1204-05 (commenting that the requirement of cohabitation to establish a domestic partnership may exclude those who are truly committed to one another).

⁸² Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation, and Collective Bargaining*, 2 WISC. WOMEN'S L.J. 1, 3 (1986). Alternative families involve committed relationships

functional⁸³ or nontraditional families. Individuals in couples may call themselves "family partners,"⁸⁴ companions,⁸⁵ "life partners"⁸⁶ or "domestic partners,"⁸⁷ the term most commonly used. Some lesbians and gay men take on the term "spouse" to best describe their relationship. To distinguish the relationship between

between unmarried heterosexual or homosexual couples and their dependent children. *Id.* at 3-4 & n.8.

⁸³ Note, *Looking for a Family Resemblance: The Limits of the Fundamental Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1646-47 (1991).

[T]he functional approach [to family] inquires whether a relationship shares the essential characteristics of a traditionally accepted relationship and fulfills the same human needs. Thus, the specific characteristics of each relationship, such as economic cooperation, participation in domestic responsibilities, and affection between the parties, play a crucial role in a functional determination of family status. . . . Courts that apply functionalism are generally less deferential to the legislature and believe that they should expand the definition of family to incorporate social changes and keep pace with "the needs of the country." For functionalist courts, the value of marriage and parenthood derives from positive societal effects, such as encouragement of stable, affectionate, and economically efficient human relationships.

Id.

⁸⁴ See, e.g., *Hinman v. Department of Personnel Admin.*, 213 Cal. Rptr. 410, 412 (Ct. App. 1985) (identifying Hinman's gay partner as his "mate," "spouse" or "family partner").

⁸⁵ See, e.g., *Phillips v. Wisconsin Personnel Comm'n*, 482 N.W.2d 121, 123 (Wis. Ct. App. 1992) (noting that dependent insurance coverage is not available to "companions" of unmarried state employees).

⁸⁶ See, e.g., *Braschi v. Stahl Assocs.*, 74 N.Y.2d 201, 212, 543 N.E.2d 49, 55, 544 N.Y.S.2d 784, 790 (1989) (noting that "[t]he determination as to whether an individual is entitled to non-eviction protection should be based upon an objective examination of the relationship of the parties" and that the gay "life partner" of tenant in rent-controlled apartment should have been given an opportunity to prove that he was a member of tenant's family).

⁸⁷ Beyond simply cultural status, domestic partnership has reached legal status through the adoption of many city and county ordinances across the country which provide employment benefits, such as health insurance and bereavement leave, to the domestic partners of government employees. See generally Bownan & Cornish, *supra* note 5, at 1188-1203 (identifying the cities which have such ordinances as of 1992 and discussing the common threads that run between them).

the biological mother and her partner who is raising children with her, the terms co-parent⁸⁸ and second parent⁸⁹ were coined specifically as non-gendered terms that reflect the experiences of lesbian couples who raise children.

Accepting a cultural view of family as individuals who are emotionally and financially interdependent, the New York Court of Appeals became the first to legally define family to include a gay couple. In *Braschi v. Stahl Associates*,⁹⁰ two gay men, Leslie Blanchard and Miguel Braschi, had shared ten years of their lives together in Blanchard's rent-controlled apartment.⁹¹ After Blanchard's death, the landlord attempted to evict Braschi on the grounds that the rent control regulations allow only family members to remain in the apartment after the death of the tenant.⁹² Braschi fought the eviction, and convinced the court of

⁸⁸ See generally Paula L. Ettelbrick, *Who Is A Parent?: The Need To Develop a Lesbian Conscious Family Law*, 10 N.Y.L. SCH. J. HUM. RTS. 513 (1993) [hereinafter Ettelbrick, *Who Is a Parent?*] (discussing judicial treatment and future implications of "lesbian co-parents"); Polikoff, *Redefining Parenthood*, *supra* note 6 (using term "co-parent" to refer generally to the biological mother's lesbian partner who functions equally as the child's parent). "Co-parent adoptions involve the attempt by the life partner of the biological parent to adopt the child so that the child is part of a family with two parents." William E. Adams, *Whose Family is it Anyway? The Continuing Struggle for Lesbians and Gay Men Seeking to Adopt Children*, 30 NEW ENG. L. REV. 579, 590 (1996).

⁸⁹ Aside from distinguishing between two lesbian mothers, the term second parent also distinguishes an unmarried co-parent from a step-parent, a term which presupposes a marriage between a parent and her partner. See, e.g., *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535, 538 (N.J. Super. Ct. App. Div. 1995) ("As we understand the trial judge's reasoning, he was of the view that since the plaintiff was not the legal spouse of the natural mother, she could not qualify as a stepparent and, consequently, her adoption petition could not be granted . . ."). In *Adoption of Two Children by H.N.R.*, the appellate division held that the statutory requirement of marriage attached to the term "stepparent" should not be "narrowly interpreted so as to defeat an adoption that is clearly in the child's best interests" and, consequently, allowed the adoption labelling the natural mother's adoptive lesbian partner as the child's "second parent" instead of "stepparent." *Id.* at 539.

⁹⁰ 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

⁹¹ *Id.* at 206, 543 N.E.2d at 50-51, 544 N.Y.S.2d at 785-86.

⁹² *Id.* The rent control regulation extended "non-eviction protection" to the "surviving spouse of the deceased tenant or some other member of the deceased

appeals that gay couples (who are financially and emotionally interdependent) are family members for purposes of the rent control law.⁹³

To reach its decision, the court examined family from a cultural perspective, referring to family alternately as "a group of people united by certain convictions or common affiliation" and a "collective body of persons who live in one house under one head or management."⁹⁴ The court rejected the view that family must be "rigidly restricted to those people who have formalized their relationships by obtaining, for instance, a marriage certificate or adoption order."⁹⁵ Rather, the court looked at the cultural and functional aspect of family that does not "rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life."⁹⁶

Though extension of *Braschi* to other family contexts has proved to be quite limited, the court's inclusion of lesbian and gay couples within the definition of family was an historical step toward creating a lesbian and gay-inclusive cultural view of family. Marriage was not, and should not be, the determining factor in whether rent control occupants may stay in their homes after the person with whom they have shared that home as a family dies.

The New Jersey Supreme Court recently looked to the cultural indicia of family to allow recovery for emotional distress damages by a woman who witnessed the accidental death of her fiancé. Ruling that Eileen Dunphy had a "familial relationship" with her fiancé, the court in *Dunphy v. Gregor*⁹⁷ extended recovery for the common law tort of bystander liability beyond the limits of blood and legal family members.⁹⁸ As in *Braschi*, the *Dunphy* court

tenant's family who has been living with the tenant." *Id.* at 209, 543 N.E.2d at 52, 544 N.Y.S.2d at 787.

⁹³ *Id.* at 213-14, 543 N.E.2d at 55, 544 N.Y.S.2d at 790.

⁹⁴ *Id.* at 211, 543 N.E.2d at 54, 544 N.Y.S.2d at 789 (citing BLACK'S LAW DICTIONARY 543 (Special Deluxe 5th ed. 1979); WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 448 (1984)).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ 642 A.2d 372 (N.J. 1994).

⁹⁸ *Id.* at 376.

emphasized the components of the couple's lives that served as the indicia of family: cohabitation, shared finances and a long-term commitment, as evidenced by their intention to marry.⁹⁹ Reflecting upon the practical interpretive posture of the *Braschi* decision, the *Dunphy* court expressed its confidence that "courts are capable of dealing with the realities, not simply the legalities, of relationships to assure that resulting emotional injury is genuine and deserving of compensation."¹⁰⁰

Parenting cases have long been fertile ground for exploring the contours of functional family definitions. Most notably, due to the limitations on reproduction for same-sex partners, the experiences of lesbian and gay parents have challenged the parameters of parenthood. For lesbians, specifically, the couple decides which of them will bear or adopt the child.¹⁰¹ Should the couple break up, the question is whether the non-biological/non-adoptive parent has a legal claim to visitation or custody as a functional parent to the child. Advocates have argued that the assumption of responsibility and caretaking incurred by the co-parent, and the clear intent of the parties at the time of conception or adoption to raise the child as co-equal parents, form the basis for a claim of parental rights by the non-legal parent.¹⁰² Courts, initially unwilling to grapple with the absence of a bright line rule, have gradually moved toward following the cultural view that parenthood is an active function, not just a status.¹⁰³

⁹⁹ *Id.* at 378. While the betrothal between the plaintiff and her fiancé assisted the court's finding of a long-term commitment, nothing in the court's reasoning indicates that the intent to marry is dispositive of its ruling.

¹⁰⁰ *Id.*

¹⁰¹ See Deborah Lashman, *Second Parent Adoption: A Personal Perspective*, 2 DUKE J. ON GENDER L. & POL'Y 227 (1995) (noting a lesbian couple who decided that one partner will bear their children using alternative insemination with an anonymous donor); Ann Pressley & Nancy Andrews, *For Gay Couples, The Nursery Becomes the New Frontier*, WASH. POST., Dec. 20, 1992, A1 (detailing one gay couple's efforts to have two children through the artificial insemination of two surrogate mothers).

¹⁰² See Ettelbrick, *Who is a Parent?*, *supra* note 88, at 548 n.176 (discussing the standard set forth by NOW Legal Defense and Education Fund as amicus curiae in *Alison D.*, 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991)).

¹⁰³ See *infra* notes 121-55 and accompanying text (discussing parental status

In addition, the mere acts of including lesbian and gay lives into the definition of family and attaching names to lesbian and gay family relationships have helped to shift the focus from the purely sexual to the familial. The terms "domestic partner" and "second parent," with their emphasis on familial relationships, highlight the broader experiences of lesbian and gay lives and lessen the degree of sexual stigma that has long justified the mistreatment of lesbian and gay families.¹⁰⁴

To the extent that love and commitment form the basis of family from a cultural view, lesbians and gay men are equally capable of fulfilling the functional role of family. Family definition advocates have successfully shifted society's view of lesbians and gay men from an emphasis solely on the sexual aspects of their relationships to an acceptance of their familial bonds.

B. Public Policy Goals

Assume for a moment that a genuine social commitment to supporting families and reinforcing their ability to care for each other exists. What would it look like? Perhaps the commitment would be realized by allowing families to keep some of their tax dollars to pay for new winter coats, a vacation or college tuition; by ensuring that couples can, after years of pooling assets, plan for their old age, assured that pensions and social security benefits will be available to each of them should the other die first; by providing health insurance to each family member and the right to return to his or her job after caring for an ill family member; or by allowing access to each other in hospitals or prisons, and the dignity inherent in respecting their decisions in the most intimate of family matters, such as bearing and raising children, making medical decisions, terminating life support and handling funeral arrangements.

and its relation to the best interests of the child).

¹⁰⁴ See *Bottoms v. Bottoms*, 457 S.E.2d 102, 107 (Va. 1995) (upholding a ruling taking a child away from his lesbian mother because of her sexual relationship with her domestic partner); see also Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 650-54 (1996) (discussing "judicial concerns regarding gender roles, sexual identity, and social stigma") (emphasis added).

This commitment to family might also secure the parent-child interests of those with no formalized relationship. If the strongest of public policy goals is to support families, and if these are just a handful of the ways in which that could be accomplished, is there any justification for allowing only those families joined by marriage, or only those families biologically joined, to partake in economic and social support?

Perhaps the most dramatic impact of the work of family definition advocates has been their questioning of the policy justifications for providing these kinds of economic and social benefits to marital and blood families while denying them to functional families. How is the need to care for an ill partner any less important, to both the family members and to society, than the need to care for an ill spouse? How do unmarried couples have less of a need than married couples to save on their tax burden in order to buy their children winter coats? Why would courts assume that a child's functional relationship with the biological parent's partner, who also cares for and raises the child, is meaningless as compared to the child's relationship with the biological parent?

By asking these questions and examining the policy goals underlying the laws and regulations that impact on families, family definition advocates have gradually, but steadily, challenged the government and private industry to treat people who share in the burden of caring for each other, whether married or not, equally. They ask whether there is a legitimate justification for denying such fundamental economic and social support to families not joined by marriage or other formal indicia of family.¹⁰⁵ As long as legally recognized family status is the gateway to benefits and privileges, the question must be asked whether the policy goal for providing the benefit is furthered or diminished by allowing access only to married or biological family members. Access to benefits and privileges should be guided by a desire to fulfill the purpose for which those benefits are provided, not by rigid definitions of family.

¹⁰⁵ In contrast, same-sex marriage advocates ask only whether there is a justification for denying marriage to lesbian and gay couples, never questioning the legitimacy of privileging marital relationships over other family relationships.

Again, the decisions in *Braschi v. Stahl Associates*¹⁰⁶ and *Dunphy v. Gregor*¹⁰⁷ serve as excellent examples of this process. In *Braschi*, the court was asked to fully examine the legislative history and policy underlying the rent control law in New York City.¹⁰⁸ The regulation extended protection against evictions to the “surviving spouse of the deceased tenant or *some other member of the deceased tenant’s family* who has been living with the tenant [of record].”¹⁰⁹ After the death of his longtime gay partner with whom he had lived and under whose name the apartment was leased, Miguel Braschi faced eviction because he did not qualify as a member of his deceased partner’s “family” according to the rent control regulation.¹¹⁰

For years, landlords and tenants alike doubtlessly assumed that the term “member of the deceased tenant’s family” applied to so-called traditional family members: spouses, biological or adopted children and grandchildren, perhaps siblings, aunts, uncles and cousins. By 1986, the year Mr. Braschi’s longtime partner had died, lesbian and gay couples had become increasingly more visible and had found growing social acceptance due, in part, to publicity surrounding gay men who cared for their lovers as they died of AIDS and lesbians having children in unprecedented numbers. These, and many other factors, prompted functional family

¹⁰⁶ 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

¹⁰⁷ 642 A.2d 372 (N.J. 1994).

¹⁰⁸ *Braschi*, 74 N.Y.2d at 206, 543 N.E.2d at 50, 544 N.Y.S.2d at 785 (referring to New York City Rent and Eviction Regulations, N.Y. COMP. CODES R. & REGS. tit. 9, § 2204.6(d)). As the court noted, the rent control law was a post-World War II measure designed to address the severe housing shortage that resulted in “speculative, unwarranted and abnormal increases in rents” and to prevent “profiteering, speculation and other disruptive practices tending to produce threats to public health . . . [and] to prevent uncertainty, hardship and dislocation.” *Id.* at 208, 543 N.E.2d at 52, 544 N.Y.S.2d at 787. In order to fully protect tenants, the legislature determined that rents would have to be controlled and evictions would have to be regulated. *Id.* at 209, 543 N.E.2d at 52, 544 N.Y.S.2d at 787. To accomplish both tasks, the legislature adopted regulations that, among other provisions, anticipated situations in which the named tenant on the lease had died or otherwise vacated the apartment leaving family members behind. *Id.*

¹⁰⁹ *Id.* at 206, 543 N.E.2d at 50, 544 N.Y.S.2d at 785 (emphasis added).

¹¹⁰ *Id.*

advocates to take Mr. Braschi's case to the state's highest court in order to deliberate on the meaning of the term "family."¹¹¹

The court allowed legislative history and intent to guide its decision regarding the definition of family. Grounding its definition in the "realit[ies] of family life," the court found that "the Legislature intended to extend protection to those who reside in households having all of the normal familial characteristics."¹¹² To that end, the court further noted that family should not "be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order."¹¹³ For purposes of the rent control law, a "more realistic, and certainly equally valid, view of a family" includes unmarried partners in committed, long-term relationships.¹¹⁴

The greater policy goal of the rent control law simply cannot be accomplished by protecting only those who are married. The harshness and unfairness of adhering to a definition of family limited to biology or marriage in the rent control context is self-evident. Mr. Braschi, who had lived in the apartment for ten years, would have been evicted from his home only because of the uncontrollable event of the death of his partner. To be sure, the fact that the couple could not legally marry appealed to the court's sympathy. The equally significant aspect of the ruling, however, is the clear injustice that the court found in requiring marriage to a deceased partner as a condition to the retention of one's own home.

¹¹¹ The *Braschi* case was far from the first case to question the definition of the term "family." See, e.g., *Athineos v. Thayer*, 153 A.D.2d 825, 826, 545 N.Y.S.2d 337, 338 (2d Dep't 1989) (holding an orphan living with a family most of her life, without having been formally adopted, to be a "family member" under New York City's rent control laws); *2-4 Realty Assocs. v. Pittman*, 137 Misc. 2d 898, 907, 523 N.Y.S.2d 7, 12 (Civ. Ct. 1987) (expanding the definition of "family" to include a 25-year landlord-boarder relationship that evolved into a father-son relationship). It was, however, the first case to reach New York's highest court, and certainly is a groundbreaking case for the proposition that lesbian and gay couples can have legally recognized family relationships.

¹¹² *Braschi*, 74 N.Y.2d at 211, 543 N.E.2d at 54, 544 N.Y.S.2d at 789.

¹¹³ *Id.* The legislature's intention to prevent against sudden eviction of rent control occupants "should not rest on fictitious legal distinctions or genetic history." *Id.*

¹¹⁴ *Id.*

With a less developed family policy examination, the New Jersey Supreme Court in *Dunphy* decided that there was little rational distinction between a woman who witnessed the accidental death of her husband and a woman who witnessed the accidental death of her fiancé.¹¹⁵ The horror and emotional distress experienced by the fiancé could hardly be quantified as less than that which a spouse would suffer. Thus, common law tort liability to a bystander who shared a "familial relationship" with the deceased equally covers one who shared a functional relationship with the deceased. The award of emotional distress damages to family members who witness the death of a loved one, therefore, is a direct acknowledgment of the value of that relationship.

Both *Braschi* and *Dunphy* illustrate the greatest advantage and benefit of pursuing recognition of lesbian and gay families from the functional perspective. These cases promote an examination of the purpose for which the law was adopted and ask whether adhering to formalized definitions of family furthers or obstructs the law's goals. In so doing, the courts paved the way for many types of families to receive long overdue support.

Although courts have been slow in interpreting family terms according to function, domestic partnership has become a very important means of challenging the mechanical way in which married couples are unjustly privileged over those who are unmarried. Domestic partnership is first and foremost a workplace concept.¹¹⁶ It establishes a civil rights remedy to the pervasive

¹¹⁵ *Dunphy v. Gregor*, 642 A.2d 372, 380 (N.J. 1994). "The specific issue presented [in *Dunphy*] is whether bystander liability allows recovery by a person who was not legally married to a deceased victim but who cohabited with and was engaged to marry the decedent." *Id.* at 373. The New Jersey Supreme Court concluded that "an unmarried cohabitant should be afforded the protections of bystander liability for the negligent infliction of emotional injury . . . [based on] the existence of an intimate *familial relationship* with the victim of the defendant's negligence." *Id.* at 380 (emphasis added). Describing a "familial relationship" as "a relationship that is deep, enduring, and intimate," the court found the fiancé in *Dunphy* to be in such a relationship with the decedent even absent marriage. *Id.* at 377-78.

¹¹⁶ Some marriage advocates have unfairly maligned domestic partnership as creating a "second class citizenship." See Sullivan, *supra* note 20, at 20; Wolfson, *supra* note 17, at 606-07. Those who receive health benefits, bereavement leave

practice of disproportionately providing married employees with health insurance, paid bereavement, family sick leave and other "family" based benefits that are denied to unmarried employees and their families. Its main premise is that unmarried workers who perform the same jobs, at the same salaries as married workers, should be entitled to "equal pay for equal work."¹¹⁷

Employers who have extended domestic partner benefits to unmarried couples have done so for two primary reasons. First, the change in policy was a necessary response to the reality of their employees' lives. Bereavement leave policies allowing an employee

and family sick leave as domestic partners receive the same benefits as their married counterparts. Far from being second classed, they are paid equally. Those whose relationships are given full recognition with regard to rent-controlled apartments and parenting options are treated equally. Granted, the unfortunate attempt by some citizens to lend some form of government recognition to unmarried couples through domestic partnership ordinances, which allow unmarried city residents to register their non-marital relationship, has confused and disillusioned many who register only to find that, unless they are a city employee, they receive little in the way of benefits. This one glitch, however, should not be used by marriage advocates to undermine the vibrant movement to treat employees and others in domestic partnerships equally, despite the absence of a marriage license.

¹¹⁷ "Equal pay for equal work" is a concept that came out of the feminist movement's exposure of the ways in which women, who performed the same or similar job functions as men, were chronically underpaid. It is legally encapsulated in the Federal Equal Pay Act. See 29 U.S.C. § 206(d) (1994) (guaranteeing equal pay for men and women performing substantially equal work). Courts have not generally been receptive to claims of discrimination in this area. See *Hinman v. Department of Personnel Admin.*, 213 Cal. Rptr. 410 (Ct. App. 1985); *Phillips v. Wisconsin Personnel Comm'n*, 482 N.W.2d 121 (Wis. Ct. App. 1992). But see *Tanner v. Oregon Health Sciences Univ.*, No. 9201-00369 (Or. Civ. Ct. Aug. 8, 1996) (allowing plaintiffs to proceed with claim of discrimination in denial of domestic partner benefits); *Slind-Flor*, *supra* note 56, at A8 (reporting on *Tanner* decision). For the most part, legal challenges have been abandoned in favor of negotiating strategies by employees and unions. As the case of *Rovira v. AT&T* illustrates, it is virtually impossible to legally challenge private employers whose duties with regard to benefits are governed by the Employee Retirement and Income Security Act ("ERISA"). See 760 F. Supp. 376 (S.D.N.Y. 1991). Insofar as neither ERISA nor federal civil rights laws ban marital or sexual orientation discrimination in employment, the law does not disallow such inequitable treatment.

paid time for the death of a spouse or a spouse's parent, but not for a partner, partner's parent or even a best friend, seem insensitive to the human needs of employees. The loss of a long-term partner is no less traumatic than the loss of a spouse. Second, failure to extend such benefits, for many employers, undermines their own commitment to equal treatment in the workplace. Thousands of employers have adopted internal policies prohibiting sexual orientation and marital status discrimination,¹¹⁸ even where the law has not required them to do so. Additionally, in response to domestic partner advocates, many of these employers have extended this commitment to the area of benefits.¹¹⁹

Domestic partnership has had a powerful social impact. It has raised the visibility of non-marital relationships, in particular, those of lesbian and gay couples.¹²⁰ It has created an identifiable third social category of family: people who are neither married nor single. And, it has allowed advocates a means for challenging the

¹¹⁸ See *Rovira v. AT&T*, 817 F. Supp. 1062, 1069-72 (S.D.N.Y. 1993) (holding that employer's sexual orientation and marital status non-discrimination policy not enforceable under ERISA).

¹¹⁹ See Dunlap, *supra* note 13, at A18 (reporting on IBM's newly enacted domestic partner benefit policy). New York City, San Francisco, Seattle and Boston are some of the larger cities that have followed the lead of Berkeley, California, in extending domestic partner benefits to city employees. See Bowman & Cornish, *supra* note 5, at 1188 (enumerating the municipalities that have enacted domestic partnership ordinances or extended certain partnership benefits to employees).

¹²⁰ The mere existence of domestic partnership has allowed commentators who are not yet ready to accept same-sex marriage the opportunity to argue for a viable alternative. See William Safire, *Same-Sex Marriage Nears*, N.Y. TIMES, Apr. 29, 1996, at A27 (advocating that lesbian and gay domestic partners should be granted all the benefits of marriage, but that marriage should remain a union between a man and a woman). *They Needn't Be Called 'Marriage,' But Gay Unions Merit Legal Status*, BUFFALO NEWS, May 20, 1996, at 2B (noting that lesbian and gay couples should be given all benefits except adoption). The extension of domestic partner benefits to only lesbian and gay couples is a troubling trend. The primary purpose of the remedy is to recognize the range of family relationships that are denied costly economic employment benefits. Extending benefits to only gay or lesbian couples on the theory that they should receive them because they cannot legally marry reinforces the central role of marriage in family benefits: one receives the benefits only if one is married or legally prohibited from marrying.

denial of important economic benefits, particularly in the workplace, to those who are sharing a life with a partner to whom they are not married.

Family definition advocacy has promoted more flexible and meaningful views of parent-child relationships as well. The best interests of children, the standard by which family law decisions about children are made, are much better served by adopting a functional approach to family, rather than holding rigidly to formal definitions of parent-child relationships as defined by marriage or biology. The focus on functional roles of parents forces courts to more fully examine both the essence of parenthood and the policy directive to decide cases which are in the children's best interests.¹²¹ Rather than simply matching a biological or adopted child with her biological or adopted parent, courts must be allowed to consider the active role of parenting proposed by the functional model if the policy goal of promoting the child's best interest is to be truly realized.

In custody and visitation cases, this approach has found favor with many courts where the functional parent is a step-parent, grandparent or other extended family member.¹²² When the functional parent is a lesbian or gay man, however, judges' first inclination has often been to retreat to strict interpretations of the

¹²¹ See generally Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984) (emphasizing that the caretaking role of parents to decide custody cases gives courts a clearer direction in both the formal cases of divorce and custody determinations for biological children, and in the functional family cases where one parent's relationship is based solely on performance of the functional role as a parent).

¹²² Several New York courts have allowed parental status to individuals functioning as parents. See, e.g., *Taylor v. Alger*, 129 Misc. 2d 1054, 1055, 495 N.Y.S.2d 120, 121 (Fam. Ct. 1985) (granting standing to step-great-grandfather); *Trapp v. Trapp*, 126 Misc. 2d 30, 30, 480 N.Y.S.2d 979, 979 (Fam. Ct. 1984) (granting standing to stepfather); *Humphrey v. Humphrey*, 103 Misc. 2d 175, 178, 425 N.Y.S.2d 759, 761 (Fam. Ct. 1980) (granting grandparents standing to seek custody when the "petition shows patently that the welfare of the child may require it"); *In re Lutz' Estate*, 201 Misc. 539, 543, 107 N.Y.S.2d 388, 392 (Sur. Ct. 1951) (holding that a blood relationship between the parties is not necessary to establish a parent-child relationship).

term "parent." Two decisions from New York and Wisconsin's highest courts provide classic examples of this retreat and illustrate the need to keep pushing courts to adopt a functional analysis of parenthood in appropriate cases as the only sure way to secure full consideration of children's interests.¹²³

In *Alison D. v. Virginia M.*,¹²⁴ the court mechanically determined that Alison, as a "biological stranger" to the child she helped raise from birth with her former partner, had no claim to visitation.¹²⁵ With no discussion of the goal of furthering the child's best interests, of the lower court cases adopting a functional approach to determining "parental status"¹²⁶ or of an acknowledgement of the nontraditional family setting in which many

¹²³ E.g., *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991); *In re Z.J.H.*, 471 N.W.2d 202 (Wis. 1991). Each case involved long-term lesbian couples who had ended their relationships and were battling over custody or visitation of their children. Each case presented the question of whether the non-biological or non-adoptive mother had standing to seek either visitation or custody. In each, the courts had previously adopted functional familial definitions, only to either inexplicably ignore the prior ruling, as the New York Court of Appeals did, or to make tortured distinctions, as did the Wisconsin Supreme Court.

¹²⁴ 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991).

¹²⁵ *Alison D.*, 77 N.Y.2d at 654-55, 572 N.E.2d at 28, 569 N.Y.S.2d at 587.

¹²⁶ For authorities setting forth criteria to determine whether a person is entitled to *in loco parentis* status under New York law, see *People v. Lilly*, 71 A.D.2d 393, 394, 422 N.Y.S.2d 976, 978 (4th Dep't 1979) (stating that the *in loco parentis* doctrine requires the petitioner to intend to assume all the obligations of parenthood before he will be held to those obligations); *Rutkowski v. Wasko*, 286 A.D. 327, 331, 143 N.Y.S.2d 1, 5 (3d Dep't 1955) (stating that support for and a genuine interest in the child's welfare is required for *in loco parentis* status); *Pierce v. Helz*, 64 Misc. 2d 131, 137, 314 N.Y.S.2d 453, 460-61 (Sup. Ct. 1970) (stating that petitioner's involvement in the home, school and recreational aspects of the child's life did not bestow *in loco parentis* status on petitioner as a matter of law); *Miller v. Davis*, 49 Misc. 2d 764, 765, 268 N.Y.S.2d 490, 492-93 (Sup. Ct. 1966) (stating that the petitioner, to stand *in loco parentis*, must establish more than the providing of instruction and care for the general welfare of the child). See also *In re Raquel Marie X.*, 76 N.Y.2d 387, 405, 559 N.E.2d 418, 426, 559 N.Y.S.2d 855, 863 (noting that when the state has an interest in determining parental status, the focus should be on the parent-child relationship), *cert. denied sub nom. Robert C. v. Miguel T.*, 498 U.S. 984 (1990).

children are raised today, the court's ruling was premised simply on the primacy of biological parenthood and the ultimate authority of the biological parent to exert control over the adults with whom her child associates.¹²⁷

The implicit assumption that the best interests of the child are served only by adhering to rigid definitions of the term "parent" drew vigorous dissent from now Chief Judge Judith Kaye, who refused to "fix biology as the key to visitation rights," and rejected the court's decision to "firmly close . . . the door on all consideration of the child's best interest in visitation proceedings . . . unless the petitioner is a biological parent."¹²⁸ By calling upon the court's duty to look to "modern-day realities in giving definition to statutory concepts"¹²⁹ such as parent, Judge Kaye gave voice to the theory that some children's interests can only be served by adopting a functional approach to parent-child relationships.

The true oddity of the court's decision in *Alison D.*, however, lies in the inexplicable fact that the majority never referred to its groundbreaking ruling in *Braschi*.¹³⁰ Two years prior to its *Alison D.* decision, the same court held that the term "family member" must include those, such as gay couples, who share the functional attributes of marital and biological family members.¹³¹ In *Braschi*, the court had explicitly recognized the necessity of interpreting ambiguous statutory terms in a manner that would further the stated goals of the law.¹³²

Alison D. and *Braschi* share so many significant attributes that the court's silence is all the more glaring. Each case required the court to give meaning to a familial term that the legislature had not qualified or defined: the term "parent" in *Alison D.*,¹³³ and the

¹²⁷ *Alison D.*, 77 N.Y.2d at 657, 572 N.E.2d at 29, 569 N.Y.S.2d at 588.

¹²⁸ *Id.* at 657-61, 572 N.E.2d at 30-32, 569 N.Y.S.2d at 589-91 (Kaye, J., dissenting).

¹²⁹ *Id.* at 661, 572 N.E.2d at 33, 569 N.Y.S.2d at 591.

¹³⁰ *Braschi v. Stahl Assocs.*, 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

¹³¹ *Id.* at 211, 543 N.E.2d at 54, 544 N.Y.S.2d at 789; see also *supra* notes 106-14 and accompanying text (discussing the *Braschi* opinion).

¹³² *Id.* at 212, 543 N.E.2d at 54, 544 N.Y.S.2d at 789.

¹³³ *Alison D.*, 77 N.Y.2d at 656, 572 N.E.2d at 29, 569 N.Y.S.2d at 588 (defining "parent").

term "family" in *Braschi*.¹³⁴ Each involved gay litigants seeking acknowledgment of their family relationship, and, in each case, access to the statutory right or benefit turned exclusively on whether the plaintiff was a parent or a family member. The relevant statutes in each case promoted very strong policy goals of a highly personal nature: the best interests of the child in parental disputes¹³⁵ and protection from eviction from one's home.¹³⁶ Lastly, the differences in outcome between *Alison D.* and *Braschi* are magnified by the fact that membership on the court of appeals had not changed in the two years between these two rulings.

Yet, while perhaps several dozen functional family members who inhabit rent-controlled apartments can live more securely in their homes, thousands of children stand to lose the guidance, love and care of a functional parent. In a society with complex family structures, failure to acknowledge different family relationships by considering their functional aspects is more destructive of the goals of family policy than it is useful.¹³⁷

The New York Court of Appeals had refused to extend its interpretive analysis of "family" employed in a rent control case to the term "parent" in a child visitation case. In *In re Z.J.H.*,¹³⁸ however, the Wisconsin Supreme Court refused to apply its broad interpretation of the child visitation and custody statute, which the court had applied to extended family members, to a lesbian non-adoptive mother who functioned as a parent.¹³⁹ Here, the child was placed in the home of a lesbian couple for adoption. One of the partners petitioned to adopt the child, and the other stayed

¹³⁴ *Braschi*, 74 N.Y.2d at 211, 543 N.E.2d at 53-54, 544 N.Y.S.2d at 788-89 (defining "family").

¹³⁵ *Alison D.*, 77 N.Y.2d at 659, 572 N.E.2d at 31, 569 N.Y.S.2d at 590 (Kaye, J., dissenting).

¹³⁶ *Braschi*, 74 N.Y.2d at 214, 543 N.E.2d at 56, 544 N.Y.S.2d at 791.

¹³⁷ The court's decision in *Alison D.* drew critical responses from the family law bar, who viewed the decision as creating an untenable situation for the majority of children who have very close, loving relationships with, among others, step-parents. See Ettelbrick, *Who Is a Parent?*, *supra* note 88, at 553 n.76 (citing Leonard Florescue, *Law Struggles With Gay Parenting Issues*, 8 MATRIMONIAL STRATEGIST 1 (1990)).

¹³⁸ 471 N.W.2d 202 (Wis. 1991).

¹³⁹ *Id.* at 204.

home full time to care for the child.¹⁴⁰ Before the adoption was finalized, the couple ended their relationship and a struggle for custody and visitation ensued.¹⁴¹

The non-adoptive mother argued that the custody statute, which explicitly allowed visitation only to a child's parent, grandparent or great-grandparent,¹⁴² should be interpreted to include functional parents in order to further the policy goal of providing for the child's best interests.¹⁴³ To support her argument, the non-adoptive mother pointed to the court's ruling in *In re D.M.M.*,¹⁴⁴ in which the Wisconsin Supreme Court four years earlier had interpreted the same statutory provision to allow standing by an aunt who had functioned as a parent for a child to whom she had been the legal guardian.¹⁴⁵ In *D.M.M.*, the court found the term "parent" to be ambiguous, having not been defined or modified by the legislature.¹⁴⁶ Turning to a standard dictionary for guidance, the court found parent to include "a person standing *in loco parentis* although not a natural parent."¹⁴⁷

When the same question was presented by the lesbian mother in *Z.J.H.*, however, the court recanted most of its reasoning, pointing to the "bloodline"¹⁴⁸ relationship between the aunt and the child in *D.M.M.* as a critical distinction.¹⁴⁹ The court brazenly recast its decision, stating that the aunt had established her right to visitation not as a "parent," but as an "other person."¹⁵⁰

¹⁴⁰ Until recently, it has not been clear that lesbian couples could adopt jointly. Therefore, similar to couples who decide which partner will conceive and bear the child, couples who choose adoption decide between them which will proceed as the adoptive parent. As in donor insemination cases, the clear intent of the parties is to raise the child together, each as an acknowledged parent.

¹⁴¹ *Z.J.H.*, 471 N.W.2d at 204.

¹⁴² *Id.* at 207.

¹⁴³ *Id.*

¹⁴⁴ 404 N.W.2d 530 (Wis. 1987).

¹⁴⁵ *Z.J.H.*, 471 N.W.2d at 207.

¹⁴⁶ *D.M.M.*, 404 N.W.2d at 534.

¹⁴⁷ *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1967)) (emphasis added).

¹⁴⁸ *Id.* at 535.

¹⁴⁹ *Z.J.H.*, 471 N.W.2d at 207.

¹⁵⁰ *Id.*

The double standard often applied to lesbian and gay parents, which was blatant in *Z.J.H.*, has been somewhat tempered by a growing number of courts that are either adopting the functional parent approach in lesbian parenting cases¹⁵¹ or have expanded the law to allow non-biological and non-adoptive lesbian and gay parents to adopt children as second parents. Instead of leaving lesbian and gay parents to confront the vagaries of individual judges who may or may not find that functional relationships are worthy of respect, some courts have provided a bright line rule for adoption by such couples.¹⁵² These courts have rejected the

¹⁵¹ After a series of cases across the country denying standing to functional parents for purposes of visitation or custody, the trend may be slowly reversing. Of special note is *J.A.L. v. E.P.H.*, in which the court granted standing to a lesbian functional parent to seek partial custody of the 10-month-old child that she and her partner had brought into the world. *J.A.L. v. E.P.H.*, No. 02456, 1996 WL 539760, at *7 (Pa. Sup. Ct. Sept. 19, 1996) ("We hold that the evidence of record in this matter, particularly the evidence that J.A.L. and the child were co-members of a nontraditional family, is sufficient to establish that J.A.L. stood *in loco parentis* to the child and therefore has standing to seek partial custody."). The court overturned the trial court's "overly technical and mechanistic" decision denying standing, finding that "biological parenthood is not the only source" of the right to seek custody. *Id.* at *3. In direct contrast to the *Alison D.* decision, the *J.A.L.* court found that

the need to guard the family from intrusions by third parties and to protect the rights of the natural parent must be tempered by the paramount need to protect the child's best interests. Thus, while it is presumed that a child's best interest is served by maintaining the family's privacy and autonomy, that presumption must give way where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture and affection, assuming in the child's eye a stature like that of a parent.

Id. at *5.

¹⁵² Interestingly, the New York Court of Appeals partially remedied the situation created by its decision in *Alison D.* by allowing unmarried partners, whether gay or not, to adopt the children they raise with their partners. *See, e.g., In re Jacob*, 86 N.Y.2d 651, 656, 660 N.E.2d 397, 398, 636 N.Y.S.2d 716, 717 (1995) (holding that "the unmarried partner of a child's biological mother, whether heterosexual or homosexual, who is raising the child together with the biological parent, can become the child's second parent by means of adoption"). Perhaps the only appellate court thus far to consider and reject a construction of

formality of marriage as a condition for couples to adopt.¹⁵³ Instead, they allowed the policy of furthering children's interests to supersede narrow constructions of the adoption laws that did not anticipate nor explicitly ban adoption by same-sex couples.¹⁵⁴

an adoption statute that would allow lesbian couples this option for their children is the Wisconsin Supreme Court. See *In re Angel Lace M.*, 184 Wis. 2d 492 (1994) (denying adoption of the birth mother's child to her lesbian partner because the biological father's parental rights were not terminated). The Wisconsin Supreme Court later modified itself by allowing a non-biological mother to pursue a claim for visitation rights. *H.S.H.K. v. Knott*, 533 N.W.2d 419, 420 (Wis.), *cert. denied*, 116 S. Ct. 475 (1995).

¹⁵³ See, e.g., *In re K.M.*, 653 N.E.2d 888, 899 (Ill. App. Ct. 1995) (holding that unmarried cohabitants have standing to petition for adoption of a minor child, regardless of sexual orientation, because it is not specifically prohibited by the statute); *In re Tammy*, 619 N.E.2d 315, 316 (Mass. 1993) (affirming second parent adoption of minor child by two unmarried women living together in a committed relationship); *Jacob*, 86 N.Y.2d at 656, N.E.2d at 398, 636 N.Y.S.2d at 717 (1995) (holding that biological mother's unmarried partner, who is raising the child together with the biological parent, can become the child's second parent regardless of sexual orientation); *In re B.L.V.B.*, 628 A.2d 1271, 1272 (Vt. 1993) (reversing and granting petition for adoption of minor child by one of two unmarried women living together in a monogamous relationship, where the other woman is the biological mother).

¹⁵⁴ Most adoption laws have language similar to the Vermont statute at issue in *B.L.V.B.*:

A person or husband and wife together, of age and sound mind, may adopt any other person as his or their heir with or without change of name of the person adopted. A married man or a married woman shall not adopt a person or be adopted without the consent of the other spouse.

VT. STAT. ANN. tit. 15, § 431 (1989) (repealed); See *In Re B.L.V.B.*, 628 A.2d 1271, 1273 (Vt. 1993).

Like the Vermont Supreme Court, most courts interpret this language as allowing single people and married couples to adopt. *B.L.V.B.*, 628 A.2d at 1273. As a single person, the lesbian co-parent was allowed to adopt as a second parent in *B.L.V.B.* *Id.* Furthermore, the requirement of spousal consent did not apply because she was not married. *Id.* See also *Tammy*, 619 N.E.2d at 319 ("Clearly absent [in the Massachusetts act] is any prohibition of adoption by two married individuals like the petitioners."). The court's recognition in *B.L.V.B.* that the lesbian partner could adopt as a second parent because it would be in the best interests of the child was recently codified. The adoption statute at issue in *B.L.V.B.* was repealed and replaced with the following:

In fact, broad family definitions not only further but also enhance the legislative goal of adoption.¹⁵⁵

As the cultural vision of family incorporates those who love and care for one another, strict adherence to formal definitions will only obstruct the broader social policy of supporting family nurturance, caretaking and commitment. Just as these family functions are hardly the sole province of married couples, same-sex couples' eventual access to legal marriage will not erase the need to acknowledge, legally and culturally, functional family relationships. So long as couples, both straight and gay, continue to fall in love, live together and raise children together, the need to continue broadening the vision of family beyond the structures of marriage and biology will exist.

-
- (a) Subject to this title, any person may adopt or be adopted by another person for the purpose of creating the relationship of parent and child between them.
 - (b) If a family unit consists of a parent and the parent's partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent's parental rights is unnecessary in an adoption under this subsection.

Vt. STAT. ANN. tit. 15A, § 1-102 (Supp. 1996).

¹⁵⁵ Judge Eve Preminger offered the most eloquent statement in support of definitions of family that do not turn on marriage for purposes of second parent adoptions by lesbian co-parents:

[T]his is not a matter which arises in a vacuum. Social fragmentation and the myriad configurations of modern families have presented us with new problems and complexities that can not be solved by idealizing the past. Today a child who receives proper nutrition, adequate schooling and supportive sustaining shelter is among the fortunate, whatever the source. A child who also receives the love and nurture of even a single parent can be counted among the blessed. Here this Court finds a child who has all of the above benefits and *two* adults dedicated to his welfare, secure in their loving partnership, and determined to raise him to the very best of their considerable abilities. There is no reason in law, logic or social philosophy to obstruct such a favorable situation.

In re Evan, 153 Misc. 2d 844, 852, 583 N.Y.S.2d 997, 1002 (Sur. Ct. 1992).

C. Function, Not Social Concepts of Morality, Should Guide Family Definitions

Legal family definitions are largely driven by an ideal of sexual morality which places heterosexual intercourse at the center of marriage. Marriage distinguishes proper sex from immoral sex, separating incorrigible women from virtuous women.¹⁵⁶ In some states, heterosexual intercourse is the only sexual activity that is legal as it is the only sexual activity that leads to reproduction and family creation. Where reproduction is not possible within marriage, legal fictions, such as adoption, are created to further the cultural purposes for marriage and to further the pretense of reproduction within marriage.¹⁵⁷

Those who deviate from marriage and heterosexual intercourse in creating families suffer the cultural and legal price of stigma and invisibility in the law. Laws declaring children of unmarried women to be illegitimate cast shame on the mother and child. Her pregnancy is visible proof of her downfall, a stigma that her male sexual partner will never have to endure. Until recently, many middle-class, pregnant, single women who were not cajoled into marriage to the father were hidden away during pregnancy and forced to consent to their child's adoption. Terms such as "teen pregnancy," "single parenthood," and "welfare mother"¹⁵⁸ carry a cultural message of moral intolerance that serves to stigmatize rather than prompt genuine attention to the problem. Divorced

¹⁵⁶ See D'EMILIO & FREEDMAN, *supra* note 28, at 17-18.

¹⁵⁷ See generally Jane Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283 (1994).

¹⁵⁸ Hostility to welfare and public assistance programs is fanned by the media's focus on young, lower class, mostly women of color who stand on the verge of requiring public assistance to support their families. See Lucy A. Williams, *Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 FORDHAM URB. L.J. 1159, 1163-68 (1995). Abortion access is legally denied to women who cannot afford to pay, yet those who bear children are likewise denied any assistance in raising them. See Laura M. Friedman, *Family Cap and the Unconstitutional Conditions Doctrine: Scrutinizing a Welfare Woman's Right to Bear Children*, 56 OHIO ST. L.J. 637, 659-60 (1995).

parents who maintain a sexual relationship with an unmarried partner pay the price of losing their children.¹⁵⁹ Judges tend to concentrate on the sexual lives of lesbian and gay parents, ignoring the truly relevant inquiry into whether these parents, and their partners, are loving, caring and capable of providing a good home to their children.¹⁶⁰ The moral preference for a certain form of family that centers around marriage can lead to tragic, sometimes ludicrous, results.¹⁶¹

¹⁵⁹ *Jarrett v. Jarrett*, 400 N.E.2d 421, 426 (Ill.) (transferring custody of three children from mother to father because the divorced mother lived with her male partner, thereby threatening the moral development of her children), *cert. denied*, 449 U.S. 927 (1980); *Bottoms v. Bottoms*, 457 S.E.2d 102, 107-08 (Va. 1995) (removing child from custody of lesbian mother because she engaged in "immoral" sexual behavior with her partner, with whom she lived). Many parents, particularly lesbian and gay parents, are faced with the Hobson's choice between living with an adult partner or having custody of their children.

¹⁶⁰ *See, e.g., Ward v. Ward*, No. 95-4184, 1996 Fla. App. LEXIS 9130, at *1 (Fla. Dist. Ct. App. 1996) (removing child from custody of her lesbian mother to custody of father who previously had been convicted for murdering his first wife); *Bottoms*, 457 S.E.2d at 108 (removing child from custody of his lesbian mother because she engaged in "immoral" sexual behavior with her live-in partner).

When courts allow prejudice and anxieties about sexual mores to overwhelm other evidence in a custody case, they stray from the goal of determining the best interests of the child. The needs of the particular child are marginalized, distorted, or entirely obscured. Whether courts are motivated by a desire to enforce perceived societal norms, by stereotypical and uninformed views of lesbians and gay men, or by a sincere, if misguided, desire to protect a child, the result is the same: Children are unnecessarily removed from loving and secure homes where they have been thriving, or their contact with a caring and concerned parent is needlessly and unreasonably constrained. Thus, the failure of the judicial system to develop and adhere to the appropriate test harms not only the nonconforming parent but also the child.

Shapiro, *supra* note 104, at 626.

¹⁶¹ *See Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (denying visitation to biological father, Michael, who lived for a time with his child, Victoria, and the mother, Carole, before the mother reconciled with her husband, Gerald). According to Justice Scalia:

Views of marriage, sexuality and reproduction have, however, undergone shifts in moral tolerance for many different kinds of families.¹⁶² Factors contributing to this shifting view include women's increased public role in society; greater consciousness of and commitment to women's equality; development of and increased dependence upon reproductive technologies; heightened visibility of and respect for lesbian and gay relationships; greater expectation of individual autonomy vis-à-vis other family members and the government with regard to family decisions;¹⁶³ and changing demographics of the age at which people choose to marry.¹⁶⁴

These changes are forcing the shift from form to function in family definitions.¹⁶⁵ Rather than a linear passage from childhood to adulthood, marriage to parenthood, old age to death, most Americans no longer follow such an even course. Divorce and remarriage, tolerance for both gay and straight non-marital

[T]he legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has. In fact, quite to the contrary, our traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts.

Id. at 124.

¹⁶² See COONTZ, *supra* note 3, at 180-83.

¹⁶³ For example, some women have the right to choose abortion free of governmental control and free of their husband's control. See generally *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (striking down provision of law requiring woman to obtain her husband's consent in order to have an abortion); *Roe v. Wade*, 410 U.S. 113 (1973) (establishing a constitutional right to choose abortion). See also DIZARD & GADLIN, *supra* note 3, at 67-99 (analyzing the change from a family-centered to an autonomous society). Contrast American family and sexual life today to that of the early immigrants, where privacy was a premium and in which neighbors, clergy and the community in general felt it was their role to monitor the sexual relationships of individuals and to punish transgressions from the moral and legal codes. D'EMILIO & FREEDMAN, *supra* note 28, at 27-38.

¹⁶⁴ COONTZ, *supra* note 3, at 180-206.

¹⁶⁵ COONTZ, *supra* note 3, at 180-83.

relationships, greater commonality of single parenthood, blended families and the use of reproductive technology all paint a picture of both greater diversity of family relationships and the pressing need to formulate a view of family around function. Laws that once seemed logically centered on narrow definitions of family, now seem both illogical and unjustly harsh.¹⁶⁶

Attributing legal and cultural significance to functional family relationships serves many valid purposes. First, such attribution mirrors the expectations and reality of people who without question view themselves as family, and removes the vulnerability that causes unnecessary stress on their ties to each other. For example, the mutual agreement of a lesbian couple who choose donor insemination to conceive and bear children generally carries with it the expectation that they will be recognized equally under the law as well. The children of these couples, likewise, grow up making no distinction between the two parents. Should the biological mother die or become ill, or the couple break up, these family relationships can effectively be rendered void by judges who look at family only along formal definitional lines, rather than at the substance of the relationships that exist. Undoubtedly, marriage could provide some protection for these relationships,¹⁶⁷ but even then, overattachment to marriage as the guidepost could equally destroy the expectations of the parties. Giving weight to the parties' expectations undoubtedly strengthens family ties by allowing the family members to act without fear that a court or other body of authority will render their family non-existent.

¹⁶⁶ For example, the court in *Braschi v. Stahl Associates* clearly understood the harshness of allowing a person who had lived in a rent-controlled apartment for 10 years to be evicted simply because he shared no legal relationship with his male partner. 74 N.Y.2d 201, 211, 543 N.E.2d 49, 53-54, 544 N.Y.S.2d 784, 788-89 (1989).

¹⁶⁷ See N.Y. DOM. REL. LAW § 73(1) (McKinney 1988 & Supp. 1996). "Any child born to a married woman by means of artificial insemination . . . shall be deemed the legitimate, natural child of the husband and his wife for all purposes." *Id.* Fatherhood is premised not on biology but on marriage to the child's mother at the time of birth. See *Michael H. v. Gerald D.*, 491 U.S. 110, 121, 129 (1989) (holding valid California statute presuming natural mother's husband to be father of the child).

Recognizing functional families lends support to those parties' emotional and economic well-being. For example, many children grow to love and to depend upon a step-parent with whom they have no biological or legal relationship. In many instances, the step-parent is the only mother or father the child has known. Rules which strictly allow only biological or adoptive parents to seek visitation prevent a step-parent or other co-parent from maintaining relationships that are fundamentally important to children. These children would lose not only the emotional, but also the financial support of these parents.

Recognition of functional families also allows both the law and society to better address difficulties that arise which may have tragic consequences. The tragedy of Karen Thompson and Sharon Kowalski's treatment by the Minnesota courts¹⁶⁸ focused on the inability of the lower court to recognize that Karen was more dedicated to caring for Sharon, better understood her needs and was more determined to help Sharon recover than Sharon's biological family. Had Karen and Sharon been considered a family at an earlier stage, her needs could have been met much sooner. Instead, the morality of their relationship kept them apart.¹⁶⁹

Similarly, an Ohio trial court went out of its way to overlook both the clear language and purposes of the state's domestic violence law. In *State v. Hadinger*,¹⁷⁰ the lower court denied a woman's request for a temporary restraining order against her female partner who, she alleged, was abusing her.¹⁷¹ The domestic violence law of Ohio allowed for temporary restraining orders where the parties cohabit.¹⁷² Though the women lived together,

¹⁶⁸ See *supra* Part II.A (discussing the *Kowalski* case).

¹⁶⁹ See generally THOMPSON & ANDRZEJEWSKI, *supra* note 36 (recounting the *Kowalski* story).

¹⁷⁰ 573 N.E.2d 1191 (Ohio Ct. App. 1991).

¹⁷¹ *Id.* at 1192 (summarizing on appeal the actions taken by trial court as "dismissing sua sponte the domestic violence charge against defendant from which plaintiff now appeals").

¹⁷² See *id.*; OHIO REV. CODE ANN. § 2919.26(A)(1) (Anderson 1996) (authorizing restraining orders for "family or household member[s]"). The Ohio domestic violence statute defines "family or household member" as:

(a) Any of the following who is residing or has resided with the offender:

the trial court, apparently appalled by their relationship, ignored the legislature's clear desire to provide a remedy to victims of domestic violence, and erroneously ruled that only opposite-sex couples could legally cohabit, and denied the woman's request.¹⁷³ Fortunately, the appellate court reversed, holding that the term "cohabit," as used in the domestic violence statute, also applied to two persons of the same sex.¹⁷⁴

The obstacle for lesbians and gay men is not that they cannot enter the institution of marriage. The true problem is that lesbian and gay families are widely excluded from the broader institution of family due to morally-based views about their sexual orientation¹⁷⁵ and the nontraditional avenues used by lesbian and gay

-
- (i) A spouse, a person living as a spouse, or a former spouse of the offender
 - (2) "Person living as a spouse" means a person who is living or has lived with the offender in a common law marital relationship, who otherwise is *cohabiting* with the offender, or who otherwise *has cohabited* with the offender within one year prior to the date of the alleged commission of the act in question.

Id. § 2919.25(E)(1)(a)(i), (2) (Anderson 1996) (emphasis added).

¹⁷³ *Hadinger*, 573 N.E.2d at 1191.

¹⁷⁴ The Ohio Court of Appeals concluded:

[T]he legislature intended that the domestic violence statute provide protection to persons who are cohabiting regardless of their sex. We believe that to read the domestic violence statute otherwise would eviscerate the efforts of the legislature to safeguard, regardless of gender, the rights of victims of domestic violence.

Id. at 1193.

¹⁷⁵ Lesbians and gay men have struggled for over 40 years to retain the right to parent the children they conceived and raised before publicly disclosing themselves as homosexuals. *See, e.g.,* *Nadler v. Superior Court*, 63 Cal. Rptr. 352 (Ct. App. 1967) (reversing a holding that mother's lesbianism made her an unfit parent as a matter of law).

For years courts have relied, implicitly and explicitly, on the assumption that having a lesbian or gay parent would be harmful to a child. This has been devastating in the area of child custody, where parents have been deprived of custody and visitation with their children on the basis of such unfounded assumptions.

partners to have children.¹⁷⁶ Courts are still locked into a very narrow vision of proper family form that ignores the true needs of the members of lesbian and gay families.¹⁷⁷

D. Inadequacy of the Traditional Marriage Model

The different-sex model of marriage is not simply a legal anachronism.¹⁷⁸ Nor is the reproductive focus of marriage to be ignored by advocates for same-sex marriage who claim that, because heterosexual married couples are not required to have children, the procreative role of marriage may not be used as an argument to deny same-sex marriage.¹⁷⁹ The fact is that the

Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research*, 2 DUKE J. ON GENDER L. & POL'Y 207, 224 (1995). The numerous reported lesbian and gay custody cases document such a history. See Paula L. Ettelbrick, *Legal Issues Facing the Non-Traditional Family*, in ESTATE PLANNING & ADMINISTRATION 1994, at 299 (PLI Tax Law & Estate Planning Course Handbook Series No. D4-5250, 1994); Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691 (1976); Julie Shapiro, *supra* note 104; Stephen B. Pershing, Symposium, *Defining Family: Gays, Lesbians, and the Meaning of Family*, 3 WM. & MARY BILL RTS. J. 289 (1994); Annamay T. Sheppard, *Lesbian Mothers II: Long Night's Journey Into Day*, 14 WOMEN'S RTS. L. REP. 185 (1992); David M. Rosenblum, Comment, *Custody Rights of Gay and Lesbian Parents*, 36 VILL. L. REV. 1665 (1991); Steve Susoeff, Comment, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852 (1985).

¹⁷⁶ Lesbian and gay partners can parent through various means, including heterosexual intercourse, adoption, foster-care, donor insemination and co-parenting. David K. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Realities*, 3 WM. & MARY BILL RTS. J. 345, 345 (1994).

¹⁷⁷ See *Michael H. v. Gerald D.*, 491 U.S. 110, 118 (1989) ("California law, like nature itself, makes no provision for dual fatherhood.").

¹⁷⁸ Marriage was not created to give form to romantic love, which is shared by straight and gay couples alike. Marriage was premised primarily on property, both the property each individual brought to the marriage and the idea that the wife was the property of the husband, available to him for sex, housekeeping, child rearing and overall caretaking.

¹⁷⁹ See ESKRIDGE, *supra* note 10, at 96 (arguing that discrimination against sterile, impotent or aged couples on this basis would be unacceptable and that marriage serves other more important goals); Wolfson, *supra* note 17, at 579

origins of marriage are deeply imbedded in procreation and the two-parent family. The lesbian and gay community will need more than marriage to address the many issues of their family structures that will never fit the heterosexual model.

The case of *Thomas S. v. Robin Y.*¹⁸⁰ best illustrates one aspect of this problem.¹⁸¹ Robin and her partner, Sandra, shared in the parenting of two daughters, one of whom was conceived with the sperm of Thomas.¹⁸² At the time of insemination, it was agreed that Thomas would not serve as a functional father, but would be introduced to the child when she began to ask questions about her "father."¹⁸³ When Ry (the daughter) was three years old, they introduced her to Thomas.¹⁸⁴ Everyone got along famously, and the adults decided on occasional visits with Thomas.¹⁸⁵ For many years, Thomas visited Robin, Sandra and the girls in New York a couple of times a year.¹⁸⁶ Occasionally, the family would visit Thomas and his male partner in San Francisco. There is no doubt that the relationship among all of them was warm and loving.¹⁸⁷ There is also no doubt that the

(noting that the Supreme Court distinguished marriage from procreation long ago by stating "[i]t is an association that promotes a way of life, not causes . . . or social projects").

¹⁸⁰ 209 A.D.2d 298, 618 N.Y.S.2d 356 (1st Dep't 1994).

¹⁸¹ Additionally, the two-adult model for marriage does not fit multiple adult family units, such as that at issue in *Baer v. Brookhaven*, nor does it account for the familial structures that many lesbians and gay men form in response to alienation from biological family members and the need to find nurturance in an often hostile world. See *Bear v. Brookhaven*, 73 N.Y.2d 942, 942, 537 N.E.2d 619, 619, 540 N.Y.S.2d 234, 234 (1989) (finding members of group home not related by blood, adoption or marriage considered to be functional family for purposes of zoning ordinance); BROWNING, *supra* note 32, at 151 (discussing domestic partnership referendum passed in San Francisco, California and the common belief that society will benefit if people live as families).

¹⁸² *Thomas S.*, 209 A.D.2d at 298, 618 N.Y.S.2d at 356. Sandra's experience of never knowing her father prompted their decision to use known donors for both of their children.

¹⁸³ *Id.* at 299, 618 N.Y.S.2d at 357.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

visits were "family" visits, meaning that Ry never travelled alone to visit Thomas nor did Thomas spend time alone with Ry when he visited.¹⁸⁸ Aside from his biological relationship with Ry, Thomas' relationship with the family could be characterized as one of a close friend or an extended family member. He did not financially support Ry, he was not consulted by the mothers in the making of decisions concerning Ry, nor did he otherwise execute the day to day functions of a parent.¹⁸⁹ Ry had no relationship with any other of Thomas' family members beyond his life partner. In fact, most of his blood family did not even know of Ry's existence.¹⁹⁰

Thomas eventually decided that he wished to introduce Ry to his biological family for the first time.¹⁹¹ Feeling that this step went beyond their agreement, the mothers refused.¹⁹² As Thomas became more insistent, the mothers became more resistant. Thomas then filed a paternity action. The trial court ruled that Thomas was estopped from claiming paternity.¹⁹³ The court found that from Ry's perspective, her family consisted of her mothers and her older sister. Thomas, while known as her biological father, was not Ry's functional father. The appellate division overturned the trial court's ruling, emphasizing Thomas' biological relationship with Ry, which entitled him to establish his claim for paternity.¹⁹⁴ The mothers appealed, but before the case went on to New York's highest court, Thomas withdrew his request for paternity and visitation, leaving the paternity decision in place and his relationship with the couple and their daughters in tatters.

It is far from clear whether marriage would have saved this family. According to the U.S. Supreme Court,¹⁹⁵ the state's interest in preserving the marital union between the mother and her husband overrides the rights of even a biological father who

¹⁸⁸ *Id.* at 299-300, 618 N.Y.S.2d at 358.

¹⁸⁹ *Id.* at 302-03, 618 N.Y.S.2d at 360.

¹⁹⁰ *Id.* at 299-300, 618 N.Y.S.2d at 358.

¹⁹¹ *Id.*

¹⁹² *Id.* at 300, 618 N.Y.S.2d at 358.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 306-07, 618 N.Y.S.2d at 362.

¹⁹⁵ *See Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

functioned as a parent.¹⁹⁶ The thought of extending Justice Scalia's vociferous support for the marital union to a married lesbian couple is amusing to contemplate, but difficult to imagine.¹⁹⁷ Anyone who has ever represented lesbian and gay parents knows that there is always a gay exception to family law rules.¹⁹⁸ Under New York law, the husband (read "spouse") of a woman inseminated with the sperm of an unknown donor is legally presumed to be the father.¹⁹⁹ However, the statute provides no guidance with regard to a known donor, such as Thomas.²⁰⁰

New York law also allows second parent adoption by the unmarried partner of a biological parent,²⁰¹ whereby Sandra could have adopted Ry without Robin having to terminate her legal relationship with Ry. While this option would have secured Sandra's relationship with Ry, it does not allow parenting options for Thomas, assuming the parties agreed to pursue such a relationship.

The absence of a marital relationship was irrelevant to the events in *Thomas*. Even if there were an agreement that Thomas would act as father to Ry, Sandra, as the second mother to Ry,

¹⁹⁶ Therefore, if Sandra and Robin had married, Thomas' relationship with Ry would have been negated.

¹⁹⁷ Justice Scalia's view of lesbian and gay men was made painfully clear in his dissent to the Court's decision overturning a voter initiative that would have prevented state officials from passing laws banning sexual-orientation discrimination. See *Romer v. Evans*, 116 S. Ct. 1620, 1629 (1996) (Scalia, J., dissenting) (stating that the initiative was "a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against efforts of a politically powerful minority to revise these mores through use of the laws").

¹⁹⁸ See *supra* notes 138-50 and accompanying text (discussing *Z.J.H.*).

¹⁹⁹ See N.Y. DOM. REL. LAW § 73(1).

²⁰⁰ See *Crouch v. McIntyre*, 780 P.2d 239, 246-47 (Or. Ct. App. 1989) (holding that the state statute on artificial insemination, which is silent with regard to known donors, violates a known donor's federal constitutional due process rights if it could be established that he and the mother agreed that he should have rights and responsibilities of fatherhood, and in reliance on that agreement, he donated his sperm), *cert. denied*, 495 U.S. 905 (1990).

²⁰¹ See N.Y. DOM. REL. LAW § 117(1)(d) (McKinney 1988); see also *In re Camilla*, 163 Misc. 2d 272, 620 N.Y.S.2d 897 (Fam. Ct. 1994) (noting that N.Y. DOM. REL. LAW. § 117(1)(d) "is interpreted to apply to all 'second-parent' adoptions").

must also be recognized as a parent, therefore extending the two-parent mold allowed by marriage.

If Robin and Sandra married, how would Thomas' relationship with Ry be defined? Would Thomas be able to adopt as a third-parent? Would Robin, Sandra and Thomas have to marry one another in order to clarify the legal roles of the three adults to the child?²⁰² Can a role be created for Thomas that would not empower him with full parental rights, but only the right to maintain his relationship with Ry through visitation? What about Thomas' life partner, who would clearly be severed from any recognized relationship with Thomas, functional or otherwise, were Thomas to marry Robin and Sandra? What would be the relationship between Thomas and Ry's older sister, who shared no biological relationship with each other? What result if Thomas was a straight, married man with other children, or if he was Sandra's brother?

The clarity that marriage arguably provides for two-person couples without children blurs when there are more than two parents, either functional or biological. And while there are solutions to these questions, it is doubtful that they lie in same-sex marriage. Lesbian and gay parenting simply do not fit the marriage mold. Thus, the parties' relationships should be governed by their clear intentions and the functional relationships they create. If, for instance, Sandra and Robin felt secure that their agreement with Thomas that he will not be a full-fledged parent would be respected

²⁰² Fear that same-sex marriage would create a slippery slope toward polygamous marriages is used frequently by the opposition to stir up hysteria over the thought that lesbian and gay couples may eventually win the right to marry. See Carl Ingram, *Wilson, Lungren Back Bill Against Gay Marriages*, L.A. TIMES, July 9, 1996, at A1 (discussing California politicians' concerns that the defeat of the Defense of Marriage Act would lead to polygamous marriages); Cheryl Wetzstein, *Thursday is D-Day to Ban Gay Marriage: Hawaii Lawsuit Could Open the Door*, WASH. TIMES, Apr. 1, 1996, at A2 (noting that "opponents of same-sex marriages warn that legalization of gay and lesbian marriage opens the door for polygamy or other now-illegal arrangements"). The fact is, though, that in many parenting contexts, the creation of lesbian and gay families may require recognition of more than two adults as parents where the lesbian couple and the sperm donor agree that all of them will function as parents.

and upheld, they may have been less reluctant to allow Ry's relationship with him develop differently as she got older. It was the fear that a court could take Ry away that led Sandra and Robin to sever the relationship with Thomas the moment he filed the paternity action.

Likewise, if Thomas' biological relationship with Ry did not potentially entitle him to the full privileges of parenthood, including the right to seek custody or, in New York, the right to request visitation,²⁰³ Robin and Sandra would not have had their primacy as parents and their family threatened. Their decision not to allow Ry to visit Thomas' family would not have been put into question, at least from a legal perspective, as the state may not so intrude into family decisions.²⁰⁴

Instead of marriage, the solution to defining many lesbian and gay family relationships is best accomplished by giving legal effect to parenting agreements and the actual functioning of their relationships. If lesbian couples knew that their agreements of co-equal parenting vis-à-vis each other, as well as the agreements between themselves and their sperm donors would be enforced, the power dynamic that infects many of these families would shift dramatically. Biological mothers and sperm donors could no longer use the powerful leverage that their biology allows them under the law to claim an absolute right to parental status. Children of gay and lesbian parents would have the security of maintaining the parental relationships that developed.

Second, these families would be better protected if the role of known sperm donors could legally be limited. While some couples want full involvement of the donor as a father, the more traditional agreement is that the donor is not a functional father. Development of this concept of "limited parenthood," like limited partnership in the business world, would secure the relationships of all parties and

²⁰³ See, e.g., *In re Jessica R.*, 163 A.D.2d 553, 554 (2d Dep't 1990) (staying order granting visitation to paternal grandparents pending the hearing and determination of an abuse and neglect proceeding against the child's father).

²⁰⁴ See *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 656-57, 572 N.E.2d 27, 29-30, 569 N.Y.S.2d 586, 588-89 (1991) ("To allow the courts to award visitation—a limited form of custody—to a third person would necessarily impair the parents' right to custody and control.").

identify their role with regard to the child. In the Sandra, Robin and Thomas situation, a clearly defined, legally recognized limited parenthood role could potentially have diffused the situation. If Robin and Sandra could feel secure that Thomas' role would never extend beyond a right to visit with Ry should the adults' relationship break down, they may have been more willing to give Thomas what he wanted—the chance to introduce Ry to his own extended family. As long as the threat that he could remove Ry from her home is a legal possibility, Sandra and Robin will never feel secure in moving beyond the original agreement. Likewise, if Thomas knew unconditionally that his agreement to be a sperm donor with the possibility of some role in the child's life could never extend beyond that limited role, he, too, might not have pushed his will on them.

The benefit of family definition advocacy lies in its flexible approach to defining family, not as a set of strict rules that have little relevance to the real ways that human beings function. It recognizes that "fictitious legal distinctions or genetic history"²⁰⁵ are less relevant to family formation than love, commitment and caretaking.

CONCLUSION

There is no doubt that marriage currently represents the social and legal badge of full citizenship. With a history in which slaves could not marry, people of color could not marry Whites, and Jews could not marry non-Jews, there is no doubt that marriage has been used to control one's full sense of being a citizen. But, it does not need to remain that way.

Through its history of family definition advocacy, the lesbian and gay community has taken on the challenge of showing the range of family relationships that exist in our society. As we have found, marriage laws, with their explicit "one man, one woman" language, are not the only laws that forbid us entry into family. Any laws that presume a heterosexual relationship in general keep

²⁰⁵ *Braschi v. Stahl Assocs.*, 74 N.Y.2d 201, 211, 543 N.E.2d 49, 54, 544 N.Y.S.2d 784, 789 (1989).

us from the borders of family. By questioning the building of an entire system on marriage and biology, when so many, gay and straight alike, do not fit that particular model, we create a vision of family that would encompass the way in which most citizens live their lives as family.

The marriage struggle alone leaves unchallenged the basic premise upon which family is built, a premise that we have long fought to change. In the end, even if the marriage struggle is resolved, we would still end up with the status quo: healthcare benefits, adoption and many other benefits and privileges determined according to marital status. Our vision of family has always been broader than that. Marriage is not what makes a family. Love, commitment and caretaking make a family. No group knows that more intimately than lesbians and gay men.