

SPEAK NOW: PROGRESSIVE CONSIDERATIONS ON THE ADVENT OF CIVIL MARRIAGE FOR SAME-SEX COUPLES

KARA S. SUFFREDINI*
MADELEINE V. FINDLEY**

Abstract: Amidst the political and legal storm surrounding the Massachusetts Supreme Judicial Court's recent groundbreaking decision in *Goodridge v. Department of Public Health*, which extends marriage rights to same-sex couples in Massachusetts, this Essay seeks to maintain the debate questioning the supremacy of marriage as the ideal family unit. The Essay presents examples of the subordinating effects that marriage laws sometimes have on women, people of color, and the poor; and it explores specific problematic possibilities that the new application of marriage laws may hold for lesbian, gay, bisexual, and transgender individuals. The Essay contends that marriage, although providing significant gains for some, is not a panacea. The Essay then proposes a progressive vision for the separation of certain important benefits from their traditional association with marriage and for the diversification of forms of partnership and household recognition.

INTRODUCTION

Since November 18, 2003, when the Massachusetts Supreme Judicial Court released its historic decision in *Goodridge v. Department of Public Health*, extending civil marriage rights to same-sex couples under the Massachusetts Constitution, it seems that everyone is weighing

* Co-Chair Elect, Board of Directors, National Lesbian and Gay Law Association; J.D., Boston College Law School; B.A., University of California, Berkeley.

** Board of Directors, National Lesbian and Gay Law Association; J.D., University of Michigan Law School; M.P.P., University of Michigan Ford School of Public Policy; B.A., Yale University.

The authors thank Sundyna Beaven, Sharon Beckman, David Chambers, David Cruz, Naisargi Dave, Elizabeth Emens, Paula Ettelbrick, Kim Forde-Mazrui, Michele Morris, Chai Feldblum, Kent Greenfield, Nan Hunter, Shelley Smedberg, and Chris Brooks Whitman for helpful insights during the development of this Essay, and Lisa English and Karyl Roberts Martin of the *Boston College Law Review*, for commitment to its completion. The viewpoints expressed in this Essay are intended to reflect only the position of the authors.

in on the same-sex marriage debate.¹ A number of cities across the nation have begun issuing marriage licenses to same-sex couples in what some may call, acts of civil disobedience.² A “deeply troubl[ed]”³ President George W. Bush has announced his support for a federal constitutional amendment prohibiting same-sex marriage.⁴ In contrast, an editorial in *The New York Times* has proclaimed that “[t]his page fully supports the right of gay men and lesbians to marry.”⁵

¹ See 798 N.E.2d 941, 969 (Mass. 2003). Following the release of the *Goodridge* decision, the Massachusetts Senate asked whether a “civil union” bill that limited “marriage” to mixed-sex couples would satisfy the court’s ruling. See *In re Opinion of the Justices to the Senate*, 802 N.E.2d 565, 566 (Mass. 2004). Approximately three months later, in an advisory opinion to the Massachusetts Senate, the court clarified that the constitutional mandate is “marriage”:

The history of our nation has demonstrated that separate is seldom, if ever, equal.

....

... The dissimilitude between the terms “civil marriage” and “civil union” is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.

....

... [T]he Massachusetts Constitution does not permit this type of labeling.

Id. at 569–71.

² See Chris Barker, *Couples Tying the Knot While They Can*, THE BULLETIN (Portland, Or.), Mar. 5, 2004, at A1 (discussing marriage licenses issued in Multnomah County, Oregon), available at http://www.bendbulletin.com/news/story.cfm?story_no=12869; David Von Drehle & Alan Cooperman, *Same-Sex Marriage Vaulted into Spotlight*, WASH. POST, Mar. 8, 2004, at A01 (discussing marriage licenses issued in New Paltz, New York); CNN, *Judge Combines Same-Sex Marriage Cases*, at <http://www.cnn.com/2004/LAW/02/20/samesex.marriage/index.html> (Feb. 20, 2004) (discussing licenses issued in San Francisco, California and Sandoval County, New Mexico).

³ CNN, *Massachusetts Court Upholds Same-Sex Marriage*, at <http://www.cnn.com/2004/LAW/02/04/gay.marriage> (Feb. 6, 2004).

⁴ Elisabeth Bumiller, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1.

⁵ Editorial, *Gay Marriage in the States*, N.Y. TIMES, Feb. 18, 2004, at A18.

Lawsuits seeking the right to marry have been filed in California, New Jersey, New York, and Washington. See Press Release, Lambda Legal, Lambda Legal Files Historic Lawsuit Seeking Full Marriage for Gay Couples in New York (Mar. 5, 2004), <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1462>; Press Release, Lambda Legal, Sweeping Gay Marriage Lawsuit in New Jersey Aims for U.S. History (June 26, 2002), <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1074>; Press Release, Lambda Legal & Northwest Women’s Law Center, Lambda Legal and Northwest Women’s Law Center File Lawsuit Seeking Full Marriage for Lesbian and Gay Couples in Washington State (Mar. 8, 2004), <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1464>; Press Release, National Center for Lesbian Rights, Gay Rights Groups and Same-Sex Couples Ask California Supreme Court to Enforce Constitutional Requirement of Equal Protection (Mar. 5, 2004), <http://www.nclrights.org/releases/pr-sflicenses030504.htm>.

Much of this current debate presumes the supremacy of married, two-parent families, engaging only the narrow question of whether same-sex couples should have access to the rights and responsibilities of civil marriage. This Essay does not weigh in on the right, or the choice, of same-sex couples to marry. Instead, this Essay steps back from the current political and legal storm over same-sex marriages to question the supremacy of marriage as the ideal family unit and to offer a progressive vision for the diversification of partnership and household recognition post-*Goodridge*.

Part I of this Essay considers several significant economic and social incentives that federal and state laws and private entities provide to encourage marriage and deconstructs several examples of their sometimes inequitable distribution along gender, race, and class lines.⁶ Against this backdrop, Part I briefly considers how such incentives may be decoupled from relationship status and provided more equitably. Part II examines some possible operations of marriage in the context of same-sex couples.⁷ Part III proposes an inclusive strategy for the recognition of a diverse range of relationship forms in addition to marriage, and also for the disassociation of important legal and economic benefits from relationship status.⁸ This Essay concludes that translating the attainment of marriage into a gain for all lesbian, gay, bisexual, and transgender ("LGBT")⁹ individuals may require a

⁶ See *infra* notes 10–53 and accompanying text.

⁷ See *infra* notes 54–91 and accompanying text.

⁸ See *infra* notes 92–107 and accompanying text.

⁹ Throughout this Essay, we use the acronym "LGBT" to refer to the broader lesbian, gay, bisexual, and transgender community. This term is both over- and under-inclusive, and reflects our decision, given the constraints of the Essay, to take a relatively uncomplicated approach to the discrete experience of same-sex marriage. That is, we use the acronym "LGBT" in recognition of the fact that the entire LGBT community is affected by the same-sex marriage effort, although we also acknowledge that it is inaccurate to characterize marriage as a primary issue for all members of the community. Marriage is not at the forefront of either bisexual or transgender organizing, nor are bisexual and transgender concerns sincerely reflected in much lesbian and gay organizing around marriage. As a further clarification on language, we use "transgender" to encompass both transgender and transsexual individuals; we realize that this essentializes the variety of transgender experiences. For transgender individuals, the rhetoric of "same-sex" marriage belies the complexity of their relationships and their legal experience with marriage. In some jurisdictions, transgender parties have been able to marry legally. Paisley Currah, *Defending Genders: Sex and Gender Non-Conformity in the Civil Rights Strategies of Sexual Minorities*, 48 HASTINGS L.J. 1363, 1374–75 (1997). In addition, many transgender individuals who entered a mixed-sex marriage before beginning sex reassignment or transition remain in those legally recognized marriages. In other jurisdictions, courts have engaged in intrusive inquiries as to the birth sex assignment or, occasionally, chromosomal sex of one member of a couple and have ignored the individual's own experience of sex and gender and tes-

complicated approach to marriage advocacy that accounts for some of the interconnected effects of marriage laws across gender, race, class, and sexuality lines and that recognizes the specific and varied needs of real households.

I. DECONSTRUCTING MARRIAGE: EXAMINING THE BUNDLE OF RIGHTS

Some federal and state laws, as well as many private entities, encourage marriage by providing potentially valuable and unique incentives to couples who marry, while withholding these benefits from individuals and couples who do not.¹⁰ Although such incentives may not have a strong effect on a couple's decision to marry, they are valuable, tangible privileges attendant to participation in marriage. Additionally, marriage carries intangible personal and social benefits; it is "a cultural institution," often read as a public symbol of a couple's love and com-

timony from various experts in deciding to deny marriage recognition. See, e.g., *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999). This has led to inequitable results and a sense for some transgender people of existing in a legal no-man's land. See Currah, *supra* at 1373-76. Some may argue that legal recognition of both same-sex and mixed-sex marriage will eradicate such problems for transgender individuals. Such a proposition, however, fails to appreciate the erasure of transgender identity that transgender individuals may experience as their relationships are categorized dichotomously as either "same"-sex or "opposite"-sex, unrealistically simplifying the complexity of their relationship with sex and gender. It also fails to address the additional uncertainty of whether a transgender individual's marriage will receive the preferential status of mixed-sex marriage or that of same-sex marriage. For transgender individuals, the arguments made in support of same-sex marriage often prove troublingly inadequate.

¹⁰ The General Accounting Office (the "GAO") has identified over 1138 federal benefits, rights, and obligations based on marriage. Letter from Dayna K. Shah, Associate General Counsel, United States General Accounting Office, to the Honorable Bill Frist, Majority Leader, United States Senate 1 (Jan. 23, 2004) ("[A]s of December 31, 2003, our research identified a total of 1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges."), available at <http://www.gao.gov/new.items/d04353r.pdf>. This represents an increase of almost 100 statutory provisions from the GAO's 1997 survey, which included laws enacted prior to the Defense of Marriage Act. *Id.*; see *Defense of Marriage Act*, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000) and 28 U.S.C. § 1738C (2000)). Marriage carries a set of state-sponsored entitlements, including state and federal tax breaks; reduced inheritance and income taxes; social security benefits; inheritance rights; survivor's benefits upon the death of a spouse in public services, such as police officers, firefighters, and military veterans; family medical leave; the right to visit a spouse in the hospital; the right to seek the services of family court in domestic violence situations; the right to adopt a spouse's child; the right to sue for a spouse's wrongful death; preferential treatment in appointment as a guardian, in appointment as a personal representative for an intestate spouse, for consultation in medical decision making, and for immigration purposes; and greater deference and protection with respect to the privileges of child custody and visitation. See Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL'Y 107, 126-29 (1996).

mitment.¹¹ Despite some growth in recognition of nonmarital family structures, such as the increasing numbers of unmarried mixed-sex couples in domestic partnership or cohabitation arrangements,¹² marriage remains the most privileged form of family relationship in American society.

This privileged institution, however, is not available to all those who may wish to enter it.¹³ Same-sex couples do not have the legal right to marry in forty-nine states.¹⁴ For those who can and do marry, some incentives that accompany marriage may attach differently, or not at all. Women, people of color, and the poor are among those likely to receive uneven benefits.¹⁵ This Part presents some examples

¹¹ GAY & LESBIAN ADVOCATES & DEFENDERS, CIVIL MARRIAGE V. CIVIL UNIONS: WHAT'S THE DIFFERENCE? I ("Marriage is a unique legal status conferred by and recognized by governments the world over. It brings with it a host of reciprocal obligations, rights, and protections. Yet it is more than the sum of its legal parts. It is also a cultural institution."), *available at* <http://www.glad.org/Publications/CivilRightProject/OP7-marriagevcu.pdf> (last visited Mar. 17, 2004); *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 965 (Mass. 2003) (noting "marriage's solemn obligations of exclusivity, mutual support, and commitment to one another").

¹² Some supporters of the incentives surrounding marriage may argue that if marriage were legally available to all couples, regardless of sex or gender, then nonparticipation in marriage would be a choice and it is therefore not unfair to reserve certain benefits to it. This argument has a certain formal appeal but begs the question of whether it is fair to reserve benefits to a certain relationship status at all. *See* Ettelbrick, *supra* note 10, at 139. Moreover, for those couples whose relationships do not fit the marriage structure, and for same-sex couples in all states except Massachusetts, marriage is an illusory choice. These individuals, however, continue to subsidize the distribution of benefits to couples who can marry through their participation in the workforce and the economy.

¹³ Ettelbrick, *supra* note 10, at 119–22; Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK: NAT'L GAY & LESBIAN Q., Fall 1989, at 9, 9–10, *reprinted in* WE ARE EVERYWHERE 753, 753–54 (Mark Blasius & Shane Phelan eds., 1997).

¹⁴ Massachusetts is the only state in which same-sex marriages are legal under the state constitution. *See* Goodridge, 798 N.E.2d at 967. Thirty-nine states have express bans on same-sex marriage. Human Rights Campaign, *Statewide Discriminatory Marriage Laws*, *at* http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=15855 (last visited Mar. 17, 2004) [hereinafter HRC]. Ten states have laws that are arguably silent as to same-sex marriage, and have not, as of yet, recognized same-sex marriages. *See id.* Within some of these forty-nine states, a handful of municipalities are issuing same-sex marriage licenses, although the legal effect of these licenses is not yet clear. *See supra* note 2 and accompanying text.

¹⁵ *See* Darren Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 585–602 (1997) (noting that many arguments supporting same-sex marriage exclude race and class issues from analysis); *see also generally* LISA DUGGAN & NAN D. HUNTER, *SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE* (1995); Dorothy A. Brown, *The Marriage Penalty/Bonus Debate in Black and White*, 16 N.Y.L. SCH. J. HUM. RTS. 168 (1999); Ettelbrick, *supra* note 10; Nancy Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"*, 79 VA. L. REV. 1535 (1993).

of the inequitable distribution of economic marriage benefits along gender, race, and class lines, and briefly considers how some incentives may be distributed more equitably.

A. The Gendered and Hierarchical Structure of Traditional Marriage

The traditional model of marriage is structured in a gendered and socially hierarchical manner.¹⁶ According to this model, the husband is the sole wage earner and supports the household financially, while the wife manages the domestic affairs. Under this model, married couples are superior to unmarried couples.¹⁷ Some state and federal laws provide certain economic incentives only to married households that most closely resemble this model, thereby promoting and reinforcing its primacy.¹⁸ Other state and federal laws may withhold or deny economic benefits to unmarried households least resembling the traditional model.¹⁹ Finally, certain critical benefits, such as access to healthcare, traditionally are associated not only with marriage but also with employment, and therefore may not be available to some households with limited employment benefits, despite their resemblance to the traditional model.²⁰ These examples of some of the inequities that may result from the privileged structure of traditional marriage, without undermining the potential value of its numerous economic and social benefits, provide a basis for questioning the primacy of the traditional, married, two-parent household.

Federal and state laws may entitle some married couples to exemptions from certain estate taxes, permit couples to file joint tax returns, and establish immigration rights for spouses from another country. The economic benefits marriage laws provide may include access to tax exemptions, inheritance and survivor rights, and insurance privileges.²¹ The economic rights and obligations that accompa-

¹⁶ See Ettelbrick, *supra* note 10, at 152–60; Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 16 (1991).

¹⁷ See generally Ettelbrick, *supra* note 10.

¹⁸ See *infra* notes 21–31 and accompanying text.

¹⁹ See *infra* notes 34–44 and accompanying text.

²⁰ See Ettelbrick, *supra* note 10, at 128–30.

²¹ See David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 472–76 (1996); Ettelbrick, *supra* note 10, at 128–29. The economic incentives built into the structure of marriage are significant. See Brown, *supra* note 15, at 168. See generally LAMBDA LEGAL DEFENSE & EDUC. FUND, WHY MARRIAGE EQUALITY MATTERS, available at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/127.pdf (last visited Mar. 17, 2004). For example, marriage entitles employees to important family-oriented benefits employers provide, such as

ny marriage do not, however, benefit all married couples uniformly.²² Some of these marriage benefits, such as tax-free inheritance, retirement and survivor benefits, and reduced income tax, promote wealth preservation and may be more beneficial to those households with some amount of wealth, however small, to preserve. For those without accrued wealth, spousal retirement and survivor benefits may be particularly important.²³

In a study evaluating the racial impact of federal tax laws, Professor Dorothy Brown found that the so-called marriage penalty had uneven effects across race lines.²⁴ The marriage penalty, which occurs when married spouses who both work pay more in taxes than they would if they were unmarried, affects households where spouses earn similar incomes.²⁵ African-American couples are more likely than white couples to earn similar incomes, and consequently to pay a marriage penalty.²⁶ According to Brown, this effect appears to hold true at all but the

healthcare, paid bereavement leave, parenting leave, sick leave, discounts on tuition waivers, and death benefits. *See* GAY & LESBIAN ADVOCATES & DEFENDERS, PROTECTIONS, BENEFITS AND OBLIGATIONS OF MARRIAGE UNDER MASSACHUSETTS AND FEDERAL LAW: SOME KEY PROVISIONS OF A WORK-IN-PROGRESS 24–26 (2001) [hereinafter GLAD], available at <http://www.glad.org/Publications/CivilRightProject/PBOsOfMarriage.pdf>.

²² *See* Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK: NAT'L GAY & LESBIAN Q., Fall 1989, at 9, 16–17, reprinted in WE ARE EVERYWHERE, *supra* note 13, at 757.

²³ *See id.* at 16; *see also* DORIAN SOLOT & MARSHALL MILLER, LET THEM EAT WEDDING RINGS: THE ROLE OF MARRIAGE PROMOTION IN WELFARE REFORM 4–5 (2002), available at <http://www.unmarried.org/rings.pdf>.

²⁴ Brown, *supra* note 15, at 169–70. The federal tax cuts of 2001 included provisions designed to reduce the marriage penalty over time, but analysts suggest that these provisions will have only mixed results. According to Brown, most households earning \$10,000 or less were headed by single working individuals, who qualify for the Earned Income Tax Credit (the “EITC”). If such an individual marries someone earning a comparable income, eligibility for the Earned Income Tax Credit greatly diminishes or disappears altogether. The loss of the EITC functions as a potentially severe marriage penalty over and above existing tax laws regulating married couples. M. Wood, *Marriage Penalty Hurts Black Families More, Brown Says*, NEWS & EVENTS (Univ. of Va. Law Sch., Charlottesville, Va.), Feb. 3, 2004, at http://www.law.virginia.edu/home2002/html/news/2004_spr/brown_tax.htm; *see also* CTR. ON BUDGET & POLICY PRIORITIES, THE HOUSE PROPOSAL TO MAKE MARRIAGE PENALTY RELIEF PROVISIONS PERMANENT (June 12, 2002), available at <http://www.cbpp.org/6-13-02tax.pdf>; IRIS J. LAV, ALLEVIATING MARRIAGE PENALTIES IN THE EITC, CTR. ON BUDGET & POLICY PRIORITIES (June 10, 1999), <http://www.cbpp.org/6-10-99tax2.htm>.

²⁵ Wood, *supra* note 24 (stating that when joint federal tax filing began in 1948, “eighty percent of husbands worked and had a stay-at-home wife, thus the law benefited most of the population—although married black women likely worked more than white women then as well”).

²⁶ *See id.* (noting that married African-American women earn approximately 40 percent of their household incomes, whereas married white women earn only 29 percent of their household incomes).

upper range of income levels.²⁷ The marriage penalty appears to affect upper- and middle-class white households least.²⁸ Low-income households of all races face the greatest tax consequences from marriage.²⁹ Professor Brown explains this uneven impact as the consequence of a marriage model that favors single-wage-earner households over dual-earner households and that fails to appreciate the differences in women's roles as co-providers across race and class lines.³⁰ Because federal tax laws contemplate hierarchically and traditionally gendered households in which a single, usually male, wage-earner supports the household, they fail to address the realities of many households in which both partners work and earn similar incomes. As a result, federal tax laws offer fewer breaks and may even hold more penalties for African-American families and low-income families of all races.³¹

Private entities also provide important incentives to marry, such as access to employer-sponsored healthcare coverage. As with some marriage benefits, privatized healthcare may also be distributed differently across gender, race, and class lines. Automatic access to spousal healthcare coverage by virtue of marriage may be more likely to benefit those households with only one spouse working for an employer who offers healthcare benefits.³² Marriage appears least valuable as a vehicle for accessing healthcare to households in which both, or neither, partners have jobs with employers that offer such benefits. For households in which both partners enjoy coverage through their employers, access to each other's healthcare by virtue of marriage may provide financial savings and choices, but may not be perceived as economically vital. For low-income households, in which one or both partners work for an employer that artificially restricts hours below thresholds where provision of benefits is required, or that simply does not provide certain

²⁷ Brown, *supra* note 15, at 169–70; Wood, *supra* note 24.

²⁸ Brown, *supra* note 15, at 169–70.

²⁹ In a 1997 study by the Congressional Budget Office using projected data for tax year 1996, households earning less than \$20,000 per year faced a marriage penalty equivalent to 7.6% of their adjusted gross income, the highest of any income bracket. CONG. BUDGET OFFICE, FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX, at xiv tbl.1 (June 1997), available at <http://www.cbo.gov/showdoc.cfm?index=7&sequence=1>. Although tax changes since 2001 have raised the standard deductions for married couples in an effort to reduce the marriage penalty, this will have limited impact on those low-income families who were already paying little or no income tax. See Edmund L. Andrews, *Fight Looms over Who Bears the Biggest Tax Burden*, N.Y. TIMES, Jan. 13, 2003, at C1. See *supra* note 24 for a discussion of the potentially penal effect of marriage on EITC eligibility.

³⁰ Brown, *supra* note 15, at 168–70.

³¹ *Id.* at 169–70.

³² Ettelbrick, *supra* note 22, at 16.

benefits, marriage may be ineffective as a means to access valuable health insurance coverage. As Professor Paula Ettelbrick has observed, "For women, particularly women of color who tend to occupy the low-paying jobs that do not provide healthcare benefits at all . . . [t]he opportunity to marry will [not] get them the health benefits"³³ Therefore, workers at hourly positions or in service industries are likely to find themselves without healthcare benefits.

Sometimes, the marriage model is used coercively, rather than merely as an incentive scheme.³⁴ As with marriage incentives, this coercion is likely to be experienced unevenly along gender, race, and class lines. Coercive pressures to marry are reflected in President Bush's announcement of a \$1.5 billion marriage promotion program targeting low-income households.³⁵ The program reflects a public policy decision to privatize traditionally public programs that assist economically and socially marginalized communities.

Coercive pressures to marry also appear in the context of welfare and public assistance. The Center for Women Policy Studies has documented the increasing trend in welfare reform, enforced through the Temporary Assistance for Needy Families ("TANF") program,³⁶ to promote explicitly "the formation and maintenance of two-parent families."³⁷ This policy uses marriage as a public policy approach to privatize responsibility for poor women and their children by moving them into husband-and-wife households and, according to the assumption, off welfare.³⁸ This policy of marriage promotion in welfare reform has diverted "already limited and insufficient funding for custodial parents, mostly women, to fund job training for non-custodial parents, mostly men, on the assumption that these newly employed men will provide financial support to their children and perhaps marry the women who are the mothers of their children."³⁹ The implementation of this policy

³³ *Id.*

³⁴ See, e.g., Polikoff, *supra* note 15, at 1546.

³⁵ Robert Pear & David D. Kirkpatrick, *Bush Plans \$1.5 Billion Drive for Promotion of Marriage*, N.Y. TIMES, Jan. 14, 2004, at A1 (describing Bush's "extensive election-year initiative to promote marriage, especially among low-income couples," which "would be available only to heterosexual couples").

³⁶ TANF was created by the welfare reform legislation of 1996. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified in scattered sections of 42 U.S.C.).

³⁷ CTR. FOR WOMEN POLICY STUDIES, STATEMENT IN OPPOSITION TO "PROMOTION OF MARRIAGE" AS A PUBLIC POLICY STRATEGY FOR ENDING WOMEN'S POVERTY (May 2002), <http://www.centerwomenpolicy.org/papers/200205tanfandmarriage.htm>.

³⁸ *Id.*

³⁹ *Id.*

in welfare reform has been at the expense of resources to fund job training and to promote women's economic self-sufficiency.⁴⁰

Similarly, the National Organization for Women ("NOW") observes that under federal welfare reform laws, states that achieve the greatest annual reduction in out-of-wedlock births without increasing the number of abortions performed receive an "illegitimacy bonus."⁴¹ TANF also promotes a "family cap" policy to discourage women from having additional children while receiving welfare assistance. The family cap policy denies welfare benefits to children born to unmarried welfare recipients or heightens work requirements for mothers who exceed the family cap.⁴² These policies fail to appreciate the complicated interplay of gender, race, and economic subordination in the real lives of poor mothers and their children, a multivalent problem that marriage alone likely cannot solve. In fact, for some low-income households, marriage may cause economic loss by rendering them ineligible for the Earned Income Tax Credit.⁴³ The imposition of marriage as a solution to female poverty illustrates one way in which laws characterizing marriage as the preferred family structure not only fail to reduce, but may, in some instances, even aggravate the economic and social subordination of women, particularly women of color.⁴⁴ The promotion of marriage as a solution to poverty deprives poor, single mothers of necessary economic benefits, and shifts attention away from the lack of job training, education, or government services for the poor and to the poor's stigmatized marital practices.

⁴⁰ *Id.* Poverty and welfare reform researchers at Princeton University note that among the assumptions underlying marriage promotion policies in welfare reform is the ideological belief that "the retreat from marriage . . . is a root cause of poverty." WENDY SIGLE-RUSHTON & SARA McLANAHAN, FOR RICHER OR POORER?: MARRIAGE AS AN ANTI-POVERTY STRATEGY IN THE UNITED STATES 7 (Ctr. for Research on Child Wellbeing, Princeton Univ., Working Paper No. 01-17-FF, 2003), available at <http://crcw.princeton.edu/workingpapers/WP01-17-FF-Sigle.pdf>. In a discussion of data from a joint study by Princeton and Columbia Universities (the Fragile Families and Child Wellbeing Study), researchers noted, "Proponents of marriage are substantially overstating its benefits when they compare the earnings or poverty rates of single mother families to those of married, two-parent families." *Id.* at 20. They also stated that "[w]ith welfare programs that make it more difficult for two parent families to obtain support when the market fails, marriage for unmarried couples might mean more rather than less vulnerability" because of the prevalence of means testing in benefit distribution. *Id.*

⁴¹ See NOW LEGAL DEFENSE & EDUC. FUND, MARRIAGE AND FAMILY INITIATIVES: ARE THEY EFFECTIVE?, at <http://www.nowldef.org/html/issues/wel/marriagefamily.shtml> (last visited Mar. 17, 2004).

⁴² *Id.*

⁴³ See *supra* note 24 and accompanying text.

⁴⁴ See CTR. FOR WOMEN POLICY STUDIES, *supra* note 37.

B. *The Primacy of the Married, Two-Parent Model*

Over the last few decades, the U.S. Supreme Court gradually has recognized the variety in American families without, however, challenging the lack of equivalence in family status among these varied family forms.⁴⁵ Federal laws privileging marriage may work to exclude communities in which family ties are built on social, romantic, economic, or kinship networks rather than marital vows. Such laws fail to offer important state and social recognition of these communities' real needs and values.

Some same-sex couples may be invested in the concept that love and function, not marriage or form, make a family.⁴⁶ This may be because they have been unable to marry legally. Alternatively, some same-sex couples may desire recognition of multiparty relationships.⁴⁷ For example, a same-sex couple who have a child with a known sperm donor or surrogate mother may wish to form a three-party relationship, with each party having recognized rights vis-à-vis the other parties and the child. Alternatively, a bisexual individual may wish to maintain a co-parenting relationship with a former partner even after each has formed a new primary relationship. Some LGBT individuals may form polyamorous or ethically nonmonogamous relationships.⁴⁸ As some same-sex couples begin to enter legal marriage, other LGBT individuals and couples will be excluded; it is therefore important to remain mindful of the diversity of real partnerships and households, and to engage critically the primacy of the married, two-parent model.

C. *Some Benefits of Marriage and the Alleviation of Inequalities Based on Marital Status*

Marriage attracts people for a variety of reasons, some of which are personal and some of which are economic or social. Marriage car-

⁴⁵ See, e.g., *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (plurality opinion) ("The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household."); *Moore v. City of East Cleveland*, 431 U.S. 494, 504–06 (1977).

⁴⁶ Ettelbrick, *supra* note 10, at 153–59.

⁴⁷ *Id.* at 159–65.

⁴⁸ For a thorough historical and legal discussion of polyamory, ethical nonmonogamy, and the apparently unquestioning popular acceptance of the numerosity requirement of marriage, see generally Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2004), <http://ssrn.com/abstract=506242> (Feb. 2004) (cited with permission).

ries numerous valuable and, in some instances, unique benefits.⁴⁹ The rights that marriage laws grant married couples in the domestic relations, tax, and employment contexts are significant.⁵⁰ Although some same-sex couples may have the means to make private contractual arrangements regarding property and child custody, many couples do not; for these couples, marriage may provide an economical alternative. Additionally, some same-sex couples may experience the process of hiring an attorney to contract the intimate arrangements of their relationship as alienating or anxiety-producing. Moreover, private contracts cannot grant many of the rights extended to married persons under current law, such as family leave or social security survivor rights.⁵¹ Marriage laws and the benefits that they provide eliminate the need for many such costly and invasive legal arrangements.

Although access to marriage is a significant gain for some same-sex couples, marriage may not be the only means by which LGBT families can attain equal economic and social benefits.⁵² Certainly, marriage need not be the only strategy pursued. A growing number of private employers provide benefits to same-sex couples through domestic partner coverage.⁵³ Some employers extend domestic partner benefits to both mixed-sex and same-sex couples; others cover only same-sex couples. Whether this trend reflects a growing willingness to recognize non-marital relationships or simply a pragmatic business decision designed to attract desirable employees, such a decoupling of benefits from marriage represents a positive move toward recognition for all LGBT family relationships in the full range of forms in which they occur, including step-families, co-parenting arrangements, unmarried couples and individuals, and married couples.

⁴⁹ See *supra* note 21. Marriage also carries a set of state-sponsored entitlements, including tax breaks, social security benefits, inheritance rights, survivor's benefits, family medical leave, etc. See *supra* note 10 and accompanying text.

⁵⁰ Spouses have rights to retirement and survivor benefits, rights to take family leave to care for family members, including spouses, and other rights not granted to unmarried partners. Immigration laws also provide spousal preferences. See Ettelbrick, *supra* note 10, at 126–29.

⁵¹ See Stoddard, *supra* note 13, at 11–12 (“[T]here are some barriers one simply cannot transcend outside of a formal marriage.”).

⁵² See *infra* Part III.

⁵³ See, e.g., HUMAN RIGHTS CAMPAIGN, FORTUNE 500 COMPANIES THAT OFFER DOMESTIC PARTNER HEALTH BENEFITS, at http://www.hrc.org/Template.cfm?Section=Search_the_Database&Template=/CustomSource/WorkNet/WorkplacePolicySearch.cfm&DPHealth=f500 (2004).

II. DECONSTRUCTING SAME-SEX MARRIAGE: EXAMINING SOME POSSIBLE OPERATIONS

Access to same-sex marriage may import some of the inequalities described in Part I and may also introduce new, specific inequalities into the lives of LGBT individuals.⁵⁴ Marriage laws probably will continue to favor households containing a primary wage earner and may therefore unevenly distribute some benefits along race and class lines. Private provision of marriage-contingent benefits may continue to forestall inquiry into ways to provide basic healthcare to all individuals, regardless of employment or relationship status. Welfare laws may continue to promote marriage as a solution to poverty, shifting attention from job training, education, or government services to the poor's marital practices. Although marriage may offer some same-sex couples valuable and unique benefits, obtaining the right to civil marriage may not guarantee unchallenged access to the presumptive benefits traditionally associated with mixed-sex marriage.⁵⁵ It is possible that the bias that has historically operated to discriminate against LGBT individuals in housing, employment, and domestic relations law will continue to limit the rights associated with marriage. Additionally, same-sex marriage may carry potentially deleterious consequences for some LGBT individuals, both because it introduces new forms of state regulation into LGBT lives and because it may endorse the presumed supremacy of married, two-parent families over other formations.⁵⁶

A. *Qualified Guarantees*

Laws promoting marriage offer a host of incentives and benefits, including presumptions in child custody matters, immigration preferences, application of divorce laws, survivorship benefits, and reduction of inheritance taxes.⁵⁷ These benefits are presumptions, however, not guarantees.⁵⁸ It is possible that the benefits associated with traditional mixed-sex marriages may not be extended equally, without challenge, to

⁵⁴ We recognize that for bisexual and transgender individuals, marriage already operates in their lives in the ways that some gay and lesbian individuals may not have been able to appreciate yet.

⁵⁵ Steven K. Homer, Note, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505, 516 (1993).

⁵⁶ *Id.*

⁵⁷ See *supra* note 10 and accompanying text.

⁵⁸ Homer, *supra* note 55, at 516; see also Ettelbrick, *supra* note 10, at 162 (noting that "[a]nyone who has ever represented lesbian and gay parents knows that there is always a gay exception to family law rules").

same-sex marriages.⁵⁹ Social and legal discrimination, which have operated to deny same-sex couples access to marriage for decades, may continue to operate to deny same-sex married couples the same degree of presumptive deference and privilege afforded mixed-sex marriages.⁶⁰

The recent federal appellate decision in *Lofton v. Department of Children and Family Services* is instructive on this point.⁶¹ In 2004, in *Lofton*, the Eleventh Circuit upheld a Florida law barring LGBT individuals from adopting.⁶² The *Lofton* court approved Florida's justification for the law, which correlated the best interests of the children with "placing them in families with married mothers and fathers . . . [which] provide the stability that marriage affords and the presence of both male and female authority figures."⁶³ Even if the *Lofton* plaintiffs had been able to, and actually did, marry in Florida, it is possible that the presumptions created by their status as a married couple could have been overcome by the court's stated preference for families with "married mothers and fathers."⁶⁴

The *Lofton* decision demonstrates the presumed supremacy of mixed-sex marriages. The deeply hostile backlash to *Goodridge v. Department of Public Health*,⁶⁵ the renewed effort to pass a federal constitutional amendment to define "marriage" as between one man and one

⁵⁹ Homer, *supra* note 55, at 516 ("At every point at which same-sex married couples would be seeking the recognition that their marriages imply, they would be vulnerable to a distinction between them and heterosexuals and thereby be vulnerable to devaluation.").

⁶⁰ See Chai R. Feldblum, *Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation, and Transgender*, 54 ME. L. REV. 159, 187–88 (2002) (noting that the public is willing to provide LGBT people "a certain amount of formal equality—but [there is] a distinct lack of willingness to rectify the tilt in a manner that would achieve full equality").

⁶¹ 358 F.3d 804, 822–23 (11th Cir. 2004).

⁶² *Id.* at 827.

⁶³ *Id.* at 818.

⁶⁴ See *id.* at 818, 819–20.

⁶⁵ See, e.g., Raphael Lewis, *Groups Muster to Fight Gay Marriage in Massachusetts*, BOSTON GLOBE, Nov. 20, 2003, at A1 (describing gay marriage opposition groups' "orchestrated campaign" to denounce the *Goodridge* decision); Press Release, Focus on the Family, Focus on the Family Decries Massachusetts Court Opinion (Feb. 4, 2004) (stating that *Goodridge* represents "a carefully orchestrated plan of judicial tyranny" to place marriage "under direct attack"), <http://www.family.org/welcome/press/a0030377.cfm>; ALLIANCE DEFENSE FUND, ADF AND ALLIES SEE SUCCESS: FIRST POST *GOODRIDGE* SKIRMISH IN BATTLE TO DEFEND MARRIAGE ENDS WELL!, at <http://www.alliancedefensefund.org/story/?id=165> (Nov. 25, 2003) (stating that "the Massachusetts Supreme Judicial Court discarded God's plan for marriage and the family by redefining 'marriage' to include same-sex couples" and criticizing "the homosexual legal agenda").

woman,⁶⁶ and the flurry of anti-same-sex marriage activity in state legislatures around the country,⁶⁷ each also demonstrate that even as same-sex couples consider marriage, potent bias against LGBT individuals and same-sex marriages persists. This animus may operate in a variety of contexts, including family structure, immigration preferences, and survivorship benefits, to militate against the extension of the benefits presumptively associated with traditional mixed-sex marriage to same-sex marriages. As a result, same-sex marriage may be interpreted as a lesser version of “traditional” mixed-sex marriage, and same-sex *marriage* may, instead, become *same-sex* marriage.⁶⁸

If anti-LGBT bias operates to deny same-sex marriages the same degree of presumptive deference and privilege afforded mixed-sex marriages, the full panoply of rights associated with marriage may be less readily available to those same-sex couples who are economically or emotionally unable to litigate to enforce them.⁶⁹ For example, married

⁶⁶ See, e.g., Amendments Regarding Marriage, S.J. Res. 26, 108th Cong. (2003); Marriage Amendment, H.J. Res. 56, 108th Cong. (2003); Mary Leonard, *Gay Marriage Stirs Conservatives Again, Right Wing Braces for Mass. Ruling*, BOSTON GLOBE, Sept. 28, 2003, at A1.

⁶⁷ See, e.g., H.B. 272, 125th Gen. Assem., Reg. Sess. (Ohio 2004) (barring recognition of same-sex relationships and, for the first time, barring state agencies from giving benefits to any unmarried partners); James Dao, *Ohio Legislature Votes to Ban Same-Sex Unions*, N.Y. TIMES, Feb. 4, 2004, at A12; see also HRC, *supra* note 14 (depicting map of states that have declared same-sex marriages void).

⁶⁸ In discussing public perception of LGBT individuals, Chai Feldblum has noted that:

The distinction between tolerating homosexuality and endorsing homosexuality turns out to be key for various public policy decisions. The reality is that most people in this country do not believe that homosexuality is morally equivalent to heterosexuality. Indeed, a clear majority of the public believes it is “better” to be heterosexual than homosexual, “better” for individuals to be in long-term heterosexual relationships, rather than long-term homosexual relationships; and “better” for children to be brought up in families headed by a heterosexual couple, rather than a homosexual relationship.

See Feldblum, *supra* note 60, at 186–87. The attainment of marriage may not, at least initially, shatter the perception that heterosexual households are preferable to same-sex households. This distinction may operate to define same-sex marriage as a different, and lesser, form of heterosexual marriage.

⁶⁹ This potential litigation would be similar to the litigation that arose in the era following the United States Supreme Court’s decision to strike down Virginia’s miscegenation statute in *Loving v. Virginia*, 388 U.S. 1 (1967). Most notably, in 1984, in *Palmore v. Sidoti*, the U.S. Supreme Court heard the appeal of a state court order revoking child custody from a divorced mother on the grounds that she was living with an African-American man and that her child would “suffer from the social stigmatization that is sure to come.” 466 U.S. 429, 431 (1984) (quoting App. to Pet. for Cert. 26–27), *rev’g* 426 So. 2d 34 (Fla. Dist. Ct. App. 1982) (unpublished table decision). The U.S. Supreme Court ultimately reversed the state court’s decision, holding that the race-based decision of the custody order violated the Equal Protection Clause. *Id.* at 434. *Sidoti* provides both good and bad news for

same-sex couples may not enjoy the same parental preferences as married mixed-sex couples, and may need to prepare, at least in the next few years, to obtain appellate review of *Lofton*-like judicial decisions that find the placement of children in mixed-sex married households preferable to their placement in same-sex households.⁷⁰ Accordingly, ongoing anti-LGBT bias may leave those LGBT individuals who do not have the practical or financial means to contract outside of marriage with compromised access to benefits, even when they choose to marry.⁷¹ Similarly, same-sex marriage may enable some LGBT individuals who otherwise would be without healthcare to access such benefits through their spouses; same-sex marriage, however, will not create access to such benefits for those same-sex couples in which neither partner has access to healthcare benefits.

Residual anti-LGBT discrimination in other critical areas, such as housing and employment, may prevent some same-sex couples from realizing some marriage-related benefits.⁷² Absent protection from discrimination in housing laws, some same-sex married couples may be unable to enjoy tenant laws favorable to married couples without exposing themselves to the possibility of lawful eviction by their landlord based on their sexual orientation.⁷³ Likewise, in contexts lacking protections against employment discrimination, some same-sex married couples may not be able to enjoy employer-provided spousal benefits because applying for such benefits may expose them to legal termination on the basis of their sexual orientation.⁷⁴ Indeed, it is possible that the mere fact of marrying a same-sex partner could lead to employ-

same-sex couples: the Supreme Court may continue to hold that “[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect,” but it may require years of costly litigation to reach that decision. *See id.* at 433. For many families, such litigation will not be an option.

⁷⁰ *See, e.g., Lofton*, 358 F.3d at 818–20, 827. Consider the case of Michael H. v. Gerald D., 491 U.S. 110, 129–30 (1989) (rejecting biological father’s challenge of a state law that creates the presumption that a child born to a married woman living with her husband is a child of the marriage). What if, in a same-sex marriage context, “Michael H.” was the sperm donor? Would courts still presume that the non-biological parent is the parent in order to protect the integrity of the married family unit? Even if the sperm donor was the only chance the child would have for a male role model?

⁷¹ Their access to benefits with marriage, however, would probably still be greater than their access to benefits if they could not marry.

⁷² *See Ettelbrick, supra* note 10, at 121.

⁷³ *See* Letter to the Editor from Chris A., *Unemployed, Homeless and . . . Hitched?*, PlanetOut, at <http://www.planetout.com/news/letters/?id=150> (Feb. 24, 2004).

⁷⁴ *Id.*

ment termination.⁷⁵ Although housing or employment discrimination may be vulnerable to legal challenge, some same-sex couples may be unable to sustain the initial loss of a home or a job and, additionally, may be unable to sustain the financial and emotional burden of litigating to enforce rights presumably attendant to their marital relationship. These couples could be the same couples for whom it has been predicted that same-sex marriage would lessen the burdens associated with having to contract for relationship-oriented rights outside of marriage.

In summary, persistent discrimination against LGBT individuals and the lack of sufficient protections in critical areas, such as housing and employment, may compromise these individuals' enjoyment of some of the valuable and unique benefits attendant to marriage. As a result, same-sex couples may not be able to enjoy the benefits of marriage in parity with individuals in mixed-sex marriages.

B. *Deleterious Consequences*

Access to marriage may carry deleterious consequences for some LGBT individuals. Same-sex marriage may introduce new forms of state and social regulation of sexuality into LGBT lives based on the married/unmarried distinction. LGBT individuals, particularly those in multiparty or nonmonogamous relationships, may become newly vulnerable to criminal laws that regulate marital monogamy, such as adultery⁷⁶ and fornication laws.⁷⁷ Although such criminal laws have fallen

⁷⁵ *Shahar v. Bowers*, 114 F.3d 1097, 1101 (11th Cir. 1997) (upholding Georgia Attorney General Michael Bowers's revocation of job offer on grounds that lesbian attorney who intended to wed her same-sex partner would be unable to enforce sodomy laws and hinting at inconsistency of enforcing laws that could be applied against attorney's own intimate acts). In an ironic twist, Bowers subsequently admitted to committing adultery, also a violation of Georgia law, while serving as Attorney General. *Shahar v. Bowers*, 120 F.3d 211, 211 (11th Cir. 1997) (denying plaintiff's motion for rehearing and motion to supplement the record with Bowers's admission). For a discussion of same-sex marriage as a publicly anti-assimilationist act, see Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 776 (2002).

⁷⁶ At least twenty-two states still have laws criminalizing adultery. See ALA. CODE § 13A-13-2 (1994); ARIZ. REV. STAT. § 13-1408 (2001); COLO. REV. STAT. § 18-6-501 (2002); FLA. STAT. ANN. § 798.01 (West 2000); GA. CODE ANN. § 16-6-19 (2003); IDAHO CODE § 18-6601 (Michie 1997); 720 ILL. COMP. STAT. 5/11-7(a) (2002); MD. CODE ANN., CRIM. LAW § 10-501 (2002); MASS. GEN. LAWS ch. 272, § 14 (2002); MICH. STAT. ANN. § 28.219 (Michie 1990); MINN. STAT. § 609.36 (2003); MISS. CODE ANN. § 97-29-1 (2000); N.H. REV. STAT. ANN. § 645:3 (1996); N.Y. PENAL LAW § 255.17 (McKinney 2000); N.C. GEN. STAT. § 14-184 (2003); N.D. CENT. CODE § 12.1-20-09 (1997); OKLA. STAT. tit. 21, § 871 (2002); R.I. GEN. LAWS § 11-6-2 (2002); S.C. CODE ANN. § 16-15-60 (Law. Co-op. 2003); UTAH CODE ANN. § 76-7-103(1) (1999); VA. CODE ANN. § 18.2-365 (Michie 1996); W. VA. CODE § 61-8-3 (2000); see also Emens, *supra* note 48 (manuscript at 10–11 & n.48).

⁷⁷ See Emens, *supra* note 48 (manuscript at 10–11 & n.47).

largely out of favor, it is not unusual for archaic laws to be enforced selectively against marginalized communities.⁷⁸ This has been true with respect to the selective application or enforcement of sodomy laws against LGBT individuals.⁷⁹ It also occurs in the context of statutory rape laws, which authorities persist in using to regulate same-sex activities among LGBT youth.⁸⁰ In addition to vulnerability to marital monogamy laws, unmarried LGBT individuals increasingly may be subjected to pernicious stereotypes that cast LGBT individuals as sexual predators incapable of monogamous commitment.⁸¹ As such, the promise of integration and acceptance that marriage offers some members of the LGBT community may come at the risk of introducing new forms of state and social regulation of LGBT sexuality to all members.

The legal and social preference for the married, two-parent family model may also create a hierarchy within the LGBT community, privileging married, two-person same-sex families over other same-sex partnership and household forms. This hierarchy could be counterproductive to efforts to diversify forms of partnership and household recognition. For example, domestic partner benefits have been available in some instances to same-sex couples in committed relationships, but not to similarly committed mixed-sex couples, based on the rationale that same-sex couples, unlike mixed-sex couples, have not had the option to marry. In jurisdictions where same-sex marriage becomes an option, it

⁷⁸ For a discussion of selective enforcement of fornication and adultery laws, including the ways in which they have been selectively interpreted against heterosexual as opposed to homosexual parties, see Mark Strasser, *Sex, Law, and the Sacred Precincts of the Marital Bedroom: On State and Federal Right to Privacy Jurisprudence*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 753, 778–90 (2000).

⁷⁹ See *Bowers v. Hardwick*, 478 U.S. 186, 187–88 (1986). But see *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003) (striking down Texas's same-sex sodomy law, and, by extension, all sodomy laws, as inconsistent with the substantive due process guarantees of the Federal Constitution).

⁸⁰ *State v. Limon*, 83 P.3d 229, 236 (Kan. Ct. App. 2004) (upholding sentence for bisexual youth convicted of criminal sodomy with a fourteen-year-old, even though the sentence was thirteen times longer than a heterosexual youth would have received for a similar offense, on grounds that such disparity promoted "traditional sexual mores," such as procreation and marriage).

⁸¹ See EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 19 (1990); Kara S. Sufredini, Note, *Pride and Prejudice: The Homosexual Panic Defense*, 21 B.C. THIRD WORLD L.J. 279, 284 (2001). There is also the converse possibility that such stereotypes could dissipate for all LGBT individuals as a result of visible decisions by some same-sex couples to marry, which presumably is indicative of an enduring, monogamous commitment. See *Goodridge*, 798 N.E.2d 941, 965 (Mass. 2003) (noting "marriage's solemn obligations of exclusivity, mutual support, and commitment to one another").

would be disappointing, but probably not surprising, if state and private businesses ceased to offer domestic partner benefits.

The advent of civil unions in Vermont underscores this point.⁸² Prior to Vermont's recognition of civil unions, the University of Vermont provided domestic partner benefits to unmarried same-sex couples, but not to unmarried mixed-sex couples. Civil unions created a disparity between same-sex couples, who had the option of accessing benefits either by registering as domestic partners or by entering into a civil union, and mixed-sex couples, who only had the option of accessing benefits by marrying. In response, rather than extending the option of domestic partner benefits to all committed couples, the University of Vermont revoked the option of domestic partner benefits altogether.⁸³ Such a revocation of recognition of diverse partnership and household arrangements suggests that, although same-sex marriage stands to extend valuable and unique benefits to some same-sex couples, it also may stand to reduce the availability of legal recognition of other partnership and household arrangements. Even with the choice of civil marriage, this reduction in recognized household options could be harmful to some LGBT families and may run counter to historic social justice and equality concerns of some parts of the LGBT movement.

LGBT families that do not fit the traditional marriage model may benefit more from the availability of recognition for other partnership and household arrangements than from the availability of same-sex marriage. As Paula Ettelbrick states, "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 although there are solutions to these questions, it is doubtful that they lie in same-sex marriage."⁸⁴ LGBT families often can be more complex than the model of traditional mixed-sex marriage. Consider the pair of lesbian co-parents who wish to involve their child's biological father in their child's upbringing without affirming his paternity rights. As the *Lofton* case illustrates, preferences for mixed gender role models may

⁸² See An Act Relating to Civil Unions, VT. STAT. ANN. tit. 15, §§ 1201–1207 (2001). The law provides that a same-sex couple may enter into a legally recognized civil union, which provides the same benefits, protections, and responsibilities as a civil marriage. *Id.* § 1204.

⁸³ Richard Higgins, *UVM Revises Domestic-Partner Policy, Legal Unions Now Required*, BOSTON GLOBE, Sept. 28, 2000, at B3 ("[T]he University of Vermont has told gay and lesbian employees with long-term partners that they have to legalize their relationships under the state's new civil union law if they want to keep getting domestic partner benefits.").

⁸⁴ Ettelbrick, *supra* note 10, at 163.

operate to confine same-sex parental rights.⁸⁵ Same-sex marriage may not be able to overcome such prejudicial preferences. Thus, to the extent that the availability of same-sex marriage may result in a reduction of recognition for diverse forms of partnership and households, LGBT families that do not fit the traditional marriage model may not benefit and may even be harmed.

Fifteen years ago, in advocating against prioritizing marriage at the expense of other LGBT equality or liberation-oriented efforts, Ettelbrick noted that “marriage defines certain relationships as more valid than all others” and, as such, “runs contrary to two of the primary goals of the lesbian and gay movement: the affirmation of gay identity and culture; and the validation of many forms of relationships.”⁸⁶ The legal preference for marriage, to the possible disparagement or exclusion of other forms of partnership and household structure, conditions valuable social and legal benefits on a preferred relationship status rather than on need or function. Thus, to the extent that the advent of same-sex marriage diverts attention from challenging the fairness or utility of such benefit distribution, or results in a reduction of recognition for other partnership and household arrangements, it could undermine a broader movement for social justice and democratic diversity.⁸⁷

Marriage advocacy that does not examine critically the legal structure of the institution and its broader social effects may be counterproductive to efforts to gain recognition for diverse forms of partnership and household structure. Much of the debate between proponents and opponents of same-sex marriage centers on the ownership of the “tradition” of marriage, with each side claiming that its position serves to better “reinforce the importance of marriage to individuals and communities.”⁸⁸ In *Goodridge*, the court may have predicated its decision, in part, on its perception of the plaintiffs’ acceptance of the presumptive supremacy of the tradition of marriage. In reaching its conclusion that same-sex couples should have access to marriage, the court noted, as a threshold matter, that “the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the con-

⁸⁵ See 358 F.3d at 818–20.

⁸⁶ Ettelbrick, *supra* note 22, at 9, 14.

⁸⁷ See Lisa Duggan, *Holy Matrimony!*, THE NATION, Mar. 15, 2004, at 14, 16–18, available at <http://www.thenation.com/doc.mhtml?i=20040315&s=duggan&c=1>; Hutchinson, *supra* note 15, at 585–602.

⁸⁸ *Goodridge*, 798 N.E.2d at 965; see also David B. Cruz, *The New “Marital Property”: Civil Marriage and the Right to Exclude?*, 30 CAP. U. L. REV. 279, 293–99 (2002).

sanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law.”⁸⁹

It may be instructive, however, to distinguish between “sameness” in the sense of being equally deserving of freedom from discrimination and “sameness” in the sense of disparaging less conforming expressions of gender, sexual intimacy, and familial structuring. The claims that all LGBT individuals are the “same” as non-LGBT individuals, that all want the “same” things, that the only way for them to be fully equal is to be able to marry, and that, absent marriage, same-sex couples are “in a state of permanent adolescence,” may serve to promote marriage in terms that marginalize other partnership and household forms by stigmatizing them as adolescent and legitimizing the notion that there is “no other way” to achieve greater “esteem” than to marry.⁹⁰

Because ongoing anti-LGBT bias may operate to extend marriage unequally to some same-sex couples, may carry deleterious consequences for some LGBT individuals, and may be counterproductive to the diversification of forms of partnership and household recognition, marriage, although a significant gain, may not be a panacea. As same-sex couples begin marrying, therefore, it is important to shift the debate from a presumption of the supremacy of the tradition of married, two-parent families to a progressive vision for a diversification of partnership and household recognition that honors the history of the varied forms of LGBT families and their needs for recognition and support. A broader vision of possibilities may translate the immediate ability of some LGBT couples to access valuable and unique rewards into a movement for social justice and democratic diversity that may benefit many forms of LGBT families.⁹¹

III. MORE THAN MARRIAGE

Current marriage advocacy and the movement to achieve a progressive vision for diversification of partnership and household recognition can be complementary pursuits. In her 1995 book, *Virtual Equality*, Urvashi Vaid observed that “[t]o win genuine equality, a rights-oriented movement and a gay liberation movement are both necessary.”⁹² Genuine, rather than formal, equality for LGBT individuals requires a commitment not only to attaining the same social and legal

⁸⁹ *Goodridge*, 798 N.E.2d at 965.

⁹⁰ Duggan, *supra* note 87, at 18 (citation omitted).

⁹¹ *See id.*

⁹² URVASHI VAID, *VIRTUAL EQUALITY* 212 (1995).

rights as those extended to heterosexual individuals, but also to achieving freedom from discrimination flowing from their differences.⁹³ As long as LGBT individuals face discrimination based on their differences from heterosexual individuals, that discrimination may operate to compromise the parity of the rights, such as marriage, that LGBT individuals attain. Thus, in the wake of *Goodridge v. Department of Public Health*,⁹⁴ the flurry of marriage ceremonies in select cities across the nation,⁹⁵ and the threat of anti-marriage amendments to the U.S. Constitution and some state constitutions,⁹⁶ it is imperative to consider how to preserve the rights associated with marriage not only by promoting the “sameness” of some LGBT individuals, but also by challenging the stigma associated with the differences of other LGBT individuals. Attaining marriage may be one way for some LGBT families to achieve state and social recognition and support, but it may not be the *only* way, and it need not be the *exclusive* way.

In her recent article, *Holy Matrimony!*, Lisa Duggan offers a number of means by which the drive for marriage may be used as a progressive springboard to recognition of an expanded and diverse range of relationship forms, rather than as an impetus to whittling down options to simply married or single.⁹⁷ Progressives could promote the retention and expansion of alternatives to marriage, such as domestic partner schemes, civil unions, and reciprocal beneficiary status.⁹⁸ Progressives could also begin to promote disentangling the symbolic, kinship, social, and economic functions of marriage.⁹⁹ This might include disassociating tax advantages from kinship, household, or romantic status, so that individuals could direct such advantages not only to a resident intimate

⁹³ *Id.*; see also Ettelbrick, *supra* note 22, at 14 (noting that the right to marry would create rights for a few, but not broader justice); Feldblum, *supra* note 60, at 187 (noting the difference between formal and full equality).

⁹⁴ 798 N.E.2d 941, 969 (Mass. 2003).

⁹⁵ See *supra* note 2 and accompanying text.

⁹⁶ See *supra* notes 66–67 and accompanying text.

⁹⁷ Duggan, *supra* note 87, at 15–16, 18; see also HUMAN RIGHTS CAMPAIGN FOUND., THE STATE OF THE FAMILY: LAWS AND LEGISLATION AFFECTING GAY, LESBIAN, BISEXUAL AND TRANSGENDER FAMILIES 13–17 (2002), http://www.hrc.org/Template.cfm?Section=LGBT_Families&CONTENTFILEID=379&TEMPLATE=/ContentManagement/ContentDisplay.cfm (listing states that recognize civil unions (Vermont), some form of domestic partnerships—often limited to health insurance (California, Connecticut, Maine, Oregon, Washington, New York, Rhode Island, Vermont), and reciprocal beneficiaries (Hawaii)).

⁹⁸ *Id.* at 15. For a discussion of ways in which domestic relations law might borrow from corporate law to recognize a wider range of relationship functions and structures, see generally Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79 (2001).

⁹⁹ Duggan, *supra* note 87, at 15.

partner, but also to a designated non-resident relative or friend.¹⁰⁰ This might also include efforts to achieve basic, universal healthcare, thus creating access to healthcare based on need, rather than on select relationship and employment statuses.¹⁰¹

Attempts to create such “a flexible menu of options” and to make critical benefits available regardless of household, partnership, or employment status, could yield both practical and symbolic benefits.¹⁰² They could create choices for forms of household and partnership recognition that might better respond to the diverse forms that real households take, depending on their specific and varying needs, while preserving marriage for those whose needs and desires favor the marital arrangement. It could also address some of the inequities that may flow from the current presumptive social supremacy of the two-parent married household, such as marriage promotion as an instrument of welfare reform policy and the marginalization of unmarried or single-parent households and “out of wedlock” births.¹⁰³ These changes may have more obvious appeal for those individuals for whom marriage may be only a means, or both a means and an end, to a broader goal of social justice.¹⁰⁴ Support for these changes could also appeal, however, to individuals for whom the attainment of marriage may be simply an end in itself.

The current political and legal storm around marriage has deepened the commitment by some to preserve gendered marriage on economic as well as moral grounds. Depending on its final wording and interpretation, the proposed federal marriage amendment may bar not only same-sex marriage but all recognition of diverse partnership and household forms, including civil unions, domestic partnerships, and reciprocal beneficiary statuses.¹⁰⁵ This could render civil, heterosexual marriage the only form of legally recognizable family relationship available at the federal, state, and municipal level, and may deter private businesses and organizations throughout the country from offering domestic partnership benefits. This approach is not dissimilar to that of the statute recently enacted in Ohio, which bars recognition of same-sex relationships, including marriage.¹⁰⁶ The Ohio law also, for the first

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 15–16.

¹⁰² *Id.* at 15.

¹⁰³ See CTR. FOR WOMEN POLICY STUDIES, *supra* note 37.

¹⁰⁴ Duggan, *supra* note 87, at 18–19.

¹⁰⁵ See *supra* note 66 and accompanying text.

¹⁰⁶ See H.B. 272, 125th Gen. Assem., Reg. Sess. (Ohio 2004).

time, bars state agencies from giving benefits to any unmarried couples, including mixed-sex couples.¹⁰⁷ These legislative examples suggest that, in some instances at least, the backlash to the movement for same-sex marriage may exceed the scope of the movement itself. In this climate, an inclusive strategy that advocates diversification of partnership and household recognition, in addition to marriage equality, may offer better protection for the interests of *all* members of the LGBT community.

CONCLUSION

The presumed supremacy of married, two-parent families warrants critical examination as same-sex couples legally begin to marry. Some same-sex couples may gain valuable and unique benefits from entering marriage. Other couples, however, will face the sometimes subordinating effect of marriage laws across gender, race, and class lines. The possibilities that some same-sex marriages may receive only qualified guarantees and that marriage may impose deleterious effects for some LGBT individuals¹⁰⁸ suggest the modest conclusion that marriage is not a panacea. Translating this significant gain for some LGBT individuals into full equality for all LGBT individuals may require a complicated, progressive approach to marriage advocacy that accounts for the interconnection of marriage laws across gender, race, class, and sexuality lines and that envisions recognition of the specific and varied needs of real households. As political scientist Cathy Cohen writes, "We must . . . start our political work from the recognition that multiple systems of oppression are in operation and that these systems use institutionalized categories and identities to regulate and socialize."¹⁰⁹ Accordingly, a positive vision of more than marriage may serve not only to affirm the "sameness" of some LGBT individuals, but also to challenge the stigma associated with their differences. Moreover, such an approach may make a diverse range of forms of partnerships and households eligible for state and social recognition, a range that recognizes and embraces the reality of a growing number of families and households in our society.

¹⁰⁷ *Id.*; Dao, *supra* note 67, at A12.

¹⁰⁸ The authors recognize that many LGBT individuals' identities intersect with race, ethnicity, gender, and class issues.

¹⁰⁹ Cathy J. Cohen, *Punks, Bulldaggers and Welfare Queens: The Radical Potential of Queer Politics?*, 3 GLQ: J. LESBIAN & GAY STUD. 437, 458 (1997).