

EQUALITY FOR UNMARRIED AMERICA: EXPANDING LEGAL CHOICE FOR AMERICA'S DIVERSE FAMILIES

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Marriage in 2013 America is in a state of paradox. The country is embroiled in debate about whether same-sex couples should be allowed to legally marry. The Lesbian, Gay, Bisexual, Transgender, Queer (hereinafter “LGBTQ”) movement dedicates the majority of its funding dollars and attention to the battle for same-sex marriage, while groups like the National Marriage Project and the Institute for American Values funnel money and public messages into projects aimed at preserving heterosexual marriage. In June 2013, the United States Supreme Court decided two landmark cases on same-sex marriage. The Court ruled in *Hollingsworth v. Perry* that the proponents of California’s Proposition 8, which banned same-sex marriage in the state, did not have standing to appeal the district court’s order invalidating the ban on these marriages, in effect opening the door to legal same-sex marriage in California.¹ In *United States v. Windsor*, the Court struck down Section 3 of the federal Defense of Marriage Act (DOMA), which denied federal marriage benefits to same-sex couples legally married at a state level, as an unconstitutional deprivation of equal liberty under the Fifth Amendment.² In this legal and cultural context of upheaval, progressives and politicians line up to celebrate the right to marry while social conservatives caution that same-sex marriage will cause a collapse

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¹ *Hollingsworth v. Perry*, 133 U.S. 2652 (2013).

² *United States v. Windsor*, 133 U.S. 2675 (2013).

in family values; what seems to unify the country is a valorization of marriage as an ideal. Meanwhile, fewer Americans than ever are actually getting married.

American marriage is on a steady decline in numbers. In 1960, nearly 70% of American adults were married.³ When marriage was at its all-time high in the 1950s, marriage defined gender roles, distribution of labor in and out of the home, and an individual's role in society.⁴ As women went to work and society became more secular, marriage gradually declined.⁵ In 2011, the percentage of married American adults dropped below 50% for the first time, with no signals that it will increase again.⁶ It has become common knowledge that half of all marriages end in divorce. Nearly 40% of Americans describe marriage as having become obsolete, while claiming to value family highly.⁷ Today only 20% of American households fit the model of a nuclear family, a married couple with children, down from about 25% in 2000.⁸

Meanwhile, living single has become common. Since 2000, the most common household type in the United States has been a person living alone.⁹ The average American spends most of his or her adult life unmarried.¹⁰ Sixty percent of that adult

³ *The Decline of Marriage and Rise of New Families*, PEW RESEARCH CENTER, *i*, (Nov. 18, 2010), available at <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf>

⁴ *Id.*

⁵ *Id.*

⁶ Sabrina Tavernise, *Married Couples Are No Longer a Majority, Census Finds*, N.Y. Times (May 26, 2011), http://www.nytimes.com/2011/05/26/us/26marry.html?_r=0 (referencing U.S. CENSUS BUREAU, THE 2011 STATISTICAL ABSTRACT, POPULATION: MARITAL STATUS AND LIVING ARRANGEMENTS, tbl. 56 (2011), available at <http://www.census.gov/compendia/statab/2011/tables/11s0056.pdf>).

⁷ PEW RESEARCH CENTER, *supra* note 3.

⁸ Tavernise, *supra* note 6.

⁹ Frank Hobbs, *Examining American Household Composition: 1990 and 2000*, U.S. CENSUS BUREAU 6, tbl. 2 (Aug. 2005), available at <http://www.ncfpc.org/pdf/files/censr-24.pdf>.

¹⁰ Rose Kreider & Jason Fields, *Number, Timing, and Duration of Marriages and Divorces: 1996*, U.S. CENSUS BUREAU (Feb. 2002), available at <http://www.census.gov/prod/2002pubs/p70-80.pdf>.

unmarried population consists of the more than 56 million American adults who have never married and have always been single.¹¹

Living with a partner without marriage has also become common in both different-sex and same-sex couples. Between 1960 and 2000, the number of unmarried cohabiting partners increased by a staggering ten times,¹² and increased another 88% between 1990 and 2007 alone.¹³ Meanwhile, public opinion about the importance of marriage is also shifting. As of a 2008 Gallup survey on marriage, 57% of respondents described a cohabiting couple of five years or more as just as committed as a married couple of five years or more.¹⁴ The public overwhelmingly responded to surveys by the Pew Research Center in 2010 with views that marriage is not the only way to form family, and with 44% of Americans reporting that they have been part of a cohabiting couple at some time.¹⁵

Despite this decline in the number of married Americans and rise in unmarried cohabitation of couples, we still see a false assumption in the same-sex marriage debate that couples would prefer marriage to domestic partnership, civil union, or a different legal recognition of partnership. Some same-sex marriage advocates have described civil union and domestic partnership as a “separate but equal” designation that is inherently unequal, using this phrase known from racial segregation.¹⁶ While civil unions and domestic partnerships may have been created to keep same-sex couples out of marriage,

¹¹ Rose M. Kreider & Diana B. Elliott, *America's Families and Living Arrangements: 2007*, U.S. CENSUS BUREAU (Sep. 2009), available at <http://www.census.gov/prod/2009pubs/p20-561.pdf>.

¹² Lynne M. Casper and Jason Fields, *America's Families and Living Arrangements: 2000*, U.S. CENSUS BUREAU (Jun. 2001), available at <https://www.census.gov/prod/2001pubs/p20-537.pdf>.

¹³ See Kreider & Diana B. Elliott *supra* note 11.

¹⁴ GALLUP *Marriage*, page 1, available at <http://www.gallup.com/poll/117328/marriage.aspx#1>.

¹⁵ PEW RESEARCH CENTER, *supra* note 3 at iii.

¹⁶ *Separate and Not Equal*, N.Y. Times (Dec. 20, 2008), available at http://www.nytimes.com/2008/12/20/opinion/20sat4.html?_r=0.

for many American families, these are not lesser designations, but instead are valuable options to create a legal family.

As the right to same-sex marriage is achieved, we need to maintain other options to create legal families. Same-sex marriage is just one piece of improving family policy. As an active family law practitioner for LGBTQ and nontraditional families in New York and as an academic involved in the national conversation on the evolution of the American family, I will explore the variety of domestic partnership, civil union, and residual beneficiary programs established for same-sex couples, and how they have been used creatively by heterosexual couples and platonic partnerships. I will argue that these alternatives to marriage should be maintained when same-sex marriage is achieved. Offering more than one legal framework for committed relationships will contribute to stable family formation and support families more effectively than the push for marriage alone.

I. THE LEGAL MEANING OF MARRIAGE

For many couples, the decision to marry is based on romance. It is a commitment to lifelong love and partnership. For same-sex couples, marriage may also feel like political activism, a celebration of their legal recognition as a couple. In practice, however, marriage is a legal financial institution, conferring 1,138 rights and responsibilities under federal law.¹⁷ These rights and responsibilities are different than any other family designation, with marriage in a privileged status. Many couples are unaware of the legal meaning of marriage when they get married. Under equitable distribution laws in divorce, couples generally consent to share their financial wins and

¹⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT 1 (2004), *available at* <http://www.gao.gov/new.items/d04353r.pdf>.

losses during the time they are married; if one makes \$100,000 and the other racks up \$100,000 in credit card debt, at the time of divorce they may be obligated to split these rewards and each be left neutral. Before appealing to the government for financial support, a spouse will be held financially responsible. Marriage is an agreement of financial support and an agreement to pass on money at death. By getting married, couples sign on to this heavy responsibility, and must appeal to the government for permission to break this contract through divorce. Until 2011, when a no-fault ground for divorce finally passed in New York as the final state in the country, fault grounds such as abandonment, adultery, or cruel treatment had to be established to argue to a court why one should be able to get out of a marriage, and if the spouse did not concede to the grounds and the court was not persuaded, people were legally compelled to remain married.

Despite being one of the most important fiduciary duties a citizen may undertake, many couples are unaware that they are taking on these responsibilities at the time of their marriage. Although couples entering marriage agree to one of the most important contracts they may ever sign, few people read the terms as closely as they might a consumer contract. And unlike a consumer contract, the terms are not in fine print to read when signing on to a marriage. As a practitioner of both prenuptial agreements and divorces, I have counseled hundreds of married couples that were unaware of the terms to which they had agreed.

The United States Government Accountability Office outlines the vast rights and responsibilities of marriage. Of the 1,138 provisions of federal law that treat marriage differently, 179 relate to taxes, with provisions that preference marriage and often

disadvantage domestic partners, unmarried couples, and LGBTQ parents.¹⁸ Additionally, the Family Medical Leave Act also offers protections for spouses, but not domestic partners, federal benefits are extended to spouses of federal employees, but not domestic partners, and in cases of death or disability, Social Security benefits are issued to married spouses and their children.¹⁹ The list goes on and on.

A premise of the arguments for same-sex marriage is that the rights of marriage are so expansive that denying them to a same-sex couple amounts to discrimination. In *United States v. Windsor* for example, attorneys for Edie Windsor point out that Section 3 of DOMA violates the equal protection guarantees of the Fifth Amendment by denying federal marriage benefits to same-sex couples.²⁰ Given the legally preferential status of marriage, however, to continue to preference marriage alone, a family structure that includes fewer than 50% of American adults, just pushes the line of discrimination from homosexuality back to marital status. Even by allowing same-sex couples to marry, unmarried families remain less legally valued.

II. THE ORIGINS AND IMPACTS OF DOMESTIC PARTNERSHIP & CIVIL UNION

A growing cultural surge in the 1990s argued that same-sex couples deserved some of these rights of marriage. Starting in the late 1990s, domestic partnership options were created at a state level in states such as California,²¹ Oregon,²² Washington,²³

¹⁸ *Id.*

¹⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, *An Overview of Federal Rights and Protections Granted to Married Couples*, HUMAN RIGHTS CAMPAIGN (Apr. 10, 2013), available at <http://www.hrc.org/resources/entry/an-overview-of-federal-rights-and-protections-granted-to-married-couples>.

²⁰ *Windsor*, *supra* note 2.

²¹ CAL. FAM. CODE § 297-297.5 (Deering 2013), available at <http://www.leg.state.or.us/07reg/measures/hb2000.dir/hb2007.en.html>.

²² Oregon Family Fairness Act, OR. REV. STAT. §§ 106.300-106.340 (2013) available at <http://www.leg.state.or.us/07reg/measures/hb2000.dir/hb2007.en.html>.

Maine,²⁴ and the District of Columbia.²⁵ Many local city areas also passed domestic partner ordinances allowing couples to register, such as New York City,²⁶ and a number of localities in states such as California,²⁷ Colorado,²⁸ and Ohio.²⁹ Civil unions were enacted in Vermont,³⁰ New Hampshire,³¹ and Colorado.³² In general, these ordinances explicitly welcomed same-sex couples that were legally unable to marry, but had great variation in whether they also welcomed heterosexual couples or any two people. The requirements for entering these partnerships and the rights conferred varied widely. These divergences create cultural and legal challenges when a term like ‘domestic partner’ can have very different meanings in different places, in one locality perhaps signifying a simple registration between two friends who live together, but in another city conveying a financially entangled, long-term romantic couple like our conception of marriage.

Some state civil unions, such as Colorado, Delaware, and Hawaii, confer nearly all the same rights, benefits, protections, and responsibilities as marriage.³³ The same, however, does not hold true at the federal level for these civil unions. The rights and

²³ SB 6239, 62nd Leg., Reg. Sess. (Wash. 2012).

²⁴ ME. REV. STAT. ch. 701, tit. 22, § 2710 (2012), *available at* <http://www.mainelegislature.org/legis/statutes/22/title22sec2710.html>.

²⁵ D.C. CODE § 32-702 (2012).

²⁶ N.Y. CITY ADMIN. CODE § 3-241 (2012), *available at* http://law.onecle.com/new-york/new-york-city-administrative-code-new-/ADC03-244_3-244.html.

²⁷ Cathedral City, Cal., Municipal Code § 11.97 (2000); Laguna Beach, Cal., Municipal Code § 1.12, *available at* <http://www.qcode.us/codes>.

²⁸ DENVER REV. MUN. CODE Ch. 28, art. VI, § 28-200.

http://www.denvergov.org/Portals/703/documents/CivilUnions/Docs/LegalCite_CommittedPartnershipsOrd.pdf

²⁹ Toledo, Ohio, Municipal Code § 114; Cleveland, Ohio, Municipal Code § 109, *available at* <http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:oh>.

³⁰ VT. STAT. ANN. TIT. 15, §§ 1201-07 (2013).

³¹ N.H. REV. STAT. ANN. § 457-A1 (2013) (repealed 2009).

³² COLO. REV. STAT. §§ 14-15-101-119 (2013).

³³ COLO. REV. STAT. §§ 14-15-101-119 (2013); DEL. CODE ANN. TIT. 13, §§ 201-17 (2013); HAW. REV. STAT. §§ 572B-1-11 (2013).

responsibilities of marriage conveyed by these civil unions at a state level include access to equitable distribution of property in divorce, hospital visitation between partners, the right to make medical decisions about a partner, wrongful death suits, and even state tax benefits. In Oregon, domestic partnership conveys these same rights of marriage within the state, under the Oregon Family Fairness Act.³⁴

Elsewhere, the rights conferred under civil unions are individually tailored by the state to include some, but not all, rights of state marriage. The Illinois Religious Freedom Protection and Civil Union Act allows same-sex and different-sex couples to enter into civil unions, giving them some of the same benefits available to married couples, including the right to visit a sick partner in the hospital, disposition of a deceased loved one's remains, and the right to make decisions about a loved one's medical care.³⁵ Before 2009, when the Marriage Equality Act passed in Vermont, civil unions in that state conveyed a different subset of the rights and responsibilities of marriage, including co-parenting privileges and responsibilities for any child who became a child to one partner during the civil union, access to divorce laws, and inheritance rights even without a will.³⁶ Once the Marriage Equality Act passed in Vermont, no new civil unions were granted, even if citizens might prefer this status.³⁷

Domestic partnership has an even more widely varied meaning depending on locality. In New York City, as in many city-level domestic partnership plans, a domestic partnership designation does not imply a sharing of financial responsibility for the other

³⁴ Family Fairness Act, OR. REV. STAT. §§ 106.300-340 (2011); H.B. 99, 74th Or. Leg. Assemb., 2007 Reg. Sess. (Or. 2007).

³⁵ Illinois Religious Freedom Protection and Civil Union Act, 750 ILL. COMP. STAT. 75/1-75/90 (2013).

³⁶ VT. STAT. ANN. tit. 15, § 1204 (2013).

³⁷ See An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage, S.B. 115 (Vt. 2009) (redefining marriage as between "two people" instead of "one man and one woman" and repealing statutes allowing for the issuance of civil union licenses.)

partner as a marriage would.³⁸ Instead, the designation allows city employees to share health insurance with a domestic partner beyond just a spouse, and often extends health insurance benefits from other employers, though sometimes with a higher tax burden than sharing health insurance benefits with a spouse.³⁹ This opportunity to share health insurance impacts many Americans. Employers are the primary source for health insurance in the United States.⁴⁰ By 2008, over 30% of employers offered health benefits to the same-sex partners of employees.⁴¹ The expansion of health insurance benefits to domestic partners, however, allowed cohabiting different-sex partners, who could legally marry, to avail themselves of these domestic partnership options.

Many portability challenges arise in a landscape in which the term “domestic partner” conveys very disparate levels of rights and responsibilities and varying degrees of commitment. In states such as Oregon, for example, domestic partner conveys a similar deep commitment as marriage, whereas elsewhere domestic partner conveys the lower commitment of living together and agreeing to share health insurance. For example, some national tax software for tax year 2012 still mistakenly required all who describe themselves as domestic partners to file jointly at the state level and separately at the federal level, as same-sex couples do, although in many areas domestic partnership does not imply any right or obligation to share finances and tax responsibilities.⁴²

³⁸ N.Y. CITY ADMIN. CODE § 3-241 (2012), available at http://law.onecle.com/new-york/new-york-city-administrative-code-new-/ADC03-244_3-244.html.

³⁹ See *Id.* In addition to sharing health insurance, these domestic partnerships are also useful for establishing oneself as a partner for hospital visitation purposes. There are few other legal benefits.

⁴⁰ “2008 Employer Benefits Health Survey,” Sept. 24, 2008 available at <http://ehbs.kff.org/pdf/7790.pdf>

⁴¹ Daryl Herrschaft, *The State of the Workplace For Lesbian, Gay, Bisexual, and Transgender Americans: 2004*, at page 9, HUMAN RIGHTS CAMPAIGN (June 2005), <http://www.hrc.org/resources/entry/the-state-of-the-workplace>.

⁴² See N.Y. CITY ADMIN. CODE § 3-241 (2012), available at http://law.onecle.com/new-york/new-york-city-administrative-code-new-/ADC03-244_3-244.html.

LGBTQ and nontraditional family attorneys receive scores of calls about this and many other issues. This is just one example of the many ways that the meaning and implication of domestic partnership is unclear at a national level.

Furthermore, issues of portability with these designations arise between states, especially at the dissolution of relationships. A number of states allow couples to marry or get civil unions in their jurisdiction without residency, but do require residency to divorce; this difference presumably occurs because marriages and civil unions bring revenue to a state, but it costs a state tax dollars to adjudicate a divorce. Vermont was one state that created its civil union designation in 2000 without requiring residency,⁴³ and same-sex couples flocked to Vermont to get a civil union. In the first three years of offering civil unions, more than 75% of civil unions were granted to out-of-staters.⁴⁴ The legal meaning of these civil unions in other states was, and is, unclear. Many New York State residents went to Vermont to get civil unions without residency and later found that they could not get divorced. They did not have residency to do it in Vermont, and in New York there was no legal procedure to dissolve a civil union. New York courts did not accept civil union dissolution through divorce procedure, so couples have been forced to hire lawyers at a greater expense to argue these dissolutions in equity. These complex

⁴³ See Act 91, Adjourned Session of 1999-2000 Biennium (1999), codified at 15 VT. STAT. ANN. tit 15, § 1202 (2012).

⁴⁴ According to a report of the Vermont Civil Union Review Commission from January 2001, 78% of the civil unions in Vermont were from out-of-state residents. *Report of the Vermont Civil Union Review Commission*, LEGISLATIVE COUNCIL.(January 2001), <http://www.leg.state.vt.us/baker/cureport.htm>, (located at Finding 2) The 2002 report says that the number of non-residents who got a civil union was 89%. <http://www.leg.state.vt.us/baker/Final%20CURC%20Report%20for%202002.pdf>.

equity cases continued until Vermont recognized this problem and allowed nonresidents to dissolve civil unions in Vermont.⁴⁵

Despite challenges of variation, the primary critique of civil union and domestic partnership, of course, has been that they were created to accommodate same-sex couples that are barred from legal marriage. The historical definition of marriage as between a man and woman has led to unending debates about whether same-sex couples should be included. The creation of a civil union or domestic partnership as a substitute, while preventing same-sex couples' access to the legal institution of "marriage," even in instances in which the same state rights are conferred, deprives same-sex couples of the cultural meaning of the institution of marriage. By depriving these couples of the dignity of that cultural label, and moreover, of the legally preferential status, their rights are denied. This is the negative association domestic partnerships and civil unions carry.

III. THE CHOICE NOT TO MARRY

At the same time that the LGBTQ community does not want to be siphoned off into a separate designation and deprived of these associations of marriage, many other couples (both heterosexual and homosexual) might prefer domestic partnership to avoid partaking in the religious, social, and political associations of marriage. In addition, some couples may not want to take on the far-reaching legal responsibilities and meanings of marriage in terms of sharing finances. Far from acting as a second-class citizenship, domestic partnership is a preferred choice for many Americans.

Marriage is a "one size fits all" approach to family in America, and American families do not fit this constraint. While some same-sex couples choose marriage, other

⁴⁵ An Act Relating to Divorce or Dissolution VT H. 758 (2012), referred to in April 27, 2012 press release by Vermont Freedom to Marry, *available at* <http://www.vtfreetomarry.org/2012/04/vermont-drops-residency-requirements-for-dissolving-vermont-civil-unionsmarriages.html>.

heterosexuals and members of the LGBTQ community are inspired by the history of gay relationships. While shut out of the institution of marriage, creativity flourished in the gay community, inspiring the rest of our society with examples of more than two individuals living together as a family, flexible relationships that might not promise to be lifelong, and freedom to build relationships of our own design. While unable to enter into marriage, these gay and lesbian individuals had the opportunity to create relationships without one set cultural framework for partnership. Gay couples, as well as straight couples, explored open relationships, or created polyamorous triads of three partners. Some chose to live in family groups of several friends, not based on romance. Some couples realized they might not want to blend their extended families, or that they might prefer not to commit to lifetime partnership.⁴⁶ Now that they have the opportunity to marry, these couples may prefer to continue to create their own creative, personal, or queer commitments rather than adopt the over 1,138 federal rights and privileges of legal marriage and the historical cultural associations with marriage.⁴⁷ As gay couples want entrance into marriage, many straight couples prefer the options the gay community has demonstrated while held outside the law.

In my family law and mediation practice in New York, I counsel many clients about the legal ramifications of marriage that are of importance to them, and explore whether legal marriage meets their legal, financial, and cultural intentions. Many couples that could marry in New York (both same-sex and different-sex) express a preference *not* to marry. Some reasons frequently cited by these couples include a desire to avoid state

⁴⁶ See “*The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life*”, Michael Warner 1999; First-person interviews with some of these nontraditional families at Family Matter’s Project: Family Gallery, available at www.familymattersproject.org.

⁴⁷ See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 17.

involvement in their relationship; to avoid the financial terms of marriage; to opt out of divorce law or court involvement if the relationship dissolves; or to reject an implicit agreement to monogamy. Some wish to reject the institution of marriage which they may see as politically corrupt, or an institution which violates the separation of church and state by offering legal and financial benefits to couples fitting into the historically religious model of heterosexual monogamous marriage.

Many couples come to my office for counsel on the decision of whether or not to marry; they are curious about the meaning behind marriage, unlike couples in the past that may not have viewed marriage as a choice among options. Depending on financial and social priorities, the ramifications of marriage may or may not meet their needs. We explore whether sharing health insurance is a priority, and if so, whether New York City's domestic partnership designation could work equally well as legal marriage, or whether it would convey a burdensome extra tax. I ask clients to what extent they intend to share finances; if one of them is clearly choosing to act as breadwinner while the other focuses on schooling, home, or child care, the couple may want the security of marriage and divorce law, ensuring that the less moneyed spouse will be provided for and legally entitled to a share of money and assets. Alternately, this couple could remain unmarried but create a co-habitation agreement for financial support during the time of the relationship and in the event of any breakup. Another key issue to discuss in the decision to marry is inheritance after death. A heterosexual married couple will be able to transfer assets at death without paying an estate tax or transfer assets at divorce without a gift

tax.⁴⁸ Another relevant factor for a female same-sex couple seeking to have a child is that marriage in New York will allow the non-biological mother to register her name on the child's birth certificate, securing her legal parenting status within New York State.⁴⁹

As marriage is laden with public policy incentives to get citizens married, such as health insurance and immigration status, couples sometimes get married for practical reasons other than a desire to create a commitment to lifelong romance.⁵⁰ Even with these casual City Hall nuptials, many couples describe a weighty cultural significance to getting legally married that they had not necessarily desired or intended.⁵¹ These cultural associations of marriage go far beyond legal rights and obligations. Marriage is a status of celebration in our culture. It is associated with the blending of two families, a lifetime commitment of monogamous romance.

One woman's journalistic account of marrying her boyfriend for health insurance reasons, with no intention to commit to a lifetime of partnership, explains that despite being open about their pragmatic reasons for marrying, friends and co-workers treated her differently and his family felt more obligated to welcome her as family.⁵² By making their relationship public and legally sanctioned, others seemed to take on a right to comment on their relationship, and how it compared to traditional expectations of

⁴⁸ In fact, the \$363,000 more in estate tax paid by Edie Windsor at the death of her wife because their relationship was not federally recognized under DOMA was the discrimination at issue in *Windsor v. United States*, *supra* note 1.

⁴⁹ N.Y.S. DRL §24, FCA §417; *Debra H. v Janice R.*, 14 NY3d 576 (2010).

⁵⁰ *See I Wish I Wasn't Married: In Def. of Domestic P'ships for Straight Couples Domestic P'ships Should Be an Alt. to Marriage for All Couples*, GOOD, (July 12, 2011, 6:30 AM), available at <http://www.good.is/posts/domestic-partnerships-should-be-an-alternative-to-marriage-for-all-couples>.

⁵¹ *Id.*

⁵² *Id.*

marriage.⁵³ She concludes that she would rather be domestic partners, and allow for a more fluid definition of partnership.⁵⁴

In a New York Times op-ed, law professor Katherine Franke wrote about the mixed-blessing of same-sex marriage.⁵⁵ While supporting the option of same-sex marriage, she and her same-sex partner preferred to remain unmarried, after the blessing of creating a queer partnership outside of the confines of marriage, and noted with alarm that with same-sex marriage rights achieved in other states alternate options fell away.⁵⁶ Once marriage became an option, many couples were forced to marry to keep their benefits such as health insurance from employers.⁵⁷ She argued astutely that this historical moment provides an opportunity to reconsider whether we should force people to marry to have their relationships recognized and valued.⁵⁸ Already, since same-sex marriage passed in New York, I have seen clients in my law practice who are domestic partners losing health insurance options from both public and private employers because marriage is an option. In effect, these same-sex and different-sex couples may be financially compelled to marry, even if this is not their preferred framework for relating.

There are also many examples of families defined more broadly than a romantic couple in marriage. A more expansive definition of family could include people in a committed relationship, providing caretaking for infants or the elderly, committing to economic support and financial dependency, sharing resources and love, and building a life together of mutual support. A sexual relationship is secondary to these aspects of

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Katherine M. Franke, *Marriage is a Mixed Blessing*, N.Y. TIMES, June 24, 2011, at A25, available at http://www.nytimes.com/2011/06/24/opinion/24franke.html?_r=0.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

family. Among the 51% of American adults who are not married, many may still be living in a family.⁵⁹ Marriage is not appropriate for non-romantic committed partnerships such as best friends living together, two single mothers sharing a household and child care, two elderly sisters or widows supporting one another, or a gay man and woman co-parenting and sharing family life. Marriage is also inappropriate for partnerships of three or more. Among my clients, I serve polyamorous triads or quads of three or four people in a committed romantic relationship. I also support clients in non-romantic partnerships of three or more people, such as a sperm donor and lesbian couple who choose to all be involved in co-parenting, or two couples choosing to create a home and/or co-parent together. This year we have also seen a dramatic rise in matchmaking websites for co-parenting rather than romance, and many couples end their romance but continue living as a household to raise their child. In addition, the Family Matters Project of the Woodhull Sexual Freedom Alliance, launched in 2012, allows non-traditional families of many varieties to tell their stories and to offer other images of what family can look like in our country.⁶⁰

These nontraditional families, however, need role models and support to build their families with intention so that they can create a stable family unit, especially if children are involved. In my law practice, I carefully negotiate sperm donor agreements to make sure that a lesbian couple or single woman and sperm donor are really clear on whether the man providing the sperm will be a donor with no rights and responsibilities as a parent or a father, or whether the man will be involved in the child's life in any way. I negotiate co-parenting agreements to make sure that potential co-parents have deep trust

⁵⁹ See PEW RESEARCH CENTER, *supra* note 3.

⁶⁰ FAMILY MATTERS, <http://www.familymattersproject.org> (last visited Apr. 11, 2013).

and a committed relationship, even if not romantic, and agree on issues of schooling, religion, lifestyle, child care, financial support, and more. At times, these negotiations break down and parties realize that they do not have the common vision necessary to build a family. While I support my clients through their grief with compassion in these moments, I also feel relief that a child was not created in a situation that could devolve into conflict.

As a practitioner, I discover that the negotiation of agreements is more important than the document created. Gay and lesbian parents must go through an extensive process of assisted reproduction, adoption, and/or negotiation to become parents. The process of making these choices consciously is positive for parents and families. As marriage becomes one option to create family, instead of the only culturally acceptable path, it is my hope that couples will be forced to slow down and create families with intention. Maintaining a domestic partnership option alongside marriage is one route to this intentional family creation.

IV. MARRIAGE MAY NOT EQUAL STABILITY

Among proponents of the traditional family, the negative impact on children of unmarried parents is frequently cited. *Why Marriage Matters* was one widely publicized 2011 study claiming that children of unmarried cohabiting parents are at risk for a range of serious problems, including academic trouble, physical abuse, psychological stress, and poverty.⁶¹ The report argues that the crisis for these children is a series of temporary partners and parental figures entering and leaving the children's lives.⁶² This study, however, was conducted by organizations (the National Marriage Project and the Institute

⁶¹ W. BRADFORD WILCOX ET AL., INST. FOR AM. VALUES, *Why Marriage Matters, Thirty Conclusions from the Social Sciences* (3d ed. 2011).

⁶² See *id.* at 6-8.

for American Values) with the explicit mission of defending the traditional institution of marriage. While there does seem to be evidence that the children of unmarried cohabiting parents have higher risk factors, this correlation does not indicate causation. This study does not account for the socioeconomic marriage gap in America, with lower-income Americans less likely to marry.⁶³ Children of struggling lower-income families fare worse, but this is likely caused by a host of factors other than whether their parents possess a marriage certificate. Later studies from more balanced sources argued instead that stable care arrangements, whether achieved through marriage or otherwise, are what matter most for children.⁶⁴ Thus, cohabitation in itself is not the likely culprit for harm to children, but rather instability of family arrangements.

Frequently, the government response to concerns about the American family has been to create more incentives for marriage, including using welfare dollars to promote marriage.⁶⁵ If unstable partnerships are harmful to the children of these partnerships, other policy options may be better solutions to encourage family stability than incentives for marriage. If people choose to get married for health insurance, immigration, or tax purposes, or because they have no other means of support as a single mother, this may not create the basis for long-term healthy and stable families.

A better basis for stable families comes in creating families with intention. Families can be empowered with conscious decision about whether to marry, get domestic partnered, live single, or live in another family configuration. This presents an

⁶³ *See Id.*

⁶⁴ W. Bradford Wilcox & Andrew J. Cherlin, CENTER ON CHILDREN AND FAMILIES AT BROOKINGS, *The Marginalization of Marriage in America 2* (CCF Brief #46, Aug. 2011) available at http://www.brookings.edu/~media/research/files/papers/2011/8/10%20strengthen%20marriage%20wilcox%20cherlin/0810_strengthen_marriage_wilcox_cherlin.

⁶⁵ ALTERNATIVES TO MARRIAGE PROJECT, *Let Them Eat Wedding Rings 2-3* (2d eds. 2007) available at <http://www.unmarried.org/press-releases/let-them-eat-wedding-rings-report>.

opportunity for reflection with a new cultural awareness that family and relationships come in many varieties. American families would benefit not just from same-sex marriage, but also from maintaining domestic partnership policies as a choice for other families.

V. DOMESTIC PARTNERSHIP AS A TOOL FOR CREATIVE FAMILY POLICY

While domestic partnership options were ostensibly created to serve same-sex couples that could not marry, heterosexual and non-romantic partners also availed themselves of these options. The language of some domestic partner policies required that partners not be related by blood or otherwise prohibited from marrying, suggesting that those drafting the policy intended the program to appeal to couples, but did not require a vow of love and romantic relationship.⁶⁶ Therefore, same-sex and different-sex friends in committed relationships could honestly participate in these programs. A number of California cities, such as Cathedral City, Davis, Laguna Beach, Los Angeles County, and Oakland, do not require an intimate relationship to enter domestic partnership, though partners must not be blood relatives.⁶⁷

Accordingly, some domestic partnership programs have pushed family policy forward creatively, even if unintentionally. The ‘Residual Beneficiary’ registration in Hawaii gives the same rights as marriage, and is open to parties *not* in an intimate relationship, *but only those who cannot marry*.⁶⁸ Two different-sex committed friends could not benefit from the program.⁶⁹ Some might prefer this to marriage, but if same-

⁶⁶ See example VT. STAT. ANN. TIT. 15, §§ 1201-07 (2013).

⁶⁷ CATHEDRAL CITY, CAL., CODE tit. 11, ch. 11.97.010 (2000); DAVIS, CAL., CODE ch. 10, art. 10.05.020 (2012); LAGUNA BEACH, CAL., MUNICIPAL CODE § 1.12, available at <http://www.qcode.us/codes>

⁶⁸ HAW. REV. STAT. §§ 572c-1-7 (2012).

⁶⁹ *Id.*

sex marriage passes there, it will no longer be an option. As same-sex marriage is achieved, we must be mindful that these other creative options are not lost as well.

Elderly women in particular, statistically often outliving their husbands and widowed, have banded together in mutual household support and companionship, and registered as domestic partners.⁷⁰ The language of some domestic partnership statutes (e.g. California's state domestic partnership) allows both same-sex couples *and* the elderly over sixty-two the opportunity to formalize relationships.⁷¹ New Jersey's domestic partnerships are also available to same-sex couples or couples over sixty-two.⁷²

Georgia Republican Party Chairwoman Sue Everhart spoke out in April 2013 about a risk of fraud if gay marriage passed throughout the country.⁷³ She expressed alarm that straight people could claim to be a gay couple just to share health and other benefits.⁷⁴ Two different-sex people, however, could marry for benefits just as easily as two same-sex people. Indeed, many couples are encouraged by our government to marry with explicit public policy incentives for marriage,⁷⁵ which may lead casual couples to marry for benefits rather than committed love. Moreover, if two people are willing to take on the responsibilities of marriage and band together in mutual financial support, it may be in the best interest of the state to support such partnerships. Committed partnership can exist outside of sexual relationships, and given the rampant problem of

⁷⁰ See CAL. FAM. CODE § 297 (2005).

⁷¹ *Id.*

⁷² N.J. STAT. ANN. §26:8A (2003).

⁷³ Jon Gillooly, *Cobb Sounds Off as Facebook Goes Red in Support of Gay Marriage*, MDJ ONLINE (Apr. 01, 2013, 12:00 AM), available at http://www.mdjonline.com/pages/full_story/push?article-Cobb+sounds+off+as+Facebook+goes+red+in+support+of+gay+marriage%20&id=22108736; Luke Johnson, *Sue Everhart, Georgia GOP Chairwoman, Warns Of 'Free Ride' Gay Marriage Fraud*, HUFFINGTON POST (Apr. 01, 2013, 10:08 AM), available at http://www.huffingtonpost.com/2013/04/01/sue-everhart-gay-marriage_n_2991860.html

⁷⁴ *Id.*

⁷⁵ See ALTERNATIVES TO MARRIAGE PROJECT, *supra* note 65.

single motherhood poverty in our country, banding together with a trusted friend or relative may be a better way to provide stability for these families than a pressure to enter a romantic relationship out of economic duress.

Unfortunately, when same-sex marriage passes in a state, domestic partnership and civil union options are sometimes lost. When same-sex marriage passed in New Hampshire and Connecticut, all existing same-sex civil unions were converted into marriages.⁷⁶ This is a dramatic presumption that these citizens would prefer marriage. In Vermont, civil unions were replaced when same-sex marriage became legal, but previous civil unions remained valid.⁷⁷ The state of Washington had a “State Registered Domestic Partnership” program open to both same-sex couples and to people over the age of sixty-two, which did not explicitly mention an intimate relationship as a requirement.⁷⁸ When same-sex marriage was legalized in Washington in November 2012, Referendum 74 was passed, which would keep all domestic partnership rights the same for registered couples that had at least one partner over the age of sixty-two. Any registered partnerships not fitting the criteria would be automatically converted to marriage on June 30, 2014, unless dissolved or converted to marriage prior to this date.⁷⁹ This demonstrates very low awareness that some citizens might prefer a civil union or domestic partnership, and that these designations are not just a second choice for those who cannot marry.

As the struggle for same-sex marriage continues, we must also remind legislators and the public that the freedom *not* to marry should be defended. In 2009, when the

⁷⁶ N.H. REV. STAT. ANN. § 457:46 (West 2013); CONN. GEN. STAT. § 46b-38rr (2013).

⁷⁷ See An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage, S.B. 115 (Vt. 2009) (redefining marriage as between "two people" instead of "one man and one woman" and repealing statutes allowing for the issuance of civil union licenses.)

⁷⁸ WASH. REV. CODE § 26.60.010 (2012).

⁷⁹ *Id.*

District of Columbia legalized same-sex marriage with Bill 18-482, organizations such as the Unmarried Equality (then called “Alternatives to Marriage Project”) and the Woodhull Sexual Freedom Alliance (then called “Woodhull Freedom Foundation”) lobbied successfully for Washington, D.C., to maintain its domestic partnership plan as an alternative.⁸⁰ These organizations, along with some legal academics, have attempted to protect the right to stay in domestic partnership and not get married even as same-sex marriage passes.⁸¹

When advocating for same-sex marriage rights, LGBTQ legal activists should also keep in mind a long-term vision of family variation beyond marriage. Proponents of same-sex marriage have at times described marriage as a “fundamental human right,” the highest form of adult human expression, crucial to adult human flourishing and healthy parenting.⁸² This rhetoric sounds alarmingly similar to their religious fundamentalist opponents. While equal marriage rights for LGBTQ citizens are obviously crucial, it is also important to not presume that LGBTQ, or other couples, definitively wish to marry. Legal precedent that prioritizes marriage as the healthiest form of family and parenting relationship may hurt the LGBTQ community in the future.

As the battle for same-sex marriage continues state by state, I advocate for local domestic partnership policies to continue as a valid alternative to marriage for many families. In shaping these domestic partnership policies, we can learn from the fact that many couples that could marry, both same-sex and different-sex, choose domestic

⁸⁰ Enacted at D.C. CODE § 46-401 (2012). Woodhull Sexual Freedom Alliance (then called “Woodhull Freedom Foundation”) Press Release *We Won! Victory for Equal Rights in Washington, DC* (Nov 10, 2009) available at www.woodhullalliance.org.

⁸¹ See NANCY D. POLIKOFF, BEYOND (STRAIGHT OR GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (Beacon Press, 2007). This book is a fantastic piece of early legal commentary on this subject which must be mentioned in any conversation on valuing families beyond marriage.

⁸² See *Perry v Brown*, 671 F. 3d 1052 (9th Cir. 2012).

partnership as an alternative. We also have the opportunity to notice the many platonic partnerships that can form stable families without romance. As we shape domestic partnership policies, we may benefit from allowing more openness about the categories of relationships that can enter these partnerships. Partnerships should not be limited to couples that cannot marry, but instead, should include any two committed people who will take responsibility for one another. Ultimately, we would further benefit from more standardization of the meaning of domestic partnership across state lines. All Americans would benefit from having a solid flexible domestic partnership plan that could allow two people to share a household, share health insurance, and acknowledge their status as family without welcoming the government into their division of finances and the question of whether they are in a romantic relationship. By retaining a designation of domestic partnership alongside marriage, we may encourage Americans to enter into marriage with more conscious choices available. These conscious choices promote stable families and may promote stability more effectively than incentives to marriage. We would also take one valuable step away from a state compelling its citizens into a religious family institution. Instead, our government could value the American families that actually exist.