Michigan Journal of Gender & Law

Volume 10 | Issue 1

2003

Marriage Law: Obsolete or Cutting Edge?

Michigan Journal of Gender & Law

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THE MICHIGAN JOURNAL OF GENDER & LAW

PRESENTS A SYMPOSIUM

MARRIAGE LAW: OBSOLETE OR CUTTING EDGE?

Friday, March 22, 2002

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MARRIAGE LAW: OBSOLETE OR CUTTING EDGE?

BIOGRAPHIES OF SYMPOSIUM PARTICIPANTS

MELISSA L. BREGER is currently a Clinical Assistant Professor at Albany Law School of Union University, where she serves as the Director of the Family Violence Clinic. Prior to teaching at Albany Law, Professor Breger spent three years teaching at the University of Michigan Law School, where she earned the L. Hart Wright Award for Excellence in Legal Teaching in her third year. She received her J.D. from the University of Michigan Law School. Prior to returning to Michigan to teach, Professor Breger was employed by a number of organizations in New York City, including the Legal Aid Society, Juvenile Rights Division, where she also supervised law students from NYU Law School’s Juvenile Justice Clinic. Since graduating from law school in 1994, Professor Breger has dedicated her career to the rights of children and women.

EVAN H. CAMINKER, who was named dean of the University of Michigan Law School in 2003, writes, teaches, and litigates about various issues of American constitutional law. His scholarship and professional activities focus on matters concerning individual rights, federalism, and the nature of judicial decision making. Dean Caminker came to Michigan from the UCLA Law School, where he was a faculty member from 1991 to 1999. Dean Caminker received his B.A. in political economy and environmental studies, summa cum laude, from the University of California at Los Angeles, and his J.D. from the Yale Law School. He then clerked for Justice William Brennan at the Supreme Court and for Judge William Norris of the Ninth Circuit. Dean Caminker also practiced law with the Center for Law in the Public Interest in Los Angeles and with Wilmer, Cutler & Pickering in Washington, D.C. From May 2000 through January 2001, Dean Caminker served as deputy assistant attorney general in the Office of Legal Counsel, U.S. Department of Justice. At the time of this symposium, Dean Caminker was Associate Dean for Academic Affairs and Professor of Law at Michigan.

DAVID L. CHAMBERS is a graduate of Princeton University and Harvard Law School. He practiced in Washington and served on the staff of the National Advisory Commission on Civil Disorders. Professor Chambers is the author of Making Fathers Pay, an empirical inquiry into the enforcement of child support. He is noted for work on the differing experiences of men and women in the law profession as well as for work on AIDS and on child custody, same-sex marriage and other issues in family law. Professor Chambers has served as president of the Society of
American Law Teachers. He began his academic career at the University of Michigan Law School in 1969 and was the Wade H. McCree Jr., Collegiate Professor of Law. Professor Chambers became an emeritus faculty member in 2004.

William J. Doherty, Ph.D., is Professor of Family Social Science and Director of the Marriage and Family Therapy Program at the University of Minnesota. He is past President of the National Council on Family Relations. In 1992, Dr. Doherty received the Significant Contribution to the Field of Marriage and Family Therapy Award from the American Association for Marriage and Family Therapy. He is the author of twelve books on families, marriage, and family therapy. His recent book for married people is titled, *Take Back Your Marriage: Sticking Together in a World That Pulls Us Apart*.


Martha E. Ertman is Professor of Law at S.J. Quinney College of Law, University of Utah. She received her B.A. from Wellesley College, cum laude, and her J.D. from Northwestern University School of Law, cum laude. Professor Ertman clerked for The Honorable Peter H. Beer, U.S. District Court for the Eastern District of Louisiana, and practiced law in Denver and Seattle before becoming a law professor. Her writing focuses on bridges between commercial law and intimate affiliation, suggesting ways in which commercial models can improve family law, as well as feminist and gay/lesbian legal theory. Prior to joining the S.J. Quinney College of Law, she was an associate professor at the University of Denver, as well as a visiting professor at the universities of Michigan, Connecticut, and Oregon.

Paula Ettelbrick is currently the Executive Director of the International Gay and Lesbian Human Rights Commission, a U.S.-based global GLBT advocacy organization. For nearly twenty years, she has worked nationally as a lawyer and policy advocate on lesbian, gay, bisexual and transgender issues, holding a number of leadership positions at groups such as Lambda Legal Defense and Education Fund, the National Center for Lesbian Rights, the Empire State Pride Agenda, and the Policy Institute of the National Gay and Lesbian Task Force.
Professor Ettelbrick has spoken and written extensively on a range of legal and policy issues of concern to lesbians and gay men, in particular in the area of family law and policy. In addition, she teaches Sexuality and the Law as an Adjunct Professor of Law at New York University Law School and the University of Michigan Law School.

Bruce W. Frier, the Henry King Ransom Professor of Law at the University of Michigan, is the author of numerous books and articles on economic and social history, focusing especially on Roman law. His publications include Landlords and Tenants in Imperial Rome, The Rise of the Roman Jurists, A Casebook on the Roman Law of Delict, and A Casebook on Roman Family Law. In addition to his Law School professorship, in 2001–2002 he served as the interim chair for the Department of Classical Studies at the University of Michigan and holds a joint appointment in that department. Dr. Frier received a B.A. from Trinity College and a Ph.D. in classics from Princeton University. He was a fellow of the American Academy in Rome and taught at Bryn Mawr College before joining the Department of Classical Studies at the University of Michigan in 1969; he has taught at the Law School since 1981.

Norval D. Glenn (Ph.D., University of Texas at Austin) is the Ashbel Smith Professor of Sociology and Stiles Professor in American Studies at the University of Texas at Austin. In recent years his research has dealt largely with the bases of marital quality, mate selection, and the dissemination of social science findings to students, the public, and policy makers. Dr. Glenn’s current projects include studies of marital matching among middle-aged and older persons and of the family-related regrets of older Americans. He has been editor-in-chief of Contemporary Sociology and the Journal of Family Issues and has been on the editorial boards of several other journals. He teaches graduate and undergraduate courses on family policy issues, marital matching, family change, and aging and the life course.

Jeffrey S. Lehman is currently the President of Cornell University. At the time of the Symposium, he was the Dean of the University of Michigan Law School, serving in that capacity from 1994–2003. President Lehman received a bachelor’s degree from Cornell University. He earned a master’s degree in Public Policy from the University of Michigan Institute of Public Policy Studies and a J.D. from the University of Michigan Law School, where he served as Editor-in-Chief of the Michigan Law Review. After graduation, President Lehman served as law clerk for Chief Judge Frank M. Coffin, U.S. Court of Appeals for the First Circuit, and for Associate Justice John
Paul Stevens of the Supreme Court of the United States. During his tenure at the University of Michigan Law School, President Lehman was the moving force behind the creation of the Law School’s Program in Legal Assistance for Urban Communities, a clinical program that offers students an opportunity to offer technical assistance to community groups engaged in economic development work.

RICHARD O. LEMPERT is the Eric Stein Distinguished University Professor of Law and Sociology at the University of Michigan. A graduate of Oberlin College, he received his Ph.D. in sociology from the University of Michigan in 1972. Dr. Lempert is a Fellow of the American Academy of Arts and Sciences and a Senior Fellow in Michigan’s Society of Fellows. He has been a Visiting Fellow at The Center for Advanced Study in the Behavioral Sciences and a Visiting Scholar at the Russell Sage Foundation. He is a winner of the Law and Society Association’s biennial Harry Kalven Jr. Award for excellence in socio-legal scholarship. Dr. Lempert chaired the National Research Council’s Committee on Law Enforcement and the Administration of Justice and has served on NRC panels on DNA as Forensic Evidence and Drug Testing in the workplace. He has written a number of articles on DNA evidence and co-edited (with Jacques Norman and Charles O’Brien) Under the Influence: Drugs and The American Work Force. He is the author (with Joseph Sanders) of An Invitation to Law and Social Science. From 1982 through 1985, he edited the Law & Society Review. He also teaches evidence and is co-author of A Modern Approach to Evidence, having recently completed a largely new third edition (with Samuel Gross and James Liebman). Dr. Lempert is the founding director of the University of Michigan’s Life Sciences, Values and Society Program.

STEVEN L. NOCK is Professor of Sociology, Director of the Marriage Matters project, and co-founder of the Center for Children, Families, and the Law. He earned his Ph.D. at the University of Massachusetts-Amherst in 1976. Before he joined the faculty of the University of Virginia, Dr. Nock taught at Tulane University and the National Academy of Sciences. He is the author of six books and more than seventy scholarly articles. His research focuses on the causes and consequences of change in the American family. Dr. Nock has investigated issues of privacy, unmarried fatherhood, cohabitation, commitment, divorce, and marriage. His most recent book, Marriage in Men’s Lives, won the William J. Goode Book Award for the most outstanding research on the family from the American Sociological Association in 1999. Dr. Nock’s current research is the Marriage Matters project. This ongoing effort examines the legal innovation
known as Covenant Marriage in Louisiana and Arizona. In both states, couples wishing to marry must choose between the standard form of marriage governed by no-fault divorce laws, and a Covenant Marriage, governed by fault-based divorce laws. The latter is more difficult to enter, and much more difficult to dissolve. This five-year project, funded by the National Science Foundation and other sources, seeks to determine the role of law in marriage by following a large sample of newly married individuals in each type of marriage for five years.

Jacqueline Payne is the Assistant Director of Government Relations for Planned Parenthood where she drafts legislation and promotes policies designed to advance reproductive rights in state law and policy. At the time of this symposium, Ms. Payne was policy attorney for NOW Legal Defense and Education Fund where she worked primarily on federal policy initiatives related to economic justice and violence against women. Ms. Payne is also a professional lecturer at Georgetown University, where she teaches Women and the Law. Prior to moving to D.C., she worked as a legal services attorney on the West Side of Chicago and for a short time on gender equality issues in South Africa. Ms. Payne graduated magna cum laude from the University of Illinois with a degree in business administration, and cum laude from the University of Michigan Law School.

Beth Robinson is a partner at Langrock Sperry & Wool in Middlebury, Vermont. Along with law partner Susan Murray and co-counsel Mary Bonauto from Gay & Lesbian Advocates & Defenders in Boston, Ms. Robinson represented the three plaintiffs in Vermont's groundbreaking freedom to marry case, Baker v. Vermont. Before litigating the case, Ms. Robinson and Ms. Murray co-founded the Vermont Freedom to Marry Task Force, a public education organization committed to educating Vermonters about the freedom to marry for same-sex couples. After Baker was decided in 1999, they led the lobbying effort that ultimately led to the passage of Vermont's landmark civil union case, and then ran a political action committee to support pro-civil union legislators. Ms. Robinson graduated from Dartmouth College in 1986, and the University of Chicago Law School in 1989. Her practice focuses on workers’ compensation, personal injury, domestic relations, and gay and lesbian civil rights. Ms. Robinson currently serves as an associate member of the Vermont Board of Bar Examiners.

Lawrence W. Waggoner is the Lewis M. Simes Professor of Law at the University of Michigan. He has been active in law reform in the field of wills, trusts, and future interests. As Director of Research and
Chief Reporter for the Joint Editorial Board for Uniform Trust and Estate Acts, Professor Waggoner was the principal author of the Uniform Probate Code revisions completed in the 1990s. He currently serves as Reporter for the *Restatement (Third) of Property (Wills and Other Donative Transfers)*, a project that is ongoing. He has authored a statute granting intestacy rights to committed partners.

**LYNN D. WARDLE** received his B.A. from Brigham Young University in 1971 and J.D. from Duke University School of Law in 1974. He clerked for Judge John J. Sirica, U.S. District Court for the District of Columbia, then practiced law in Phoenix, Arizona until joining the faculty of the J. Reuben Clark Law School at Brigham Young University in 1978. He regularly teaches Family Law, Conflict of Laws, Biomedical Ethics & Law, Origins of the Constitution, and related subjects. He is the lead coauthor and editor of a four-volume treatise, *Contemporary Family Law* (1988), the author or lead co-author of five other law books, more than 60 law review articles, chapters, essays, and other scholarly and professional publications. Professor Wardle served as President of the International Society of Family Law from 2000–2002, and is a member of the American Law Institute. Professor Wardle has testified regarding proposed legislation and constitutional amendments relating to family law in many states, and before committees of both the House of Representatives and of the Senate of the United States, including the Defense of Marriage Act (DOMA). He has served on the Juvenile Court Rules Committee and Child Support Guidelines Task Force for Utah, and on boards of the National Lawyers Association, Americans United for Life Legal Defense & Education Fund, National Right to Life Committee, Utah Prolife Coalition, and in other public interest organizations.

**MARILYN YALOM** received her Ph.D. in Comparative Literature from Johns Hopkins University. She is a Senior Scholar at the Institute for Research on Women and Gender at Stanford University. Previously, Dr. Yalom was Professor of French at California State University/Hayward. She is the author of numerous books and articles, including *A History of the Wife* (2001), *A History of the Breast* (1997), *Blood Sisters: The French Revolution in Women's Memory* (1993), and *Maternity, Mortality, and the Literature of Madness* (1985). Dr. Yalom has co-edited and edited six books in Women’s Studies, including *Rethinking the Family* (1982, 1992) with Barrie Thorne, and *Inside the American Couple* with Laura Carstensen (2002).
DEAN JEFFREY S. LEHMAN: Okay everyone, let’s start. I’m Jeff Lehman, Dean of the Law School and it’s a privilege to welcome you here this morning.

Law is arguably the most important instrument through which a society determines the consequences that follow from individuals’ words and deeds. And within the law, the law of marriage is arguably one of the most significant domains in almost every legal system in the world. Through the law of marriage, individuals’ actions or expressions of commitment can create enduring rights and duties: rights that can be enforced against one another and against third parties, duties to one another and sometimes to outsiders as well. Inherent in the idea of law is some element of consistency over time. In positive terms, the force or precedent is usually described as stable and predictable. In negative terms, that same force can be described as rigid and archaic.

Over the past hundred years, social and cultural expectations surrounding various forms of committed relationships have changed dramatically, and contemporary legal systems have struggled to adapt. The result has been an extraordinary opportunity to test fundamental assumptions about law, about the cultural understandings that are enforced through state power, and about the mechanisms that drive law’s evolution. The Michigan Journal of Gender & Law has drawn together an exceptional group of panelists who will discuss these questions throughout the day. The four panels develop these questions chronologically, beginning with a more historically grounded conversation about the way in which marriage law has evolved and ending with a more speculative conversation about the way in which marriage law is likely to evolve in the future. The panelists bring deep expertise from a variety of disciplines. We are all grateful to the editors of the Journal of Gender &
Law for their work in preparing what promises to be a day of intellectual stimulation and insight.

And so without further ado, let's have the first panel come forward and we’ll turn things over to the first moderator, Bruce Frier.

PANEL I

MARRIAGE IN HISTORICAL AND CULTURAL PERSPECTIVE:
TRADITION AS EMBODIED AND ENFORCED THROUGH LAWS

BRUCE W. FRIER, MODERATOR: Let me welcome you to this first panel on Marriage in Historical and Cultural Perspective: Tradition as Embodied and Enforced Through Laws. This first session of the symposium on marriage law centers on the weight of history in relation to the institution of marriage. The historical development of marriage, the historical forms that marriage has assumed, these things are of considerable interest in determining the extent to which the familiar institution of marriage is malleable, either through the direct normative control of law or through suppler responses to social changes. In order to decide whether marriage has a future, we must first discuss whether marriage has a past.

The principal question that historical sources pose may perhaps be put in the following way. Marriage in some form or another is an all but ubiquitous feature of human societies in the sense that external observers will virtually always find within each society an institution that they broadly recognize as what we call marriage: a regularized and long-term coupling of a man and a woman, a degree of guaranteed domestic exclusivity and autonomy associated with that coupling, and a widespread social understanding that such a coupling is intimately associated with procreation and the demographic reproduction of society.

Nonetheless, even if we confine ourselves solely to the mainstream Western cultural tradition, thus ignoring huge masses of evidence on non-Western societies, the forms that marriage has taken over the past three millennia have been so diverse as to make it questionable whether we are correct in referring to one single institution that has undergone repeated metamorphosis in response to social and legal demands, or rather to a series of institutions or social formations, more or less historically independent of one another, that for the sake of convenience we simply designate with the cover name of marriage. The answer to this question may in turn influence the extent to which we feel free to alter the legal institution of marriage in order to make it conform more perfectly with modern social expectations. Is marriage a natural human
institution that cannot be drastically reshaped without damage to basic humanity, or instead, a temporal creation? Are we best advised to work within its traditional contours, or instead to seek more radical alternatives? Speakers in this and subsequent panels will have much to say about such issues.

However, before I turn this over to them, I want to very briefly sketch a sort of radical default model, one that is based directly on the classical Roman law of marriage. In this model, the role of law is deliberately kept to a minimum, so that the social institution of marriage operates almost without external restriction (legal restriction, at any rate). In principle, in Roman law both the act of marrying and the act of divorce are entirely matters of consent between the couple.

Marriage arises when the couple agrees to marry, and it ends whenever man or wife wishes it to end, subject only to a generalized requirement that these intentions be objectively manifest. The Roman government and Roman law, more generally, do not overtly participate either in marrying or in divorce. There is no process of public registration, no legally required ceremony of any kind, nor does the government even require that it be eventually informed when marriage or divorce occurs.

Although Roman law does establish certain capacity requirements for legitimate marriage, for instance as to minimum age and degree of kinship, these requirements come into play largely retrospectively and tangentially in the process of determining, for instance, whether offspring of a putative marriage are legitimate.

Roman law encourages legitimate marriage and procreation through indirect incentives, mainly of a financial character, but beyond that it does not obtrude. Although couples have considerable freedom to structure marriage as they see fit, Roman law establishes no shared regime of marital property. The two parties in principle each retain for themselves whatever property they brought to the marriage, and they are actively discouraged from mixing their separate estates during marriage. Any substantial gifts between spouses, for instance, are voidable.

The husband has almost no legally sanctioned disciplinary authority over his wife nor vice versa, except as a result of statute in the area of adultery. The spouses have no legal duty of maintenance or support toward one another, though they may have one toward other family members, and with only rare exceptions, neither spouse has any property claim when the other dies or after a divorce. Each spouse is solely responsible for its own contracts and its own torts. The husband is, in the normal case, the head of his household, the pater familias, and
as such, he is vested with considerable power over his descendants in the male line, but this power does not extend to his wife nor is it shared with his wife. After divorce, children remain in their father’s power and usually also in his custody.

This marital regime is obviously very different from any that we know, but despite its minimalist character, it endured for almost five hundred years throughout the heyday of the Roman Empire, until it was finally swept away by the rise of Christianity. The Roman model raises, I would suggest, two related questions. First, can such an extraordinarily *laissez faire* model of marriage be regarded as still compatible with the Western tradition of marriage? For if it can, then that tradition can safely be regarded as very pliant indeed. Second, even if Roman marriage is compatible with our later models of marriage, can we possibly regard such radical unobtrusiveness of public policy and law as desirable? After all, not for nothing did a law student of mine once describe Roman marriage as the prenup from hell! The Romans may well have paid a very heavy social price for their insistence on the continuing legal independence of spouses.

And so to our speakers. And our first speaker today is Ariela Dubler, Associate Professor of Law at Columbia University Law School.

ARIELA R. DUBLER: Thank you. And I want to start by thanking the organizers of this conference for inviting me to participate, and prior to that for deciding that history is relevant to the question of the future of marriage, which I think it is. I hope I can convince you of that in the next fifteen minutes.

This morning I want to offer three specific historical arguments about marriage in America that I think should be useful in evaluating the future place of marriage in our socio-legal order. And these arguments focus primarily on the period between roughly the Founding and the early twentieth century.

Argument number one is a social claim. Historically, formal legal marriage does not describe the social reality of how all adults have ordered their intimate and domestic lives. Argument number two: although marriage has not been a part of all people’s lives, marriage as a legal regime has exerted tremendous regulatory power over the lives of people living outside a formal marriage. So even unmarried people, in other words, and particularly (as I’ll explain) unmarried women, have lived, from a legal perspective, in what I want to call the “shadow of marriage.” And finally, argument number three: the meaning of marriage proper has been defined in large part through its shadow. In other words, courts and lawmakers have used non-marital relationships
to define the legal and social meaning of marriage itself. So let me take these arguments in order.

My first argument boils down to a relatively straightforward, but important historical proposition, and one that often gets overlooked because of the way that legal actors in particular talk about marriage: Many adults have always organized their intimate and domestic lives outside of the formal legal boundaries of marriage. Now, clearly there's a big, messy social reality outside of the formal, legal boundaries of marriage, and let me just sketch out some of the basic categories inhabiting that terrain, both historically and today. Some adults never married, either by design or by chance. Some of these people entered into romantic relationships with members of the opposite sex, some entered romantic relationships with members of the same sex, some did neither. Others entered long-term heterosexual relationships and might even have thought of them as marriage-like, even though they never formalized their unions in formal ceremonies. Others would eventually marry, but at some point lived alone with extended family or with other non-relatives. Still others were formally married, but either their spouses died or (and this was less common historically) they got divorced.

Now, this list is obviously not exhaustive. Historically, like today, people ordered their domestic and intimate lives in countless ways, and I make this list really only to get us thinking concretely about some of the ways in which people structured their domestic and intimate lives outside of marriage, and to stress that life outside marriage is not a peculiarly modern phenomenon. And just a quick, historical tidbit for a little perspective on this claim. In 1833, in deciding whether to recognize the doctrine of common-law marriage (which is something I'll talk about more in a few minutes), Pennsylvania's highest court observed that if it considered all of the couples who had not conformed to the particulars of its state's marriage laws, if it considered them unmarried (and I'll quote), "It would bastardize the vast majority of children who have been born within the state for half a century." In other words, life outside marriage was pervasive.

Let me also stress that I don't mean to equate the decision to live outside marriage with any principled opposition to the institution of marriage. To be sure, contemporary critiques of marriage have rich historical antecedents and some of the people who lived outside marriage historically did so out of principled opposition to the institution. But others did not, and I think it's important to remember both of these groups in thinking about the social norms and the legal rules that define both marriage and non-marriage. I will use the term
"nonmarriage" to refer to forms of ordering other than formal, legal marriage.

So with that, let me move to my second claim, which is that marriage law exerted its regulatory power over unmarried women. I'm focusing on women because historically (although clearly both men and women lived outside of marriage) lawmakers were much more concerned about the marital status of women. I think that an attentiveness to this gendered dimension of the social and legal discourse surrounding life outside marriage is critical to observing the ways in which marriage's shadow developed and functioned, as well as the ways in which it regulated the legal rights and responsibilities of unmarried people.

Now let me make explicit my underlying assumption that marriage law clearly regulated the lives of married women. So before we move to unmarried women, let me just state that as uncontroversial. And what I mean is that marriage constituted the dominant regime through which legislators and courts defined married women's private and public legal identities. Marriage regulated married women's lives at two levels. First, the system of coverture explicitly defined women's private legal rights within and outside of the family. So, for example, married women could not enter contracts, they could not sue their husbands. Their identities were legally covered (that's the coverture language) by their husbands' identities. A wife was a *femme covert*.

Second, marriage functioned more broadly as a public institution that defined women's citizenship rights vis-à-vis the state. Thus, to name a couple of examples, women couldn't vote because they were considered virtually represented by their husbands. And women who married foreign men, for long periods in our history, lost their American citizenship.

Now given the governance work that marriage was doing legally as well as socially and culturally, you can see why women living outside of marriage posed a formidable threat to lawmakers. They seemingly lived outside of a tremendously powerful regulatory regime. And this created not only a cultural threat, but also—in the eyes of nineteenth and early twentieth century judges, lawmakers, politicians—it created an economic threat. Marriage, at least in theory, functioned to privatize female dependency by tethering women to particular men, who were then responsible for their financial well being. Single women thus posed a potential threat to the public fisc as well as to some kind of collective imagination of an ordered polity.

But unmarried women existed and they weren't going away. So the question was how could the law regulate this population. And my contention, the core of my second argument, is that the law found ways
to regulate unmarried women by placing them into direct relationships to the institution of marriage, the very core institution of which they were not a part. So even women who were not directly covered by marriage in a coverture sense were nonetheless covered by marriage’s extended shadow.

At one level this extension of marriage’s shadow occurred through an act of erasure. Lawmakers often implicitly denied that women lived outside marriage at all. The most vivid example of this is the virtual representation argument that constituted probably the leading argument against women’s suffrage in the nineteenth and early twentieth century. Women, the argument ran, did not need the vote because they were already represented by their husbands. Now query where single women fit into this scheme of the polity. Another quick example is the structure of the wage labor market, which largely assumed that a woman’s wages would be supplemented by her husband’s wages.

Beyond this type of willful blindness, though, marriage as a normative model exerted a more direct gravitational pull and actually defined how the law regulated relationships outside of marriage’s formal borders. And let me briefly offer two concrete examples of this phenomenon. The first is common-law marriage and the second comes from inheritance law.

Common law marriage was a doctrine that allowed courts to recognize as marriages relationships between couples who had never formally married. Almost all common law marriage cases were brought by female plaintiffs who were in search of economic support from a long-term male partner who had either died or left. And the doctrine functioned by explicitly relying on a set of social norms. Essentially, if you acted married in a social sense then you were married in a legal sense. Remember, though, that these cases involved couples who had not formally married. For a woman to get support, however, she had to claim that although she had never formally married for whatever reason (and the cases are almost always opaque on what reason that was), she and her partner were actually married. That was the only way to get support.

So here is a case where the law imported marriage as a legal framework within which to understand formally non-marital relationships. And in so doing, legal actors reinforced the idea that marriage was the only game in town. It was the only normative model of relationships out there and so any relationship worthy of legal recognition and giving rise to legal rights had to fit into its borders. Common-law marriage, in
other words, extended the reach of marriage's regulatory shadow to the lives of women who had never formally married.

The second example focuses on a different group of women: widows. I think that we tend to accept more uncritically the role that marriage played in defining a woman's rights after her husband died. But let me be explicit about something that I think we often overlook. Dower, which was a widow's common-law right of inheritance, continued to define a woman's rights and status in relationship to a marriage that was most definitively over. One member of the marriage was dead. Widows, therefore, lived outside of marriage, but very much in its shadow.

Dower granted widows a rather meager amount of support: a life estate in one-third of her husband's real property. And in so doing, it sought to keep women in their wifely roles, i.e., as economic dependents within a marriage framework. And it's worth noting that the system worked pretty poorly and it often failed to provide for widows' economic needs. Gradually over the course of the nineteenth century and the early twentieth century, states began to look to other systems to regulate widows' support.

Both common-law marriage and this form of inheritance law illustrate how marriage as a normative model of domestic and intimate relations has historically bounded the imaginative universe of the law. Unmarried women lived under the shadow of marriage because judges and lawmakers found ways to fit them into that dominant, normative model.

Now this brings me to my final argument, which is that the shadow of marriage ultimately played a constitutive role in defining marriage itself. Let me illustrate this dynamic very quickly with the same two doctrinal examples that I used a minute ago. First, common-law marriage: Common-law marriage pointed to formally unmarried couples in order to define what it meant to act married, and thus what it meant legally to be married. So the law used the behavior of unmarried couples, or certainly couples who for one reason or another had chosen not to formally marry, to define the legal meaning of marriage proper. Similarly, in the inheritance context, courts used dower to cement the dependent-provider relationship between a widow and her deceased husband, and in so doing, courts defined what marriage should mean socio-culturally, and thus what it did mean legally. It meant that a husband supported his dependent wife. So again, I think we see how lawmakers defined marriages by talking about relationships that were not marriages. In the case of dower they were talking about relationships between live women and dead men.
And I should note that when states abolished common-law marriage and dower (which most of them did by the middle of the twentieth century), lawmakers reflected quite self-consciously on what marriage proper meant and what it should mean and how these doctrines could be revised in order to define marriage to reflect changing social and legal norms. In other words, they very much saw common-law marriage and dower as constitutive of marriage itself.

Let me conclude with the suggestion that as we evaluate marriage today and as we think about what role marriage should or might play in organizing our future social and legal order, we should stay attuned to the ways in which marriage functions as a gnomon. It’s like the pillar at the center of a sundial that casts a shadow on the things around it. And today, as in the past, we should be attentive, not only to marriage, but to marriage’s shadow. We should be attuned to the ways in which marriage proper has created a set of both legal rules and social norms that have both drawn upon nonmarriage in unacknowledged ways and, in turn, have regulated the lives and legal rights of people living outside marriage in many unacknowledged ways. Thank you.

BRUCE W. FRIER, MODERATOR: Our next speaker is Marilyn Yalom, Senior Scholar at the Institute for Research on Women and Gender at Stanford University.

MARILYN YALOM: Hello! I’m also very glad to be here today, despite the cold, and I want to take a position somewhat different from Bruce Frier, when he said that Roman law was swept away by Christianity. In fact, I’m going to argue today that Roman law, Greco-Roman civilization, and the Judeo-Christian tradition have provided the template for marriage in the Western world and continue to impact our present problematic moment. And I’m going to explore with you today in somewhat greater detail than previous speakers, the history of Western marriage.

In ancient Greece, a young woman was her father’s possession until she was married, then she was literally given by her father to her husband. A father would betroth his daughter to a bridegroom with these words, “I pledge,” and he would use his daughter’s name, Naomi, or something like that, “for the purpose of producing legitimate children.” The groom would reply, “I accept.” The bride was traditionally not present at the betrothal ceremony. From the wedding day on, the husband replaced the father as the bride’s kyrios, her guardian and master. A marriageable woman was treated like a human commodity to be transferred from her father’s home to her husband’s, where she assumed the latter’s name and was subject to his control.
Probably a remnant of that still exists in the marriage ceremony when the minister or priest asks, "Who gives this daughter?" And the father of the bride announces that he gives the daughter in marriage.

But in the thousand years that extended from Homer to Nero, the status of the wife changed from that of subjugation to limited partnership. Under the early Roman republic from the fifth to the second century, B.C., marriage resembled the Greek model, the ownership of women continued to pass from fathers to husbands and married women’s chief responsibility was to perpetuate the husband’s family name through the production of offspring. Yet by the time of the Empire, a more egalitarian ideal had taken root, one that emphasized the partnership of husband and wife. These two different ideals were spelled out in Roman law, marriage with hand and without hand are the official terms. The gradual shift from one to the other meant that a woman, even after her marriage, remained under the nominal tutelage of her father instead of becoming the ward of her husband.

Roman marriage laws continued to require the father’s and the groom’s consent but now added that of the bride as well. Provided they were above the official age of puberty (twelve for a girl, fourteen for a boy), a male and a female would enter into a marriage by a declaration of marital affection and by bringing the bride to the bridegroom’s house. Such marriage was legally binding, even without further ceremony. Emphasizing the couple’s consent as the primary determinant of a valid union, Roman authorities spread this notion throughout the Empire and eventually throughout the Western world.

It was the requirement of mutual consent that during the course of many centuries helped change the wife’s position in the past, lifting her from the status of chattel to that of partner, if only a junior partner.

While Roman law provided the legal essence of marriage, the Judeo-Christian religious tradition provided its substance. As early as the ancient Hebrews, some limited benefits for the bride were established, for example, in Exodus, a husband was obliged to provide a wife with food, clothing, and surprisingly, sexual rights. The marriage contract, or ketubah specified the sum of money that would revert to the wife in the event of divorce or widowhood. Still, we must not forget that biblical Hebrews were polygamists. A husband was allowed more than one wife if he could afford them, and he also had the right to initiate divorce. Moreover, he was allowed sexual relations with unattached women, such as widows, concubines, and servants, whereas wives were required to limit their sexual activity to only one man. A convicted adulteress could be put to death by stoning. I’m tempted, of course, to think about countries and societies where women convicted
of adultery are still put to death by stoning. But I'll try to limit myself to the West.

In biblical times, adultery was but one of several abominations that carried a death penalty. Another was homosexuality. Why homosexuality was so reviled by the biblical Hebrews has been the subject of endless debate. One answer has to do with the ancient focus on procreation. Any sexual act that did not contribute to progeny was vehemently condemned. Whereas other inhabitants of the ancient Mediterranean world, most notably the Greeks but also the Romans, tolerated same-sex couples, Judaism was consistently anti-homosexual. As for Christianity, St. Paul explicitly condemned both male and female homosexuality. His negative view of same-sex eroticism was rooted in a widespread system of thought that took heterosexual relations as natural and all other forms of sexuality as unnatural.

In other respects, early Christianity deviated significantly from Judaism. For one thing, Jesus, in opposition to Hebrew practice, equated the male prerogatives of divorce and remarriage with adultery. Whoever wanted to be a Christian and married, male or female, would have to be permanently monogamous. He also challenged the excessive punishment meted out to the adulteress. In a by now famous incident, he was asked whether a woman taken in adultery, in the very act should be stoned, according to Mosaic law. His response has become proverbial: he that is without sin among you, let him first cast the stone at her. The emphasis on compassion rather than revenge and upon the equality of all men and women in sin struck a new chord in religious and marital history.

During the early Middle Ages, the Catholic Church gradually took over the jurisdiction of marriage. Previously, much of Europe had followed the Roman model that required the consent of the bridegroom and their fathers. But from the mid twelfth century onward, Church law, Canon law, made two changes that were to have long-term effects. First, the Church pressured individuals to marry in the presence not only of witnesses, but also of a priest, and to perform the ceremony at church. Second, it downplayed the need for parental consent and foregrounded the mutual will of the spouses as the major criteria in the making of a valid marriage. In addition, once marriage was declared a sacrament (a ceremony through which one obtained God's grace), it could not be undone. Medieval men and women entered marriage with the knowledge that there was no way out of it, even if it proved to be disastrous for one or both parties.
Throughout Christendom the wife was mandated to be subservient to her husband. The thirteenth century English jurist, Henry de Bracton, framed the relationship between spouses by saying that a woman was obliged to obey her husband in everything, as long as he did not order her to do something in violation of divine law. He related a case in which a wife and husband forged a royal writ, and though the husband was hanged, the wife was acquitted on the grounds that she had been ruled by her husband.

In the German-speaking world, the rights of a husband over his wife were clearly outlined in the Sachsenspiegel and Schwabenspiegel, two books that provided the basis for the laws in many German towns. These rights extended to a wife's assets as well as to her person. A husband could dispose of his wife's property, her clothes, her jewelry, even her bed linens. And he had the legal right to beat her if she did not accede to his wishes. In most countries, husbands could punish their wives however they saw fit, short of murder. Wife battering was an accepted practice, sanctioned by law and custom. It was a staple of folk wisdom and provided comic caricature in the popular reverse images of wives beating husbands. But the reality was far from comic, as shown from court records, that often condoned the behavior or brutal husbands as a matter of course. Legal wife-beating did not disappear with the Middle Ages, as we know, and this was long after wife-beating had been declared illegal.

From the Middle Ages onward, when priests began to participate more regularly in wedding ceremonies, the Church gained greater presence in all aspects of marriage, beginning with the conjugal bed, where consummation was mandatory if the union was to be considered binding. Sexual relations were considered a solemn duty that each spouse owed to the other, but not an approved pleasure as we hold today. Theoretically married couples were supposed to copulate only for the benefit of procreation. Christian theologians viewed married life as a lesser state than either virginity or widowhood, since virgins and chaste widows abstained from sex. St. Jerome had stated explicitly, “Let married women take their pride in coming next after virgins.”

It's hard for us today to imagine the extent to which the ideal of chastity was glorified and spread among the faithful. Just as we are bombarded by commercial images proclaiming the value of sexual activity, so too Medieval Christians were surrounded by model images of famous aesthetics. A medieval girl and boy were constantly being reminded that sex, even in marriage, was tainted by original sin. If they wanted to be more certain of salvation, it was better to enter a convent or a monastery.
Now let me say a few words about the Reformation, because few people have influenced the institution of marriage more than Martin Luther. By questioning whether priests needed to be celibate, and then by marrying a former nun, Luther established the model of the pastoral couple that became so influential throughout the Protestant world. The result of the Reformation in Germany, Switzerland, etc., and then in the American colonies, was to elevate the value of marriage at least to the level of celibacy.

During the second half of the sixteenth century, the primacy of love in marriage arrangements began its ascendance, at least among the English. Historian Eric Carlson, who has studied marital practices among Tudor country folk, states unambiguously that the most important consideration was love. While it's true that monetary and social matters weighed in heavily among the nobility and gentry, this high-status group accounted for only about ten percent of the population and even here during the Elizabethan period, love marriages were on the rise. The English on the whole seem to have allowed for love matches to a greater extent than Continental Europeans.

By the turn of the seventeenth century, English conduct books assumed that a man would choose a wife according to his heart, and that a woman, though not so free as a man, had the right to express her preference, first to her parents, and then if they approved, to her suitor.

Most social historians agree that modern American marriage emerged in the period between the Revolution and around 1830. During those fifty years, love became the most celebrated criterion for choosing a spouse, even if property, family and social status continued to weigh heavily in the decision. One young American woman, Eliza Chaplin, expressed the credo of her generation when she wrote to a friend in 1820, "Never could I give my hand unaccompanied by my heart." In many homes parents accepted the fact that their children would select a husband or wife on the basis of inclination, even if the parents disagreed with the choice.

Since the early nineteenth century, romantic love has been the primary criterion in the choice of a spouse. With the introduction of birth control and a corresponding decline in the birthrate from an average of seven children in 1800 to 3.5 children in 1900 (now I'm speaking specifically about the United States), pleasure began to replace procreation as the major meaning of sex. Marriage, once a religious and social duty, became a venue for personal fulfillment.

By the late twentieth century, Americans were finding that marriage was no longer necessary for many of the things traditionally
associated with it: sex, for one thing, cohabitation, or children, not to mention economic support of the wife. Today cohabitation before or in lieu of marriage has become the norm and forty percent of first babies are being born out of wedlock.

If marriage is no longer the sole gateway to sex, cohabitation, and children, why marry? How can marriage still have meaning in a society where the alternatives to marriage are as attractive to many as marriage itself? Marriage today is clearly not for the fainthearted. The fifty percent divorce rate gives even the most optimistic couples reason to pause before vowing to live together for better or worse. Women able to support themselves (and that is most women) think more than twice about endangering their careers by assuming the domestic responsibilities of wifehood and especially motherhood.

It is becoming apparent that the real difference in economic earnings is not so much between women and men, but between mothers and everyone else. Even with the decline of the birthrate to roughly two children per adult woman, the amount of time, energy, and money involved in raising those two children can sink a woman’s career or a marriage. Given the new demographics (a life expectancy of seventy-three years and more for men and eighty for women), lifelong marriage as opposed to serial marriage has become an endangered species.

And yet, people still marry. Nine out of ten Americans marry once in their lives. And eighty-seven percent of newlyweds, according to a New York Times survey, believe their marriage will last for life. They marry to provide a framework for love and sex, companionship and mutual support, and in many cases, children. But since we are no longer living in ancient Greece or in the world of the Hebrew Bible, the production of legitimate offspring is no longer the primary reason that two people choose holy matrimony. I say two people rather than man and woman, for I do believe that full-fledged legal marriage with benefits ranging from tax rights to adoption will be an option for same-sex partners before the end of the twenty-first century.

Ironically (and I’m closing now) we may come to think of marriage as a vocation, requiring the kind of devotion that was once expected only of celibate monks and nuns. The state has an interest in shoring up that vocation, not by excluding those who wish to enter marital unions, but by including all who are brave enough to make the commitment and by helping provide support for those couples who take on the added responsibility of having children. But that’s the subject for another symposium!

Thank you.
MARRIAGE LAW: OBSOLETE OR CUTTING EDGE?

BRUCE W. FRIER, MODERATOR: Let me thank all of the speakers. I’m the most moderate of moderators, and I was very happy that they kept so closely to the time limits! We now want to give all of you the opportunity to ask questions. I’m afraid I’m going to have to repeat the questions because this is being recorded, so if I fail to repeat your question as you ask it, please let me know and I’ll correct myself. I’ll also correct the record.

QUESTION: I’m going to make an effort to try to summarize that. Your particular interest is in the relationship between Ariela’s general thesis and the problems that arose out of the definition of attempting to impose marriage in the post-Civil War era on newly-freed slaves who had relationships that antedated the Emancipation. Is that roughly correct? That they had previously not had legal access and suddenly were in a position of having such legal access.

ARIELA R. DUBLER: I think that’s a great question. And I think it is a really interesting example of how to think about marriage’s shadow and marriage’s core. And I should say at the outset that if you don’t know Catherine Franke’s work on this very subject, you should definitely look at it because it’s a great attempt to look at exactly the question you’re talking about. To answer as briefly as I can, I think that the dynamic that I’m trying to describe in the examples I gave played out in really interesting historical ways in exactly the case study you’re giving. And I should say that you shouldn’t take from my talk that I thought that everyone had access to marriage. Certainly same-sex couples did not in the nineteenth century, as they do today. Interracial couples did not, although they do today. And slaves certainly didn’t. And I think that in the post-Emancipation moment, one of the things you see going on is a variation of what I think was going on with common-law marriage generally. It was perceived to be in the interest of the state, by some people, to look at relationships that were not marriages and say, you acted married by our standards, so presto chango, now you’re married. It’s worth noting that not everyone saw it this way and that some people actually thought that it was a huge threat to the institution of marriage, which was a white institution, to give former slaves the privilege of entering it. And I think that there was a lot of debate within the freed people’s community about whether they wanted their relationships to be viewed as marriages or not. And so I think that this was an instance where a set of norms that existed in a different population were largely imposed by statutes. So states actually passed laws that transformed slave marriages, which were not legal marriages, into legal marriages. I should say that this dynamic actually
occurred during slavery as well, because some plantations had systems in which slave relationships were recognized as long-term unions if not as legal marriages. There, too, I think you see the same kind of legal rule/social norm loop in action, where what people understand to be marriage then gets read into people's behavior who can not formally marry. And I think always the important thing for me to remember is that some of those relationships were probably between people who wanted their relationships to be thought of as marriages. And I think that's true for slaves and for freed people. But some of them were probably between people who did not. And so that's where I think the social norm/legal rule loop gets the most interesting, but I thank you for pointing that out. I think that is an important historical example.

QUESTION: So the question concerns the general situation of women who never married in the period before the nineteenth century in particular, and what we can say about their social circumstances and what it is that might have led them not to marry, how society treated them and so on.

MARILYN YALOM: Well certainly in Europe the question of having a dowry was essential in most societies. If one didn't have a dowry, if one's parents could not give you a dowry or if you were a working-class person and you could not amass a sufficient dowry (even to the extent of bringing a cow or some minor property into the marriage), you didn't get married. Marriage was primarily in pre-modern times an economic arrangement. Many women who entered monasteries or convents at an early age were placed there because they didn't have sufficient dowry for a marriage. They had sometimes a smaller portion that they brought to the convent. That was the case of Luther's wife, as a matter of fact, Katarina von Bora, who was from a minor noble family and they didn't have enough money to place her in an appropriate noble marriage. And so she was put into the convent at the age of eleven. But even in the colonies and in the United States, very often the last daughter, it was understood that she would stay at home and take care of the parents. So there are many instances of women who were designated primarily for economic reasons not to marry.

Well, in some ways their legal status was better than that of married women because they weren't subsumed by the husband! But very often economically they were at the bottom of the hierarchy, and certainly socially they were. They were considered old maids, stale maids, spinsters, which came, by the way, from the fact that many women in early modern times made their living by spinning. So they were spinners as well as spinsters.
QUESTION: So your question is what larger public interest involved the state in regulating marriage apart from the settling of private disputes at the margins of marriage, what interest has the state historically proclaimed in marriage itself. Not just entry into marriage, but what happens during marriage and the ease with which marriage can be terminated.

MARILYN YALOM: I think Nancy Cott's book, *Public Vows*, is probably the best study of why the state got involved in regulating marriage in the colonies and in the United States. Essentially she takes the position that the underlying assumption is that a man will support and protect his wife, and the state's interest was primarily that that be enforced. And she shows quite brilliantly how that idea continued right into the twentieth century. Of course the quid pro quo was that the wife would provide sexual and domestic services for the husband. And that's a quid pro quo that continued right into the second half of the twentieth century and probably the malaise that marriage is experiencing now is because that quid pro quo has broken down, in that that husband is no longer the sole support for the wife, in that women have taken on the role of provider in the family and from a feminist perspective are carrying an uneven burden with their husbands who are still fledgling homemakers. I'm answering your question, I'm sure, far beyond its original intent, but it does allow me to say something about the present moment!

ARIELA R. DUBLER: Can I add one thing to that? I second that Nancy Cott's book on this is a terrific argument. In addition to the economic role marriage played, it played a real public ordering role that went beyond only economics, but it wasn't unique in this respect. If you look at old treatises on marriage, they cover the law of baron and femme, of master and servant, and of parent and child. So there were these status relationships that mediated the relationship between subordinate individuals and the state, and marriage was not the only one that did that. I think that today we lose sight of the way in which marriage was often paired with these other status relationships that performed very similar functions, that were economic at their core but that were, I think, really about the ordering of the relationship between private individuals and the state.

QUESTION: So your question concerns the broad metaphors, the guide changes in the law in particular are you interested in? Does the metaphor precede change as opposed to simply, if you will, reflecting the change that has already occurred.
Marilyn Yalom: Well, I can just think of one that comes immediately to mind. During the reformation period in England, the expression “yoke fellows” came into being, and that was a reflection, I think, of the new idea of the couple as being bound together in some kind of partnership. Sometimes that partnership was seen as burdensome. I mean think of a yoke, think of being bound together by a yoke, and people played on that term. It reflected on the one hand the new spiritual partnership of husband and wife that was much emphasized in the English tradition from the Reformation on. But at the same time, marriage was thought of as a duty. And I should also add that the notion of the wife’s subservience to the husband was still there. Those two notions were seen as opposite to one another, that is, the notion of partnership and the notion of subservience, and they get expressed over and over again in various metaphors. But that’s just one example. A certain section of my book (The History of the Wife) I called “From Ownership to Partnership.” And I think that that is the history, not only of what happened from Homer to Nero, in that thousand years, but the gradual history of the relationship of the wife in marriage in Western tradition.

Ariela R. Dubler: I’ll offer one more example, which I think is also related to the question of change of metaphors. Women’s rights activists in mid-nineteenth century America were very explicit about comparing marriage to slavery. And going back to the question asked earlier, we can bracket whether mainly well-off white women’s rights activists should have made this analogy and the politics of that. But it was an analogy that was definitely out there, and it was one that was explicit and widespread enough so that in the debates over the Reconstruction Amendments, there were actually congress people (congressmen) who thought about whether the Fifteenth Amendment might undo coverture. Now nobody, I think, really took that seriously. I don’t think anyone really thought the Fifteenth Amendment was going to undo coverture, but that language was out there enough that it seeped into real debates about changing fundamentally how our society was ordered. So I think that that’s another metaphor that actually was important to rethinking what marriage meant.

Bruce W. Frier, Moderator: We’re going to have to call it a halt at this point and have a break, fifteen minutes. Could you reconvene here at 10:45 for the second panel. I hope you’ll join me in thanking all of our panelists.
PANEL II
THE PROCESS OF RECOGNIZING NON-MARITAL FAMILY RELATIONSHIPS

LAWRENCE W. WAGGONER, MODERATOR: One of our panel members is Paula Ettelbrick to my right, and Paula is, I think, pretty familiar to the Law School Community here. I think her primary position is Adjunct Professor at University of Michigan Law School, and secondarily, she does something in New York, I’m not sure exactly what it is! [Laughter] No, she’s Family Policy Director for the Policy Institute for National Gay and Lesbian Task Force, and she has done a lot of good deeds that she’ll be talking about. Steven Nock is the other panel member and is from the University of Virginia. I was reminded again that I used to be on the faculty at the University of Virginia Law School and I regret coming up here every February! Steven reminded me that the crocuses are already up in Charlottesville! You have the bios of both of the panel members in your packet of materials, so I’m not going to go into everything, but Steve has been a very prolific author and has received book awards. His current research is on covenant marriage, and that’s actually what he’s going to talk about today. So I think what we’ll do is we’ll start with Steven, since he’s going to use the PowerPoint, and then I’ll go second because I’m also going to make a presentation, and then Paula will come third, and then we’ll have questions and answers after that. Steve.

STEVEN L. NOCK: Thanks. I just have a couple of apologies to make. First, I am using a PowerPoint presentation, and I know that may not be terribly customary in this room. The second is that I’m not going to be talking about alternatives to legal family relations, but the opposite. Covenant marriage is probably about as close as we can get to a traditional, legal, marital arrangement. But I think there are a lot of lessons to be learned in this experiment that’s taken place in three states so far. Eighteen other states are considering it. As some of you know, the federal government has committed a half a billion dollars to experimenting on various programs to promote marriage of varying types. I am now in the third year of a comprehensive evaluation of one such type program, the implementation of covenant marriage in Louisiana. So today I will quickly review what we’ve done in hopes that if questions arise, I can address them in the question-and-answer session.

Covenant marriage is the result of a law passed in Louisiana in 1997, which basically creates two optional forms of marriage. When a couple applies for a marriage license in Louisiana, Arkansas, or Arizona,
they must now declare which type of marriage they will enter. To simplify matters (I'll explain in just a moment the primary distinction between covenant marriage and standard marriage), standard marriage is governed by no-fault divorce proceedings and covenant marriage is governed by fault-based divorce proceedings or extended waiting periods and a requirement for premarital counseling. So a covenant marriage is more difficult to get into, and more difficult to get out of.

The reason I studied covenant marriage was to answer some basic science questions. First, I wanted to know who in America wants a more restrictive marriage regime, and why? Men, women, rich, poor, black, white, or what. And second, I wanted to know to what extent the state, through its actions in domestic relations law, could predictably alter demographic trends such as divorce rates, marriage rates, or abandonment.

With respect to the topic of this session, which is recognizing non-marital family relations, I can offer a few observations based on our extensive research in Louisiana. First, cultural beliefs resisting change with respect to marriage are enormously strong. Even while Americans are quite open and tolerant of alternative lifestyles, they are less tolerant of alternative marital regimes. Second, marriage is experienced and understood by most Americans as a sacred relationship, and when we start talking about changing the legal terms of it, we venture very quickly into the sacred lives of Americans. Third, social norms and cultural beliefs will be the primary obstacles to any attempt to change the definition of marriage. Neither legislation nor judicial actions are likely to be as significant. As we have learned, passing legislation is a relatively simple thing compared to changing the popular culture. And finally, the social classes (and different races) understand marriage and its meaning in very different ways. Marriage serves different purposes, and is a different institution depending on one's social class. In the current social environment, it may be impossible to expect a single marital regime that will confer the same benefits to spouses in middle, working class, and poor families.

Here are the broad outlines of covenant marriage. In order to enter a covenant marriage, a couple must receive premarital counseling from any person licensed by the state to perform it. The terms of the premarital counseling are simple. Counseling must include a discussion about the seriousness of marriage, and the lifelong commitment being made. Counseling must also address the commitment to make a good faith effort to work through problems if they arise. Counseling may also include a discussion of the exclusive grounds for divorce in a covenant marriage.
The couple must file a notarized affidavit asserting that they have received this marital counseling. They must also file a legally binding declaration of intent. This declaration acknowledges the intention that this marriage is a lifetime commitment, and that the couple consents to the restricted grounds for divorce available in covenant marriages. We don’t really know whether courts in other states will recognize this declaration of intent. There’s a conflict-of-laws issue which I’ll talk about in just a moment.

The exit requirements from covenant marriage are equally different and more strenuous. A divorce from a covenant marriage requires proof of a good faith effort to rectify the problems. This could be in the form of repeated visits to a counselor, attempts to go to a psychologist, requests for help from friends, or whatever, but there must be evidence of good faith effort to resolve the problems. Then there are two routes to divorce in covenant marriages. First are the traditional fault-based grounds, including felony life-or-death convictions, physical or sexual abuse of a child or of the spouse, adultery, and abandonment. The alternative route is by no-fault divorce. This requires living separate and apart for two years (versus six months in a standard marriage). In either case, the court will expect evidence of good faith efforts to resolve the problems in the marriage. So it is relatively difficult to get out of a covenant marriage. It’s somewhat more difficult to get into. And so you can see why I was interested to understand who would want to enter into such a marriage.

The proponents of covenant marriage come in all stripes and shapes, but they basically endorse the same principles. First, they see covenant marriage as turning the tide. The author of the bill says it’s the first piece of divorce legislation in almost two hundred years to make it more difficult to get divorced. So far as I can see, that is true. It emphasizes the seriousness of marriage and tests the initial commitment of the two partners. Confronted with a required choice between a simple marriage with very easy entry and exit rules, and a more rigorous form of marriage with more difficult entry and exit rules, how do couples make such choices, and how do they reconcile differing preferences?

Advocates of covenant marriage believe it enhances investments in marriage and reduces the risks of divorce. We have found that it demonstrably does the former, and probably does the latter, largely through the economic signaling function associated with it. For various reasons, including the requirements for entry and exit, couples in
covenant marriages have different incentives (to be and remain married) and preferences (of what each expects from marriage).

I want to note that this law was drafted by a woman, and championed by many women in Louisiana. Our research has confirmed that covenant marriage appeals more to women than men. Among those who are currently in standard marriages, one in five states that they now wish they were in covenant marriages. But this desire is driven largely by wives. Both husbands and wives report that wives were the ones who most desired a covenant marriage, regardless of the type eventually entered.

There are two legal issues that should be mentioned. First, never before to our knowledge have two coexisting marital regimes existed in the West. To some extent this represents a novel arrangement where couples actually have some ability, you might even want to call it contractual ability, when entering into a marriage to decide which system of rules and laws will govern their marriage. People on both sides, the right and the left, fear that this may lead to marital pluralism (gay marriages, or polygamy for example.) Once you have two forms of marriage, why not three, four, five, whatever? Knowing the political climate of Louisiana (as I do), Arkansas and Arizona (the other states with the covenant marriage), I see no great sentiment in any of these states to allow polygamy or gay marriages.

Second, the conflict of laws issue has yet to be resolved. If a couple gets a covenant marriage in Louisiana, they agree to be bound by a different set of divorce rules (as part of the Declaration of Intent). The question is whether or not that document will be recognized as legal in other states. We just don’t know yet. And the legal community is divided on this conflict of laws issues.

It is important to consider why states are becoming involved in marriage and divorce issues as they now are. We should ask whether the state can intentionally and predictably, reduce the divorce rate? That’s essentially what many are trying to do. States are trying to reduce divorce rate because of the role it (and unmarried births) plays in poverty. Another reason is the consequence of federal welfare reform that exposes states to responsibility for welfare after a recipient has exhausted his or her five-year lifetime limit. In short, many state legislators see marriage promotion and/or divorce reform as part of a coordinated effort to reduce state responsibility for welfare (and Medicaid) support. It’s as simple as that, and it’s as complicated as that.

To provide a bit of background on how we have conducted our research, I will quickly review our major efforts. First we began with focus groups with diverse individuals: covenant married couples from
the right, feminists (these were members of the National Organization for Women), women who lived in public housing projects, working-class groups, and members of both gay and lesbian organizations. Second, we commissioned with Gallup to conduct a statewide poll of Louisiana (similar efforts were conducted in Arizona, and Minnesota)—two states that had passed covenant marriage and one that had not. We will replicate these in another two years to see how general public opinion may have changed. Third, we studied the implementation of the law. We did that by sending unmarried graduate students (male-female graduate student pairs) into seventeen parishes in Louisiana to apply for a marriage license. They recorded how they were treated, what they were shown, what they were told, and all relevant information provided about covenant marriage. We also conducted a panel study of one hundred engaged couples for a period of a little less than a year from the time they announced their engagement until they either got married or until they didn’t, just to see whether covenant marriage played any role in their decision about whether to continue with the marriage plans. We interviewed clerks of court who had issued licenses for a covenant marriage because there is an increment of work that’s added with all these additional documents. We also wanted to determine the attitudes and perspectives of court clerks in regards covenant marriage. We also interviewed clergy in the state who had performed covenant marriages to find out what they know about the option, and what type of counseling they provide to couples seeking such a marriage.

Finally, the biggest effort is a five-year, longitudinal study of about thirteen hundred individuals, half in each type of marriage. We contact these people by phone regularly, and we interview them with lengthy questionnaires every eighteen months. What we’re trying to do is see how they change over the course of five years. Our first round of surveys was completed within six months of marriage. The second round was completed at about two years of marriage. We’re currently fielding the third and final round of surveys.

Selected findings. First, who selects which type of marriage? Covenant couples are more educated, are more conservative on a wide range of political issues, and are more religious. We characterize them as “sanctifying” or “institutionalizing” marriage, which is to say they do not operate strictly on a quid pro quo basis when it comes to assessing equity in marriage. A naive model of equity is equality: two people are the same. People in covenant marriage do not use such a model of equity; to them equity is a much more complex issue than both people
doing exactly the same thing. This “third party” to the marriage, we have found, provides a template for solving the mundane and challenging problems so often associated with early marriages. Covenant couples are also more likely to seek counseling. They have more family and friend support. They are less likely to have cohabited (dramatically less likely to have cohabited), or have been previously married. But on a whole range of other issues, such as issues about gender, issues about men and women and so forth, they do not differ.

Secondly, how has the law been implemented? The simple answer is badly. Some clerks of court have intentionally subverted the law. Many do not tell people about it. They fill out the marriage licenses by checking a standard marriage as opposed to covenant marriage and so on. The state did not provide sufficient resources to implement this law.

The pioneers who are going into covenant marriage are more traditional. They’re much less likely to have cohabited or to bring children from a prior marriage with them. They’re more traditional in their attitudes about gender and social duty to bear children. Their attitudes about children are really quite strong. They see marriage as a venue for having and rearing children. And there’s a lot less violence in covenant marriages than there is in standard marriage. That’s emotional violence, physical violence, however you measure violence, we have forty questions about violence. By any measure, there’s less violence against women or against men or against children in covenant marriages than in standard marriages.

So what do we have to learn about implementing pro-marriage policies, if that’s what we’re trying to do? First, I would say, that legislative action without corresponding efforts on the grassroots is of little importance. Passing a law, by itself, does very little. Even though our research suggests that covenant couples have lower chances of divorce, and that the choice of covenant marriage may be a part of that story, there are very few couples seeking covenant marriages. Without dramatically higher rates of covenant marriage, this type of optional arrangement is unlikely to alter basic demographic trends in divorce or marriage.

On the other hand, covenant marriage has provoked what Etzioni calls a megalog, a large, public discussion among all parties with vested interest in some issue. Following the passage of covenant marriage legislation, and continuing today, the popular media, scholars, clergy, and pundits gave great attention to the question of the role of government in domestic relations, the importance of marriage, the trends in living arrangements, and related issues. This may be the most
enduring consequence of covenant marriage and similar efforts in America.

Thank you.

LAWRENCE W. WAGGONER: Steve, thank you. We’re going to take a slight pause while they dismantle PowerPoint. Paula and I then will make our presentations, then we’ll take questions at the end for all three panelists.

Okay, these handouts ought to be distributed by now, I think. I’m going to report on what the two major law reform organizations in the United States have done by way of recognizing non-marital relationships. Those are the American Law Institute and the Uniform Law Conference.

I want to begin with a few fundamental distinctions. What I’m about to talk about is how the law is perhaps moving in the direction of recognizing non-marital relationships in private law. And when we’re talking about that, we’re talking about whether or not unmarried partners have monetary legal rights against one another, or to say it the other way, whether one partner has monetary duties to the other one. That’s to be distinguished from what you read about more often in the newspapers and magazines, which is the recognition of domestic partnerships by universities, municipalities and corporations. The big difference is that there we’re talking about other people’s money. We’re talking about domestic partners being able to register and the result of the registration typically is that the corporation or municipality or university will grant benefits to the partners, such as health benefits, one of the biggest ones. What I’m talking about is coming out of the pocket of one partner and going to the other partner, and whether the law is moving toward recognizing that. And I say it with particular emphasis on what the American Law Institute has done so far and what the Uniform Law Conference has done so far.

In this area it matters principally in two places. One is when one of them dies survived by the other, and the other one is when they break up during life. When one of them dies survived by the other, there really are two regimes that I want to mention. One is intestacy and the other is disinheriance by will.

In the area of intestacy, a surviving spouse who is legally married to the decedent gets a rather sizeable intestate share of the estate if the decedent dies without a valid will. The share varies, but in the Uniform Probate Code states, it’s really quite large and in many cases can be one hundred percent of the estate that goes to the surviving spouse automatically. The other area, in the probate area, is what happens
when a married person dies survived by the other spouse and tries to disinherit that surviving spouse by will. Now those of you who have had trusts and estates will know this hopefully, but it’s called elective share law or forced share law, and the surviving spouse is the only relative, only person, who in the United States gets what’s called a non-barrable share (you cannot totally disinherit your surviving spouse). Everything is qualified a little bit. Georgia doesn’t have an elective share. The community property states do not have an elective share because the community property states have a (fifty-fifty) split anyway. They already own fifty percent each as tenants in common. But in the common law states, all states have an elective share regime except for Georgia.

Now those two areas of law, the elective share law and the intestacy law, proceed on quite different premises, because intestacy law tries to be intent-effecting. That is to say, the reason that we give the surviving spouse a large intestate share is because we assume that the decedent in this marriage relationship would have wanted to give a large share to the surviving spouse, but just never got around to making a will. So it’s not thought to be intent-defeating, rather it’s intent-effecting. The elective share law, on the other hand, is intent-defeating, that is, forcing the one spouse to hand over (typically by way of property settlement) a share of that person’s property. That’s forcing an involuntary transfer. The analogy to the elective share law in family law is divorce. In divorce, also, the law is forcing one spouse to transfer, involuntarily, a share of that spouse’s property over to the other spouse as part of the settlement.

So in the area of recognizing non-marital relationships, it has always seemed to me that the first step would be intestacy because that’s the area where you’re not forcing an involuntary transfer, you’re simply carrying out what presumably is the intent of the parties. And also in intestacy, of course, we’re also talking about a couple who either could not marry or did not marry, but who stayed together until one of them died as opposed to breaking up during life, and that shows a greater commitment, it seems to me, in a majority of the cases. But the distinction I want to draw is between involuntary transfers and voluntary transfers, or at least attributed voluntary transfers.

Take a look at the handout. I’m not going to go into every one of these in detail, but I did want you to have a copy of this so that you could take a look at it afterwards. The first portion of the handout is what the American Law Institute has done and then in the second portion, beginning on page five, are a couple of uniform acts where the Uniform Law Conference has recognized non-marital relationships also.

The American Law Institute has gone quite a bit farther in the direction of recognizing non-marital partners as the equivalent of
marriage. The Restatement (3d) of Property, which is on page one, has done a couple of things. First of all, it has piggybacked on a project which is mentioned on page two called the Principles of the Law of Family Dissolution, which was just approved in 2000. The Principles of the Law of Family Dissolution's main focus was on how married couples ought to be forced to divide their property upon divorce, but they also have a chapter on unmarried partners. In the chapter on unmarried partners, which is chapter six (and I just gave you section 6.03 here, which is the section that identifies who qualifies for these rights), they basically treat unmarried partners, if they qualify under 6.03, as if they were married, for purposes of divorce law. The Restatement (3d) of Property, which is the one that deals with the probate rights, is on page one. I should make a disclosure here! I'm the reporter for the Restatement (3d) of Property. So when you read this, I wrote this! I'm not the reporter for the Principles of the Law of Family Dissolution. Ira Ellman is the reporter for that. But I am involved in the Family Dissolutions Project and I'm also involved in the Uniform Law Conference in other different ways.

When we did section 2.2 (the first section I'm giving you here in comment g), the Principles of the Law of Family Dissolution had not yet been approved but we were pretty sure it was going to be approved. So we said that if it is approved, then anybody who qualifies under that project or those rules ought to be treated as a surviving spouse for the purposes of intestacy. In section 8.1, Requirement of Mental Capacity, and also in section 8.3 on Undue Influence, we've put in a comment that does a very important thing. It identifies an unmarried domestic partner (of the same or opposite sex, it doesn't matter) as being a natural object of the decedent's bounty. That's extremely important because almost never will a court set aside a person's will on the ground of undue influence when it grants a large share to the surviving spouse. And what we are trying to do, particularly in 8.3 in this comment on page two at the top, is to identify the unmarried partner as being the equivalent of the surviving spouse and therefore a natural object of the decedent's bounty. That goes against some earlier case law. There's one case in Colorado back in the 1930s where the court said that if you make a will in favor of your unmarried partner, we presume it was the result of undue influence. The new Restatement will go a long way, hopefully, to defeat that notion.

This is kind of quasi-lawmaking because neither what the ALI nor what the Uniform Law Conference does has the force of law. With the ALI, we put Restatements out in the hopes that the courts will adopt the
principles in them. With the Uniform Law Conference, they promulgate statutes that will hopefully be enacted by the state legislatures, but they are not law until actually enacted, and they’re only law in the states that do enact them. And so it’s kind of a quasi-lawmaking body, but it certainly doesn’t come out with the force of law.

But one of the major problems in any lawmaking is how to identify who would qualify as a domestic partner, say for purposes of intestacy rights, for purposes of elective share, for purposes of getting divorce-type settlements? And with married couples it’s easy; they are self-identified. You are either married or you’re not married, and certainly in the probate area we almost never look behind the marriage. We almost never look to see what the quality of the marriage was. You’re either married or you’re not, and if you are, you get these rights, and if you’re not, you don’t get these rights. Even though we have no-fault divorce, in the family law area there is nevertheless fault that comes up in some states in the distribution of the property as part of the equitable distribution process. But for married couples it’s mainly self-selected and there’s a bright line rule. You’re either married or you’re not married. With unmarried partners, unless you have the benefit of some of the new statutes like the Vermont Civil Union Statute, which if you enter into that state then you basically have the same rights as if you were married. And in Hawaii there is legislation where an unmarried couple of the same sex can register a Reciprocal Beneficiary Designation Form, which is a state-sponsored form. Unless you have that kind of law, the only way of identifying them is to look at a multifactor approach. And if you look at the Principles of the Law of Family Dissolution (look on page two just for a second at section 6.03), this is the listing of factors to be considered that was adopted by the American Law Institute. I’m not going to go through all of them, but I might highlight a couple of features. In paragraph three, there’s a presumption that you are a domestic partner if you’ve lived for a certain continuous period that equals the cohabitation period, and if you don’t qualify under that rule, then the presumption is against you. You’d have to prove that you qualify.

On the top of page three, there’s a multifactor approach also where there’s a whole listing of factors, and I would say that my experience is that factors that are listed here have a claim to be right on the merits. But if you were translating that to a uniform law, I think you’d have difficulty with some of it because the one thing that legislatures want is some degree of certainty. And so the kinds of factors that I think would be more saleable in the Uniform Law Conference and then secondarily in the state legislatures would be to try to restrict these to factors that
can be established by objective evidence as opposed to evidence of how you felt toward one another. Did you name your partner as the beneficiary of your life insurance? Well you either did or didn’t. There’s a document that says you either did or didn’t. So it’s easily proved whether you did or didn’t. Did you go through a commitment ceremony? You either did or didn’t. When you start talking about how they treated each other and so on and so forth, then that’s subject to a lot of testimony that I can tell you the probate lawyers would not want to get into! Especially after one of them has died and so the only party to the arrangement who can testify is the survivor. That’s similar to some of the case law that I think a lot of you are familiar with, where they break up during life and the claim is that they had an oral contract. It’s a rare case where the party who is claiming that there was an oral contract can actually prove that there was an oral contract. The complaint may state a cause of action but the claim is very difficult to prove. In the Restatement of Property, because the Principles of Family Dissolution is another ALI project, we piggybacked on that same set of factors.

I want to say something about the premarital agreement. I gave you that section also from the Principles at section 7.04 on page three. The main thing I wanted to point out about that is subsection six (there’s another part of this that says the same thing), which deals with domestic partners. The section really is concerned with premaritals, where a couple who is going to get married enter into an agreement as to how their property would be divided if they get divorced or if one of them dies. But the section also applies to domestic partnerships, and it does require a written agreement. That is problematical in this sense. Premarital agreements do have to be in writing. That’s the law. There are no oral premarital agreements that are recognized. But with a premarital, the parties are negotiating against the backdrop of the law that grants them rights. In the non-marital situation, you’re negotiating in the background of a law that doesn’t grant any rights, and so it would be the contract that would grant the rights. And so to require a written agreement is problematic. However (and I wish I’d included this in the materials that I handed out to you, but I do want you to jot this down if you’re interested in this), in section 7.01 comment b, the principles say that their insistence on a written agreement, even for unmarried couples, is dependent upon the jurisdiction also accepting the idea that unmarried partners have marriage-type rights in the case of divorce. And if you’re in a jurisdiction that doesn’t recognize those rights, then it doesn’t have to be in writing. So really it came out the right way.
Now let me turn briefly to the Uniform Law Conference on page five and through the rest. If you just glance down there, I boldfaced the subsections that applied in the Healthcare Decisions Act, here we’re talking about an extremely important matter. I do want to make it clear that under the Healthcare Decisions Act you can execute a healthcare power of attorney naming your unmarried partner as your representative. The section that I gave you just applies in case you didn’t execute that, and then who can be named your surrogate. You’ll see that under subsection (c), which is not worded as directly as it might be (but of course it’s worded that way purposely), a person who would qualify as a domestic partner would come in but has a low priority. Other family members have a higher priority. Then on page six and seven, I gave you the two sections out of the Guardianship and Protective Proceedings Act. Those can also be a very significant matter when one of the partners becomes incapacitated and needs a guardian of the person who takes care of you or a conservator who takes care of your property. Again in subsection (c), in both of those, those are companion sections. It does recognize the unmarried partner by identifying an adult with whom the respondent had resided more than six months. But it’s a very low priority. It comes in as seventh in priority.

Now, let me switch back briefly and then I want to end this and let Paula have the floor. When you look at what the Uniform Law Conference has done, you see that it has not granted intestacy rights to surviving domestic partners. It has not granted elective share rights to surviving domestic partners. It hasn’t done any of those things, whereas the American Law Institute in a couple Restatements I gave you has done that.

There’s a difference between the American Law Institute and the Uniform Law Conference. Basically, the American Law Institute is freer, I think, to produce products based purely on the merits. That’s not to say that these things can’t be controversial. In fact, the Principles of Family Dissolution was very controversial when it was on the floor of the American Law Institute, and there were many, many amendments proposed and all beaten back. So it was controversial. When it got to our project, it was not controversial at all because the ALI had already acted. But the Uniform Law Conference can’t operate solely on the merits. Politics are involved also. The Uniform Law Conference is in the business of producing legislation that can be passed and that makes them hold back sometimes on controversial matters. I think that’s probably the major explanation of why the Uniform Law Conference has not acted in this area. I don’t think that the Vermont Civil Union legislation would have been enacted in Vermont had it not been for the
Supreme Court of Vermont's decision. And I don't think Hawaii would have enacted its reciprocal beneficiary legislation had it not been for the Supreme Court of Hawaii's decision that basically forced it to do that. So I think that's the explanation for why one has gone a little bit farther than the other one. We'll just have to see where it goes.

With that, I think we can turn to Paula, who's going to talk about her work in the Institute. Paula.

PAULA ETTELBRICK: Thank you. Well, first I am always greatly indebted to the perspective of historians and I only wish that from this morning's panel I had about half a day to rephrase and reframe some of my comments. It was very enriching in terms of my own thinking. And also, to you, Larry, I remember when you talked to me about eight or ten years ago about this project and I walked out of your office thinking, "Oh yeah, right!" Clearly, your persistence and your work over time has paid off with the ALI. Those are significant efforts that help us understand the intricacy of legal and policy change with regard to family. That it is pervasive. That the laws, structures and policies affecting family exist in all facets of our system. There are very few areas of the law in which somewhere, someway, somehow the issue of family and family definition doesn't come up. And so the idea of this issue being stuck in a family law curriculum alone obviously is something that isn't realistic in the way that we look at it as family advocates.

I'm going to talk on this panel fairly exclusively from the perspective of having advocated on behalf of the family recognition interests of the lesbian and gay community. I say at the outset, though, that it is my own personal view that broader family recognition for all unmarried couples or people functioning in family units is very important and is one that needs to be analyzed and promoted. I will probably spend more time on that in the panel later this afternoon. I'll start by sort of bringing the historical context outlined earlier a little more up to date. Then I will go back a little bit to present my own personal view as someone who's been fairly intricately involved over the last fifteen to eighteen years in the process of changing definitions of family, and to talk about what led to some of the decision-making and strategies that were adopted.

Last September, as we all well know, thousands of people were killed when four jet hijackings took place. It will forever be an historical marker for our country and probably the world. Within hours, it seemed to me, donations from around the world started flowing in, particularly to New York, out of compassion, out of a sense of despair,
out of a desire to do something to help. The donations were meant mostly to assist those impacted by this tragedy, most notably the surviving family members. Triage centers were set up in lower Manhattan, the site of most of the damage on that day. The goal was to help people locate loved ones who had been in the Trade Center or near the Trade Center or feared near the Trade Center at that particular time, to help families cut through the bureaucratic red tape, to provide emergency financial and other assistance, to expeditiously obtain death certificates for those who had been or could be declared dead (that was sort of a bit of a difficulty, as we all know throughout the subsequent weeks), or just simply to get counseling.

The question emerged immediately as to who are these surviving family members. The fact that New York City is one of the most diverse cities, certainly in the country and probably in the world, lent an extra special flair to the question of who was a family. But what was notable to me in the immediate aftermath of the World Trade Center incident was the immediate reaction of those administering aid that “well of course gay and lesbian partners are considered family.” The Red Cross, what I would consider a very mainstream institution. The mayor of New York (who had, of course, been very prominent in supporting the domestic partnership law that many of us were very involved in getting passed in New York City that expanded the definition of domestic partner beyond just those who worked for the City or lived in the City, but to all those who might want to register). And even what I think of as a rather gay-averse governor, also chimed in, in the moment at least, to recognize that in a tragedy such as this, couples should be recognized.

Now we know that the intricacies and the difficulties and the complexities of those emotional responses have met a more rational ground. The federal government in particular seems to have clearly decided, through the special master charged with administering the claims of family survivors, to make it nearly impossible for surviving gay partners to participate in the dissemination of federal benefits. The governor did declare that a surviving partner who had been a registered domestic partner in the city of New York could obtain a death certificate—an unprecedented decision.

But what struck me, nonetheless, was the fact that at least in New York City, at that moment, New York state, even at that moment, gay and lesbian couples predominantly were assumed to be within the circle of family, a fact that was deeply gratifying to those of us who have approached the issue of gay and lesbian couples’ recognition from the standpoint of family recognition rather than simply marital recognition.
I'd like to take that point and go back about twenty years to some critical decisions that have been made across the years as we developed strategies to achieve the goal of recognition of lesbian and gay couples as family members. What that incident signified to me, and what I've always felt as a public interest advocate, is that there are three major elements to social change, at least from a legal perspective. This is nothing scientific, mind you. Just my observation.

First, it is critical to incorporate the ideas and work that precedes any particular advocacy effort. That is, we must try to understand our work within a historical context. In its very brief and quick leap through history on the issue of marriage, the panel this morning showed how different forces came into play to reshape and force us to rethink (and in fact redo) the way we've always done things. For the gay and lesbian community over the last twenty years, those forces have included such things as feminist thought, writing and activism, a sense of progressive social values that I think predominated in the late 1970s and early 1980s in the thinking of gay rights advocates, liberationist goals which aren't popular to talk about much anymore but were very much a part of how we thought about our work in changing some of the social structures that were obstacles to us.

Second, obviously strategy. Strategy, vision, foresight and goal setting are obviously very important. Although life presents us constantly with events that could not have been anticipated, it is important to have a plan and set of goals that allow us to take advantage of the opportunities presented. The fact that the effort to gain recognition for lesbian and gay couples had been on-going allowed us to respond to the needs of those affected most dramatically by the World Trade Center incident.

Which goes to my third point which is that unexpected events—often tragic events—serve to illuminate and help us understand the importance of ideas that might have seemed theoretical or mundane up until that point. For instance, the idea of lesbian and gay couples as being family or spouse-like seemed either threatening or theoretical to the culture at large. But, September 11 helped illuminate the human aspects of our lives.

There is a distinct feminist frame to early lesbian and gay family advocacy. The challenges to marriage as an institution, the workings of marriage, and the gendered relationships within marriage were part of the feminist critique that gay and lesbian activists assumed in their own work. In fact, many of us came out of the feminist community whose principles informed most of our early work. We, too, questioned gender
roles within the family and our advocacy efforts were dedicated to reshaping them. Progressive social change values were much more prominent then they are now. The idea of critiquing institutions directly and seeking alternatives rather than seeking simple access to the institution seemed to be very much a part of the political and strategic thinking of the 1970s and even early 1980s. And, of course, we expanded on feminist thought by developing liberationist ideals with regard to sexuality. Sexuality should not be controlled by the state or through institutions like marriage. Sexuality and sexual behavior are a matter of personal choice a view simultaneously under doctrinal development in the Supreme Court in *Griswold v. Connecticut*, and its progeny. The Court, too, was examining for the first time the role between government and its citizens' sex lives. The civil rights movement's shaping of equality principles set us on a course of significant cultural change—principles of nondiscrimination, equality and equal rights became not just the law but a part of our cultural vision. So much so that even though lesbians and gay men are not generally protected from discrimination, most people believe or assume it is illegal to discriminate against lesbians and gay men. Many even believe that lesbian and gay couples can marry and form families as readily as anyone else. I personally have been asked many times, “Why don’t you two just marry?,” a question the person is probably very sorry they asked after my “deconstructing marriage” response. Nonetheless, the assumption and the cultural idea that has taken hold that people are treated fairly in our system. Unwinding those assumptions a little bit has allowed for some interesting discussions and perspectives.

And of course we know from what John D’Emilio, Nancy Cott, and other historians have written that the economy and economic change influences family structure more than any other single element. The economic needs of families and the exploitation of the family as a unit shapes the roles performed by family members. Cott discusses the irony of the Religious Right’s Advocacy. On the one hand they argue for traditional family values. At the same time, they support free market principles that essentially force women back into the workforce because of the family’s financial needs. Americans’ forced identities as consumers first ensures that no family can live on a single income AND be expected to fulfill our roles as consumers: buying the newer, bigger car, the fastest, newest computer, and family cell phones for all. These forces very much help change or help define some of the choices that we made early in terms of some of our strategies.

In addition to understanding the current and historic forces that shape our current lives, social change movements need a strategy.
Lesbian and gay relationships, as I’m sure most in this room know, are faced with an unending structure of rules that completely exclude our families as well as any one else who has made the conscious choice not to marry. But in this context, I’ll just talk about lesbian and gay relationships. The rules related to privileging marriage are exclusive: thousands and thousands of benefits, rights, privileges, legal access that exists at all levels, not only within law and public policy, but even in the private practices and customs of those not necessarily required to treat people who are married or unmarried, differently. Take employers, for example. There is no mandate that requires employers to provide health insurance to their workforce. In addition, if they do provide it there is no mandate that they provide health benefits only to married employers. Neither the state nor the insurance industry required married-only benefits, though the law implicitly assumed that only married employees got such benefits. In fact, the rules and laws governing the workplace did mandate equality—equal pay for equal work. The idea that all employees should be paid equally—in wages and benefits—for similar work. So our early family rights strategy was to draw attention not to the exclusion of lesbian and gay couples from the state’s marriage laws. Rather our strategy was to focus on the unequal treatment of gay employees with partners and children who were paid less than their married counterparts.

We made choices—very deliberate choices—about working to challenge marriage as the sole core of family definition rather than to challenge the exclusivity of marriage that keeps lesbian and gay couples as outsiders. Both our political desire and perhaps political philosophy at the time led to very strategic decisions to challenge the exclusive role of marriage in defining the family. To develop the idea that family function was at least equal to family form in contexts, in particular, like the workplace. Was it legitimate for employers to decide whether our relationships were worthy of receiving the equal compensation? If employee A is married and gets her salary in addition to health benefits for her husband and her children, what was the justification for denying the same benefits (i.e., full salary) to employee B for her partner and children? Part of the idea was that instead of using challenges to the marriage law to deal with this problem, it was very much part of the political culture at the time to say that what we really need to do is expand the idea of who is a family.

So in the context of the workplace and other commercial settings we began the process of challenging the idea that marriage should be the only way in which we define family for the purposes of distributing
family benefits, privileges and rights. The workplace rules seemed to be the most vulnerable, but this was quickly expanded into many other areas as well. Airline frequent flyer programs that allowed free flight benefits only for blood or legal families. Amtrak “family excursion” fares that did not extend to non-marital couples. Museum, health clubs and property insurance rates that were cheaper for married couples and their children. In a very short time, the definition of family has indeed changed in these commercial contexts.

The 1989 New York Court of Appeals decision in Braschi v. Stahl Associates is emblematic of the struggle over a course of time. It goes to my final point about situations, circumstances historically beyond our control that help us frame the issues for the courts and for policymakers in general. In that case, a gay man was faced with eviction from his rent-controlled apartment after the death of his partner from HIV. The law provided that a family member who had lived with the named tenant for a minimum of two years had a right to remain as a tenant in the rent-controlled apartment. A series of these cases had actually found their way into the courts in the early- and mid-1980s. It was both a huge problem and a huge revelation about many of the family structures that existed in New York City. Courts were grappling with the idea of what to do with remaining tenants who clearly functioned as family members but had no formal tie to the deceased tenant. Some courts were coming up with the idea of constructive adoption in the incidence of adults who had come to live with people as children and remained beyond adulthood. The “parent” dies, but there was never a formal adoption. There were also cases involving gay couples in particular who had been together for years (as Braschi had been with his partner) and who had a vested claim to the apartment in which they lived.

Now everyone who knows New York understands that rent-controlled apartments are like finding gold on Fifth Avenue. You don’t give it up easily, and there’s always a huge battle over who has the right to the apartment. And in this case, he decided that he had a right after ten years of living in the apartment with his partner, even if he was not a named tenant, to stay in the apartment. It was his home.

That case really brought forward some of the issues that you raised, Larry, regarding the proof process of how we define and look at what a domestic partnership is. How we look functionally at those relationships as well as the potential for a double bind in imposing a formal family structure where, perhaps, it was never sought. Are we simply reinforcing what marriage looks like in trying to fit into that, or are we in some way redefining something new and different? We certainly thought at the time we were defining something new and different. These days I’m not
so sure that we've really done that. Nonetheless, Braschi won his case in the Court of Appeals, New York's highest state court. A very, very narrowly split court ruled that he had the right to remain in the apartment. It was the first time in American jurisprudence that a court had found that the term "family" should be applied to a gay surviving partner.

Third, again, the events beyond our control. Some of the things in the 1980s that really helped define and illustrate the need for some structural change involved two primary events. One was the increased numbers of out lesbians who were having children. Parents felt very strongly about the need to secure the financial and economic means of their families. And so there were repeated requests to employers to cover the children, to cover their partners, to make sure that if something happened to a main wage-earner (or at least the co-wage-earner), that the insurance (health insurance in particular), and other kinds of benefits were extended to their family members in the way it was to other co-workers. So began more public demands for recognition of our family structures.

The second event was the incidence of HIV and AIDS, particularly in large cities like New York and San Francisco where, in the mid-1980s especially, many of us felt like we were losing friends on a daily basis through this disease. The lives of gay men, over time, were revealed to the American public, courts, health care and social service settings in very different ways. Cases like Braschi highlighted the unfairness of many legal structures. Feature articles in the New York Times and other mainstream papers across the country began to present gay couples more compassionately. At the time, it seemed to be the first time that the American public was allowed to view gay male relationships as being human, not just stereotyped. Being gay was not just about sex. That coverage—and this awful disease—presented an opportunity for breaking down some of the stereotypes that people had about gay male relationships, just as growing numbers of lesbians having children have moved people to see lesbian couples as more visible and complex.

Yesterday a jury convicted the two individuals responsible for the dog that mauled Diane Whipple to death outside of her apartment door. Her surviving partner, Susan Smith, has brought a wrongful death action, one of the first to get beyond a motion to dismiss in a trial court. For twenty years people have been trying to argue that domestic partners or unmarried partners should have standing to bring wrongful death actions. This is one of the first cases, at least that I'm aware of, where the court has ruled squarely that she has stated a cause of action.
Again, because of the vision and strategy of activists over the past twenty years, the court had a context in which to see Susan Smith not as a roommate with no legally cognizable relationship to Diane, but as a living, breathing person who has experienced the most horrible death of her long time partner. Had we long ago only focused on the right to marry, we would have totally missed the opportunity to do justice to Miguel Braschi, Susan Smith, and the gay surviving partners of those who died on September 11 in New York and Washington.

An uncountable number of institutional policies have changed in the last twenty years to reflect a growing acceptance of the idea that we need to look at the practical aspects of excluding certain couples (i.e., gay and lesbian couples) from marriage. And the ironic aspect of some of this is that by the total exclusion of gay couples from marriage, the incentive to try to find alternatives, to seek out alternatives, to convince courts and legislatures about the need for alternatives, was augmented. If gay and lesbian couples were allowed access into the institution of marriage it probably would have taken the steam out of developing alternative structures.

But there are dozens of city laws. Significant developments in California, Vermont, and Hawaii—Vermont being the most broad-based with its civil union law—where states are beginning to change their laws but—California’s, I think, their state domestic partnership law became a legislative reaction to the wrenching political battles over marriage initiatives.

In looking a bit to the future, we now have the beginnings of widespread empirical data on cohabiting same-sex couples that was collected in the 1990 and 2000 federal Census. In 1990, the United States Census Bureau for the first time counted people who designated themselves as unmarried partners on the census form. What many of us knew immediately when this plan was announced in the late 1980s was that there also would be a way to pull out of the data all of the same-sex unmarried partners who’d reported as such on the form. And sure enough, the 2000 data has begun to show us a huge leap in the numbers of same-sex households being counted and I think will provide us with at least some of the statistical empirical research that we have lacked in being able to establish the case of not only our existence, which is pretty self-evident, but at least what our households look like that will help us into the future.

And so we see in all of this how cultural acknowledgment and cultural influence has been very significant. September 11th became a time in which our work had its desired effect at a particularly critical time. All of those conversations with the governor, the mayor and other
decision-makers took hold. It's probably by no means the end of the battle within New York City or within that particular context, certainly. But it is an indication, I think, that people are aware and trying to find a way to do some equity to same-sex couples' relationships.

Thank you.

LAWRENCE W. WAGGONER: Thank you Paula and Steve. Let's try to stay on schedule as much as we can, but let's go ahead and have questions until about 12:15. So we welcome questions from the audience.

QUESTION: Given how significant same-sex unions are in changing the laws, how have those responded to morality-based arguments underpinning the laws?

PAULA ETTELBRICK: Well, that has yet to be determined, to tell you the truth. I think that certainly finding allies in the place that has been the most stringent of obstacles (i.e., organized religion, by and large) is very important. When they speak to legislators, when they testify in court, it forces us to address some of the moral concerns on the minds of the policymakers and lawmakers. The morality context for our relationships led many gay and lesbian couples to kind of mimic heterosexual marriage rituals as a means of gaining status within their extended families. I mean that's a thing that I think is probably more profound than the public aspect of it. It somehow has allowed parents to see their kids as equal. Their lesbian daughter and their straight son, as kind of engaging in the same kind of processes and the same kinds of values or rituals. And it's really helped a lot in terms of people understanding the level of commitment in gay and lesbian relationships.

QUESTION: What are the differences between the American Law Institute and the Uniform Law Conference? What would be the different ramifications of each adopting a model law or definition?

LAWRENCE W. WAGGONER: The American Law Institute is a private organization. The Uniform Law Conference is quasi-public, because the members of the Uniform Law Conference are actually gubernatorial appointments. The American Law Institute is not. The American Law Institute is composed of practitioners (you have to be elected), judges and legislators. The American Law Institute has about twenty-five hundred members, something like that. It's quite influential. In fact in Arizona, there's a Supreme Court decision that suggests that anything that's in the Restatements is the law of Arizona! So over the years it's been very influential because of the status of the membership. The membership really is the elite. The graybeards, I guess you could say, of the bar and the judiciary. The Uniform Law Conference does
have it's influence. Some of its statutes are very successful. It's only successful to the extent that they're actually enacted. The most successful Uniform law is the Uniform Commercial Code which is enacted everywhere. The Uniform Probate Code (UPC) is enacted only in about fifteen to twenty states, but it's had influence in the legislation in nearly every state because when you look down at their statutes, they might not be a UPC state, but when we look at their actual individual sections a lot of times it's a UPC section. So the American Law Institute does have a lot of clout. It does have a lot of influence in this country.

**QUESTION:** Do the social classes and races understand marriage differently?

**STEVEN L. NOCK:** I'm generalizing from the states that we've been doing intensive analysis in. Marriage earlier was said to have evolved from a primarily economic to a primarily emotional relationship, and I think that's clearly true among middle-class white people. It is clearly not as true among people of color in the states we're studying, especially poor women. To them marriage is more a venue in which children can be raised, and the security and the predictability of that relationship is of paramount importance. Especially the employability and stable employability of a partner is much more important than the emotional quality. I'm always struck by how we have accepted this dominance of the emotional model of marriage, the love dominating all else, and I think that's true for middle-class white people. But it's night and day in our results that when you get below the middle class income level, or educational level, that women of color do not view marriage in exactly that way. It's much more of a traditional arrangement for securing an environment for rearing children and providing.

**QUESTION:** What does the case law say about who is and isn't a surviving spouse?

**LAWRENCE W. WAGGONER:** First of all, there's very little litigation on this question as to who is and who isn't a surviving spouse. Most of the traditional litigation has been over bigamist marriages. The decedent was already legally married to somebody else, unknown to the person who thought that he or she was the surviving spouse. You do have a trickle of that kind of litigation. The case that you're mentioned is quite new, and I've forgotten myself. Has that been decided by an appellate court?

**PAULA ETTELBRICK:** The Kansas Supreme Court.

**LAWRENCE W. WAGGONER:** The Supreme Court do you think? Okay. Well, I'm sure that there will be more cases like that, although we can sometimes exaggerate the frequency of that kind of a
situation. The definitions, I suppose, of a domestic partnership in the Principles (since they don’t distinguish between same- and opposite-sex couples) could obviously transcend that and if adopted would preclude that as an issue I would think. It wouldn’t matter which gender the survivor is! But that’s a long way off. More questions?

**QUESTION:** Are the traditional gay rights organizations also working on behalf of unmarried, heterosexual domestic partners?

**PAULA ETTELBRICK:** Well, I think all of them nominally are, because there has been a trend over the last twenty years to establish within certain contexts a broader vision (if not definition) of what family is. I think all of them are still involved to some degree in that effort. Lambda Legal Defense, for instance, signed onto a Seventh Circuit brief that drew the ire of Judge Posner when he decided the case. They argued for the right of a straight teacher seeking to get health benefits for her partner. The Chicago Board of Ed allowed only same-sex benefits and marital benefits. The teacher argued that the policy violated marital status and sexual orientation-based laws. Judge Posner basically chastised Lambda, saying, “What are you doing here on this case? Get back to your gay rights work!” So, I think that there is an understanding that all of the groups need to continue to challenge the injustice that results when some families are protected but others aren’t. There is a certain timidity about challenging the marriage laws, quite frankly. I’m not sure that it’s because there’s such a strong feeling about expanding definitions of family; I think that’s been waning actually. I think many in the community finds the domestic partnership approach to be irritating. People talk about it being too incremental. I sort of point to the relative success of that over the relative success of marriage, where at least you’re kind of succeeding. I think that beyond the national groups, what you find is a little more radicalism on this issue at the local level, to tell you the truth. Maybe it’s not radical, it’s more just pragmatic. When you deal with the state legislature, you’re not thinking you will ever pass a marriage bill but you think you might be able to impact the healthcare proxy laws or other kinds of things that would be very significant.

**LAWRENCE W. WAGGONER:** Let’s have maybe one more question.

**QUESTION:** What is the terminology used for non-covenant marriages?

**STEVEN L. NOCK:** Standard marriage is the term they use.
QUESTION: What is incidence of domestic violence in covenant and standard marriages? Does covenant marriage really eliminate incidents of domestic violence?

STEVEN L. NOCK: I shouldn’t over-dramatize the magnitude here. I mean for all the attention, domestic violence is a big issue, but prevalence-wise it’s not that great. I mean five to eight percent of couples might experience some form in any one year, that’s the incidence. Prevalence-wise it might be up to eighteen percent over the course of a lifetime. So we’ve been studying couples for three years. So the incidents or the prevalence of domestic violence, if it’s physical, is relatively low. The incidents of domestic violence if it’s emotional is much higher. Using any of those things, for whatever reasons, we believe it has to do with the style of dealing with conflict. There are different styles of conflict that we’ve got built into our study. The way covenant couples seem to deal with conflict is to bring in third parties, especially family members, rather than to work it out themselves, and that does tend to reduce the incidents of escalating violence.

QUESTION: What accounts for the difference between covenant and standard marriages?

STEVEN L. NOCK: See, we think that ninety—well, it might be one hundred percent—of the difference between covenant and standard marriages is a selection fact.

QUESTION: Well, I do, too. What accounts for the low rate at which couples in these states choose covenant marriages?

STEVEN L. NOCK: Okay, so this is just guessing, okay. I made this presentation a year ago at the Population Association of America and talked about the abysmally low rate of adoption in the three states that had passed covenant marriage because everybody had predicted this landside of coercion. In fact the ACLU had brought a lawsuit—

QUESTION: It seems that if the state really wanted to promote covenant marriages, they would become the default choice rather than standard marriages.

STEVEN L. NOCK: Right, right, right. And none of that seemed to happen, in fact, quite the opposite. Nobody seemed to be adopting covenant marriages. And I was saying, you know, you’ve got “two, three, four percent,” depending on which state and which estimate you got in the first two to three years who adopted covenant marriages. It’s quite obvious that this policy has been a dismal failure if we focus only on expected adoption rates. But compared to something like Roth IRAs or any other form of complex legislation, this is an outrageous success. It’s a compared-to-what question. And so four percent compared to say, what percentage of people adopted IRAs in the first five years is
enormously high. So these innovators are a very small percentage of the total population, but compared to innovators in other forms of legislation, they actually are a large percentage. You’ve got to remember also in any one year, the percentage of people at risk of getting married—whatever you want to call it, the people who are eligible to get married—those who are not married but who are at the age to get married, is a relatively teeny fraction of the total population. Maybe three to five percent of the entire population of a state. So I don’t know. Like I said, that’s my guess compared to other forms of legislation. I don’t know whether it’s fair to compare it to Roth IRAs, but there are probably more covenant marriages as there are Roth IRAs in Louisiana. Whatever that’s worth!

**Keynote Address**

DAVID L. CHAMBERS: Welcome back to the Symposium. We have a speaker about to begin who will, I’m sure, continue the high standards that we had set for us this morning. I thought the first two sessions were wonderful, and we should all be grateful to the Journal for bringing us together.

I’m going to keep this introduction very short. “Great,” she said! She said that because I know too much about her and she thinks that if it’s short it’s likely not to reveal too much! Several of you who are in this room have seen Beth Robinson before. You’ve seen her in the course of taking a course from me in family law and getting a chance to watch a video of the oral argument in the Vermont Supreme Court case of *Baker v. State*. Beth was one of three attorneys representing the plaintiffs in the suit seeking the right for same-sex couples to marry within the state. I showed it in the course because I believe it’s as fine an example of an oral argument as I’ve seen, and because it provided a wonderful way to introduce a subject that is not just complex in itself, but arises in a historical context that oral argument helped set very well. Not only did Beth (and her co-counsel) triumph in the case, leading to a holding (which she will certainly discuss) that tossed the matter to the legislature. Beth then led the effort in the legislature to secure legislation. And then worked hard during the elections to secure the re-election of the legislators who had supported the legislation. And it never stops, because this year is another election year in Vermont, and the same controversy about both same-sex marriage and civil union persists. We are lucky to be able to pull her away from Vermont long enough for her to speak to us.
Beth is a graduate of Dartmouth College and the University of Chicago Law School. She practices with a wonderful, small firm in Middlebury, Vermont that probably devoted as high a portion of its revenues to the pro bono support of this case as any firm has ever done. It’s my warm pleasure to greet and introduce to you Beth Robinson.

BETH ROBINSON: A thank you to the Journal of Gender & Law and Nicole and all the folks who have done the great organizing. It’s great to be here. I’m thrilled to have been included and it’s nice to get away from Vermont because it’s bitter cold there right now!

I kind of see my role in this post-lunch session, being the private practitioner of this crowd, as bringing the intellectual level down a notch so that you all can digest before you climb back up in the next panel. So I hope you’ll indulge because I’m going to try not to tell too many war stories, but it may come out sounding that way.

What I would like to do is share with you some of the lessons I’ve learned through the course of our work in Vermont.

I.

It’s especially important to me to think about the first issue in the context of the incredible panels we heard this morning. I wish I’d come to this symposium before we litigated the case because I would have been so much smarter! But I think lesson number one is that it’s critical to remember that as interesting as legal arguments are and as fun as it is to craft arguments and parse language and be a lawyer, you can’t forget that the law is about real people. It’s a powerful force that shapes and affects the course of all of our lives. And that’s something that’s been with me from the start of this process and it’s something that’s not very scholarly to talk about, but it’s vital, I think, to the debate about all of the topics that we’re talking about today.

Some of my inspiration to get involved in this case involved experiences both with clients (as a practitioner) and with friends. Through the years preceding our work on this case, I had so many experiences in which I was confronted with somebody who was faced with a profound disadvantage or disability because the laws didn’t recognize the reality of their lives and the reality of their families.

I think about Nina and Stacy, who ultimately became plaintiffs in the Vermont marriage case. Nina had her first child by home birth. Things went very much awry in the middle of the labor and they had to rush her to the hospital. Both her life and the life of her to-be-born baby were hanging in the balance. As they rushed into the door of the
hospital and took Nina back into the room where they were going to work to save her life and save the baby’s life, they stopped Stacy at the door and asked her if she could produce some paperwork to demonstrate that she had a legal right to be there while her life partner’s and child’s lives were hanging in the balance. Now Nina and Stacy are actually pretty sophisticated people. They had the knowledge that they needed durable powers of attorney for health care. They had the wherewithal to pay lawyers to draft them. And somehow, even in that moment of crisis, Stacy had the presence of mind to go to the file cabinet, get those papers, and take them with her to the hospital. So she got in the room. But I have to tell you that when they describe that experience, getting in the room won’t begin to erase the sting of the assault on the integrity of their family at a time when they were most vulnerable.

And this kind of thing isn’t unusual. I talked to a friend, Jay, who lives in Vermont. His partner is a disabled veteran. A couple years ago Jay took his partner to the Veterans Hospital, to the emergency room. It wasn’t a traumatic injury, I don’t think it was life-threatening, but it was something urgent enough to cause him to go to the emergency room. I’ve never actually asked what it was. Jay was sitting in the waiting room reading *People Magazine* while his partner was back in the examining room. At that point, somebody “coded.”

Who here watches *ER*? Whenever I think of this story I always picture crash carts flying around and noises and everybody in high gear. So Jay was sitting in the waiting room, and he started to get a little nervous. He knew that his partner didn’t have a life-threatening condition, but, again, you guys watch *ER*—so, you know people come in with a hangnail and fall into a coma and die. Right? It happens all the time!

So Jay got a little nervous and he went up to the desk and he said, “Excuse me, I’m just looking for some reassurance that my partner is okay. Could you tell me what’s going on with him?” And the woman at the desk said, “Who are you again?” He said, “Well, I’m his life partner.” She said, “I’m sorry, we’ve got rules here and we can only discuss medical conditions of patients with family members. I’m afraid you’ll have to take your seat and wait until he comes back out.”

These stories aren’t made up, they happen. And now that’s just one type of example. As a lawyer, one of the things that I see a lot involves the Vermont property transfer tax. It’s a tax you pay when you transfer property from one person to another. It’s about $500 on the first $100,000 in value and then it goes up incrementally beyond that. Over
the years I’ve represented many same-sex couples who live in a home titled to one partner only. At the time they got together maybe one of them owned a home so it wasn’t in joint names. At some point they refinance or they decide to put the home in joint names for one reason or another. That’s what happened to Deb and Carol. When they went to their lawyer, their lawyer explained to them that if they put the house in joint names they would get whacked with a property transfer tax. It’s a tax that would never apply to a married couple or a legally recognized family in that way.

I think about Janice and Susie. Janice has worked now for twenty plus years for a GE plant in Rutland, Vermont. In the course of her twenty plus years there, she’s built up quite a pension. She and Susie have been together for probably seventeen of those twenty years. Susie works as well, but Janice is clearly the primary breadwinner of the family. If something were to happen to Janice tomorrow, Susie wouldn’t get a penny of that substantial pension that has built up through the years. She wouldn’t get a penny of her social security. If she were a man, if she were a husband to Janice rather than female partner, she would.

Some of the disabilities that people face when their families aren’t legally recognized (and we heard a little bit about this this morning), ironically, involve divorce. One of the most important sets of protections in our marriage laws are the divorce laws. In the course of my practice I have encountered a lot of couples, a lot of same-sex couples, who have been together for a substantial period of time, who have merged their finances in a way that many heterosexual married couples do, and who break up. And when they break up, they find that they don’t have the same recourse to the family courts that heterosexual married couples have historically had. And they don’t have the same recourse to the principles of divorce law that have been available to married couples.

I think about a client, Susan, and her partner. They were together for a number of years, and Susan’s partner owned a farm. Susan put her life savings into this farm. The two of them were raising animals together. They broke up, and it was a very ugly break up. Susan came to me and said, “Look, my life savings is in this farm that’s got her name on it.” Now if they had been legally married at the time we could have gone to the divorce court, could have prevented the partner from taking any action in terms of disposition of the property, and probably could have gotten an order to sell the property and divide the proceeds in some equitable way. What we ended up having to do is go to the Superior Court, which is a court that’s designed to deal with things like business conflicts, and we had to craft theories that were designed to
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deals with business partnerships breaking up and deals gone awry that weren’t really formulated in the context of family relationships. We had to try to engrain those principles onto this case, get a court order, and try to enforce the order. Long story short: my client lost her life savings, and racked up a substantial bill to me at the same time.

Some of the stuff that I’ve seen seems trivial, but doesn’t necessarily feel trivial. I talked a little bit about Janice and Susie a second ago. A few years back, Susie’s brother died. Now Susie’s brother was, for all intents and purposes, Janice’s brother-in-law. She had been part of the family, they’d been family to one another for many years. Janice’s employer had a bereavement leave policy that allowed workers to take paid leave to go to the funeral of a family member, and that was defined to include a brother-in-law or a sister-in-law. But because the law didn’t recognize Janice’s partner’s brother as having any legal relationship to Susie, she wasn’t able to take that bereavement leave. It wasn’t the end of the world. She just took a vacation day. It wasn’t like she didn’t get to go to the funeral, but, again, it was that slap in the face at the time when she was feeling most vulnerable. Her family’s grieving and she’s told that her family isn’t really family.

The one example that struck me the most (and this is the only one that isn’t somebody that I know personally—I read about it in the newsletter of a national advocacy organization) involved two men who had been together for many years. One of them died. The surviving partner buried the deceased partner, put up a tombstone, planted the flowers, and grieved by the graveside. One day he came to the grave to visit his deceased partner, and there, where his partner was supposed to have lain for eternity, was a hole in the ground. The tombstone was broken in pieces and it was lying by the dumpster. The deceased partner’s biological family had retrieved the body to bury it in the “family” burial plot. The kicker is that under existing law, they may have had every right to do that.

These are all examples of the way that the law, in a very specific way, allocates benefits, burdens, rights, and responsibilities that aren’t available, or in some cases previously weren’t available, to same-sex couples anywhere in this country.

One of the things that I came to appreciate during the course of this case is that what we’re really talking about here is a lot more than a set of benefits. That’s not something I appreciated when I got into it. Because I’m a lawyer, that’s sort of what I think about, but the law does more than just assign benefits and responsibilities. There is an interaction between our law and our society. I think somebody before
was talking about the "social norms/legal rules feedback loop." And it really is true.

I think about Sandi and Bobby, who just celebrated their thirty-fourth anniversary, and actually it’s probably thirty-fifth anniversary by now. About six years ago Sandi was diagnosed with cancer. So the first thing she said to her doctor was, “Before we go through all the treatment options and we figure out what we’re going to do, I want to schedule another appointment so that I can come back with Bobby and we can go through this all together.” The doctor bristled and said, “Well I think this is between you and me and I don’t see any reason for Bobby to be here. I’m not comfortable with that.” Sandi was shocked. She said, “Doctor, you know that you’ve got in your files a durable power of attorney for health care that I’ve signed that says that Bobby’s the one to make medical decisions if something should happen to me and I become incapacitated.” And the doctor said, “Well yeah, and if you become incapacitated, then I’ll start dealing with Bobby. But now, this is between you and me.”

Now that wasn’t strictly a legal problem. I mean the solution was obvious. Sandi got a new doctor very quickly! But the point of the story from my perspective is that doctor didn’t just make this up out of nowhere. That doctor was taking his cues from the laws and the law said to this doctor that Bobby was a legal stranger to Sandi, with no legal relationship and no role to play in this decision-making process.

And that really is part of this “social norms/legal rules feedback loop,” because I think our laws do tell a story. They tell a story about who we are as a people, what our values are, how we view ourselves and one another. And it’s a story that’s constantly evolving. The story affects the laws and the laws in turn affect the reality of who we are. And for that reason I think that the struggle that we’ve been waging in Vermont is a lot more than a struggle for a package of benefits, because I think that it is in part about the story told by the laws, and that story doesn’t just impact the committed same-sex couples who seek benefits for their relationship. That story affects every person in the community, whether it’s the single gay and lesbian person struggling with her or her own internalized homophobia; whether it’s our families—whether it’s the laws giving our families the message that it’s okay to shun us; whether it’s the laws giving the message to the kids on the playground that it’s okay to make fun of the kid who’s got two mothers; whether it’s the laws telling our employers that it’s okay not to hire us. The law, prior to the civil union law in Vermont, and the law in every other state in this country, essentially denies that same-sex couples exist in committed relationships, or suggests that if they do, those relationships don’t have
value, they're not worthy of acknowledgement by the law. And that story is so out of sync with the reality that I know that it becomes untenable.

So that's sort of lesson number one: real people and real lives. We can't lose sight of those when we're talking about all of these issues.

II.

The second lesson, from my perspective, is a very practical one, which is that laws don't exist in a vacuum. Courts don't operate in a vacuum. And as fun as litigation is, one can't litigate in a vacuum. We actually had an opportunity in Vermont to do a marriage case several years before the case that we actually did. When I say we, I'm including my law partner Susan Murray. I shouldn't say we—she actually had the opportunity. The clients approached her back in 1995 and asked her to represent them in a marriage case.

Now our assessment of the merits of the case in 1995 weren't any different from our assessment of the merits of the case in 1997 when we ultimately filed suit. But we believed that you couldn't just go into court and file a suit, no matter how right you were, without doing community education, without doing political work, without laying the groundwork, without trying to create a world in which this could happen, and without anticipating that every court decision can invite a political response, whether it's a statutory change or a constitutional change. So rather than taking the case in 1995, we formed the Vermont Freedom to Marry Task Force and spent several years working with volunteers all around the state, training speakers, preparing a video that played on public access TV, and going to the Rotary clubs and other civic associations. We had booths at the fairs. (I think now we're up to thirteen or fourteen county and local fairs a year.) And the goal of this work is to talk about the reality of our lives, to tell the stories about who we are, and to talk about some of the types of stories I just shared with you.

We talk about other things, too. We talk about the evolution of marriage through time. You've heard about that this morning, so I'm not going to wade into those waters because somebody here who knows a lot more than I do will correct me! We talk about the distinction between civil marriage and religious marriage. We try to help people untangle these concepts. People, I think, in this room understand that distinction, but it's true that they're sort of confused in the way people think about marriage sometimes. We try to make sure people
understand that long after every state in this country allows same-sex couples to marry, there will still be churches that decline to recognize or celebrate same-sex marriage, and we’re not suggesting that should be otherwise. Well maybe it should be otherwise, but that’s not our mission, and I’ve always said that if somebody tried to force the Catholic Church to do a gay wedding, I would represent the church *pro bono*. So that’s not what this is about. And there are already lots of churches that have celebrated same-sex unions long before any states in this country recognized those unions for civil purposes.

It was about a year ago that I did my last fair shift. It was a spring fair, it wasn’t a summertime fair, and it was at the ice hockey rink in Lyndonville, Vermont at the Northeast Kingdom Home Garden & Lawn Show. And there we were with the Vermont Freedom to Marry Task Force booth right next to the fudge booth and the chimney sweep booth. And the one next to me, which I just love, was called “Blazing Needles, Custom Embroidered Baseball Caps While You Wait!”

So I guess the point of lesson number two is—I suspect I’m talking to a lot of lawyers, lawyers-to-be, and practitioners—the legal work that we do in courts and even in legislatures is very important. But unless we or somebody that we’re working with closely is standing in the booths at the county fairs, or going to the Congregational churches on Wednesday night for coffee and information sessions, or doing some form of educational outreach, our legal work isn’t going to have the impact that it should.

III.

In terms of the actual marriage case, just a quick summary of how it proceeded. We represented three couples: Stan and Peter, Holly and Lois, and Nina and Stacy. Stan and Peter are very articulate, well spoken, thoughtful guys, whose courage I truly admire. I think for two gay men to stand up and publicly speak of their love and affection for one another exposes them to that particularly violent kind of backlash that I don’t see lesbians triggering as frequently. And Stan and Peter were willing to be up front and talk about that, and are true heroes to me for that reason. They really approached this as a reflection of deep respect for the institution of marriage. They think that marriage is an important institution in our community—one of the many institutions that weave us together as a people. They wanted to share in that.

Holly and Lois had been together, at the time we filed suit, twenty-five years. During their twenty-five years together they’d served as foster
parents for over a dozen kids. They’d been deacons at their church and on town boards. They’d go pick up litter on litter pickup day every year. They’d do the bike-a-thon for lung cancer every year, and were very active and involved in their community. They had also been closeted. When they came to their first Vermont Freedom to Marry Task Force meeting some time in 1995, that act of showing up in a meeting with a dozen people in the basement of the Episcopal Church in Montpelier was for them an act of coming out. And then they finished the job a few months later on the front page of the *New York Times!* Again, the courage that they showed in doing that, I’m in awe!

Nina and Stacy, whom I talked about earlier—they really came to this case as parents. We asked them, “Why are you doing this, why do you want to go through this?” They said, “We’re doing it for Noah. If there’s something about marriage that’s good for kids, if there’s something about marriage that creates a more stable environment in which to raise children, then Noah deserves to have that as much as any other kid. He deserves to grow up knowing that his family is as much a family, respected and protected by the laws, as any other family.” And that was really their inspiration.

That’s actually where this case took a tragic turn. Noah had been born with a congenital heart problem. It had not been problematic significantly until about a week before we filed the marriage case, when his heart failed and he spent about six weeks on life support waiting for a donor heart. He ultimately died. Now at that point we fully expected that Nina and Stacy might say, “We can’t go forward as part of this case; we’re dealing with unimaginable grief, and we need to pull back and focus on that.” And we would have understood that; we were fully prepared for that. That’s not what they did. They took time and they grieved. And then they came back and they said to us, “We got into this case for Noah, and we can’t think of a better testament to his life, a better way to honor his memory, than to continue forward in his name and in the name of all of the other children out there being raised by same-sex parents.” From that point forward, Nina and Stacy were powerful spokespeople for parents, same-sex parents of children, and for children being raised by same-sex parents.

We filed the case in July of 1997. It was very quickly briefed on summary judgment motions. We were dismissed by the trial court by December, filed our appeal, briefed the case in the spring of 1998 and were actually up in the Vermont Supreme Court arguing by November of 1998. So the case moved relatively quickly in litigation terms.
We made all of the arguments you would expect, and I’m not going to run through them all today. They may come up in discussion to the extent people are interested. But we made all the different arguments about why heightened scrutiny would apply: sex discrimination, sexual orientation discrimination, fundamental right. We also spent a lot of time talking about, even in the absence of heightened scrutiny, how do you really apply the constitution? This was actually interesting for me. Maybe you all are still enough in a scholarly world where it’s not a revelation, but by the time we brought this case I was enough out of law school that my recollection of equal protection jurisprudence was: If you get heightened scrutiny you win, and if you don’t get heightened scrutiny you lose! And I think that sometimes we get a little lazy and we think that’s how the Equal Protection Clause works. But when you start reading the cases (and this is true under Vermont’s equal protection jurisprudence and is also true under federal equal protection law), it’s not really quite that simple. Even in cases where courts don’t apply heightened scrutiny and they’re purporting to apply something like rational basis, there’s a difference in how hard they look and how demanding they are of the state in justifying discrimination, depending on the type of discrimination at issue. We spent some time talking to the court about that and suggesting that even under a rational basis kind of approach, you still have to have a reason that makes sense.

One thing was kind of new about the Vermont case—it wasn’t completely new but it was a step forward. We were really building on the work of the folks in Hawaii who’d worked very hard in the *Baehr v. Lewin* case, which led to the first state supreme court in the country acknowledging that there’s a real constitutional problem here and sending the case back for trial as to whether there’s a compelling interest to justify the discrimination. What we did in the Vermont case is we said, “Okay, we’ve got all these arguments about heightened scrutiny, but putting aside the level of scrutiny, put your reasons out there. We don’t think you have any reasons that are even going to pass the laugh test. We don’t think you have any reasons that are going to satisfy whatever level of review the court decides to apply.” Much of the Vermont case was about the State trying to articulate its reasons and trying to come up with something that made sense.

The trial court dismissed our case, but only one of the State’s rationales got more than just the back of the hand. The trial court said that most of the reasons that the State offers just don’t make any sense at all; they don’t even pass the laugh test. The one that got the State through, that got them the dismissal by the trial court, was a rationale
that had to do with procreation. The idea was that there is a connection between the fact that only a man and a woman can biologically beget a child together and the State's right to deny Holly and Lois, Stan and Peter, and Nina and Stacy marriage licenses. (Just as an aside for those of you who have seen the oral argument, that assumption was something that Justice Morse actually questioned at one point during the State's argument. He pointed out some of the advances in cloning research and questioned whether the State's argument would change when procreation no longer required a man and a woman. It was kind of a funny moment because I don't think the State—you know how you prepare for every question you could conceivably get on oral argument—I don't think the State had anticipated that question!)

We made those arguments. We get to the Supreme Court, we argue it in November of 1998, and the decision comes down in December of 1999. (Just another aside, a month before the decision came down (and this is a slightly happier twist to the Nina and Stacy story I told you earlier), their second son was born, and he's a happy, healthy one-and-a-half-year-old now. So that’s exciting! And he was a great addition to the press conference. Anyway, the decision came down in December of 1999, and the court essentially agreed with us. It didn’t apply any kind of heightened scrutiny, per se. It agreed that you’ve got to have a reason that makes sense, and went through the reasons that the State had articulated. It gave most of them the back of the hand. The reason that it spent the most time discussing was this procreation argument. And it made two observations. I draw an illustration from my own life. When I was in sixth grade, my grandmother, who had been widowed for a number of years—she was like seventy—she met this dashing widower whom all of the widows were after, and she got him! And they got married. And, you know, when we were in the church there celebrating their wedding, and when I was out drawing on her windows with soap and “hot springs tonight” and all that stuff, nobody thought for a second that Babbo and Dudley were going to biologically beget a child. I mean it was the furthest thing from anybody’s mind. But nobody questioned the value of what they were doing, and nobody could begin to suggest that the State could deny them the legal rights or responsibilities and legal status of being married because they couldn’t and weren’t going to biologically beget children. And the Vermont Supreme Court essentially made that point. There are lots of couples that we know who either can’t biologically beget children, or choose not to. Some bring children into their families through adoption just like many same-sex couples; some use the same
reproductive technologies that many gay couples use. So the procreation argument sort of breaks down on that side.

The flip side is we have a lot of same-sex couples with children, including Nina and Stacy, obviously. Holly and Lois actually adopted one of the foster kids that they raised, so they had a child as well. What the Court essentially said is, it can't really be that we're so obsessed with how the child is conceived. If there is a legitimate purpose of marriage involving kids, it has to do with creating a stable environment in which to raise those children. But that purpose doesn't support denying Nina and Stacy, and Holly and Lois, and Stan and Peter marriage licenses. If anything, that purpose would point in favor of giving these folks marriage licenses. So the procreation argument broke down.

The Court concluded (this is the one quotable paragraph from the Court's decision, and it is a pretty quotable paragraph):

> The past provides many instances where the law refused to see a human being when it should have. The future may provide instances where the law will be asked to see a human when it should not. The challenge for future generations will be to define what is most essentially human. The extension of the common benefits clause to acknowledge, [that's the Vermont Constitutional Provision at issue] plaintiffs as Vermonters who seek nothing more nor less than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity.

In that respect, the *Baker* decision was absolutely groundbreaking. I mean having read what courts have been saying about gay and lesbian people for many years, the simple recognition of our common humanity is fairly leading edge. And as obvious as it may be, it was groundbreaking. The Court said, in light of this recognition of our common humanity, there's no basis for making the distinctions that the State is making. The State is required to provide all the same benefits of marriage to same-sex couples.

So up to that point the *Baker* decision was absolutely breakthrough, groundbreaking, etc. What the Court did next was as disappointing as what it did first was exciting, because rather than ordering the State to issue marriage licenses to our clients, the Court did two things. First, it kind of redefined the case as being a case about *benefits*, only about benefits. Then it drew a distinction between the benefits of marriage and the *legal status* of being married that hadn't
been drawn in any of the nineteen briefs that had been filed. It had been raised in a fleeting question at the end of the oral argument that I relive every night in my dreams, wishing I could go back and answer it again. That was the only hint that that's a distinction that the Court was considering. So it redefined the case in terms of benefits and it said, it's clear that the State of Vermont has to extend all of the same benefits of marriage to same-sex couples as it makes available to heterosexual couples, but we're going to withhold judgment on the question of whether the State of Vermont has to make the legal status of being married available to same-sex couples, as if somehow the legal status of being married isn't one of the benefits of marriage!

Then the Court said, rather than issue any relief at all for these folks, we're going to sit back for some undefined period of time and we're going to give the Vermont legislature an opportunity to respond, if it so chooses, to this decision. The legislature could pass a law allowing same sex couples to marry. Or it could pass a law—it could consider passing a law—like the European Registered Partnership Laws or through some other mechanism that would create a parallel structure that delivered those same benefits but under a different heading. Then the Court said, we're not actually going to decide today whether that second option that we just spent a page and a half suggesting you might consider is actually constitutional, we're going to reserve that question for some future day, and in the meantime we're going to sit back and see what the legislature does."

So, I don't want to sound too harsh because obviously Baker v. State was groundbreaking, but it was this strange fusion of Brown v. Board of Education and Plessy v. Ferguson in the same decision, because it made very lofty statements about principles of inclusion as they applied to same-sex couples, but then it fell short of actually seeing those statements through to their logical conclusion.

I was disappointed because we had just spent four years going to the legislators one by one talking about these issues and saying we're not going to ask you to do anything affirmative on this issue. We just want you to stay out of the way and do nothing so that we can do this in court. And then the Court sent us to the legislature. So I had to go back with my tail between my legs and say that everything I had said for the last four years was not really true!
IV.

We started off in the legislature in January of 2000. We had about a week to adjust to the notion that we had neither won nor lost and that we were finding ourselves in the legislature. We had to craft a legislative policy. We had to hire some lobbyists. We had to figure out how the legislature works, and we had to figure out what we were doing. The legislature, in the meantime, also had a week between when the Court handed down its decision and the beginning of the session to throw its entire agenda for the session out the window and figure out how it was going to deal with this issue. So it was really a shock for everybody involved in the political process in Vermont because of the timing and the weight of what was going on.

The decision was made that the work would start on this in the House Judiciary Committee, which consisted of eleven people. These are citizen legislators. These are not professional politicians. These are folks who come to Montpelier four or five months a year, and then the rest of the year they’re home within their communities doing their thing. This committee had five Republicans, five Democrats, and one Progressive. They had two retired state troopers, a retired teacher, a social worker, a saleswoman, and a housewife. It was a diverse cross section of the community. There were actually only three lawyers on the committee.

For the next six weeks this committee took testimony every day from scholars, from people like the distinguished panelists we’re hearing today, from gay and lesbian people, from clergy. There was actually a significant clergy involvement, which in itself could be a whole symposium as to why that is and its significance. There was the day when the Catholic bishop came down and testified against doing anything. And then the next day the Episcopal bishop and the Methodist bishop came and testified in favor of including same-sex couples in marriage. It was the battle of the bishops! Then there were the Rabbis, the pro and the con!

The committee also held public hearings drawing unprecedented numbers. Remember, Vermont has a population of about six hundred thousand. There were two public hearings in the State House. One of them was in a snow storm, and they still filled the State House. They literally had to stop letting people come in because it got so crowded. There were over two thousand people crowded into the Vermont State House putting their name in a hat in the hope that they get drawn and have their chance to speak for two minutes.
And I've segued into my next section because I divide this into the different lessons and I have moved beyond the court lesson, which I always called expect the unexpected! Usually I tell the story about how the court decision came down on a Monday. They always hand down their decisions on Fridays, and I was wearing the wrong suit! But anyway!

The title in my mind for this legislative process (and there are a lot of potential titles) really is “There are Heroes Among Us.” I was so amazed throughout this process by the number of heroes around me in our community in all sorts of roles. This was not just some debate buried in the newspaper. Every single day it was on the front page of all of the Vermont papers for six weeks/eight weeks, even actually four months. You couldn’t find a person in Vermont who hadn’t been sucked into conversations around the water cooler, who wasn’t involved, who didn’t have an opinion. And it was an increasingly volatile and divisive environment. And in the midst of that, there were so many gay and lesbian people who had been leading perfectly contented lives in their small towns in Vermont—closeted, maybe not to family and close friends, but closeted at work and closeted in their community. Many of these folks didn’t choose this battle, wouldn’t have necessarily wanted us to engage it, and though they were not necessarily happy with their legal lot in life, were not seeking to stir up trouble. The number of those people who heard the call and stepped up and spoke to their co-workers, their neighbors, the members of their community, and their legislators at public hearings about the reality of their lives, at great personal risk, was absolutely awe-inspiring to me. And I think that’s probably what made the biggest difference in Vermont—the cumulative courage of all those individuals sticking their necks out that way.

There were also some really wonderful friends, allies, and family members who also stuck their necks out. One of them, who came to our attention through a letter she’d written to her senator which he read on the floor of the senate during the debate, actually became the anchor person in a television, newspaper, and radio ad campaign that we put together. We found her to be so compelling. I’m going to read you the paragraph from the letter that she wrote to Senator Leddy that brought her to our attention.

Dear Senator Leddy: I’m a seventy-eight-year-old Catholic mother of eight. This is not about statistics or biblical interpretation. It is about a farm family and a son who announced twenty-six years ago that he is gay. What could we
do? Cast him out or accept him instantly? Patronize him or love him? We brought up our eight children with the same value system. Did we do something wrong? Our son would not choose emotional and cultural persecution. He was just plain born gay. I can only say that God blessed us with eight children, and God made no mistake when He gave us our gay son.

I’ve talked about all the testimony and the pressure of the legislative process, but what I haven’t actually talked about is its substance. There were three options before the House Judiciary Committee when they started this process. One was to pass a law allowing same-sex couples to marry, or just including same-sex couples within the marriage laws. The second option was to do nothing, ignore the Court’s decision, and maybe think about impeaching some of the justices. Those were the two main options. The third one was to try to find a middle way.

Now the way the advocacy broke down, as you can imagine, is that there was a powerful voice for option number one coming from the Freedom to Marry community. There was a powerful voice for option number two coming from opposition. There was no voice whatsoever for option number three. You could not find anybody to come to the public hearing and testify for option number three. You couldn’t find anybody to say that’s the way to go, because the people who cared most passionately about this issue, those of us who seek equality for same-sex couples, wanted true, full, and complete equality. For the folks who oppose equality for same-sex couples, the concept of parity or “almost equality” or “equality-lite” is in some ways just as unacceptable. So the options really were the extremes.

Political reality being what it is, the House Judiciary Committee, after debating for six weeks, seemed to be resigned and morose on the day that they finally took the vote to figure out which direction to go. I’m happy to say that not a single one of the eleven members, after listening to all the testimony, concluded that do-nothing-and-impeach-the-Vermont-Supreme-Court-Justices was the right road to follow! Of the eleven, eight of them opted to try to find some middle road. Three opted to promote marriage inclusion for same-sex couples.

So they started to craft a bill that was going to be a parallel structure. That put us in a difficult position. We just spent six weeks saying anything short of full equality we can’t support. We’ve thankfully gotten past the days in which concepts of “separate-but-equal” were acceptable in our legal system. While this is a different context (and I’m not trying to say it’s the same thing), there certainly is a strong analogy
between the type of separate structure we were contemplating and what we saw in the “separate-but-equal” law of the 1940s and 1950s.

So there we were. It was clear that marriage wasn’t going to happen and we had to decide what to do. We didn’t decide anything until we saw the product, because we wanted to see that it truly was as equal as it could possibly be without being truly equal. In other words, we wanted to ensure that the bill that was offered in lieu of marriage did provide all the same benefits and was equal in other respects. We ultimately decided, after much gnashing of teeth, and many tears, and people quitting the organization and then joining it the next day and then quitting, and fighting, and all of the things that you can imagine. Everybody ultimately came back together and we formed a consensus. Those who didn’t necessarily agree came together in consensus anyway, and we opted to support the civil union bill.

I think there were four reasons that that decision was made. First, the benefits under the civil union bill are comprehensive. It wasn’t a laundry list of a dozen benefits that were now going to be available to same-sex couples. This bill incorporated by reference all law in Vermont, whether it was by statute, regulation, administrative rule, what have you, that relates to married couples and said such law applies now with equal force to couples joined in civil union. That was important to us.

A second factor is that the process of entering a civil union and the process of dissolving a civil union are the same as a process for marrying and divorcing. In other words, you’ve got to go to your town clerk’s office, you’ve got to get the license, you’ve got to take the license to a justice of the peace or a minister or judge, you’ve got to have it certified, you’ve got to come back and file it. And that’s important. It’s important because it connects with the story told by the law. It’s important as well because we’re talking about all the same benefits of the law: the way we get in and the way we get out. We may not like it, but the way you get in and the way you get out is part of the structure of marriage. It’s part of the benefits. It’s part of the responsibilities. And to the extent people have criticisms about changes they’d like to see, those criticisms ought to apply with equal force to same-sex and heterosexual couples.

The third reason is that, even though the story told by the civil union law is not a story of full equality, it’s a story of a tremendous step forward. I’m going to read to you language from the preamble to the law. Knowing what legislators have written about same-sex couples through the years, I thought this was pretty impressive language. The law says:
Despite longstanding social and economic discrimination, many gay and lesbian Vermonters have formed lasting committed, caring, and faithful relationships with persons of their same sex. These couples live together, participate in their communities together, and some raise children and care for family members together, just as do couples who are married under Vermont law. The state has a strong interest in promoting stable and lasting families, including families based upon a same-sex couple.

The last reason that we opted to support the civil union bill was that we believed, and continue to believe, that it would be a positive step in the right direction rather than a step backwards. Whether the civil union law has been a step backward or a step forward was a subject of debate and still remains a subject of debate, but we believed, and I still believe, that in the end it's a step forward. And the reason it's a step forward is because it would give Vermonters and the world an opportunity to see that the sky didn't fall; that whatever parade of horribles they were imagining didn't come to pass. That in turn would make it easier in Vermont and everywhere else for folks to come to terms with the notion of full equality for same-sex couples and full inclusion in our community, both as a social matter and as a legal matter.

So we supported the bill.

I could tell lots of legislative war stories, but long story short, it passed. It passed by the thinnest of margins. It passed in the Senate by a lot, but it passed the House by the thinnest of margins. On the day of the last vote of the House, the House was packed because people from all over the state were coming to see this historic moment when they were hopeful that the House was going to pass this law. There was still some doubt. The House spent the first hour on this mobile home septic regulation bill. None of us could figure out what was going on. The reporter of the bill was literally standing up reading the bill line by line and word for word, which was a little bit unusual. The crowd was getting restless. Then I saw one of our strong allies fly through the back door, rush to her seat, and take off her coat. The second that happened, the reporter of the bill put the paper down and said, "Mr. Speaker, I think we're prepared to submit this for a vote." I guess our ally's car had broken down that morning on the highway, and we needed every vote we could get!

There were some real heroes in the legislature. The vast majority of the legislators had the good fortune of representing districts in which
the constituents' own collective views about this issue pretty much matched their own, but there were probably about a dozen or more who didn’t have that good fortune and whose own conscience on the issue didn’t match the collective consciences of their constituents, and they knew it. One of them was John Edwards, who was a Republican former state trooper on the House Judiciary Committee. He would have been in the “do nothing” camp if we’d had the vote on day one. He was from a Catholic conservative district on the Canadian border—a farming community. However, from his law enforcement background, he was accustomed to trying to keep an open mind and hear all sides before he made a decision. He sat there every day for six weeks in the pressure cooker, with the cameras in his face, getting thousands of emails a day. Normally, if a Vermont legislator gets five letters on a given issue, it’s a groundswell. These people were getting hundreds and thousands of letters. They were getting calls at their home. They were getting emails. John Edwards was one of them. He listened to all of that and in the end not only did he vote for civil unions, but he stood up in front of a packed gym in St. Alban’s with six hundred plus hostile people booing him and heckling him, and he tried to explain to them why this was the right thing to do. Not surprisingly, he did lose his reelection battle by a lot. And he’ll tell you that losing the reelection battle wasn’t nearly as painful as the friends and neighbors who had known him for years who wouldn’t speak to him anymore because of his vote on that. He still says it’s the best thing he ever had an opportunity to be part of as a legislator, and it’s his proudest moment.

Marion Milne, a sixty-eight-year-old grandmother, kept pictures of her grandkids on her desk in front of her, and she looked at them all the time. She would look at them to remind herself whom she should be keeping in mind when she cast her votes. She looked down at those pictures, and stood up in the middle of the House debate and said, “I know that my constituents probably are going to throw me out of office for this, but I can’t look at those pictures and stand here and vote to exclude a group from the protection of the laws in Vermont. It’s not the right thing to do, and I’m going to have to vote with my conscience.” And she voted her conscience. She was soundly defeated in the Republican primary. She actually got the Democratic nomination by write-in votes! She declined it, ran as an independent, and then lost soundly.

I know of one legislator who, I’m told, is a devout Catholic mother of seven, has been very active in her parish for twenty plus years, and was reportedly asked by her priest to stop coming to church because her
presence was too divisive. I know another Catholic legislator who—and I'm not trying to pick on the Catholics, this spanned religious traditions, these are just the stories I happened to hear—when he went to his parish and sat down in a pew, with his family, if there were other people sitting in the pew they would get up and move and leave his family isolated in a pew by themselves. There was tremendous personal sacrifice by a lot of legislators with a great deal of courage.

I titled this section "There Are Heroes," because of the gay and lesbian people who put themselves on the line, the Helena Blairs of the world who talked about their family honestly and openly, and the legislators who made decisions which they knew would cost them the ultimate political price but felt that their duty to all of their constituents, to history and to justice outweighed their desire to get re-elected. I can tell you John Edwards, the retired cop from St. Alban's, would not have chosen to make gay couples the issue that he went down on. But when the issue was there, and he was confronted with it, he rose to the occasion and was truly a hero.

V.

The last lesson from Vermont is for me probably the most important, which is that the sky didn't fall. The sky hasn't fallen. It's kind of gray and snowy, but it's gray and snowy here and you guys don't have civil unions, so I don't think that's what's going on!

I went to a lot of weddings in the summer of 2000, and I continue to go to a lot. There are a lot of couples who are very excited to have the opportunity to take advantage of not only the legal protections that civil union offers, but the legal and public commitment that a civil union represents. And the form that those commitments take in terms of the ceremony that surrounds them are as varied as my friends Mary and Cheryl, who had a very private ceremony with just them and their minister followed by a gathering with close friends at their home, to Joseph and Michael who had a small ceremony in the town hall in their town performed by a justice of the peace who's close to them, to Stan and Peter who had a very colorful, high church, lots of incense, two-and-a-half-hour long mass at the Episcopal Church in Burlington, to some lovely outdoor garden weddings where people spoke very honestly and openly from their heart about their love for one another.

I think one thing that all of these ceremonies have shared is a little moment of excitement when you get to the moment where the presiding official says, "And now by the authority vested in me by the
State of Vermont, I hereby join you in civil union." The recognition that we, as a body politic through the institution of the state that we've created, are recognizing you as a couple and embracing you as part of our community, has far more meaning than I could have anticipated when we started this battle.

So the sky hasn't fallen. Life goes on. I'm hopeful that that lesson, if nothing else, is the lesson that will be remembered in terms of Vermont. Nobody's any worse off. We had a tough time. I don't want to deny that the fall of 2000 and the aftermath of the civil union law in terms of community division and bad feelings and tough times in Vermont was really hard. I feel like we're coming through it as a state. We're stronger. Nobody's worse off, and there are some families that now have additional protections and additional security for themselves and their families, and an additional sense of being a part of the community. So that's the lesson in Vermont. And I actually do have time for questions.

QUESTION: You mentioned that there is a continuing debate concerning whether the civil union legislation is a step forward or step backward in the fight for full equality for same-sex couples. What is the argument for saying that it is a step backward?

BETH ROBINSON: Well, here's the argument for step backward. If the concept of civil union becomes a new ceiling, a new step in the evolution towards full equality, that everybody in every state in the country has to pass through before marriage for same-sex couples is a reality in this country, then what we've done is we've set back the movement by a generation. That's one vision. All of a sudden there's this new creature called civil union that is kind of marriage-like, and you can't go to a legislature and ask for marriage because you haven't gone through marriage-like. And you can ask a court for marriage, but now a court's going to look and see what Vermont has and it's going to think that seems to be good enough and do what the Vermont court did. So my hope is that the Vermont court's decision in Baker is a building block for the next court that considers this in the same way that we built on the work in Hawaii, rather than Baker becoming a ceiling against which other people are pushing.

QUESTION: Ultimately what are you seeking to achieve?

BETH ROBINSON: I'm seeking full equality for same-sex couples, which means inclusion of same-sex couples in the marriage laws. There's no question. There's been some great discussion this morning about the possibility of other non-marital structures to present different options, and I'm not averse to those at all, but to the extent
that marriage is one of the structures, I'm very strongly committed to full inclusion of same-sex couples in that.

**QUESTION:** Do you have any idea how many civil unions have been celebrated? What have courts in other states said about the effect of Vermont civil unions?

**BETH ROBINSON:** There have been about four thousand celebrated. There haven't been any direct challenges in other jurisdictions. There's been one court case in Georgia. There was a divorce order, a custody order, in a case in Georgia that said that mom couldn't have kids with her for overnights (and I'm probably botching this a little bit)—if she had an adult staying with her to whom she wasn't married or family. She had a same-sex partner, and they had come to Vermont and joined in a civil union. One question was, was their civil union in Vermont tantamount to making them married? And the court answered no to that.

A question that the court didn't really address that was briefed and I didn't see it answered to my satisfaction, is did the civil union in Vermont create a family relationship. I didn't see the court address that. But that issue was there in that case.

I talk to people from around the country who have joined in civil union in Vermont, and I hear a variety of experiences. Private parties, non-governmental parties, seem to be more readily recognizing civil unions as having some legal meaning. So in other words, employers around the country are extending insurance to partners of couples joined in civil union; health clubs are giving family membership rates to couples joined in civil union when they bring in their certificate; or museums and zoos are giving family membership rates. I'm only aware of one trivial case where a state agency waived a fee for changing your name on your driver's license for a couple who had changed their name due to civil union because they waive it for people who are changing their name due to marriage. That's the only governmental acknowledgement that I'm aware of.

**QUESTION:** There seemed to be a backlash in the aftermath of the Baker decision. Do you think there was a latent anti-gay sentiment, or this was just a reaction to the case itself?

**BETH ROBINSON:** Yeah, and I don't know. I'm not a sociologist. I don't pretend to be able to figure that out. I was a little bit surprised. What was most surprising to me is that the most violent polarization and bitterness in Vermont didn't occur during the court case. There was very little community discussion during the court case. Things began to turn up during the legislative process, but there was still a tremendous sense of civility and unity even among differences.
The ugliness didn’t come into play until about August (the law was passed in April). It was four months after the law was passed when it started getting really ugly. That happened to be campaign season and an election year. I do think that a lot of the opposition was very real, visceral, and I’m not going to suggest that it was manufactured by other folks, but I think that because it was occurring during the campaign season, it spiraled in a way that I don’t think it would have in a different political context. So that’s part of it.

I think there is something about marriage, and I don’t think it’s about the word marriage because this isn’t the word marriage. I think there was a prediction that if we don’t give them marriage but we give them civil union, we try to make it as close to marriage as possible but not call it marriage, then we’re not going to have nearly as bad a political backlash, but they’re going to get their benefits. That was the political compromise. I wasn’t happy about it, but I wouldn’t have necessarily questioned the judgment that went into that calculation. As it turned out, the calculation was wrong. This isn’t just borne out by my anecdotal experience: it’s borne out by the polling that we were doing all the way along. If you compare the polling done asking people if they think same-sex couples ought to be allowed to marry, and the polling done asking people whether they like the civil union law, the polling was the same. Perhaps one or two percent of the voters were swung by the compromise, but what we ended up doing was compromising the concept of full equality in exchange for a community harmony that didn’t materialize. I think it was the concept of comparing heterosexual couples and same-sex couples that directly and clearly pushed some buttons. And I understand that. One of the things I think we need to be cognizant of as advocates—and I don’t back away one bit from my belief that same-sex couples have the right and ought to be allowed to be married in every state in this country, and I don’t think we ought to be shy about moving forward with that advocacy—but I do think we need to be conscious of the fact that that makes some people feel very threatened and is very hard for people to come to grips with. I think it puts the responsibility on us, even though maybe we shouldn’t have to bear this responsibility, of telling our stories and allaying their fears and talking about the reality of our lives and addressing the myths that cause them to have those feelings.

QUESTION: Did you use Johnson to make a sex discrimination argument?

BETH ROBINSON: Absolutely. Actually Johnson is speaking of sex discrimination! We made the sex discrimination argument. I
personally think that that’s the argument that’s the truest in terms of just truth. I’ll tell you an interesting anecdotal story. We did two moot court sessions preparing for this oral argument. The first one I did down in Boston with a group of folks who were almost all gay except for ones who were straight feminists. Everyone present at the moot court session felt as though the sex discrimination argument was the strongest, and would win the case for us. I did a second moot court session with a bunch of heterosexual male lawyers in Vermont, some of whom actually were not sympathetic on the merits of the issue. The lesson that came out of that moot court session is that the sex discrimination argument made no sense to them. They felt it was funny wordplay like “girl, girl, boy, boy,” but not sex discrimination. I think the sex discrimination argument is real, but the second moot court session taught me that we would have to climb a lot of learning curves in order to persuade a court, which included three heterosexual men, that the sex discrimination argument was true. I think that’s a place where how I would think as a scholar and how I think as a tactician in a courtroom part ways. You have to have a feminist consciousness to understand why this is sex discrimination, and I think that’s a lot of water to ask a litigator to carry in a case like this. You’ve got to give the court a feminist consciousness and you’ve got to then explain how this argument works.

PANEL III
THE SOCIAL IMPLICATIONS OF EXPANDING MARRIAGE AND FAMILY CONVENTIONS

RICHARD O. LEMPERT, MODERATOR: I’m Rick Lempert. I’ve been asked to take about five minutes to introduce this panel. As I thought about this panel I was reminded of a song of my youth, “Love and Marriage,” which was built around the refrain “Love and marriage go together like a horse and carriage.” This is a close link, but even more closely linked than love and marriage has been the ideal of marriage and family. We have long since seen in our rising divorce rate a break in the link between love and marriage. Today we are seeing social and structural changes that are leading to a break of the link between marriage and family.

Many factors have played a role in the break of this link. In my lifetime perhaps the most important has been the increased access of women to work. This has fundamentally changed power relations within families while increasing the ability of middle and upper class
women to live singly while raising children and to do other things that families do. Second, as we have just heard, there is a new openness in many segments of society to so-called non-traditional couples, particularly gay and lesbian couples. Third, and perhaps causally prior to the access of women to work, is the sexual control we, and women especially, have over reproduction. Finally, new reproductive technologies are further destroying the link between formal recognized relationships and procreation. Our panelists are all going to talk about the social ramifications of these and other changes and how they affect these issues.

The last point I want to make is stimulated by the marvelous talk we just heard. This concerns the intersection between the law and people’s minds. Stacy recounted how, when she accompanied her same-sex partner to a hospital, she was stopped at the emergency room door, and would not have been allowed in if she had not had her power of attorney for health care with her. I was struck by the contrast between her experience and my experience in Washington, D.C. about six months ago when I had to go to the emergency room. My fiancée was with me, but she had no power of attorney allowing her to play a role in my health care, nor any other legal relationship to me at that time. It didn’t matter. She wasn’t questioned at all! The point is that it wasn’t just the law that led to Stacy’s presence being questioned. The hospital authorities weren’t just enforcing legal rights. Rather they had a mindset created by social structure and history, which, when a same-sex person wanted to be with her partner said, “You are not welcome here.” When in my case it was an opposite sex partner who wanted to be with the patient it didn’t matter that she had no legal relationship to me. The health care provider’s view was, “Come on in. Tell us what you think! Be there. He needs you!” This is all I have to say by way of introduction. Now I’ll let the speakers talk.

WILLIAM J. DOHERTY: Good afternoon! That was almost too good an introduction in terms of a powerful story. I’m from the University of Minnesota, so I actually came to warmer weather here and have appreciated the warmth of this climate! I also want to say that for me this is an intergenerational experience in that I am a social scientist and family therapist, but my mother always wanted me to be a lawyer, and I missed that opportunity. But my son Eric Doherty is a third year law student here at the University of Michigan. So this conference was a chance to come and spend time with him at his law school. My mother, when I told her I was going to speak at the Law School, was most impressed that after all these years a law school invited me to speak!
I was asked to address the implications of changing marriage and family forms on fathering and fatherhood. I’d like to start with a story about a young African-American father. This young man was excited to be a father, and even though he and his girlfriend broke up, he stayed connected with his baby. He had his six-month-old son for a weekend, and when he got the baby home, he noted that there were bites on the baby that looked like animal bites, like rodent bites. He took his baby to the emergency room, whereupon the nurse swept the baby away from him. The medical professionals determined that these were animal bites, and that it was a sign of child neglect. They put the baby in a foster home and would not even communicate with the father about what had happened. They would not even tell him that these were animal bites. They would not tell him where his baby was. He had no legal status as the father of the baby. During the interview for our study, he told us with an incredulous voice, “I was the one who brought the baby to the hospital.” This story underlines the core point of my talk: that fatherhood in American society is inextricably linked to marriage, because fatherhood is inextricably linked to the mother/father relationship. Because he was not married to the mother, or even in a relationship with her, this young father faced large hurdles in staying involved with his child.

Specifically, outside of marriage, you have the issue of declaring and proving of paternity. Outside of marriage, the stability of the father’s relationship/contact with the child depends in practice, if not in law, on the stability of the relationship between that man and the mother. New research on fragile families—low-income, unmarried families—indicates that the majority of these couples want to be a couple and want to raise this child together. In fact more than fifty percent say they would like to marry some day. If that does not occur (and often it does not occur partly because the father sees himself or is seen by the mother as not providing the kind of income stability that might be needed for marriage), most of those relationships do not continue as coupled, committed relationships. When the breakup occurs, the father-child relationship often suffers. It may be that the father still wants to be involved but the mother may not want him to be, especially if he cannot leverage child support payments. The mother may have a new boyfriend, or the mother’s mother may not want the father around. The law then gets involved by asking the father to support the child financially. Often these fathers have very little contact with the child, and many, particularly the low-income fathers, have very little way to provide that economic support. Non-marital childbearing puts fathering and father-child relations in a precarious situation.
We also have a lot of research among married-couple families indicating that after a divorce mothers are the residential/custodial parent in most of the cases, and that for fathers, even when they are involved substantially early on, there is unfortunately a substantial drop-off in their involvement with the child that occurs over time. Divorce, then, is another major hurdle to fathering.

The third strand of evidence is that, even within a marriage, the father-child relationship suffers more when the relationship goes sour. There is more of a decline in the quality of the father-child connection when there is a decline in the marriage relationship than there is a corresponding decline for mothers. Studies show that when fathers and mothers are not getting along, fathers tend to withdraw from the children and be more irritable with their children. There is less of a decline in the mother-child relationship when the marriage is in trouble. We also know that when men are facing unemployment, there is more of a decline in their relationship with their children than there is when the mother is unemployed. There are many of these kinds of contextual factors—relational factors, economic factors—influencing fathering in a unique way.

Mothers are important to fathering even when marriages are satisfactory. Many studies have shown that the mother’s attitudes and expectations of the father are more strongly correlated with his fathering behavior than his own attitudes and expectations are. In other words, if you design a study in which you ask fathers what they expect of themselves and what sort of fathers they want to be, and you survey the mothers, and then you look at the actual behavior of fathers, the mother’s expectations correlate with the father’s behavior far more than his own expectations. In some of the studies, the father’s own attitudes and expectations correlated about zero with his actual behavior.

There are two ways to conceptualize the point I am making thus far. One is that fathering is more ecologically sensitive than mothering is. That is, there are more third-party influences on fathering—both the stability and quality of fathering—than there are third-party influences on mothering. Third party and other external factors have more impact on fathering than on mothering. The second way to frame this issue is that culturally mothering is seen as a dyadic relationship and fathering is a triadic relationship. That is, fathers tend to parent in a triad or a triangle with the mother of that child. Mothers seem themselves more in a one-to-one relationship that’s going to endure no matter what happens to her relationship with the father. You’re a mother until death do you part. You’re expected culturally to be involved in an everyday,
even in an obsessed way, with this child regardless of what happens to the father. But men are not expected to have that kind of enduring substantial relationship with the child if the relationship with the mother dissolves. And how the mother views the father's success in the world—particularly economic success—is a key to how she will relate to him as a partner and co-parent.

So we have to think of fathering, then, in that triadic way, which means that the changes we have been talking about in marriage have had, in many ways, substantially negative effects on fathering. Now I'm going to say at the end that there are also some positive effects.

I want to say something briefly about cohabitation, in order to indicate that it is not a viable substitute for marriage, at least for fathers. (By the way, all the research I am referring to is on heterosexual fathers; we know little about gay fathers and their coparenting partnerships). Research on cohabiting relationships in which a child is born has shown that these relationships are less stable than marriage relationships. We also know that if those relationships break up, fathers are even less apt to be involved with their children in the future. It seems that something about having been married and having a child in marriage creates the expectation among all parties that the father will be involved later. Cohabitation is not an adequate substitute for marriage, at least sociologically speaking, when it comes to father-child relationships.

Let me just say a few words about how I see law fitting into this picture. Because I am not a lawyer, to my mother's great disappointment, I cannot speak with authority here. But my observation is that the law tends to see unmarried fathers in terms of their income contributions, and many unmarried fathers have very little income to contribute. The law does not support them in maintaining contact with their children. It's clear from the studies that there is a link between involvement with a child and willingness to pay child support. By the way, the research on non-custodial mothers' child support payments indicates that they are no better than fathers in terms of paying child support. I suggest that the nonresidential parenting makes financial support (even though it is the right thing ethically and legally) very difficult to manage over the long haul outside of a committed relationship with the other parent. All law cares about, from the point of view of many never-married and divorced fathers, is your dollars, not your nurturing involvement with your child, an involvement that can be readily blocked by the mother with few consequences.

The way divorce laws have been interpreted causes mothers to be seen as the parent who should get custody unless there's some reason otherwise. We know that women initiate about seventy percent of
divorces. I'm not arguing that there are not good reasons why they do, but I'm suggesting that divorce in the United States for a new married father is not only a threat to his marriage but also his fathering.

Welfare laws, as you know, have inhibited the formation of marriages and the stability of marriages. The welfare laws are trying to change that now, but there is still powerful disincentive for women to marry the father of their children, adding his income in, and then losing benefits. This problem in the law needs to be addressed.

I also want to mention an evolving family form that has not come up here. The biggest evolving family form is stepfamilies. Over forty percent of all new marriages in the United States now are a remarriage for one or both parties. I heard this wonderful term today, "legal strangers." Stepparents are legal strangers to their stepchildren, and most residential stepparents are fathers or stepfathers. We are not encouraging stepparents to invest in these children that they are helping to raise. They have no more legal right than a stranger down the street. In England, I'm told that there are stepfamily laws that allow a child to have more than two legal parents. In England, if the biological or adoptive father agrees to it, the new father, in the case of the mother and the stepfather, can also legally adopt the child so that the child will have three parents. I think that's something we have to consider as we look at the future of the family in the United States.

My final overview point is that when it comes to child-father relationships, we live in the best and the worst of times. If you are a child whose parents are in a good, quality marriage, your father and your mother living with each other and care for you and each other, you have a higher likelihood than any child in history of having a high-quality relationship, nurturing, committed relationship with your father. If you are in any other arrangement than that kind of high-quality marriage, you have a very good chance of having a minimal relationship with your father for most of your life. My main point, then, is that as we think about changes in family forms, we should consider carefully the impact on fathers and their children.

Thank you.

MARTHA E. ERTMAN: Before I jump into my topic, Marriage Markets, I'd like to thank the Journal of Gender & Law and the University of Michigan Law School, as well as the various departments that have sponsored what is one of the most interdisciplinary conferences that I've ever attended. The last panel and Beth Robinson's talk just now, along with this morning's panels, show how conversations
across disciplines can enrich our analysis of whether marriage is cutting edge or obsolete.

My own particular intervention into this topic, on this panel titled "Expanding Marriage and Family Conventions," has to do with talking about how we might expand what it means to be married. Beth Robinson’s incredibly moving talk (given her rhetorical skills it is no surprise that she and the lawyers at GLAD—Gay and Lesbian Advocates and Defenders) won the Vermont marriage case—addressed the point about who gets to marry. Mine goes to the level of asking what it means to be married. What does it mean to be a husband? What does it mean to be a wife? This question goes to the heart of the purpose of this Journal as I understand it, to investigate the way that law constructs gender and of course the way gender constructs law. Any time we talk about gender, of course, we’re very deeply in the territory of sexual orientation, class-related issues, and race as well.

My talk today has to do with ways that business models and commercial models, and contractual understandings generally, can enrich our understanding of domestic relations law. In particular, what I do in my work is challenge what I call the naturalized understanding of family. Generally, in both law and culture, we think of intimate affiliation as either “natural” or “unnatural.” This morning, talking about estates and trusts, we heard phrases like “who is the natural beneficiary of one’s bounty in a will,” reflecting legal and cultural tendencies to think and talk about what is a natural way to organize one’s life.

I would argue that naturalized understandings of family are intimately associated with either ideas of divine mandate (they’re natural because some divine being dictates that it be so) or biology (that because men are built one way and women are built another, they fit together to procreate, a pattern that is natural, rendering all else unnatural and thus unworthy of legal recognition). There’s a third way of thinking about what we mean when we use the term “natural,” an understanding that is particularly legal. In tort law we refer to a particular type of liability as *res ipsa loquitur*. This phrase literally means, “the thing speaks for itself.” Similarly, calling something “natural,” relieves the speaker of any burden of explaining why it’s a good thing. We just defend it by saying it’s natural, the way things are. Perhaps it’s divinely ordained, perhaps it’s biologically mandated, but it is nothing we have to think about, nor do we have to present reasons why a particular outcome is good.

There are a lot of inadequacies and inequalities in domestic relations law, both within relationships and among different kinds of relationships, which are artifacts of this naturalized model. Thus we
need a new model. The major competitor to the naturalized model is the business-type market analysis. In the legal academy, of course, we've been exploring all kinds of topics—including abortion and accidents—from a legal economic perspective for some thirty years. That rich literature suggests that maybe we can think of intimate affiliations as being, not just about love, pet names, notes left in lunch bags, hearts and flowers, but also about how intimately affiliating with other people also involves engaging in economic transactions. In other words, our hopes for living happily ever after are as much about economic issues—having a beautiful home, for example, or sending children to the college of their choice—as they are about the more abstract rewards of emotional intimacy and jointly shared lives.

What I propose to do is to build on traditional law and economics approaches. I do this in my work by suggesting that we think about intimate affiliation in market metaphors. If we think about contract—in other words, about intentionality, consent, and functionality—when we worry about what rules should govern intimate relationships, then in fact we'll get a more adequate and a more equal set of legal rules. This approach would apply to marriage as well as other relationships.

The particular example that I'm using today, marketizing marriage, demonstrates one way we can import market models to understand marriage. In my work I have proposed something called a Premarital Security Agreement. It differs from a conventional premarital agreement in that it's based on debtor/creditor relations law. This is one of the few family law conferences I've attended where I am the second person to mention the Uniform Commercial Code. Ordinarily nobody else does, but Professor Waggoner mentioned it earlier as the most successful project of the National Conference of Commissioners on Uniform State Laws. For those of you who haven't taken commercial law, took it years ago, or recall it from a bar review course, I will recap shortly the rules governing debtor/creditor regulations. What I do is explore the possibility of treating primary homemaking spouses as secured creditors in relationship to their primary wage-earning spouses. What would it look like if a housewife were a secured creditor in relation to her primary wage-earning husband? I say “she,” not because only women are or could be homemakers, but because of demographic patterns, that most often in a heterosexual affiliation the person who engages in the primary house maintenance work is female rather than male.

So what is a security agreement? A security agreement is an agreement between a debtor and a creditor where there's collateral and the collateral is personal property. For example, when you go to the car
dealership, and buy a car on credit, a finance company such as GMAC helps you finance it and takes a security interest in the car to protect its right to be repaid. If you stop making payments, or let your insurance lapse, GMAC has this extraordinary right, the right to engage in self-help to protect itself, its interests. If you’ve seen the movie Repo Man, this is what that movie is all about. Repossession people get the tremendous right of taking debtors’ property without state intervention. It’s private law, largely governed by private ordering. When I talk about importing U.C.C. Article 9 rules to the law of domestic relations, I am talking about taking the private law of the family and the private law of contract, and showing the ways that those two are much more closely associated than what they’re commonly thought to be. You could say it’s taking the private law of family and making it really private.

The way it works in the context of Premarital Security Agreements, which I call “PSAs,” is that there’s a debt between wage earners and primary homemakers. In marriages in which the spouses engage in specialization of labor, where one is a primary homemaker and the other is a primary wage-earner, the primary homemaker extends credit to her primary wage-earning spouse by engaging in household labor and foregoing developing her own wage labor potential. She, logically, extends that credit expecting to share in family wealth that is accumulated as a result of the primary wage-earner doing his part.

What happens when they divorce is the equivalent of a default on a loan, the equivalent of not making your car payment. She doesn’t get what she had hoped to from the relationship, which is an ongoing sharing of the primary wage-earner’s income. At that point, the debtor, the primary wage-earner, is in default, and must pay the full amount of the loan.

Upon default, secured creditors can exercise their self-help rights to repossession to collect the amount due on the loan. I’ll define the debt in a moment, but first I want to describe the collateral. Generally speaking, secured transactions involve a debt, collateral, and an event of default. The collateral under Premarital Security Agreements is half of the marital property. Secured creditors often over-collateralize, meaning that they get a security interest in collateral that’s worth more than the debt because there is rarely enough collateral to go around once the debt goes bad. Consequently, it’s in their interest to ensure that the value of collateral will be greater than the amount of the debt.

How much is the debt? How much is it worth to take children to soccer matches, shop for clothes, go to parent-teacher conferences, clean the floors and keep family relations on an even keel? This work, if well done, often remains invisible, at least as work, like sending out holiday
cards and making sure that the family gets together at Thanksgiving. There are a lot of different ways you could calculate the value of this work, and thus the debt secured by the PSA. Economists have come up with a range of models. One method, the one that I have employed, uses a formula to take into account the differences between the spouses’ income at the time of the divorce, the length of the marriage, and the age of any minor children.

Many former homemakers, known in the literature as “displaced homemakers,” suffer from poverty (or close to it). If in fact we replace the current alimony regime with a regime of entitlement based on an investment model, recognizing that the primary homemaker has invested in family wealth by performing domestic services as well as foregoing the opportunity to develop her own wage-earning potential, then she is entitled to a payback.

Treating alimony as an entitlement, a right to be repaid for contributions to family wealth, would give primary homemakers the set of rights enjoyed by secured creditors. Because these rights involve the exercise of power, they would expand what it means to be married by taking a very weak social and legal role, primary homemaker, and grafting it onto an extremely powerful commercial role, a secured creditor.

What I hope would happen in this process of importing law from the private world of contract into the private world of domestic relations is that we’d begin to think differently about what it means to be a wife, to be a husband, to be married. That, if primary homemakers enjoyed an entitlement to post-divorce income sharing, perhaps their primary wage earning spouses might increase their respect for the work of taking care of home and children. Moreover, I suspect that if homemakers were compensated, people might be less likely to engage in specialized labor, both spouses instead engaging in both wage-earning and homemaking labor, because specialization would become more expensive for the wage earner. Of course, only elite families fully specialize, where one is a full time homemaker and the other is a full time wage earner. Even so, compensating homemakers could, in the long run, encourage more men to more fully engage in homemaking, and more women to maximize their wage earning potential.

Particularly important to keep in mind is who pays the price for the conventional arrangements in marriage. Right now current doctrines that govern the distribution of assets at divorce rarely enforce meaningful income-sharing after divorce, causing indigency or near indigency of a number of homemakers. The real reason behind this
failure to compensate homemaker contributions to family wealth is that we just don’t value the work that’s being done. One way to value it is by putting a price tag on it, and Premarital Security Agreements represent one means of doing just that.

I want to change the way we think about how marriage is organized because thinking in economic ways allows us to distance ourselves from naturalized understandings of family. If we import contract and business models, then we can think in functional ways that inquire about the value of particular work being done as opposed to assuming that a homemaker is specializing in homemaking labor because that role is divinely or biologically mandated. Finally, having very briefly described the idea of importing U.C.C. Article 9 to domestic relations law to remedy the devaluation of homemaking labor, I suggest starting to think in business ways about conventional marriage opens up the possibility of thinking about intimate affiliation generally.

One of the major reasons that many people oppose same-sex marriage is that they think there is one natural superior model of intimate affiliation that the state should recognize, and that everything else is inherently inferior. If instead we thought about intimate affiliations more along the lines that we think about business, we would likely recognize a range of affiliations. In business law we have corporations, general partnerships, limited liability companies. There’s no moral judgment that accompanies organizing your business as a corporation, a partnership or a limited liability company. If we start thinking about intimate affiliation in functional terms, rather than worrying about which people or affiliations are morally superior to others, we can open up the possibility for thinking about both conventional and untraditional affiliations in new ways. In doing so, we create the possibility of remedying both inadequacy and inequality in domestic relations law.

NORVAL D. GLENN: My goal is not to use quite all of my fifteen minutes. I’ll try to keep my presentation to slightly less than that. However, as you all know, it’s very difficult for a college professor to say anything very important in less than fifteen minutes! We’re very good at taking about ten minutes of material and stretching it out to an hour, but doing the opposite is very difficult. Of course the best of us can talk for an hour without having anything to say whatsoever! But I hope that’s not the case with me this afternoon. I am going to go into a topic on which I do not claim high expertise, but it’s such an important topic that I’m going to play the role of sociologist of law and discuss the relationship of law to family change.
I'm going to critique what is often an implicit assumption, sometimes an explicit assumption, underlying discussions of family law and family change. That assumption, which seems implicit in the description of this panel, is that the proper function of family law is to simply keep up with changes that occur in family structure, family relationships, and informal norms and values concerning family relationships. This idea is very similar to a concept we once had in sociology: that of cultural lag. The concept of cultural lag was the idea that different aspects of society and culture tend to change at different rates, that there are certain aspects of society that drive change, and that there are other aspects of society and other aspects of culture that tend to follow but with a lag. This causes dissonance and all kinds of negative consequences in the society.

A widespread assumption about family change and law is that family change occurs in response to economic and demographic forces and that the law is always struggling to keep up with trends in the concrete ways that people organize their lives.

Many if not most sociologists of law would cringe at the notion of the proper role of law in regard to families that is implied in this view. There are certainly examples of the law's failure to keep up with family structure, with how people are organizing their lives. All of us can think of examples of that. The case of stepfamilies is one good example. We've had a great increase in stepfamilies, but until recently stepfamily members—stepparents, stepchildren, and stepsiblings—were legal strangers to one another. There has been some change in some states, but in many states that's still the case. And I think this is an example of cultural lag—one of the cases in which there is a need for the law to catch up with the concrete reality.

But on the other hand, there are instances in which the law has gotten ahead of changes in family structure, an example being the no-fault divorce movement in which change in the law got ahead of popular opinion. The adoption of no-fault divorce was not the result of a popular movement, though it was to a certain extent the result of changes that had already occurred in marriage and in people's values. Most people in the general population didn’t even know what was happening, and there are still some people who are not aware of what happened in the no-fault divorce movement. This was a case in which the law led and had important consequences, though perhaps not quite the effects that some people believe it had.

So the law can either lead or it can follow, and there can be various kinds of complicated relationships between legal change and family
change. Since we have fifty different jurisdictions that are primarily responsible for family law in this country, we can have very different situations in the different jurisdictions.

Another problem with this rather simplistic view that families change and the law follows is that sometimes the kinds of changes that are supposed to have occurred have not really occurred. Or at least the changes have not been as pronounced as many people believe, so that some advocacy for adaptive changes in family law is based on a misperception of what has occurred.

Those of us who make our living by gauging family change spent a great deal of time twenty years ago or so trying to convince other people that a great deal of family change had occurred. Now many of us find ourselves trying to convince people that not quite as much change has occurred as is popularly believed. A lot of change has occurred. There's no doubt about that. But it's very easy to exaggerate the amount of change, and it's unwise to formulate law or social policy as a whole on the basis of supposed change that has not occurred.

To give a very simple example, marriages are not as unstable in this country as many people believe. You have all heard the statement that fifty percent of all marriages end in divorce. That is not quite correct. Ideally the projection of what percentage of recent marriages will end in divorce would be based on the duration-specific divorce rates and the age-specific death rates that existed during the base period from which the projection is made. It could be a particular year or a longer period of time. But unfortunately we don't have the necessary basic data to do a really good projection of that type. So the different people who have done the projections have used differing techniques and have come up with a wide variety of projections. Most of the recent projections, however, have arrived at a percentage below fifty. Furthermore, we can now arrive at some pretty accurate estimates of the percentage of marriages entered into in the 1960s and 1970s that will eventually end in divorce. Even though those marriage cohorts are apparently the most divorce-prone ones the country has known, apparently less than half of the marriages in them will end in divorce.

Furthermore, we often overestimate the social forces that have led to increased marital instability. One of the most commonly given explanations for the increase in marital instability in American society and other modern societies in the last few decades is the increased life expectancy explanation. It's often correctly pointed out that in 1900 life expectancy at birth in this country was only about forty-eight years. Now life expectancy is around seventy-seven years. That's a very great increase. But it's not the case, of course, that in 1900 everybody lived to
age forty-eight and then suddenly died. Nor is it the case today that everybody lives to be seventy-seven and then drops dead. A large percentage of the increase in life expectancy since 1900 has come about because of a decline in infant mortality, and the decline in infant mortality, so far as I can tell, shouldn't have had any effect whatsoever on the risk of divorce of married people. A great deal of the remaining increase in life expectancy has come about because of declines in mortality at the pre-adult ages above one, which also could have had little or no effect on divorce rates.

Because most divorces occur during the early years of marriage, only declines in mortality in the early adult years are likely to have much effect on divorce rates. Those declines have been quite modest since the beginning of the “divorce boom” in the mid-1960s. In the past two decades, life expectancy from such ages as fifty and sixty has increased to an important extent, but I don’t think that has had more than a negligible effect on marital stability. Since 1940 the increase in life expectancy from the median age at marriage has increased by just over four years. In order for that to have had a substantial effect on divorce rates, young adults and early middle-aged couples would have to take into account their life expectancy in decisions to divorce or not to divorce. For instance, a young adult who found himself or herself in an unsatisfactory marriage would have to think, if I were going to live fifty more years I would divorce, but since it’s only forty-five, I’m going to stay with this marriage! I don’t think that happens! I don’t think that kind of thinking really influences decisions to divorce or not divorce. So I can’t believe that the increase in life expectancy has had any appreciable impact on marital stability and instability.

People who advocate changes in family law should of course take into account family changes that have occurred and the reasons for those changes. But their views of family change should be based on sound social scientific data and theory, not on popular perceptions. They should have well-founded views of what is happening, and why it is happening, before they start advocating the passage of laws to keep up with family change.

JACQUELINE PAYNE: My name is Jackie Payne. I’m a policy attorney for NOW Legal Defense and Education Fund. I’m also an alum of the Law School, so it is my great pleasure to be here, and especially on a panel with two of my former professors. So I guess I’ve arrived!

I’m going to talk to you today about welfare reform and the role that marriage is playing in that. I’m intimately involved in the issue of
welfare reform, having participated in the drafting of the progressive welfare bill that’s pending in Congress. So I have a pretty good idea of what’s happening and why, and I’m going to try to share some of my thoughts about that with you.

To begin with, you probably have some memory of when welfare reform happened five years ago. If you picked up the law now and looked back at it, you might expect to see in the findings information about what causes poverty in America focused on education levels, employment levels, sustaining employment, rates of unemployment, etc. Actually, what you will find if you look at this law is nearly every single finding relates to non-marital births and how single motherhood causes poverty in America and the crisis of non-marital births in America.

Three out of the four purposes of the welfare law focus on family formation, including reducing non-marital births, increasing two-parent families and “shifting women’s dependence, from welfare to marriage.”

Over the last five years we have engaged in a campaign to convince women and specifically women on welfare, not to have children outside of marriage. Initially, the focus was on the reproductive side of that equation, so there was absence on the education, $250 million dollars of federal money in the last five years was invested in encouraging women not to have a child until marriage. The illegitimacy bonus, $100 million dollars every year goes to the five states that do the best job at reducing non-marital births without increasing abortions. And both of those two things are irrespective of your class status, so it’s really telling that to all women.

Finally, there’s the family cap, which says—twenty-three states have said to women on welfare that if they bear children while on welfare, the state will not increase the money they get. Where originally the government would have given women on welfare an extra let’s say $50 to help pay for the cost of that child, twenty-three states have tried to take away the financial incentive of having a child by refusing to give women on welfare the additional money if they choose to bear a child while on welfare.

The welfare law also actively disregarded women’s decisions around family formation and worked to connect them up with the father of their children irrespective of their wishes. Thus, in a framework that is very largely about state flexibility and a hands-off approach, the federal government tells states specifically what to do with respect to paternity and child support enforcement. So Congress requires states to sanction women if they refuse to cooperate with establishing paternity and cooperating with child support enforcement, while at the same time changing the rules so that that child support money does not necessarily
have to go to the children. So it’s not that the Congress was worried about getting more money to kids, because at that time Congress changed rules and told states to enforce child support, it did not require them to give it to the children. The state could keep the money for itself to pay itself back for welfare. And the reason behind that is very clearly based in a traditional, patriarchal perspective that men are responsible for taking care of women and children, and that if they fail to do that, and the state has to step up and fill that role, that men will be held responsible. Not the woman herself or the child, but the man.

That family formation and the requirement that women engage in this establishing paternity is irrespective of her wishes. There have been cases where lesbian mothers on welfare who had a man help them become pregnant were forced to establish his paternity. Even when they had made an agreement with him that they would not establish paternity, the state was interested in that family formation.

Since 1999 there have been several attempts to pass federal legislation designed to increase father involvement and change child support laws. As a part of that legislation, however, there has been a marriage promotion aspect to it. Thus, the money that would be going out to increase father involvement would be tied with a promotion of marriage piece.

One of the original co-sponsors of this fatherhood legislation is Representative Nancy Johnson. And I want to read a quote she said in a committee meeting. “We should not compel young couples to marry, but we can certainly hold it out as the expected standard and track the skills necessary to have a successful relationship. If we can restore marriage to its rightful place at all levels of society, we’ll have accomplished more than could be achieved by any government program we might design.”

So a few weeks ago the Bush Administration released its proposal for welfare reform. In that proposal it proposes investing $1.5 billion over the next five years in experimental programs for states to try to figure out how to promote and maintain marriages. The Administration’s plan would also, as a part of welfare, require every single state to say how it intends to promote marriage, to provide numerical goals for being successful at promoting marriage, and would hold states accountable to that.

Based on what states are already doing, we can assume that this new infusion of money under the Administration’s plan would result in marriage counseling, faith-based initiatives, waiting periods between getting a license and getting married, possibly preferences for married couples when resources are limited, and financial bonuses to married couples. Some states have done a one-time payment, ranging anywhere
from $1,000 to $3,000. Other states have said, here is a financial bonus to you for getting married and staying married, and so we will give you $100 extra a month for every month that you stay married. While a similarly situated family with the same number of people at the same income level would not get that extra money as a reward for getting married. And of course covenant marriages are, as we heard today, already in place in three states and legislation has been pending in, I think, eighteen other states.

In some of those states we have already seen states setting goals to reduce divorce. I believe one state is trying to reduce divorce fifty percent within the next ten years. As a part of that, they’re looking at ways to make divorce more difficult. So when we demand that states set new goals for increasing marriage, I think we will probably see states trying to come up with not only ways to make marriage more attractive and more possible, but also ideas about how to make cohabitation, single parenthood and alternative families less attractive or less possible.

We need to ask is what we think about marriage being held up as the solution to poverty in America, and what the consequences are going to be of these marriage-promotion policies.

To the first question I would assert that marriage is not the answer to poverty in America. Since we’re in a legal forum, I’ll start with the fact that the Supreme Court has said that we have fundamental rights of privacy. We have the fundamental right both with respect to whether or not to bear a child and with respect to decisions around marriage. This whole discussion really is about the intersection of the two rights: the decision to bear a child outside of marriage.

With respect to those rights, we have the freedom to make those decisions without government imposition of direct and substantial barriers in the way of that decision. The Administration’s plan, which will require states to set up numerical goals and meet them, creates at least a significant risk of states coercing low-income individuals into marriage in order to meet those goals.

Second, marriage does not address the root causes of women’s poverty. Nor is it a reliable long-term solution to women’s poverty. While two incomes may be better than one, they may not be much better. As we heard, non-resident fathers of poor children are, for the most part, poor themselves. Nearly forty percent of children living in poverty live in two-parent families. Thus, simply making two-parent families is not necessarily a ticket out of poverty. Moreover, while sixty percent of the women on welfare have never been married, forty percent of the women who are on welfare have been married. They have followed this prescription for success already and have found that it has
not worked for them, and they have still ended up on welfare. Thus, I think our plan for ending poverty in America should empower women to economic self-sufficiency to ensure their security, whether they marry or not. In fact, we know that of single mothers who have gotten a college education and who work full time, only one percent live in poverty. So education is a way to handle this problem. Only eight percent of single mothers with some degree of college education who work full-time live in poverty.

I think that this proposal also fails to recognize the degree to which poverty causes people not to marry and causes them to divorce. When you ask low-income women their decisions and their reasons why they don’t marry, they give four reasons. I’m relying on Kathy Eden’s study for this. She’s done, I think, four studies on this issue, and she’s interviewed low-income women to find out why it is that they haven’t married. And they say the first is affordability, and that they’re not going to enter into a marriage unless it is going to provide them with some economic security. For that reason, the fact that low-income men, and the fathers of these children, are in equally bad or worse situations financially means that the very fact of poverty right now is a barrier to getting married. Furthermore, economic stress is very clearly a factor in people getting divorced.

Third, I think we must recognize that there is an extraordinarily high prevalence of domestic violence among women on welfare. This is much too frequently passed over or considered an exception to the rule. Sixty percent of women on welfare have experienced domestic violence in their adult life, and thirty percent experienced it within the last twelve months. A recent study in Colorado said that of domestic violence survivors, three-quarters said that the batterer is the father of their children. Therefore, when we have marriage proposals that try to unite or reunite these mothers with the father of their children, we are very likely talking about dangerous relationships and relationships where the women have good reasons not to engage in them. That is not to say that all men are batterers or that all marriages have violence in them, but we cannot ignore the data that we have about this specific population.

Finally, I would say that when the federal government says that marriage is the expected standard and invests $1.5 billion at the outset to experiment in this area, it’s difficult to imagine that public policies won’t simultaneously stigmatize single, divorced, and gay and lesbian couples.

I want to close up with what I think the consequences are to choosing this as the path that our government is about to take, and I
think probably will end up taking, as a major part of the welfare law. As I said, I think it’s very likely that we will end up with coercive tactics to get at least low-income mothers, if not other mothers, married. Even if it’s wrapped up to look like a gift (i.e., bonuses to couples who marry), it will actually be a penalty against those who do not or cannot marry. This will disproportionately impact and further stigmatize African-American women who have very high rates of non-marital births and who are currently being held up as the picture of this problem. I think it will also continue to de-legitimize gay and lesbian families and thereby probably have consequences for both adoption and custody disputes. And again, will continue to stigmatize single-parent families. I think, as I said, that we will see renewed efforts to make divorce more difficult, which should have a specific threatening impact on domestic violence survivors. And I think we will see renewed efforts to restrict women’s reproductive rights about when they can decide whether to bear a child. I also think we’re going to see strengthening notions of the traditional family—that there’s one legitimate kind of family, and that is two, heterosexual, biological parents. Much of the discussion that’s happened around the marriage promotion has not focused on any remarriage, but is focused specifically on marrying the biological parent of your child. The emphasis on the biological parents as opposed to an alternative family structure has largely been driven by Assistant Secretary Horne’s belief in the natural traits of men and women and their gender roles and norms and the importance of those norms. Instead of promoting healthy relationships, I think this will also reinforce notions of inequality within marriage. When the federal law talks about shifting women’s dependence from welfare to marriage, it’s specifically envisioning an unequal, dependent relationship, which is not in my mind a model of a healthy relationship. It also clearly reinforces the male breadwinner model, which I don’t think is good either for women or for men. And it will shift the responsibility for economic security to the family unit, which is the coup d’etat of this proposal. As long as single parents are the problem, then the government can offer marriage as the solution to the problem. But if single parents are not the problem, then the government has to figure out why primary care-giving responsibility catapults single parents into poverty in America, which would mean either value in care-giving work, or creating a childcare system that can support labor market activity. This would mean addressing the fact that we don’t have living wage laws in America, that employers are not required to give sick days, that we don’t have paid family leave, that we don’t have equal pay—all of the costs related to care-giving that single mothers cannot absorb and that marriage masks. Thus, in the end, a
marriage promotion policy not only, I think, will badly fail women on welfare, but in the name of family values will significantly entrench inequality and social and economic injustice.

RICHARD O. LEMPERT, MODERATOR: Though we are running late I’d like to take a few questions, since this has been such an interesting, provocative panel. You panelists all did a fine job staying within your time limits, and you deserve the opportunity to answer questions. If there’s somebody specific you’re directing the question to, just say the name of the person you’d like to respond.

QUESTION: What do you think the advantages are for using contract law in personal relationships? The danger of using contract law seems to be that people in society who routinely hold a weak bargaining position (such as women) might get a bad deal.

MARTHA E. ERTMAN: As Ariela Dubler’s work nicely points out, contract is a double-edged sword. It’s not a silver bullet that will solve every problem of inequality and inadequacy in the law. However, I would argue that it’s a good deal better than status, which is the only other game going. So that the inequalities that happen through, say, disparate economic positions or disparate social positions, might be alleviated by contract in some circumstances, but not all. One reason I like security agreements is that they disprove a myth about commercial law that it’s an absolutely free market, that transactions are conducted at arm’s length, and that the law is hands-off in allowing people to bargain away whatever they want. In fact, while contract law generally defers to private ordering, it also provides various kinds of special protections for weaker parties. So, for example, in Article 9, there are protections for debtors, because the secured creditor often is a sophisticated repeat player, while the debtor is often a one-time player who’s not as economically strong, nor as savvy, and who as a result doesn’t draft the pre-printed form that represents the parties’ agreement, or even fully understand most of the agreement’s terms. For example, under Article 9 the debtor can’t waive its rights to, for example, notice that the creditor is selling the collateral after repossession when she signs the security agreement. Instead, the debtor can only waive this right after default. In addition, the Code provides a floor under which parties can’t contract, namely that parties can’t be bound by unconscionable terms. Unconscionability doctrine provides that the law won’t enforce an agreement that is so unfair that no reasonable person would have entered it and that no reasonable person would have demanded the unconscionable term. In sum, while I recognize that contract isn’t everything, I also think it’s a lot. It’s a lot in that it presupposes
functionality, autonomy, and choice, which, granted, are bounded and contingent, but nevertheless, are better than status.

**QUESTION:** [INAUDIBLE]

**JACQUELINE PAYNE:** I think there's a couple things. One is the data shows a correlation between child well-being but not necessarily a causal link. It is absolutely true that single motherhood is more likely to mean poverty and that poverty is likely to mean more pregnancy, problems in school, incarceration, and drug/alcohol use. So if we dealt with the poverty issue, I think we would deal with a lot of the problems at the outset. However, even if you get a single mother out of poverty, there's still only one person as opposed to two, so you wouldn't necessarily have as much parental supervision, time with the children, etc. In terms of that, that's where I get to system issues, which is if we had better childcare, paid family leave, could society support families, to make every family, whatever it looks like, better, rather than saying the only way to succeed is to fit this family?

**QUESTION:** [INAUDIBLE]

**JACQUELINE PAYNE:** I think what he was pushing us to do was to make sure we're looking at childcare accurately as well, and what we know about childcare in America is it's incredibly poor quality, expensive and not that available. Therefore, if we invested in childcare systems or had a system that valued care-giving, so that even if you were a single mother, you could choose to stay home with your child for the first two years the way that higher income women are able to because they're connected to a husband. There are ways that we could change the system to support people no matter what they look like.

The part two is that I'm not saying by any means that I'm not supporting people as individuals and in their relationships to improve themselves and to be better. I'm all for the government requiring all insurance, whether public or private, to cover counseling, whether it's for yourself or for marital counseling or whatever. I think that there are system-wide things that are not targeted at people in poverty that could improve us all. I'm just saying that I don't think the government should get involved in pushing people into marriage as a way to solve the poverty problem.

**RICHARD O. LEMPERT, MODERATOR:** Excuse me. I'm going to interrupt because we have a break scheduled and are six minutes past break time. I know you can talk to these people individually. So why don't we just take until a quarter after, shorten the break a bit, and then return for the last panel.
MELISSA L. BREGER, MODERATOR: Good afternoon everybody. I’m Melissa Breger, and I teach here at the Law School in the Child Advocacy Law Clinic. We are very fortunate to have as our final session a distinguished panel of experts. We’re going to hear from Professor Wardle, then Professor Chambers, then Professor Ettelbrick, and then we are going to give Professor Wardle an extra five minutes at the end.

Briefly, let me introduce our panel. Professor Wardle joins us from Brigham Young University Law School. He is well-known for his work regarding family law and biomedical ethics and is a prolific writer in these fields. Professor Paula Ettelbrick is on the faculty here at the University of Michigan Law School, as well as at NYU Law School and Barnard College. She is renowned as a policy advocate and attorney for gay and lesbian rights. Currently, Professor Ettelbrick is the Family Policy Director for the Policy Institute of the National Gay and Lesbian Task Force, and we are very fortunate to have her with us today. Finally, Professor Chambers has been a professor here at Michigan Law for the past thirty-three years. In fact, he was my professor in family law, when I was a law student here. He is known for his work regarding the differing experiences of men and women in the legal field, AIDS law, family law and constitutional law here and abroad in South Africa. The Law School will be saddened by his retirement this upcoming summer, but we are proud to have him here to speak with us at this time.

Today, the final panel will be discussing the broader view of legally-recognized marriage. What is its fate? What are the social implications of such? Should marriage include same-sex couples? Should marriage continue as a socially viable institution? What is the role of traditional marriage in future society?

Thank you.

LYNN D. WARDLE: I’m pleased to be here and participate in this wonderful symposium. I want to thank the staff of the Michigan Journal of Gender & Law for all that they’ve done to sponsor this program and bring together the diversity of views that they have invited and for the multitude of courtesies, and especially to Erin Quinn and Yarmela Pavlovic who picked me up late last night at the airport. It’s an honor also to be on this particular panel with two of the most thoughtful
commentators on issues relating to transition in family and family law. My role in this panel and this conference reminds me of Chesterton’s quip that the defense of virtue (in this case the received tradition of marriage today) has all the exhilaration of a vice!

Is legal marriage obsolete? I think not. By way of foundation, the panel title refers to legal marriage, and that reminds us that there’s a difference between private interests in marriage and the social or public interests. We’re going to talk about the public and social interests. It’s important also because the phrase legal marriage reminds us that marriage can be defined differently in different contexts and for different purposes. The meaning of marriage in the law may not be the same as the meaning of marriage in, for instance, sociology, psychology, anthropology, or a particular religious or ethnic tradition.

The inquiry, “is marriage obsolete?” properly suggests that there’s a relationship between the moral order of society and the legal order. If a wide gap between the law and moral order develops, one or the other must change, or the law will be irrelevant and ineffective. I think there’s even more to it than that. Of course, not all social experimentation constitutes real social change, and not all private lifestyle preferences are held by even the parties practicing them as public law preferences.

The panel question necessarily raises the issue of how one decides. By what process is it determined that law reform necessitating social changes have occurred and that marriage has become obsolete? The fact that we’re talking about legal marriage and legal policy, laws that are enacted by governments and enforced by government mechanisms, reminds us that it’s important to examine the question about methodology and procedure, by what method we determine that these changes occur. Our legal system is predicated on the primary principle that was declared by Mr. Jefferson over two hundred twenty-five years ago—that governments derive their just powers from the consent of the governed. Jefferson’s principle teaches us that efforts to significantly redefine marriage by circumventing the consent of the governed are unjust and illegitimate. In a democracy, it is not for a set of platonic guardians, either academic or judicial, to decide what is best for the people. The definition of marriage is precisely the kind of issue that Jefferson and the founders risked their lives and fortunes to secure for the people to decide for themselves by the democratic processes. Indeed, Jefferson’s standard, the consent of the people, helps us distinguish hype from reality, molehills from significant social mountains, mere tremors from actual social earthquakes. So the title reminds us that it’s important to ascertain by the legitimate political method whether a
social phenomenon is merely a fad or represents a real, lasting, significant change in social values.

Now to the question. In recent years there's been a lot of apparent change in living arrangements and sexual morals. One can build a plausible case that the moral image of marriage has changed and existing standards of legal marriage are obsolete due to such social changes as dramatic increase in the number of children born out of wedlock, skyrocketing rates of premarital sex, dramatic increase in non-marital and premarital cohabitation, falling marriage rates, rising age of first marriage, three decades of sustained high divorce rates, increase in open same-sex sexual cohabitation, and proposals to legalize same-sex marriage and same-sex domestic partnerships with marriage-equivalent status and benefits. All of these suggest something's going on. However, most of these conditions are not unprecedented. Prior generations had children out of wedlock and engaged in non-marital cohabitation and premarital sex. At various times the marriage rate has fallen, and at various times the divorce rate has spiked. What we've seen in recent years in this regard are only differences in degree, quantity or scope. They're not unimportant, but by and of themselves, they're not new, and they don't necessarily reflect the kind of social change in fundamental values that would affect the meaning of marriage.

On the other hand, proposals to legalize same-sex marriage or create domestic partnership, particularly same-sex domestic partnerships, as a new legal domestic status in our society or law are different and are developments that constitute a new metaphysics, a different vision of marriage and life in this corner of the galaxy. But even these more serious challenges to marriage do not indicate that current marriage law is obsolete because of how society has responded to them.

Let's measure them against Jefferson's consent-of-the-governed standard. While the effort to legalize same-sex marriage has been seriously pursued now for three decades, no state has yet legalized same-sex marriage. In spite of huge campaigns, the score in the American League is fifty-one to zero. In Hawaii and Alaska, same-sex marriage was rejected by sixty-nine percent to twenty-nine percent and sixty-eight percent to thirty-two percent in constitutional referenda. In Nebraska and Nevada it was rejected seventy percent to thirty percent. In California, home of very active gay communities in both Hollywood and San Francisco, which waged an intensive campaign, voters overwhelmingly rejected same-sex marriage sixty-one percent to thirty-nine percent. Even in Vermont, several months after the state Supreme Court ruling in *Baker*, town meetings held in fifty towns across
Vermont voted unanimously, fifty out of fifty, to reject same-sex marriage and overwhelmingly forty-six out of fifty against same-sex domestic partnership. Congress and two-thirds of the states have enacted laws prohibiting and denying recognition to same-sex marriage. Even President Clinton, a strong supporter of gay rights, signed the Defense of Marriage Act that defines marriage, for purpose of federal laws, as male-female relationships only, and allows each state to refuse to recognize same-sex marriage if it chooses. The law allows states to choose for itself whether or not to do so.

Similarly the record concerning proposed legalization of marriage-like equivalent status, domestic partnership, fails to support the claim that there's a significant Jefferson standard/Jefferson quality change here. Today, only one state has enacted anything that approaches the Scandinavian-style, marriage-equivalent, domestic partnership, of course, the Vermont Civil Union Law, and we had just a fascinating, very moving account of the background on development of that law. But it's the only state. Hawaii and Vermont also have very limited reciprocal beneficiary laws, which are relatively narrow in scope, and California has enacted an even more diluted form of partnership with more narrow benefits. All this has occurred. The point is, there's not been significant acceptance, as yet, of these new marriage-like alternative institutions with legal status. Moreover, wherever marriage-equivalent, same-sex, domestic partnership has been adopted, it's been adopted with a label different than marriage, and that's been very critical to obtaining passage of those laws everywhere, from Scandinavia to Vermont.

There's a lot of corroborating evidence that marriage isn't obsolete. Surveys continue to find that people still want to marry. They intend to marry. They expect to marry. Moreover, there's a growing number of marriage revitalization attempts in politics and in the profession and even, perhaps most surprisingly, in academia. We've had reference to the wonderful handouts that we just got from Jacqueline Payne which are evidence of something that's going on there that manifests that there is still a belief in the importance of this institution and not an acceptance of significant change.

If the aforesaid social changes don't mean that marriage is obsolete, then what do they mean? I want to suggest four possibilities.

One, premarital sex, cohabitation, and the increase in childbearing out of wedlock may just be the unfortunate, but normal, response to increased sexual stimuli in society. A lot of feminist writers and others have documented and criticized the sexual objectification of women in our modern popular culture, especially in entertainment and advertising, in the current Barbie generation. The increase in sexual stimuli may have
caused the increase in sexual behavior and the resulting increase in these phenomena that I’ve mentioned. Moreover, participants in these behaviors and situations generally don’t view their behavior or their relationship as marital. They want to preserve for later, for marriage, the ideal of love, commitment and generosity, while enjoying temporarily, on a lark, as it were, lust, exploitation, and selfishness. Now, indirectly these situations undermine marriage. We can’t ignore the transformative effect upon expectations and relationships that result from significant involvement with pornography or premarital sexual activity. But they don’t involve evidence of a change in society of the vision of marriage.

Second, to some extent these social phenomena that I referred to may suggest increasing anxiety about marriage. It’s been more than a generation since divorce, American-style, unilateral no-fault divorce-on-demand, became the standard in this country, resulting immediately in the doubling of the rate of divorce and an even greater increase in the presence of divorce in society. The first generation of the children of divorce are now of marriage age. They’ve come of age and they have misgivings about their own ability to succeed in marriage. They fear inflicting upon themselves and their loved ones, especially their children, the pains and disadvantage of divorce, which they experienced for themselves or saw family members and friends suffer. However, these people, young and old, seek not to change the definition or composition of marriage, rather they seek assurance and confidence that they can succeed in marriage. Many of them experiment with what they consider trial marriages, tragically, because it appears that so-called trial marriages decrease rather than increase the likelihood that a resulting marriage will last. This indicates not that marriage has been tried and found wanting, but it’s been found difficult and not tried. For these young people, the search for alternatives to marriage is evidence of looking for the right thing in the wrong place, because they’ve seen so much evidence of the right thing being turned into something terribly wrong. At the same time, they have a fear of marriage and cynicism about marital promise. There’s a continuing yearning for marriage and craving for successful marriage relationships.

The current generation is very much like the generation that wrote the Constitution of the United States, if I can use a different metaphor. The founders experienced the abuses of a strong central government. They bravely engineered a prolonged, nearly disastrous revolution against the government. They had established a weak central government and found it inadequate for their needs and their desires, and they somehow summoned the courage to create another government, that was a strong
central government, for the newly independent nation, despite their well-founded fear of the abuses of power in such a government. They had the creativity to establish new ways to cabin the strong government from becoming abusive. Today, many young couples, I believe, despite the experience of failed marriages that they have seen, will have the courage to embrace marriage and creatively find new ways to make marriages work.

Third, some data also suggest that marriage is being taken for granted. It's said that we come into possession of our institutions and our values the same way that we come into possession of public buildings and monuments. Someone else creates them, and we simply inherit them. The risk is that if we don’t value them, if we take them for granted, we tend to neglect their maintenance and upkeep, and they wear out. The consequences are manifest in pervasive social distress, from discarded former husbands and wives who overwhelm and burden our remedial classes, swamp our clinics, overwhelm the feeble capacity of our welfare system to inadequately parented youth who overwhelm the juvenile courts. Benefits of marriage to society are like water to fish or air to a butterfly. We’re surrounded by them so constantly we get used to them, overlook them and take them for granted. I’m reminded of a statement of Oliver Wendell Holmes that, “what we need today is education in the obvious more than investigation of the obscure.”

The fourth possible explanation for these social phenomena is a growing devaluation of marriage in some quarters. The proposed legalization and equalization of alternatives to marriage reflects a devaluation of marriage. I’ll return to this in a moment, but now I’ll just note that this phenomena is not new either. Chesterton observed nearly a century ago that the marriage-based family is now never mentioned in respectable circles, which, I would pause to note, cannot be said at the University of Michigan thanks to the Journal of Gender & Law and this conference.

Apparently, part of being the progressive elite in America historically, and in Western countries generally, is to periodically express disdain for marriage, and the marriage-based family; it is simply de rigueur to call for a leveling of marriage and other institutions, to insist on the functional deconstruction of the highly-preferred status of marriage. When marriage is devalued, investment in marriage drops, and that increases the likelihood of the kinds of problems that lead people to avoid or be concerned about marriage.

If there really has not been a significant change in basic values about marriage, should we encourage society to support a redefinition of marriage to include these alternative relationships anyway? One
response is to simply ask why. Must all relationships that are valued by parties be deemed marriages?

The significance of the legal status of marriage for the relationship can’t be ignored. In a time of so much government regulation of our lives and so many public benefits and private dignities turning on whether the parties are legally married, it must be admitted that this is a serious question. I’m out of time, so I’ll come back, perhaps in my five minutes response, to suggest whether we should encourage these models even though they fail the test. Is marriage obsolete? Have such massive social changes occurred that we need to redefine marriage? I think the answer to that is no. But that doesn’t mean that we shouldn’t redefine marriage anyway if we think that there are other powerful reasons. But I don’t think there are, and I think there are substantial risks. Thank you very much.

DAVID L. CHAMBERS: When this panel was first organized, Lynn Wardle was going to be joined by Martha Fineman, a professor of law at Cornell and a very formidable speaker. I’m sure as Lynn started thinking about what he was going to say, it was in that context. Paula and I are very last-minute substitutes. Mr. Sodom and Ms. Gomorrah.

PAULA ETTELBRICK: What does that mean really!

DAVID L. CHAMBERS: Lynn has written a good deal about his view of the importance of shoring up the position of traditional marriage in this country. As he has said here and in other writings, he believes that there will continue to be large numbers of unmarried couples living together in this country and that there will probably be a rise in the numbers of cohabiting same-sex couples. There will be large numbers of children born outside of marriage, living with single parents. There will be high levels of divorce. There will be more children living after divorce with a single parent. And despite this recognition that there will be very large numbers of people living in different settings than within traditional marriage, his advice to governments is to stay the course. Government should insist on one form of state-honored family relationship only, the traditional, heterosexual, covenant marriage.

He doesn’t, as I understand, predict that if we do stay the course, more of those currently straying will return to live out their lives in heterosexual covenant marriage. If he doesn’t make that prediction, I think he’s wise. I think it is unlikely that the policy he advocates would have that effect. His point rather seems to be that if states treat these alternative relationships in a positive manner, in a manner comparable to marriage, these other relationships will adversely affect traditional, heterosexual, marriage. He has a view of heterosexual, covenant
marriage as supremely valuable to the state, to the people of the state, and that it alone should be the central focus of American family policy. I may be overstating it, and, if I am, he will certainly correct me.

In the end, the most fundamental source of the disagreement between Lynn and me is with regard to the appropriate role of the state in its relationship to the family, and in particular in relationship to marriage. In a recent article, he states (and I wouldn't disagree) that marriage is a public status in our culture. He then goes on to say that public laws are intended to protect and effectuate the public interest, not private lifestyle preferences. For him, the question is whether the social interest, the public good is served—not whether some private interest is advanced by public legislation.

Now I do not disagree that there are public functions served by the laws of marriage, but one of the most important public functions of law is to help private citizens lead happy lives, to live lives they find more satisfying. Government should help its citizens find more comfortable ways of living the lives that they are already living and the lives they would like to lead, unless the state has good reasons to believe that those ways of living are in fact harmful.

As a way of illustrating my view, I'm going to make a few predictions about the ways the law might change in the future to be more responsive and facilitative to people in the way they live their lives. You should take my predictions about the future with a grain of salt. In 1972, I believed that McGovern would beat Nixon. In 1995, I believed that O.J. would be convicted. In 2000, I believed that the Supreme Court of the United States would not hear an appeal in Bush v. Gore. So with that warning, let me speak briefly about several sorts of families in the future.

First, the married couple. I predict in the future that marriage will remain the norm. Marriage has been with us as long as we have recorded history, and it will continue to be. For most people, it will be the preferred setting for their lives. On the other hand, I would not be surprised to see that some states would adopt more than one form of legal marriage. We have had a wonderful introduction to covenant marriage here today, the experiment being tried in Louisiana and a few other states. It is an alternative to regular marriage that seeks to encourage couples to return to traditional, lifelong, heterosexual marriage. However, we might see other kinds of marriage in the future. States might create a form of marriage that goes in the other direction, a form of marriage in which each partner in the union acknowledges more financial independence from each other than has been the case with regular marriage.
A second direction in which we are already heading, is to recognize the opportunities of people who are within marriage to contract for different terms than the default marriage law imposes. Today, in every state, married couples can contract, either before or during the marriage for different arrangements for holding property and for the disposition of property on divorce or on death. This opportunity to contract is a prime example of government in its facilitative mode. So far, despite the invitation provided by court decisions and statutes to engage in contracting, very few couples do. I'm not certain that in the future many more will take up the opportunity but it is possible.

A third area: the law and the unmarried couple. In the recent past, state courts have begun recognizing contracts between unmarried cohabitants regarding the financial terms of their relationships. We are even seeing in a few states like Oregon and Washington, a willingness of courts to impose at the point of separation of a long-term unmarried couple remedies that the court simply believe to be just and equitable. The cases in Oregon and Washington have involved heterosexual couples who had no contractual understanding, but who had a relationship in which various kinds of dependencies or reliances had developed that suggested to the court that a just division of property would call for something other than leaving the couple as they were.

There's a dilemma for courts and legislatures in trying to be supportive of people who choose to live in unmarried relationships. Some would say that the way to be supportive is not to impose state rules on them other than contract, because they have chosen to live outside of marriage. Others would say, whatever arrangements and choices people make at the beginning of a living-together relationship often fail to reflect what their lives become after a long period of time, and the state has an appropriate role in protecting those who have ended up in dependent positions.

I'm going to just mention briefly two other areas of family policy that may change. One is the place of single persons in our culture. We will have in the future a higher proportion of single persons at any given point in time than we have had at almost any point in the past. That is because people are marrying later, more people are never marrying at all and more are marrying and divorcing. Moreover, people are living longer.

The question is what can the state do to help people who are single find satisfaction in their lives. We have had a change from a time when women who lived alone past thirty were typically referred to as spinsters
or old maids. Now they’re simply referred to as lesbians, a much nicer idea.

Lots of women and men who live alone have people who are very important to them in their lives. We permit them to execute powers of attorney for people to make decisions for them if they end up incapacitated. We permit them to write wills, of course. One possibility for the future is to create laws that permit people who have a really good friend in their life to register together as "registered friends." Through this arrangement, each of them might agree to help make decisions for the other if the other is incapacitated and to make decisions after the other’s death with regard to the disposition of the body or of the organs. If they die intestate, perhaps some portion of the estate would go to the friend. This would provide some way of honoring the friendship relationship, which I think is going to be seen as more and more important in the years ahead.

Finally, same-sex marriage. I hope Paula will say more. I’m on the whole warmly disposed to same-sex marriage. In fact, I’m in one, a civil union in Vermont. A couple of million gay men and lesbians in this country live together as couples. That will continue. And I would say simply that the difference between Lynn and me is he says, what positive values flow to the state from recognizing these sort of alternative arrangements? I would ask a different question. What positive values might flow to the couple from recognizing such arrangements. The state should let people find what’s satisfying to them, let them form the relationships that work for them, and in the absence of demonstrable harms, support those arrangements in ways that makes the couple happy and fully participating citizens. In this case, I think for large numbers of gay people (but by no means all), permitting them to marry would provide that satisfaction. I would put the burden on Lynn to explain what harms he is worried about if people who were gay or lesbian marry? Are those harms really likely to occur? And if those harms did occur, do they really outweigh the advantages of helping people, good citizens, taxpayers who are gay and lesbian, lead more satisfying lives?

Thank you.

PAULA ETTELBRICK: I have mostly just a series of observations to make. No one, for the reasons David said, can really predict the future. All of us have been wrong at some point, but we can certainly look at the social forces that are in motion right now that can help us understand, if not where we’re going, where we should be going.

But first of all, I would like to say that I don’t believe in any way that marriage is necessarily obsolete or even that it should be eliminated. I guess that was Professor Fineman’s role on this panel, but she’s not
here. So it’s not necessarily a counterpoint to marriage. The work that I and many advocates like me have done for a long time, certainly incorporates a critique of marriage, but also tries to focus on the function of marriage, not just the form. If you were raised on feminism at all, you can’t get away from the gendered aspects of marriage, which are very troubling. This was why the gay community did not initially embrace marriage. Our relationships mostly didn’t look like that. Some did. Some were gendered in some odd way in the way that we define function in terms of gender. But we didn’t find ourselves and our relationships reflected in what we saw within marital relationships by and large. Not in terms of the function, the love, or the commitment, but in terms of that gendered difference. I think what we were looking for was a way to redefine, without the necessary gendered requirement, a way of being families that focused on the function of being a good partner, a good parent, and having the social resources and support to fulfill those roles.

Second, I think that the discussion and focus on divorce statistics is narrow and problematic. It misses a great deal of the positive functioning of millions of families that are different from those that are viewed as the correct or proper marital families. It misses the functionality of American families in a significant way. When cohabitating, unmarried couples get defined as less-committed and less-able to carry on when defined in relation to married families, the analysis misses some of the social good and social benefit that does exist. I’m not trying to be a Pollyanna but I think we can really paint a much happier, successful picture of family if we incorporated into our analysis the many kinds of families that exist, that are excluded from the research, and have traditionally been excluded from the research, and are still excluded from the research. When we take away the labels and stigma that we readily attach to non-marital families in our social and scholarly discussions, and stop using them for fear-mongering about the ills of America, we might actually begin to address the lives and needs of most American families whose issues don’t usually stem from the lack of a marriage license.

I think that government does have a role to play in families. I believe in families personally. I believe that families are a necessary part, a social part, of a humane world. Without families and without a structure to support families, I don’t see how we have a humane world. Families help ground us as individuals. I think that government (i.e., society) needs to find ways to support those families and the functioning of those families and to find ways in which they can work without
pushing them into boxes, without pushing them into a certain kind of norm, without pushing them into adopting something that doesn’t fit with who they are or how they as individuals view the world, how they as individuals are capable of developing their family structures and their family support systems.

David already preempted my mentioning the great value I see to the movement for covenant marriage. And that is, as Steve pointed out in his comment, a clear acknowledgement of the ability to define family along different strata within the law. To allow people to make a decision about what kind of family form, commitment and function they are able and willing to take on, and what works best for their lives at a particular point in time.

The position of people who argue to exclude gay and lesbian couples from marriage is odd to me. On the one hand, they want to strengthen marriage and coerce all people into it, whether those people value marriage or not. On the other hand they fight viciously anti-gay battles to exclude people who really do value marriage and do look at marriage as something significant, meaningful and important in both society and in our lives. That seems to be an ironic way to go about reaching their goals. Likewise, excluding lesbians and gay men people from adopting children seems an odd way to support the lives of children abandoned to the system. Better that they be raised by the state than by a lesbian or gay man who, unlike the state, can actually love and nurture them, I guess.

In the future, I think that, as was already stated in the very first panel, marriage for lesbian and gay couples will be an eventuality, perhaps even in my lifetime, somewhere in some state. I think that it provides a role in knighting people into full citizenship. It always has historically, and for better or worse, it will in the future as well. It is a symbolic way in which we understand the class status of different relationships in our society, and that has always been one of the roles that it has played in sending that social message.

I'm very interested, obviously, in expanding our advocacy and ideas and pushing our minds beyond just marriage. I don’t believe it should be the sole access point for all of the never-ending array of public and private and other kinds of benefits. I think the government needs to intervene soon and more forcefully in understanding the difference between allowing people to marry, and the incidents, the thousands and millions of incidents of marriage, and the ways in which the exclusion from marriage hurts families. If we care about families, we have to acknowledge that basic point.
I look at some demographic changes, the aging of our society, the longevity with which people are living, and I worry. I worry about what care giving structures are going to be available for people who are either excluded from familial definitions by law, choose not to engage in those, choose not to have children, or can’t have children. I look at my ninety-eight-and-a-half-year-old grandmother who, fortunately, is cared for. I look at my seventy-five-year old aunt who cares for my grandmother but has no children nor a husband to care for her—though she fortunately has devoted nieces and nephews. We don’t have a social system that provides affordable, quality care for ninety-eight-and-a-half-year-old grandmothers that feels like home and feels like your daughter taking care of you. We don’t value that in our system. If we are going to try to find some value in the system, we have to at least allow for an expanded idea of what care giving means in our society. There’s a very interesting study that’s going on right now on care giving by lesbians and gay men. It is a phenomenon within families that a lot of lesbian and gay children get called upon to care for their elderly parents. The social, cultural and familial assumption is, since they have no children, they have no obligations, and can drop everything to take care of their parents. They do because they care about their families, they care about what those structures are, and they care about performing the familial function that all of us should be called upon, or are called upon, to do. But, who will care for them? Not even their life-long partners are given such a privilege in our system.

The potential elimination of Social Security, or the private investment approach worries me. In the days of Enron-scale scandals, it’s a little scary to think that my investment skills are the sole determinant to my ability to survive or not, as a sixty-five-, seventy-five-, eighty-five-, or if I have my grandmothers genes, ninety-eight-and-a-half-year-old in this society! So we need to find ways. We’re looking at potential threats to the ability of people, as they grow older in society, to be well cared for as government continues to divest itself from that level of social support. As we continue to argue over whether or not certain family structures are right or not, we’re missing the point about our future and how each one of us, as individuals, needs to be taken care of when we’re older. Laws, such as the Family Medical Leave Act, have to acknowledge the role that partners play in taking care of one another and have to provide the legal impetus to support that.

Cohabitation. A seventy-two percent increase between 1990 and 2000 in the numbers of recorded cohabiting relationships. This doesn’t include the broad range of other kinds of family relationships, but
simply includes two adults who declare themselves to be unmarried partners on a census form, and includes unmarried partners across all racial, economic, age, same-sex, and opposite-sex categories. These are part of the structures that are reality in our society. We don’t really investigate a lot into why people make decisions not to marry. Very little of the literature investigates the decision why without some sort of judgmental approach to assuming that we know. That alone should require us to take note of the fact that we need to understand that marriage isn’t a solution to all social needs.

Something I call post-marital cohabitation is another kind of phenomenon. The culture in our society around marriage is so much about procreation and child-rearing that we forget that marriage can actually transcend that stage, as difficult as it is! We need to consider the phenomenon where people have lived long, healthy and wonderful marriages and then they’re widowed. Or maybe they do get divorced at some point, find another partner (I’m talking about opposite-sex couples), live with them, share a life with them, but don’t have the social imperative to marry, because if you’re sixty-five years old you’re not going to be procreating, and are not going to be raising children. You’re finally at that stage. In fact a lot of elder activists have been our mainstay partners in the domestic partners struggle because a lot of them live in relationships and have disincentives to remarry either because of the way pension plans are defined or the way that divorce agreements sometimes get worked out. So there are a range of people who are living in relationships, and we don’t know what to do with that phenomenon and those structures.

Finally, a friend of mine always says family is a lifelong enterprise. It doesn’t exist at just one, single point in time. It doesn’t exist just when you marry. It doesn’t exist just when you have children. It exists when you’re a child. It exists when you become an adult. It does exist when you get married. And when you get old. It restructures itself in some ways. It exists throughout child-rearing. It exists beyond child-rearing. What we haven’t done is really adequately define what family is in our society and what we need to do to prevent the dire injustices to our future and to our collective children that will occur if we continue to ignore the changes, the demographics, the cultural forces that are helping to shape families and helping families function well despite some of the disincentives they face in our world.

Thank you.

LYNN W. WARDLE: Again, I want to reiterate how honored I am to be able to sit on the platform with David and Paula, who are very thoughtful and whom I respect tremendously for their contribution to
the dialogue and Paula for her advocacy work in this area as well. David, weren't you in Vermont for a year?

DAVID L. CHAMBERS: I live there now most of the time.

LYNN W. WARDLE: Well, I am grateful to be here with both of you, and clearly we have a difference of opinion. I'm going to proceed with more of my points but digress, as I go, to respond to a few other notes that I made here.

First, certainly if relationships provide equivalent benefits to society, they should receive equivalent legal status as marriage. But where is the evidence that they provide such benefits, that they are comparable in terms of social importance? What is the burden of proof? In my paper I spend much time reviewing non-marital cohabitation as an example of the lack of contribution. Indeed, David recommends we allow them unless they're harmful. Well, certainly there is a lot of evidence of harm. I want to emphasize again that the primary concern here is not harm to the individual, or their perception of what they think is good or harmful or helpful, but to society and our social concerns.

There is a tremendous movement to treat all intimate relationships as legal in law and social order. Part of my paper reviews this so-called close relationships theory and what's happening in it. Martha Fineman is a well known advocate of that in the most extreme or polar form, but her position isn’t unique. Governor Cayetano of Hawaii, back when there was a big dispute there, was quoted in the newspaper as saying government “ought to quit the business of regulating marriage.” The ALI and its Principles of Law of Family Dissolution has endorsed treating all cohabitating relationships as equivalent to marriage for the purpose of dealing with the economic consequences when the parties separate. Incredibly, they didn’t tailor the benefits that they would give to those relationships to the qualities or characteristics of the relationship, to domestic partnerships. Rather, very woodenly and mechanically they just said they would give them all the exact same benefits that are ascribed to marriage.

DAVID L. CHAMBERS: After a certain length of time.

LYNN W. WARDLE: Actually they can contract going in and it depends on how they define the length of time. There’s an assumption, if a child is born. But the point is clear that the economic expectations and the economic characteristics of the relationship of cohabitation are very different than the economic expectations and the economic relations of marriage. Yet they just woodenly extended it.
That’s part of the problem we have when we get into the area of benefits. One of Paula’s requests is to just get the benefits. However, inevitably it’s not benefits tailored to this situation or this circumstance. We want marital benefits, regardless of the difference or regardless of the nature of our relationship and its differences. And there’s a number of Supreme Court cases that would seem to be sympathetic to this relationship’s movement.

There are three reasons why we shouldn’t embrace the relationship theory. David says (and I’m going to come to this), one of the purposes is to facilitate people living the lives that they’re comfortable with unless those lifestyles are harmful. I would emphatically agree with that. But we must distinguish three things. Law deals with three categories of relationships. It prohibits some, tolerates others, and prefers a few. In the last twenty years, we have seen a dramatic change in the law’s treatment of same-sex relationships from strict prohibition to widespread tolerance. But the question of legalizing same-sex marriage or same-sex domestic partnership with a marriage-like status and benefits isn’t a question of mere tolerance. It is a matter of substantial preference, the highest preference that the law can give.

The question of harm to society: First, the burden of proof on redefining the fundamental institution of marriage ought to lie with those who are arguing for the redefinition. Second, part of the problem with showing harm is that harm from the redefinition of marriage isn’t blood spurting out of a neck wound or a bone sticking through the arm. Comments like, “Well the sky isn’t falling in Vermont,” simply aren’t helpful, because we’re not talking about, “Gee, if we do it today, we’re going to see disaster tomorrow kind of harm.” Rather we’re seeing the kind of harm that comes after a generation or two.

If you want to see harm, let’s look at Sweden, whose government adopted a very vigorous policy of neutrality toward relationships sixty years ago. All relationships were to be treated equal. Marriage was not to be preferred. Cohabitation, and as of about 1990 same-sex domestic partnerships, were included in the group of relationship forms that were to be treated equally. But it’s consistent with their policy that all relationships are the same. The consequence of that: more than half of all children born in Sweden are born out of wedlock. Non-marital cohabitation outweighs marriage. Of people that do marry, more than 50% of the marriages end in divorce. And there is open and expressed hostility to women who wish to stay home to raise their own children, because they’ve adopted the commercial or market model. Everyone needs to work, and we have daycare centers, nursery and school, and you get into the marketplace. So there’s substantial concern in Sweden
now, but it’s awfully hard to change. Once the genie is out of the bottle, it’s hard to put the genie back in. So before we decide to go down that road, we ought to be careful and make a very careful decision, because the road appears to be a one-way road. You can’t come back once you have gone down that road.

I’m concerned because marriage is the foundation of society, so the transformative effect of radical redefinition of marriage to include relationships that are of a very different nature and have different characteristics, the transformative power of inclusion in marriage, will have an effect upon society and that is something that needs to be considered before we take that step.

I have no crystal ball to predict whether alternative relationships will be given marital or quasi-marital status in some states, but it wouldn’t surprise me if that happens to a varying degree, mostly of a moderate or compromised nature. It has already happened in Vermont, and I think that it’s going to happen in different degrees in other states. Even though I think this is bad policy, I can live with it. I can live with it because of Mr. Jefferson’s primary principle: the consent of the government. When the citizens of a given jurisdiction choose by the democratic process to experiment with new social orders, the role of the people should be respected. In a federal system, we can live with that kind of diversity. It’s not neat and tidy. There will be lots of collateral questions and debates, especially concerning interjurisdictional effects, but that’s precisely how Jefferson’s principle and our constitutional system is supposed to work. So while I do expect that there will be some change, I don’t think that it will be massive.

Thank you very much for inviting me.

MELISSA L. BREGER, MODERATOR: Thank you to our distinguished panel. I see plenty of questions from the audience.

QUESTION: I’m wondering how you feel about marriage between members of different races? Also, are you in favor of equality-based marriage?

LYNN W. WARDLE: Thanks and I think that we should hear from the other panelists if they have any response or disagree with my answer. The question essentially, if I can grossly over-summarize, is the Loving argument for same-sex marriage. Equating same-sex relationships with laws that prohibit same-sex couples from marrying with anti-miscegenation laws that prohibit persons of different races from marrying. The second question is don’t you favor more equality-based on marriage. Yes, I’m on the side of the angels, of course. First, I think the Loving argument is simply one of the weakest arguments for same-sex marriage.
The best answer was given by General Colin Powell. He said that race is an inherent characteristic and not related to behavior. Our skin color is an inherent characteristic unrelated to behavior. Sexual conduct is a very behavioral activity. Comparison of the two is a convenient but invalid argument.

**QUESTION:** So you are saying that *Loving* is not relevant to the same-sex marriage discussion?

**LYNN W. WARDLE:** That's just exactly the response. There's a difference between race and sexual orientation. Race is an inherent, immutable characteristic, while sexual behavior is "behavior" and not an inherent, immutable characteristic. We can control our behavior; we cannot control our race. (There can be a debate about that). Another difference is that race has nothing to do with the purpose of marriage. Sexual behavior has everything to do with the purpose of marriage. We fought a Civil War to establish the principle that discrimination on the basis of race is not acceptable. It's a constitutional principle. We have no similar constitutional consensus that sexual orientation discrimination is an invalid basis for discrimination, particularly in marriage. But the most important point is that race has nothing to do with marriage whereas regulation of sexual behavior has everything to do with marriage. So I think that the *Loving* argument simply fails on that basis. Am I in favor of equality-based marriages? I am. And that reminds me of a quip. I debated Evan Wolfson a few years ago. My wife came with me to the debate to give me some moral support and afterwards Evan and I were continuing the debate, and my wife—

**DAVID L. CHAMBERS:** Evan, if you don’t know is at the Lambda Legal Defense Fund and is one of the foremost advocates for same-sex marriage.

**LYNN W. WARDLE:** And very persuasive, forceful advocate. But my wife came up and said, I think both of you overstate the value of marriage.

The point is we have an equality-based marriage. At least I try very hard to hold up my end. But I don’t think that changing the nature of marriage to include same-sex couples would enhance the equality nature at all. I think it would have in fact the opposite effect. I think marriage is the oldest equal rights institution that our laws know, because it requires a man and a woman for the most basic unitive society. It says two men aren’t enough. Two women aren’t enough. For this relationship we need a man and a woman: both voices, both perspectives, and both qualities are needed in this relationship. So I think equality would suffer by the legalization of same-sex marriage. By the way, I heard a quote, Bill Eskridge told me that it comes from Paula, I think, and I give her credit,
I use it in all the debates, and that is, “Marriage is a great institution if you want to spend your life in an institution.”

MELISSA L. BREGER, MODERATOR: Professor Ertman, did you have a question?

MARTHA ERTMAN: Since you consider marriage to be an equal rights institution, how do you explain its origins in inequality (e.g., the property-rights Model)?

LYNN W. WARDLE: To the twenty first century mind it’s hard to explain it, but I think understanding the economic world and the life that existed in the nineteenth or particularly the seventeenth century and earlier or the eighteenth century. One way that you can achieve equality isn’t everybody does everything equally, rather it’s an allocation of responsibilities, a division of labor, if you will. I think that explains it. But I’m not here to defend the common law denial of property rights to married women by any justification or any means. I don’t have a justification for it. Although I think historically there are explanations that make it a lot less invidious than it sounds taken out of the context of the times to the twenty-first century mind.

QUESTION: Professor Wardle, what harms do you think would result from allowing same-sex marriage?

LYNN W. WARDLE: I’ve had two questions in a row, so I’m going to defer that to David Chambers, who’s bright enough to be able to argue both sides of the question brilliantly and then I’m going to answer it. I think there is an answer. My first answer is that you’ve got the burden of proof wrong, but then I’ll try to answer your question. Let David and Paula answer it first and then I’ll come back.

DAVID L. CHAMBERS: Well, I think that Western civilization will come to an end if—!

LYNN W. WARDLE: Okay, the sky is falling!

DAVID L. CHAMBERS: Actually, that is a question I put to you. That is, I ended up my talk by asking you to try to be specific about the harms that you would expect to accrue in this country over time if same-sex couples were permitted to marry. What would they be? [Aside to Paula Ettelbrick: Ask him the same question.]

PAULA ETTELBRICK: What would be the harms over time!

[Laughter]

LYNN W. WARDLE: When I came out here, someone asked me who was going to be participating in the panel, and I told them David Chambers and Paula Ettelbrick. And they said, “Well good, glad you’re not outnumbered!” I guess I have to ask you to define harm. If you’re asking to see the blood spurt, then it’s hard to identify. But the kind of
harm is the kind of harm that I alluded to when I referred to the Swedish experience. First, one potential harm is a dramatic increase in the instability of marriage. Second, a diminution of the exclusivity of the marriage relationship. Let me read to you, if I can, because I have just a summary allusion to this in my paper. "Important social interest for marriage can be identified that alternative relationships, including proposed same-sex marriage, do not serve as well as the received tradition of marriage." So, each of these are areas in which there would be loss, diminution and disadvantage in my opinion. I just had an article published this last year devoted to one of them, but they are: one, safe sexual relations; two, responsible procreation; three, optimal childrearing; four, healthy human development; five, protecting those who undertake the most vulnerable family roles for the benefit of society, especially wives and mothers; six, securing the stability and the integrity of the basic unit of society; seven, fostering civic virtue, democracy, and social order; and eight, promoting and facilitating interjurisdiction compatibility. And let me stop there.

QUESTION: [INAUDIBLE]

LYNN W. WARDLE: I'm not asking us to have a theological or religious discussion here, but I do think that the union of a man and woman is different than the union of two men or two women. I think that the relationship of that dyad (male-female) in a committed relationship is quite different than the relationship of two men and of two women, because men and women are different. Don't blame me if you think that it's a theological reason. I think we simply have to deal with the fact that they are different. Part of the strength of marriage is that we do have that difference. Somebody's written a book, I forget his name, *The Gift of Strangers*, about how the importance of what we've learned from the people who view the world different than we do, and that may be part of the genius of the mandate of inter-gender marriage. That's one of the other distinctions between the anti-miscegenation laws struck down in *Loving* and laws prohibiting same-sex marriage that are being questioned by advocates of gay marriage. One was exclusive. It was segregationist. You cannot integrate a white man and a black woman or a white woman and a black man. Laws requiring a man and a woman are just the opposite. They are not segregationist. They require integration. And having a family that is an integrated unit (both gender integrated and generationally integrated) is a particular value to society. It's not the only possibility, but it is of particular value. It makes a particular and unique contribution to society in my opinion.

QUESTION: [INAUDIBLE]
DAVID L. CHAMBERS: Your question has at least a couple of dimensions. One is the question of the appropriateness of the state’s use of an institution like marriage to try to encourage a certain form of behavior. I think it is appropriate for the state to offer various kinds of structures to its citizens, such as marriage, the corporate entity, the nonprofit corporation, and a partnership, as a way of encouraging people toward a form that they think has some likely benefit to them and to society as a whole. I think it’s appropriate to do that, but I have great doubts that in this context encouraging marriage will actually have much utility in serving that function. That second aspect is empirical. Will permitting same-sex marriage in fact encourage people to enter into longer-term monogamous relationships than they otherwise would have? At the minimum the court is out about that. There are just large numbers of gay and lesbian relationships that have lasted a long time without the benefit of marriage law or civil union law. And whether it will be any different in a future in which such legally recognized relationships are allowed, I’m not at all sure.

PAULA ETTELBRICK: I think one question always comes to my mind in some of these discussions. What exactly is the social value or social interest in longevity in a relationship? I haven’t quite figured that out. Monogamy seems to be uniquely a heterosexual experience required most prominently of married women. It was a way in which men could give themselves some assurance that the children their wives gave birth to were theirs. Before we had DNA testing, monogamy was a means by which they could be assured of their property transfers. Over time monogamy has become more of a social and moral value. I’m not discounting the personal harm that people might feel to their relationship if a partner is non-monogamous, but I’m not sure it’s the government’s responsibility to tell us when it’s harmful or not. I’m talking even in terms of the longevity of relationships. Take apart the idea of raising children, because as a parent of two kids I understand personally and intellectually the importance of the stability of a family unit to children, the dependence children have on the adults around them, and many other factors. Once you take that out, I’m not sure what the social value of the state’s interest in long relationships necessarily is. I’ve talked about the importance of the care giving role, but that isn’t a role that even has to necessarily be done solely by an intimate partner. For instance, children take care of elderly parents all the time. Extended family members as well. There are probably some extended family or friends who are better at caregiving than some people’s kids, for instance. Again there’s this emphasis on lifelong
relationships. That, to me, seems intensely personal. I can understand the state's interest in encouraging certain kinds of commitments during key points in my lifetime when they involve care giving for somebody else. And if we had a social value for care giving at the later stage of life, perhaps that would become part of the state's interest as well.

**QUESTION:** The whole issue of lifelong marriage is not one that we raise today and as some of you who are married probably know better than anybody else in this room, I'm constantly asked the question, "what made your marriage endure?" More the norm is serial marriage at this moment in history, and is there any talk about lawyers, legal thinkers today, of an alternative form of marriage that would contract people to remain together for a certain duration of time, because that seems to be the major issue today. That to me concerns the state. After the children are raised it seems that the state has less interest in whether people stay together. I'm just wondering is there anything out there on this subject?

**DAVID L. CHAMBERS:** Judith Younger has written extensively about a proposition to make divorce very difficult to obtain while children are being raised, unless one of the spouses can demonstrate that the children are likely to be seriously harmed if the parents are forced to remain together. On the other hand, she would leave divorce very easy to get before there are any children or after the children are grown. She has gotten, so far as I know, no legislative support, whatsoever, but the answer to your question is yes. There are some people out there making this suggestion.

**QUESTION:** [INAUDIBLE]

**LYNN W. WARDLE:** I'd like to pick up on that. It's not just the economic or social welfare argument, but there's something about commitment. It's a frightening thing to make a commitment, and yet that's one of the key basis for the ordering of our society. I remember seeing one of the firefighters who after 9-11 was being interviewed and they were praising the courage of all the firefighters who'd gone into the Twin Towers and his comment was that that wasn't brave or courageous. The only courageous thing a firefighter does is when he takes his oath as a firefighter. That's the courageous act. Everything after that is simply keeping his word. There's something to keeping your word. There's something to being able to say, I'll be there. And that is a good part of the institution of marriage and promotion of stable relationships. It's a very good point, very serious point. You have to weigh the advantages that could accrue from extending this status or a status like marriage to these couples. They're certainly at this point speculative, but we might get some data out of Vermont and certainly in
the Netherlands. Is this causing more stability in the relationships? More fidelity in the relationship? You're talking about the transformative effect of the institution on the new relationships that are taken into it. That's a legitimate point, since I'm saying we need to consider the potential transformative effect of those relationships upon those already in marriage. But monogamy—the very eloquent language from the Baker opinion about this is just a question of common humanity has always seemed to me to be begging the question, wonderful rhetoric, but there are so many other humans that are denied the right to marry. Out in my state of Utah there's a man who's now in jail, Tom Green, because he married five women. If a man wants to marry a number of women, a woman wants to marry a number of men or you want to have a communal marriage you're denied that preference. Fathers who want to marry their daughters. Brothers and sisters who love each other. Every year you get those examples in the newspaper. But there are reasons for these restrictions. I spoke at a group called Tapestry of Polygamy. They're refugees of polygamy, women who have escaped, and they tell stories that raise substantial concerns and make you realize that maybe there are some serious reasons why we say these relationships should not be given preferred status. Tom Green was prosecuted because one of his wives was thirteen years old when he married her and got her pregnant. In fact, most of his wives were thirteen, fourteen, fifteen, or sixteen or seventeen years old. There are concerns that flow from those relationships. Well, I think I've answered it.

PAULA ETTELBRICK: I just want to respond to one thing. I don't think we have to wait until Vermont is somewhere down the road before we begin to look at its impact on gay and lesbian relationships and whether they are or aren't going to last. There'll be some interesting data from Vermont, to be sure. But so much of what has impacted the longevity of gay and lesbian relationships is the personal character of some of the people in the relationships and the level to which society has become more accepting of lesbians and gay men: less violent, less discriminatory, less hostile. That directly affects people's abilities to sustain their relationships. The extent to which one's family accepts one's relationship is proven time and time again to be critical to how well people feel that they can function in that relationship. It's no fun nor is it necessarily healthy to function in a closeted relationship. It's happened. People have done it—for decades sometimes. I'm just suggesting the idea, that given the social utility many of us find in supporting same-sex relationships, I was genuinely just wondering what the response from people like Steve would be. What's the value there?
LYNN W. WARDLE: Let me just make a comment. A good analogy is probably the effect of divorce on children. In the 1970s all of the people writing about the effect permissive divorce laws would have on children were saying there would be no harm, kids are resilient, they may struggle or be confused for a few months, maybe a year, but would be unharmed. But the longitudinal studies show a very different picture. So I’m not saying that we can’t forecast and speculate, but when I do that people say, you’re just speculating. I’m saying that when we get some data, we’re likely to see things that we hadn’t expected.

PAULA ETTELBRICK: If marriage is proven to be such a social good and such a social benefit, it’s hard to imagine that taking the risk towards allowing marriage would be a bigger risk than denying it. Otherwise, I think your arguments have crumbled. Is marriage so vulnerable that a few gay people getting married is going to make it fall into the wayside? Same-sex marriage is bound to destroy, on some level, our understanding of what marriage is. The patriarchal nature of marriage, the gendered nature of marriage would probably change a bit. And that’s probably scary to a lot of folks. However, you almost have to acknowledge the social benefits that will flow from it. If marriage has such a strong social benefit, then let’s take the risk and allow it to happen.

MELISSA L. BREGER, MODERATOR: I still see many hands up for questions. We are scheduled for a reception now, so I am going to stop here. Thank you so much to our distinguished panelists. I’d also like to just take a moment to thank all of the groups that helped make this Symposium possible, including all of the student groups. As a law student here, my classmates actually founded the Michigan Journal of Gender & Law, so it is wonderful to see eight years later that it is still thriving.

Thank you to the students and everybody else who have made this possible today. We now have a few closing remarks from Dean Evan Caminker and then we have a reception outside.

Thank you.

DEAN EVAN H. CAMINKER: I want to thank the Journal very much for asking me to provide just a couple of closing remarks. The cardinal rule about such remarks is basically to be laudatory, to be thoughtful, and to be brief. I can guarantee the third. I can start with the first, which is to say that we all owe a great deal of thanks to the Michigan Journal of Gender & Law for doing such an incredibly wonderful job in planning the Symposium, bringing such distinguished people together, structuring a wonderful conversation, and executing really a wonderful day, save maybe the cold walk to and from lunch. But
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if you can all join me in a round of applause for them. And obviously, as well, thank you to all of the people who participated as panelists, as members of the audience asking provocative questions. It's really been a great day of wonderful conversation.

Such a great day of wonderful conversation that it makes it very difficult to make any sort of summarizing effort here at the end of the day, so I probably will try and be minimalist here. Unfortunately Lynn Wardle already stole my opening line, which was going to be that really the central inquiry of today's discussion was already captured by Groucho Marx many years ago when he said, "Marriage is a wonderful institution, but who wants to live in an institution?" The answer I think, that we have for today, is a lot of us want to live in the institution of marriage. The difficulty is figuring out exactly what the institution ought to look like. As was brought out by any number of panelists today in any number of ways, there's a huge gulf today between our sort of idealized, formalized, received wisdom of what a marriage and a family looks like, which of course, as we know, is a lifelong, binary agreement between two heterosexual persons to come together, live forever, have 2.2 kids, buy a minivan, and learn to recycle. That picture is reality, right? Reality is very different. We can quibble about numbers but everybody agrees that a high percentage of marriages end in divorce. This sounds horrible unless you consider the alternative, which is that they end in death. It's not clear either one, when you put it that way, is desirable. But we also have stepfamilies and single parents. And in hearing all the stories about that as we went through the day, there are bits and pieces of those stories that are quite depressing. But there are also bits and pieces of those stories that are quite life-affirming and inspirational.

There's also a gulf that leads us to, of course, the gulf between marriage as we idealize it today, again, the received wisdom, and marriage or family as we think it should be. Obviously any number of us, including particularly those on this last panel, have very different ideas about what the idealized version of marriage should be. But it is clear that there are any number of people in this room that have their own interesting and provocative ideas about how it should differ from the received wisdom and ways in which we should try and get there from here. But that, of course, is the problem. It's wonderful to have these kinds of conferences precisely because it reminds us of how these problems are incredibly complex, but unfortunately also reminds us of all of the great burdens and hurdles that we have to surmount, wherever our goal is, to get from here to there.
I did promise to be brief, so I won’t suggest an idea that I was going to talk about, but I’ll just flag it for you. I found it interesting that in all the conversations today, in thinking about legal reform, people have focused primarily on the role of state legislative bodies, secondarily on the role of state courts, but very little on the Supreme Court of the United States and its control over the content of federal constitutional doctrine. The Supreme Court, of course, also helps to shape norms and rules surrounding the family and marriage, whether it’s defining the actual right to marry, as in *Loving v. Virginia*, or ancillary rights that come along with marriage, such as rights to certain kinds of sexual intimacy, which of course the court has expanded to heterosexual couples. I think the derivation of that after the *Griswold* case is pretty clear because they have in mind the vision of a traditional married couple and are extending only so far as to unmarried, traditional-looking, heterosexual couples. However, the Supreme Court has been unwilling to extend rights of sexual intimacy to homosexuals as the *Bowers* decision reminds us (though the *Lawrence* case is on the horizon).

Secondly, thinking about the recent *Troxel v. Granville* case, where the Supreme Court focuses on the automatic rights in parents to control and have custody over their natural-born children, those rights that are automatically given by the U.S. Constitution, incident to a legally defined marriage. And one of my concerns is that even after we talk about legal reforms through state legislative bodies or state judicial bodies, we have to confront the fact that the Supreme Court focuses in defining these rights on tradition. It’s their mode of operation. They may be a little bit faster at changing their minds than the Catholic Church but not a lot and not particularly on this issue. So one of the fears I have is that even if reformers get to be somewhat successful, as in Vermont, in defining new structures of what counts as potential marriage or domestic partnership, as long as the Supreme Court continues to suggest that there are some ancillary rights that attach only to the traditional or real form of marriage, there is still obviously going to be a second-class citizenship of marriage or family. *Troxel*’s a good example only because, as I’m sure everybody in this room knows, the Supreme Court there invalidated a Washington State statute that gave visitation rights to a grandparent over the objection of a natural parent. But just last month that Alabama Supreme Court said *Troxel* doesn’t apply when the parent is an adoptive parent. Again, somehow the panoply of federal constitutional rights that come along to natural parents don’t automatically apply to parents who adopt.

I’m a little nervous about this. Obviously, state law can evolve itself to fill in the gap. State laws, of course, have to some extent filled in the
gap after *Bowers*, either by repealing sodomy statutes or state courts interpreting their state constitutions to provide a broader right of privacy than the federal constitution. But I'm still worried about the symbolic effect, and we all know the symbolic effect of *Bowers* independent of where state law itself chooses to go.

So I guess what I would say at the end of the day to the Beth Robinsons of the world, and God knows, we need more of them, that it's important to recognize that the burdens lie not only in convincing state legislatures and state judicial bodies, but also to encourage federal judges to understand that maybe constitutional law about the family has to evolve just as much as state legislative and judicial rules about the family do as well.

So in a sense, as we all know, at the end of the day life is complex, and today's conference has been really wonderful in bringing out and relating a lot of these complexities. We're at the end, but we're also really at the beginning, because my sense is that all the participants in today's conversation are leaving us with many new questions that they will then as scholars, as advocates, as lawyers, hopefully go out and try and address for our panel, next year, whenever it's going to be. I want to thank you all again very much for coming and attending this wonderful conference. And before you're allowed to go get food, we have one final announcement.

**STEPHANIE BAKER:** Hello. I just wanted to take a moment to thank someone who's been integral in today's event, and that's Nicole Haaning. She is our symposium coordinator and we just wanted to take a minute to express our gratitude. I'm speaking on behalf of all the members of the *Michigan Journal of Gender & Law*, so if Nicole could come down for a moment, we just got a little something, because she definitely stepped up to the plate and took over a very daunting task of seeing this whole symposium through, and I think she did a wonderful job! Thank you Nicole!

**NICOLE HAANING:** Thank you so much. I'd also like to thank all the speakers who came, especially those of you who traveled from far away to brave our terrible weather and whose thoughtful contributions really made today's event a huge success. Thank you so much for coming!

I'd also like to thank the members of the *Journal of Gender & Law* who pitched in to help the day run smoothly. Everyone got here, everything worked out perfectly, so thank you to all of you.
I’d also like to thank Stephanie Helfrich who really came up with a proposal, invited all the speakers and really, I think, laid the groundwork for today’s event.

I would like to thank Stephanie Baker for her work on publicizing this event. She was very creative, very hardworking, and I think her efforts paid off, because we had a great turnout today!

I’d like to thank the other members of the symposium committee; Janine Harvey, Sam Tuttle, Charlotte Gillingham, and Sharon Dolente. I hope I’m not forgetting anyone, I don’t think so!

And finally I’d like to thank Maureen Bishop, our publication manager. And I’d like her to come down here. She’s hiding in the back. Maureen! And really her expertise, her guidance, really made this day a success. She knew all the details, really all I had to do was listen to her! It turned out great, thanks! Please help yourselves, there’s food and drink outside.

Thanks! &