Toward Equal Regard for Marriages and Other Imperfect Intimate Affiliations

Judith Stacey

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol32/iss1/13

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
TOWARD EQUAL REGARD FOR MARRIAGES
AND OTHER IMPERFECT INTIMATE
AFFILIATIONS

Judith Stacey*

What are and should be the relationships between the legal
institution of marriage, democracy, and "equal-regard" families, to
borrow Professor Don Browning's term? To what extent should the
state recognize, promote, or constrain intimate affiliations beyond
marriage? While Browning seeks to reinvigorate the cultural and legal
supremacy of heterosexual marriage over other forms of intimate
affiliation, Professor Martha Fineman would eliminate the legal status
of marriage and focus family law on affiliations of caretakers and
dependents. Browning employs a very restrictive conception of "equal
regard" family values, rooted in a naturalist understanding of gender,
sexuality, and family practices as asymmetrical and complementary.
In contrast, like Fineman, I seek a more capacious social and legal
approach to "equal regard" for a broad array of contemporary family
forms. Unlike Fineman, however, I will argue for a pluralist approach to
marriage as well as to intimate affiliations "beyond conjugality," as an
official Canadian proposal for expanding family rights puts it.

I want to begin with two snapshot portraits of what I consider to be
exemplary, "equal-regard families" (although not of the sort that

* I wish to thank David Cruz and Martha Ertman for constructive comments on a draft of
this essay. Direct correspondence to Judith Stacey, Department of Sociology, 269 Mercer Street,
New York University, New York, NY 10003 (judith.stacey@nyu.edu).
1. Don Browning, Critical Familism, Civil Society, and the Law, 32 HOFSTRA L. REV. 313,
313 (2003).
2. See id. at 325.
4. See Browning, supra note 1, at 317.
5. See FINEMAN, supra note 3, at 146-47.
6. See LAW COMM'N OF CAN., BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING
CLOSE PERSONAL ADULT RELATIONSHIPS xxvi (Dec. 21, 2001), available at

331
Professor Browning had in mind), from my ethnographic research on gay men and their diverse forms of intimacy and kinship in Los Angeles. Both cases represent intimate affiliations forged beyond marriage. These particular families enjoy exceptionally harmonious, loving, responsible, committed, ethical, and successful intimate affiliations. However, they remain legally invisible and vulnerable, because of the massive disjuncture between their lived and legal statuses, or to employ Professor Michael Grossberg's terminology, because of the chasm between "functional" and "ideological" families that undergirds marriage and family law in the United States.

As "exhibit A" I wish to introduce a three-parent, two-child family initiated when, after thirteen years of close friendship, Paul (a gay man) and Nancy (a lesbian) decided to procreate through alternative insemination and to co-parent together. The two friends, both self-employed professionals, spent the next two years carefully discussing their familial visions, values, expectations, anxieties, and limits. In October 1999, during the period when Nancy was attempting to conceive their first child, they composed and signed a co-parenting agreement. Although it lacks legal force, this ethical document could serve as a model of "equal regard" family values, as the preamble and substantial excerpts I quote below demonstrate:

This agreement is made between Paul Finlay and Nancy Bower to express our understanding as to our rights and responsibilities as parents to our child and to each other. We fully realize that our power to make or enforce this contract is limited by state law. With this knowledge, and in the spirit of love, cooperation, and mutual respect that has developed over the course of our thirteen year friendship, we wish to state the following to be our agreement:

1) It is our intention to jointly and equally parent our child [Note this explicit commitment to "equal regard" family.] We will do our best to share the responsibilities involved in nurturing, feeding, clothing, loving, raising, educating and disciplining him.

7. I describe the project in an NEH fellowship proposal, Fellow Families: Genres of Gay Male Intimacy and Kinship in a Global Metropolis, available at http://www.usc.edu/dept/sociology/info/staceyNEH.pdf. The NEH funded a year of intensive field research in 2002, including life-history interviews with sixty gay men between the ages of thirty and forty-five and their designated kin of diverse race, ethnicity, social class, and family status.


9. All names of research subjects are pseudonyms, and I have altered some identifying details to protect the privacy of my interviewees and their kin.
2) Each of us, in good faith, will make an effort to equally share in making all major decisions affecting our child's health, welfare and education.

3) We agree to be jointly responsibly for our child's financial support until he is eighteen years old. We will renegotiate this to consider joint financial support until age twenty-one, depending on his educational needs and plan.

6) We will do our best to support a healthy, loving relationship between our child and the other parent, the other parent's romantic partner and the other parent's immediate family.

7) We will do our best to support the romantic relationships of the other parent.

9) We expect that the logistics of living arrangements will be a complicated challenge, and we will attempt to be flexible in building an arrangement that works for all involved. For the first year of our child's life, we will attempt to live very close to each other. We will try to find and rent a duplex apartment or homes that are on the same street. At the end of this year we will have a better sense of what type of living arrangement will work best for all involved and we will re-evaluate at that time.

10) We will generally strive to share in the day to day care of our child equally. If we agree in the future that it is in the best interest of the child for him to spend a greater portion of time with one of us, that parent will take all steps necessary to maximize the other parent's visitation and to help make visitation as easy as possible.

11) We will both do our best to consider the impact on our child whenever making major life decisions for ourselves. We agree if one of us decides to move out of the LA area while our child is still a minor, he or she will not have to right to move the child from the LA area with them. Instead, we agree that our child will remain with the parent located here, so as to provide continuity and stability in his environment. The parent who moves will continue to have rights and responsibilities in regard to visitation and child support as outlined in this agreement.
13) We agree to review this co-parenting agreement as needed, in order to jointly make changes to it when necessary as time passes.

14) We realize that the form of our friendship will change dramatically once our child is conceived and born, and we welcome this change. We have wanted to create a child out of the love that exists in our friendship. We will continue to give attention and nurturance to our friendship as it evolves and grows.¹⁰

Nancy and Paul are now delighted, devoted biological and legal co-parents of a preschool-aged son and an infant daughter. They are not, however, the children's only parents. Before Nancy successfully conceived her first pregnancy, Cupid tested Paul's ability to live up to the sixth of the pair's prenatal pledges; Nancy met and entered a romantic intimate affiliation with Liza, a childless woman who long had wanted to have children. Paul rose to the challenge of supporting and incorporating Liza into his parenting alliance with Nancy, and thus their son and daughter were born into a three-parent family. To date, Nancy and Paul have more than honored all of the pertinent terms in their shared parenting plan. Jointly they purchased a duplex residential property. Nancy and Liza co-reside in one unit, Paul inhabits the other, their toddler lives and sleeps alternately in both, while the breast-fed infant still sleeps each night in her co-mothers' room. Paul and Nancy, the primary parents, fully and fairly share the major responsibility and expenses, along with the joys of parenthood. Both reduced their weekly work schedules to three days so that each could devote two days weekly to full-time parenting. Liza, who is employed full-time, does early evening child care on the days that Nancy and Paul work late, and she fully co-parents with Nancy and Paul on weekends and holidays.

Moreover, this "functional" three-parent family enjoys the support of an exceptionally thick, diverse community of kith and kin. The children's godfather, a former lover of Paul's, visits his godchildren most weeks, and the family celebrates holidays with extended formal and chosen kin that include another gay-parent family. In addition, Paul belongs to the Pop Luck Club ("PLC"), a support group for gay fathers and their children in Los Angeles.¹¹ Organized in 1998 by nine gay-father families, it sponsors monthly gatherings, special events, and support services for a membership that has grown to nearly two hundred

¹⁰ Document provided to author by research informants (on file with author).
¹¹ For general information about the Pop Luck Club, see http://www.popluckclub.org/who_we_are.html (last visited Dec. 26, 2003).
families of varying shapes, sizes, colors, and forms. On Fridays, Paul and the children join a sub-group of at-home PLC dads and their children for their weekly play date in a local playground. The PLC has spawned additional sub-groups and activities, such as for prospective gay dads, adoptive dads, a monthly mixer for single gay-fathers as well as satellite PLC chapters in neighboring counties.

"Exhibit B," a second model "equal-regard" family from my research, consists of four-parents and their two young sons. Lisa and Kat, a monogamous lesbian couple, generated this family when after fifteen years together, they asked Michael, their dear friend for all that time and former house-mate, to serve as a sperm donor and acknowledged father to the children they wished to rear. It took Michael (a single, gay man) five years of serious reflection and discussion to agree to do so. "There is really no way to express the complexity of my journey," he recounts, "or to impart the richness of the experience. Given the rare opportunity to truly think about whether or not I wanted to be a parent (as opposed to having it sprung upon me), I left no rock unturned—no hiking trail was untread." Gradually Michael realized that he did not wish to become a parent unless he too had a committed mate: "I told them that I could not do it alone (without a partner). I thought about what it would be like going through parenthood without a significant partner with whom to discuss and share things. It seemed too isolating.

Fortuitously, just when the women were reaching the end of their patience, Michael met and fell in love with Joaquin, who had always wanted to have children. The new lovers asked Lisa and Kat to give them a year in which to solidify their union before embarking on co-parenthood. The two couples spent that year in a four-way parental courtship:

Joaquin and I had many talks and all four of us were, quite frankly, falling in love with each other in a way that can only be described as romantic love. There were flowers, there were candlelight dinners, and there were many beach walks and much laughter. There were many brave conversations about our needs and our fears and our excitement.

12. See id.
13. See id. (noting that providing information for prospective and adoptive parents is part of the Pop Luck Club’s mission); see also http://www.popluckclub.org/index.html (last visited Dec. 26, 2003) (listing events for the current month).
14 Anonymous, Love Makes a Family (unpublished speech to a gay community group) (on file with author). Additional information about this speech is withheld to protect the anonymity of my informant.
15. Id.
There was nothing that could prepare us for the first night when Joaquin and I went to Lisa and Kat's home to make love and leave a specimen. . . . By the way, it is NOT a turkey baster, but a syringe that is used. Love was the main ingredient, though, and Joaquin and I experienced a transcendent epiphany as we walked along the beach after the exchange. We knew that our lives and our relationship to Lisa and Kat would never be the same even if the conception did not happen. We shared, perhaps, the most intimate of experiences with Lisa and Kat.  

Since that magical night, the two couples also have shared, with equal regard, but without equal responsibility, access, or rights, the intimate joys and burdens of parenting their two young sons. Lisa and Michael are the children's biological and legal parents. The children reside, however, with Lisa and Kat, who are their primary, daily social caretakers as well as their chief providers. Lisa, who gave birth to and breast-fed both children, also spends the most time with them, because Kat's employment demands more time outside the home. Although Michael and Joaquin live and work more than seventy-five miles away, they have visited their children every single weekend of their lives as well as on occasional weeknights; they also confer with the co-moms and speak, sing, read, or send e-mail to their preschooler almost daily. In addition, the adults consciously sustain, monitor, and nurture their co-parenting alliance and friendship by scheduling periodic "parent time" for the four to spend together.

This four-parent family, like the three-parent example above, regularly shares holidays and social occasions with a rich array of legal and chosen kin. They too are immersed in a large local community of lesbian and gay-parent families, one of which Lisa took the initiative to organize. Three proud sets of doting grandparents vie for visits, photos, and contact with their grandchildren. In painful contrast, Kat's parents have refused to incorporate, or even to recognize, their grandchildren or any of their lesbian daughter's functional, intimate affiliations into their more rigid, ideological understanding of family.

I. INVISIBLE INTIMATES

Unfortunately, family law, demographic research, and public policy more often echo and reinforce the unequal-regard, ideological family perspective to which Kat's parents adhere than the more generous, democratic, functional definitions of family practiced by the remaining

16. Id.
parents, kin, and communities of both the thriving families I have described. The social reality of these intimate affiliations remains legally invisible and vulnerable. Census data and most demographic surveys would register the three-parent family of Paul, Nancy, Liza, and children as two unrelated households, one headed by a same-sex female couple, the other by a single man.\(^{17}\) Paul and Nancy would each appear to be unmarried parents who share legal and physical custody of their biological children. Although Liza has been an active third, co-residential parent of both children since their birth and contributes to their financial support as well as their daily care, her parental role is legally and linguistically invisible. She possesses no rights, responsibilities or obligations. No terms identify her relationships to her children or to Paul.

The same social and legal realities hold for the four-parent, geographically-dispersed family crafted by Lisa, Kat, Michael, and Joaquin. To a census-taker, these would appear to be two unrelated households in distinct metropolitan areas—the first household consisting of a single mother, her two children, and her same-sex registered, domestic partner, and the second of a same-sex male couple, one a non-residential father, the other childless. Although Kat and Lisa jointly planned for and have shared the primary parenting of their children from the outset, and although Kat is the primary breadwinner for her family, Kat, like Liza, is a legally invisible parent. Even though California's domestic partner legislation (second only to Vermont's in the level of recognition and rights bestowed) treats Kat as the law treats any married stepparent,\(^{18}\) judicial precedents do not account for the type of multi-parenting arrangement established by Lisa, Kat, Michael, and Joaquin, and offer Kat no clear legal grounds for petitioning for child custody or visitation in the event of Lisa's death or a custody conflict. In reality,

---


\(^{18}\) On September 19, 2003, California's governor signed into law Assembly Bill No. 205 (effective Jan. 1, 2004), available at http://www.leginfo.ca.gov/pub/bill/asm/ab_0201-0250/ab_205_bill_20030922_chaptered.pdf. This law greatly expands the rights and responsibilities of domestic partners, including establishing that

The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses. The rights and obligations of former or surviving registered domestic partners with respect to a child of either of them shall be the same as those of former or surviving spouses.

Id. § 4 (enacting CAL. FAM. CODE § 297.5).
Lisa cannot be legally recognized as a co-parent to her children unless Michael relinquishes his legal paternal status and rights.\textsuperscript{19}

Of the seven parents in these two families, Joaquin's parental status is by far the most invisible and vulnerable. His love, attention, and commitment to their sons have matched Michael's in every possible way since before they were conceived. His three co-parents all report that their firstborn finds Joaquin's infectiously warm, playful, and easygoing charm so irresistible that he often favors him somewhat over Michael. Yet, Joaquin, who is not a biological, residential, or adoptive parent of either son, has no legal claim to paternity whatsoever. Moreover, the visible physical contrast between Joaquin's vibrant Latino features and those of his tow-headed, blue-eyed, fair-skinned, Anglo sons immediately signals their racial-ethnic difference, evoking confusion, discomfort, and worse from strangers who observe this father with his children.

II. MARITAL PLURALISM AND REGISTERED KINSHIP

The functional families I have just described are but two among millions of de facto contemporary families generated from intimate affiliations outside of marriage.\textsuperscript{20} They represent unusually creative and successful responses to the heightened challenges, risks, and opportunities of what I have described elsewhere as the postmodern family condition.\textsuperscript{21} Family diversity is an irreversible feature of the postmodern family landscape. The decline of modern marriage and of

\footnotesize{19. Under CAL. FAM. CODE ANN. § 8617 (West 1994), adoption normally terminates the rights and responsibilities of birth parents; however, this termination is waivable, allowing for stepparent adoptions. See Sharon S. v. Superior Court, 73 P.3d 554, 561 (Cal. 2003). The California Supreme Court specifically refused to hold that the ability to waive these termination rights allows for the creation of parental rights in three or more persons. See id. at 561 n.6.

Stepparents have no clear rights to visitation or custody under California law. See In re Kieshia E., 859 P.2d 1290, 1295-96 (Cal. 1993) (holding that de facto parents, including stepparents, do not gain the status of parents); id. at 1299 (Kennard, J., dissenting on other grounds) (noting that the court's doctrine further implies no visitation or custody rights).

For close relatives who have a well-established relationship with a child, California courts are split over the constitutionality of allowing visitation rights despite the objections of the child's parents. Compare Fenn v. Sherriff, 1 Cal. Rptr. 3d 185, 189 (Cal. Ct. App. 2003) (finding constitutional a statute allowing for close relatives of a deceased parent to petition for visitation with that parent's child), with Zasuetz v. Zasueta, 126 Cal. Rptr. 2d 245, 252 (Cal. Ct. App. 2002) (finding the same statute unconstitutional).


21. See JUDITH STACEY, BRAVE NEW FAMILIES 251-71 (1990).}
the "Father Knows Best" nuclear family system, which so worries proponents of the marriage movement like Professors Browning\textsuperscript{22} and Wardle,\textsuperscript{23} is an increasingly global phenomenon.\textsuperscript{24} Propelled by disruptive effects of the U.S.-dominated, global capitalist economy, by worldwide communications technologies and new reproductive sciences, and by the international movements for gender and sexual justice these have unleashed, family diversity is here to stay.

Precisely because lesbians and gay men must forge their intimate affiliations beyond the gendered scripts of heterosexual conjugality and reproduction, they represent the vanguard of this diversity. They are simultaneously free and obliged to negotiate the fundamental terms of their romantic and domestic unions and to decide whether or not to parent, with whom, and how without resorting to default mode cultural and legal templates. Necessarily, therefore, they devote far greater reflexivity and deliberation to these definitive matters than do most heterosexuals. The magnanimous, child-centered co-parenting agreement Paul and Nancy crafted hints at the salutary possibilities of such heightened reflexivity and agency.\textsuperscript{25} Most lesbians and gay men, like Nancy and Paul, subscribe to a comparatively egalitarian and flexible approach to sharing domestic and financial responsibilities and support, one that is not only more democratic, but also better equipped to handle the pressures and instabilities that postindustrial working conditions impose on all contemporary families.\textsuperscript{26} Female and male parents alike nurture, discipline, socialize, subsidize, organize, challenge, comfort, delight, and inspire their children, as well as

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{22} See Don Browning, \textit{supra} note 1, at 326 (describing the decline of the marriage based nuclear family as an unfortunate, negative trend).

\item \textsuperscript{23} See Lynn D. Wardle, \textit{The Bonds of Matrimony and the Bonds of Constitutional Democracy}, 32 \textit{HOFSTRA L. REV.} 349, 376 (2003) (arguing that many specific, severe social ills can be attributed to the devaluing of marriage).

\item \textsuperscript{24} For summaries of the new international trends, see \textit{THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION} (Linda J. Waite ed., 2000).

\item \textsuperscript{25} See \textit{supra} text accompanying note 11.

\end{itemize}
\end{footnotesize}
disappoint, disturb, frustrate, neglect, and abuse them in patterns
governed by individual temperament, capacities, and limitations rather
than by gender conventions. Their practices give the lie to Browning's
naturalist belief that a gender binary regulates "the asymmetrical nature
of male and female investments" in child care. It may be true that even
under utopian fully egalitarian conditions, more women than men would
willingly devote themselves to the labor of child care. However, it is also
true that men like Paul and the other at-home dads in the PLC already
invest more of their lives in taking care of their children than do the vast
majority of contemporary mothers in the U.S. Browning seems to have
forgotten a rudimentary statistical principle about the difference between
two overlapping Bell Curves—gender differences in parental behavior,
as in height, are not dichotomous, but represent differences between
means.

Most lesbigay parents and their children also enjoy access to a rich
array of community support networks, like the PLC, designed by and for
these family pioneers to buttress them from hostile social forces. Confirming the adage that "necessity is the mother (and, in this case,
also the father) of invention," lesbigay parents are creating familial and
community models that others can profitably emulate and, I wish to
argue, that law and society should facilitate.

Access to legal same-sex marriage, however, would do little to
recognize or protect the complex, substantive realities of the intimate
relationships, practices, and commitments exhibited by the families I
have described. Indeed, marital status might even promote less rather
than more equal regard for the invisible parents and kin in these families,
and thereby a less democratic or desirable outcome than they, their
children, and society deserve. Instead, these families illustrate the need
to give legal recognition and form to the rich diversity of intimate bonds
that have emerged beyond marriage. Their situation helps to explain why
many queer cultural and legal theorists remain unenthusiastic about, if

27. Browning, supra note 1, at 317.
28. Cf. David K. Flaks, Gay and Lesbian Families: Judicial Assumptions, Scientific Realities, 3 WM. & MARY BILL RTS. J. 345, 350 n.35 (1994) (describing a study that found that gay fathers "more frequently explained rules to their children, . . . responded more to their children's perceived needs, . . . did more to act as resources for activities with their children, . . . and [were] more likely to act in a counselor role with their children" than were heterosexual fathers).
TOWARD EQUAL REGARD FOR MARRIAGES

not outright wary of, international campaigns for same-sex marriage that have captured center stage in gay family politics over the last decade.  

Without rehearsing the complex terrain of this debate, I consider it crucial to acknowledge the historical antinomy between marriage and democracy. The history of marriage is by no means a narrative of democratic equal regard. For centuries an explicitly patriarchal institution, marriage law never has subscribed to “equal opportunity” standards of admission or governance. Designed especially to regulate and transmit rights in property, procreation, and persons, marriage possesses a history saturated with hierarchy, inequality, exclusions, and discrimination—inequities structured not only by gender but also by race, class, religion, nationality, and of course sexual orientation. Recall, to offer just a few examples, that slaves were denied the right to marry; men without property rarely could afford to take a wife; the state actively repressed Mormon polygamy; and anti-Asian immigration policies admitted only male laborers and denied them naturalization.


32. See Opinion of Daniel Dulany, Esquire, 1 H. & McH. 559, 563 (Md. 1767) (“I adopt the rule of the civil law . . . that slaves are incapable of marriage.”) (Opinion of the Deputy Secretary); Jill Elaine Hasday, Federalism and the Family Reconstructed, 45 UCLA L. REV. 1297, 1329 n.119 (1998) (“Only one Southern court ever held that slave marriages had any legal effect . . . and the . . . legislature overturned it.”); Bill Quigley & Maha Zaki, The Significance of Race: Legislative Racial Discrimination in Louisiana, 1803-1865, 24 S.U. L. REV. 145, 153-54 (1997) (noting that under the “Digest of the Civil Laws Now in Force in the Territory of Orleans (1808), . . . [s]laves were not permitted to marry without the permission of their masters, and, if married, their marriages produced none of the civil effects of marriage”); Lea VanderVelde & Sandhya Subramanian, Mrs. Dred Scott, 106 YALE L.J. 1033, 1108 n.315 (1997) (noting that according to an 1865 treatise on slave law, slaves could not “contract matrimony”). But see Merrick v. Betts, 101 N.E. 131, 132 (Mass. 1913) (noting that, under a 1705 statute, slaves in colonial Massachusetts had the right to marry).

33. For example, in early twentieth century rural Ireland, the widespread practice was for only one son in a family—the son who would inherit the family farm—to marry. See CONRAD M. ARENSBERG, THE IRISH COUNTRYMAN: AN ANTHROPOLOGICAL STUDY 77 (Natural History Press 1968) (1937).

34. See, e.g., Edmonds-Tucker Act, ch. 397 § 17, 24 Stat. 635, 638 (1887) (repealed 1978) (dissolving the incorporation of the Church of Jesus Christ of Latter-Day Saints); see generally David L. Chambers, Polygamy and Same-Sex Marriage, 26 HOFSTRA L. REV. 53, 61-70 (1997) (discussing the history of legal repression of bigamy from the late nineteenth century through the mid-twentieth century).
rights before excluding Asian immigration entirely. Of course, as advocates of same-sex marriage correctly note, precisely because marriage has a history, rather than (heaven forbid!) an "essence," it is a terrain amenable to democratic struggles and reforms. Indeed, by now more than a century of feminist campaigns have gone about as far as they, or any legal reforms, can go in divesting Western marital law of its patriarchal heritage. Same-sex marriage fans hope, plausibly enough, to extend achievements made regarding gender (and to a far lesser extent, race) to encompass sexual identity as well.

I share the optimistic view of many same-sex marriage advocates that the question is not if but when the U.S. and most other nations will follow the lead of the Netherlands by fully legalizing same-sex marriage. The more challenging question, however, is how meaningful or democratic will be the social consequences of what now seems an


36. See, e.g., Elizabeth Cady Stanton, Stanton, "Address Delivered at Seneca Falls," July 19, 1848, in ELIZABETH CADY STANTON & SUSAN B. ANTHONY, CORRESPONDENCE, WRITINGS, SPEECHES 27, 31 (Ellen Carol DuBois ed., 1981) ("[S]uch disgraceful laws as give man the power to chastise and imprison his wife, to take the wages which she earns, the property which she inherits, and, in case of separation, the children of her love [should be,] . . . if possible, forever erased from our statute-books.").


For discussion of public and gay activist attitudes toward same-sex marriage, see generally Judith Stacey & Elizabeth Davenport, Queer Families Quack Back, in HANDBOOK OF LESBIAN AND GAY STUDIES (Diane Richardson & Steven Seidman eds., 2002); David L. Chambers, What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples, in QUEER FAMILIES, QUEER POLITICS 306 (Mary Bernstein & Renate Reimann eds., 2001) (This essay is a revision of Chambers’ article previously published under the same title at 95 MICH. L. REV. 447 (1996)); Suzanna Danuta Walters, Take My Domestic Partner, Please: Gays and Marriage in the Era of the Visible, in QUEER FAMILIES, QUEER POLITICS, supra, at 338.
historically inevitable event. Here there is less cause for optimism. For at the same time that feminist forces have been dismantling gender inequities within marriage, potent counterforces have wreaked far less democratic effects on the conjugal institution and beyond.

First, access to marriage has become more rather than less exclusive in many ways. As sociologist Frank Furstenberg aptly puts it, marriage is increasingly "a luxury good," whose privileges are by no means equally available to members of different economic or racial/ethnic groups, nor, I would add, to women or men with specific demographic characteristics.\(^3\)\(^8\) Indeed, I would go further to suggest that marriage not only signals, but actively reproduces and exacerbates preexisting social and economic inequalities. Sociologist William Julius Wilson's provocative Black "male marriageable pool index" underscores the racial coding of imperviously robust correlations between marriage and divorce rates, on the one hand, and poverty and male unemployment, on the other.\(^3\)\(^9\) To enter and sustain a marriage requires economic and social capital, but marriage also enhances the economic and social capital of those with sufficient resources to maintain their membership in the club.\(^4\)\(^0\) Marriage thereby reinforces inequalities between couples and single adults and among the children and other dependents they support. Contemporary measures to promote marriage rather than welfare as the remedy to poverty explicitly endorse and intensify discrimination against unmarried adults and their dependent kin. Extending marriage rights to same-sex couples would do nothing to mitigate this inequity.

In addition, as marriage movement proponents like Browning lament, the institution is becoming an increasingly unreliable and unstable framework for childrearing.\(^4\)\(^1\) The "transformation of intimacy," as social theorist Anthony Giddens terms it, that has accompanied the shift from industrial to post-industrial economies in the West,\(^4\)\(^2\) makes children's intimate affiliations and their economic security vulnerable to the vagaries of adult romantic, erotic, and emotional commitments. High rates of divorce, delayed marriage, cohabitation, and unwed parenthood register the contemporary disjuncture between conjugal and parental

---

40. See id. at 72, 75-77.
41. See Browning, supra note 1, at 321-23.
passions. Browning and his associates in the marriage movement seek to mind the gap by coaxing individual behavioral changes that will lure more (exclusively heterosexual) couples to join and commit to lifetime membership in the elite conjugal congregation. But even if the marriage movement were to succeed in nudging all of the indices of marital fragility downward, many millions of citizens still would remain outside the conjugal fold. The current bleak economic and employment outlook is certain to lengthen these odds.

Moreover, pro-marriage advocates rarely confront the undemocratic, zero-sum consequences of their agenda. The more eggs and raiments our society chooses to place in the family baskets of the married, the hungrier and shabbier will be the lives of the vast numbers of adults and dependents who, whether by fate, misfortune, or volition, will remain outside the gates. In my view, this is an unacceptably steep and undemocratic social price for whatever marginal increases in marital stability might be achieved for those admitted to the charmed circle. Fineman boldly confronts this dilemma by proposing to divest marriage of its legal status entirely and return it to the provenance of religion, ritual and customary norms that governed its practices for most of human history. She makes a compelling case for disentangling the state's enduring, legitimate interest in protecting children and dependents from its atavistic and undemocratic regulation of adult sexual and affectional unions.

Although I concur with much of Fineman's diagnosis of the social inequities of marriage law, I agree with Browning that the institution enjoys such overwhelming popular support, particularly in the U.S., that efforts to dissolve its legal status seem quixotic at best. If only for strategic reasons of "real politik," therefore, I believe we should work to further democratize, pluralize, and decenter marriage, rather than to eliminate it. Here I would build upon a discernible social trend toward legalizing diverse forms of marital and non-marital unions. Paradoxically, the covenant marriage movement, despite its conservative

43. See Browning, supra note 1, at 327.
44. I was pleasantly surprised to find that Browning acknowledges some of the destructive effects of market forces and post-industrial working conditions on families and advocates a reduction in the work week for parents whether married or single. See Browning, supra note 1, at 324-25. This strikes me as a fruitful avenue for common ground. I find it troubling that the marriage movement devotes almost all of its public discourse to a moralistic cultural politics rather than to addressing the severe structural challenges most families now confront.
45. See FINEMAN, supra note 3, at 228-30.
46. See id.
47. See Browning, supra note 1, at 326-27.
Christian-led agenda to restore traditional marriage, inadvertently paves the way for more pluralist policies. Introducing covenant marriage as an alternative conjugal option, as thus far Louisiana,\textsuperscript{48} Arizona,\textsuperscript{49} and Arkansas\textsuperscript{50} have done, exposes the historical variability of marriage principles and practices and undermines universalist or naturalist conceptions of the institution. Offering consumers a selection between "heavy" and "lite" brands of marriage should eventually make it more difficult to justify denying the "lower-priced spread" to same-sex couples. Indeed, as Fineman inquires, "why stop with two [forms of marriage]?"\textsuperscript{51} If heterosexual couples are free to enter a covenant marriage, but the majority choose not to do so, the state should find it difficult to claim that it must defend the sanctity of the traditional heterosexual character of "standard" marriage against whatever threat legalizing same-sex unions might pose.

Moreover, as I discussed earlier, the global trend toward legalizing same-sex unions appears historically irreversible. Hence, in my view, a progressive family agenda should embrace and seek to influence, rather than to oppose, this movement. Opening the conjugal campground to same-sex couples might indeed further undermine its traditional gender regime, as feminists like Nan Hunter\textsuperscript{52} and E.J. Graff\textsuperscript{53} hope and opponents like Wardle\textsuperscript{54} and Jean Bethke Elshtain\textsuperscript{55} fear. Expanding legal definitions and varieties of marriage would recognize and protect innovative forms of chosen kinship, including non-sexual unions of committed friends or relatives. On the other hand, it is true, as critics frequently charge for demagogic purposes, that a pluralist approach to marriage also could reopen a legal door to polygamy.\textsuperscript{56} Although this marital form appears contrary to Western feminist and democratic principles, the prospect does not seem worrisome. Abstract

\textsuperscript{53} See GRAFF, supra note 31, at 223-26.
\textsuperscript{56} See Chambers, supra note 34, at 56-58 (noting how supporters of the Defense of Marriage Act in Congress made this argument during hearings on the Act).
logic does not dictate legal and social change. Only if and when a constituency mobilizes to demand legal recognition for polygamy, as the gay rights movement has done for same-sex marriage, will it become a serious subject for public deliberation and political contest. In light of the decidedly undemocratic means by which the U.S. repressed polygamy in the late nineteenth century,\textsuperscript{57} I would not object to such a discussion. In fact, I could imagine supporting the legalization of polygamy if adequate protections ensured genuine consent of all parties, as well as rights to exit. A truly democratic and pluralist approach to marriage and kinship requires that we coexist with distinctly different family practices and values, including those contrary to our own.

Pluralizing marriage offers one avenue for legitimating intimate affiliations that currently function without legal status. I particularly welcome reforms of this sort that de-gender and de-sexualize the conventional definitions of marriage. Thus, I strongly prefer the French legislative strategy of making the Civil Solidarity Pact available to couples irrespective of gender or sexual orientation\textsuperscript{58} over the more conservative approach to civil unions and domestic partnerships in the U.S. that renders this a second-class legal option available exclusively to same-sex couples.\textsuperscript{59} However, under postmodern conditions of intimacy, even a fully pluralist and gender-blind system of marriage law offers an insufficient family reform agenda. It would fail to meet the needs of the two equal-regard families I depicted above and millions of others. To do so we must expand our cultural imagination and family law past the dyad.

Toward this end, I want to invite legal theorists and policymakers to help develop my modest (and rudimentary) proposal to devise a viable legal form for registered kinship. I envision a supple framework that moves beyond recognizing domestic partnerships both in number and kind. Participation in registered kin units would not be limited to couples or require that all the parties cohabit. Instead, to register for legal status, individual kin groups would be required to negotiate the specific terms of their respective rights and obligations and their underlying family values, along the lines of the co-parenting agreement that Paul and Nancy designed.\textsuperscript{60} A registered kinship system would enable Paul,

\textsuperscript{57} See id. at 63-64.


\textsuperscript{59} See, e.g., VT. STAT. ANN. tit. 15, § 1202 (2002); CAL. FAM. CODE ANN. § 297 (Supp. 2003).

\textsuperscript{60} See supra text accompanying note 10.
Nancy, and Liza to choose to register the terms of their three-parent, dual-household kin group as well as a process for integrating potential additional members, such as a future romantic partner of Paul's. Likewise, under this rubric, Lisa, Kat, Michael, and Joaquin could choose to register their four-parent, geographically-dispersed family. Registered kinship would legitimate and protect the currently invisible parental status of Liza, Lisa, and Joaquin and provide the children in these families more secure affiliation to all of their de facto parents and extended families.

My conception of registered kinship draws upon a variety of legal precedents and cultural sources. Like Fineman, I seek alternatives to the sexual and marital family. Although I have some misgivings about employing the market-based rhetoric of bargaining and contract law, I welcome her proposal to replace status with a process of negotiated agreements. However, "why stop with two?" I would allow a wider number of parties to negotiate and sign a kinship agreement. My thinking about registered kinship is inspired as well by the Latin American model of *compadrazgo*, the African-American tradition of othermothering, voluntary Big Brother and Big Sister mentorship programs, the designated support networks of caretakers that gay men pioneered to cope with AIDS and that many single women cancer patients have emulated, as well as more informal varietals such as allomothering to which overburdened parents are increasingly turning for support.

---

62. See id. at 229.
64. See Note, *Into the Mouths of Babes: La Familia Latina and Federally Funded Child Welfare*, 105 Harv. L. Rev. 1319, 1322-23 (translating "compadrazgo" as "godparenting" and describing the practice as one in which close friends and family of a mother are intimately involved with childrearing).
66. For more information about how a typical example of these programs works, see the webpage for Big Brothers Big Sisters of America at http://www.bbbsa.org (last visited Dec. 28, 2003).
67. For example, the Gay Men's Health Crisis. See http://www.gmhc.org (last visited Dec. 28, 2003).
The time seems long overdue to try to bridge the harmful legal and cultural gap between, as Gillis put it, the families we live with and the families we live by.\textsuperscript{70} My vision of a democratic agenda for family reform would give equal regard to multiple genres of marriage and to the diverse, de facto forms of intimate affiliation that so many people, like the lesbians and gay men I described,\textsuperscript{71} have forged in response to the postmodern condition.


\textsuperscript{71} See supra Parts I-II.