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A World Without Marriage

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I. Introduction

The legal status of marriage has become the focus of a great deal of controversy in recent years. Social and religious conservatives have voiced alarm at the decline of marriage in an era in which divorce rates are high and increasing numbers of people live in nonmarital families. For these advocates, social welfare rests on the survival (or revival) of traditional marriage.[1] Meanwhile, critics from the left argue that marriage as the preferred and privileged family form will (and should) soon be a thing of the past. Some feminists, such as Martha Fineman and Nancy Polikoff, want to abolish legal marriage altogether.[2] Fineman argues that the parent–child relationship should replace marriage as the core family form privileged under the law. On her view, adults in intimate partnerships who wish to undertake commitments to one another should be free to execute contracts embodying their mutual obligations, but their unions should have no special legal status.[3] Other critics seek to dilute the legal distinc-

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1. *See generally* JAMES DOBSON, MARRIAGE UNDER FIRE (2004); The National Marriage Project, The State of Our Unions: The Social Health of Marriage in America (2001); David Popenoe, *American Family Decline, 1960–1990: A Review and Appraisal*, 55 J. MARRIAGE & FAM. 527 (1993); Carolyn Graglia, *The Housewife as Pariah*, 18 HARV. J.L. & PUB. POL'Y 509, 511–12 (1995).

2. *See* Nancy Polikoff, *Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201 (2003-04); MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 161–66 (1995); Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 20–22 (2000); Judith Stacey, *Good Riddance to "The Family": A Response to David Popenoe*, 55 J. MARRIAGE & FAM. 545 (1993) (noting that stable marriage depends on inequality).

3. *See* Fineman, *supra* note 2.

tions between marriage and informal unions, arguing that cohabiting couples and their children should enjoy the same legal privileges and recognition as families of married couples.[4]

At its core, the debate about marriage focuses on dimensions that supporters of traditional marriage treasure, but that others believe are out of step with contemporary social norms and values. First, modern marriage is embedded in its historic tradition as a religious institution. Even today, marriage has not fully emerged as a secular legal status. Vestiges of the religious origins of marriage continue to shape attitudes and inform the views of many marriage defenders, and cause concern for those who are committed to secular legal institutions.[5] Second, traditional marriage was a deeply hierarchical institution, in which wives were legally and socially subordinated to their husbands. Despite the trend toward legal equality of husbands and wives, marital roles continue to be gendered in ways that leave many women dependent and vulnerable. Thus, it is not surprising that many feminists have little enthusiasm for marriage. Finally, marriage retains the vestiges of its historical status as the only family form endorsed by the law. The exclusive privileging of marriage and sanctioning of nonmarital families harmed (and, many think, continues to harm) individuals in those families, including children, in tangible and intangible ways.

These historic influences can be seen in the public conversation about whether gay and lesbian couples should have access to legal marriage, a flash point in the larger debate over marriage. Many opponents of gay and lesbian marriage emphasize the deep historic roots of this core social institution and its moral and religious importance, meanings that would be repudiated if marriage were extended to same-sex couples.[6] Advocates for gay marriage, on the other hand, argue that this reform would mitigate the influence of outdated values that continue to define legal marriage, and would promote family diversity.[7] Some gay advocates, however, oppose the marriage movement in the gay community precisely on the ground that marriage is a patriarchal institution that cannot escape its oppressive

4. *See generally* STEPHANIE COONTZ, THE WAY WE NEVER WERE: FAMILIES AND THE NOSTALGIA TRAP (1992); JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE (1996).

5. For an interesting discussion of this issue, *see* Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758 (2004–05).

6. *See* DOBSON, *supra* note 1. Critics of gay marriage point out that marriage as an institution predated its legal status, and was regulated by canon law and ecclesiastical courts for centuries before the Protestant Reformation and the passage of the first statute in England defining marriage. Lynn Wardle, *What Is Marriage?* 6 WHITTIER J. CHILD & FAM. ADVOCACY 53 (2006). *See also* Lynn Wardle, *Is Marriage Obsolete?* 10 MICH. J. GENDER & L. 189 (2003–04).

7. *See* Elizabeth Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency,* 2004 U. CHI. LEGAL FORUM 225; Nan Hunter, *Marriage, Law & Gender: A Feminist Inquiry*, 1 L. & SEXUALITY 9 (1991).

history.[8] Meanwhile in the political arena, moderates increasingly support civil unions for gay couples, but almost uniformly insist that marriage itself is a unique and venerated institution that must be preserved as a union of a man and a woman.[9]

This essay is essentially a thought experiment. It asks the question of whether it would be desirable—or not—to abolish legal marriage altogether and replace it with a new legal status (call it a civil union), open to all individuals who want to register their commitments to an intimate partner.[10] In this world, marriage would continue as a religious sacrament and institution, of course, but not as a legal status. My starting point in undertaking this thought experiment is my conclusion, to be explained in more detail below, that a "separate but equal" status for same-sex couples does not pass constitutional muster—and that courts will ultimately reach this conclusion. At that point, lawmakers face a choice; they will be required either to allow gay couples to marry, to abolish legal marriage altogether, or to substitute a new legal status, the civil union.

The essay argues that abolishing marriage altogether is a bad idea, but as between opening legal marriage to all adult couples who seek to formalize their commitments and substituting civil unions for legal marriage, the choice turns out to be a difficult one. It seems plausible that substantial benefits might follow from adopting the latter option. A new family form based on formal commitment that is not embedded in the problematic historical traditions that surround marriage might retain many of the positive attributes of marriage while muting some of its less attractive features. This option may also be more palatable to opponents of same-sex marriage, in that marriage can be preserved in its traditional form as a religious sacrament. Ultimately, however, whether this reform would be desirable depends on whether norms and conventions that reinforce commitment and contribute to the stability of marriage transfer to the new status—and this is uncertain at best.

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8. Nancy Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage*, 79 VA. L. REV. 1535 (1993).

9. This was evident in the debates in 2007 among Democratic candidates for the Presidency. Only Dennis Kucinish favored gay marriage, while Hillary Clinton, Barack Obama, and John Edwards favored gay marriage but opposed gay marriage. *See* Media Culture: The Gay Presidential Debate, last visited August 29, 2007 at http://www.alternet.org/mediaculture/59390.

10. Interestingly, this issue has received relatively little attention in the literature. An exception is a lively debate between Linda McClain and Mary Shanley in *Legal Affairs*, an online journal. Mary Lyndon Shanley & Linda McClain, *Should States Abolish Marriage?*, LEGAL AFFAIRS DEBATE CLUB, May 16, 2005, http://www.legalaffairs.org/webexclusive/ debateclub_m0505.msp.

II. Civil Unions as a Parallel Status

The last decade has seen substantial progress in the movement toward legal equality for gays and lesbians. Although hostility toward recognition of same-sex unions continues to be powerful in some states,[11] there is no question that attitudes and policies are changing rapidly. The best evidence of changing attitudes in this area, perhaps, is that many conservatives today, including President Bush, support civil union laws, a reality that would have been implausible ten years ago.[12] Policy change is also evident; in the past few years, state and local governments across the country have enacted laws regarding gay unions, through civil unions and domestic partnership laws.[13] Controversy continues to surround gay marriage, however, and at this point, only Massachusetts allows gay couples to marry.[14]

In some states, legal changes have resulted from courts pushing legislatures to extend the benefits of marriage to same-sex couples, by striking down standard marriage licensing statutes on state constitutional grounds.[15] In these cases, the most compelling argument made by advocates against the restrictive definition of marriage is an equality claim, based on equal protection principles in state constitutions.[16] They point out that same-sex couples aspire to marriage with the same goals as other couples—to express their enduring commitment to their partners and to

11. Some states have laws that are hostile to gay relationships. Virginia, for example, enacted the Marriage Affirmation Act in 2004, prohibiting civil unions and even the enforcement of contracts purporting to bestow the privileges of marriage (perhaps even including medical directives) between gay partners. Jonathon Rauch, *Virginia's New Jim Crow*, WASH. POST, June 13, 2004, at B7.

12. *See* Elizabeth Bumiller, *Bush Says His Party Is Wrong to Oppose Gay Unions*, N.Y. TIMES, Oct. 26, 2004, at A21.

13. By 2007, at least nine states and Washington, D.C., had statutes creating a status (civil union or domestic partnership) very similar to marriage for gay couples. See Beverly Wang, *State Senate Approves Civil Unions for Same-Sex Couples*, CONCORD MONITOR, Apr. 26, 2007, *available at* http://www.concordmonitor.com/apps/pbcs.dll/article?AID=/20070426/REPOSITORY/70426002/1030; *Oregon Gov. Signs Gay Rights Bill*, 365gay, May 9, 2007, *available at* http://www.365gay.com/Newscon07/05/050907oregon.htmhttp://en/wikipedia.org/wiki/Civil_union. Many cities have domestic partnership ordinances under which gay partners can register and receive some benefits. *See* discussion of civil unions and domestic partnerships in IRA ELLMAN ET AL., FAMILY LAW: CASES, TEXT AND PROBLEMS 936–44 (2004).

14. The Massachusetts statute authorizing same-sex marriage, enacted in 2004, was mandated by the Massachusetts Supreme Court. Opinions of the justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

15. *See, e.g.*, Baker v. State, 744 A.2d 864 (Vt. 1999); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Lewis v. Harris, 908 A.2d 196 (N.J. 2006).

16. In *Baker v. State*, 744 A.2d 864 (Vt. 1999), the Vermont statute was challenged successfully under the Common Benefits Clause of the Vermont constitution. At least one court has found marriage statutes deficient on sex discrimination grounds. Baehr v. Lewin, 852 P.2d 44 (Hawaii 1993).

undertake the obligation of caring for one another; and, for many couples, to raise children together.[17] It is well established that the right to marry is a fundamental right.[18] Thus, the government must offer substantial justification for restricting this privileged legal status to some opposite-sex-couple citizens and excluding others.[19]

Several courts have found state justifications for excluding gay couples from access to the benefits and privileges of marriage to be inadequate.[20] The primary justifications focus on the welfare of children and on the firmly settled meaning of marriage, established by long tradition. Massachusetts, for example, defended its statute on the grounds that marriage is the optimal setting for procreation and that families based on conventional marriage constitute the only adequate setting for healthy child rearing. In rejecting this argument, the Massachusetts Supreme Court in *Goodridge v. Department of Health*[21] emphasized that no compelling evidence supported that children are harmed by being raised by gay or lesbian parents. It also noted that the state actually facilitated the formation of nonmarital families by allowing unmarried individuals to adopt children.[22]

Although several courts and legislatures have responded sympathetically to claims that restrictive marriage laws discriminate unfairly against gay and lesbian couples, only Massachusetts has extended the right to marry to these couples. The Vermont and New Jersey Supreme Courts held that the state must offer to gay couples all government benefits and privileges of marriage, but need not allow them to marry. In response, these states have enacted civil union laws creating a new status carefully designed to approximate marriage. Several other states have enacted similar laws without judicial pressure.[23] It seems likely that this trend will gather force, and that other states will enact civil union statutes—voluntarily or as directed by courts.[24]

17. Michael Wald argues that the social benefits of marriage apply to same-sex couples as much as opposite-sex couples. *See* Wald, *supra* note 18, at 311–29.

18. Zablocki v. Redhail, 434 U.S. 374 (1978) (describing the right to marry as a fundamental right under the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment.)

19. For a discussion of the many tangible legal benefits of marriage, *see* Michael Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL'Y & L. 291 (2001). *See also Goodridge*, 798 N.E.2d 941 (Mass. 2003).

20. *See supra* note 15.

21. Goodridge v. Dep't of Health, 798 N.E.2d 941 (Mass. 2003).

22. *Id.*

23. Since 2006, legislatures in Washington, New Hampshire, Oregon and Connecticut have enacted civil union or domestic partnership statutes. *See generally* note 13.

24. The initial response of the Massachusetts legislature in 2004 was not voluntary, but a response to the holding of *Goodridge* that civil union status was inadequate as a remedy to the state constitutional violation. *See* Opinion of the Justices, *supra* note 14. However, in 2007, the legislature overwhelmingly declined to endorse a referendum that would have allowed

This trend is a partial victory for gay couples, but increasingly advocates argue that statutes establishing civil unions or domestic partnerships do not adequately protect the constitutional interests of gay citizens. Thus, for example, in a case that is currently before the California Supreme Court, petitioners have challenged the constitutionality of that state's comprehensive domestic partnership statute, arguing that gay and lesbian couples have a right to marry that is not satisfied by a separate status that gives them the legal rights and benefits of marriage.[25] Whether California will join Massachusetts in recognizing gay marriage is uncertain as yet; but, in general, the issue of whether gays and lesbians have the constitutional right to marry is very much unsettled and likely will be the subject of litigation and political advocacy in the future.

As a matter of political economy, there is much to be said for an incremental approach in which progress toward equality for gay couples is achieved gradually and preferably through the legislative process.[26] Without question, until very recently, the notion that gay and lesbian couples have a right to marry would have been met with overwhelming public hostility and would not have received serious consideration by courts. Not so long ago, gays could be convicted of a crime for having sex in many states.[27] But, the last ten to fifteen years have been a period of extraordinary change in social attitudes and in the legal status of gays and lesbians. In many sectors of society today, gay relationships are accepted, and despite the backlash that followed *Goodridge*, polls show that the percentage of Americans who think that gays should be allowed to marry has grown steadily, although it lags behind the number that endorse civil unions.[28] It is telling that enthusiasm in the Massachusetts legislature for a state constitutional amendment banning same-sex marriage waned to the

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Massachusetts voters to vote on a constitutional amendment overruling *Goodridge* and *Opinion of the Justices*, a powerful indicator that hostility toward same-sex marriage has waned. *See* Pam Belluck, *Massachusetts Gay Marriage to Remain Legal*, N.Y. TIMES, June 15, 2007, at A1; "*Legislature Votes Down Marriage Amendment, Unrelenting Pressure by Patrick, Murray, DiMasi Blamed*," Vote on Marriage.org, June 14, 2007, http://voteonmarriage.org/news.shtml#pr061407 (accessed 7/13/2007).

25. *In re* Marriage Cases, 49 Cal. Rptr. 3d 675 (2006).

26. Several supporters of civil unions have argued in favor of incremental steps toward full equality. *See* WILLIAM ESKRIDGE, EQUALITY PRACTICE: CIVIL UNIONS AND THE PRACTICE OF GAY RIGHTS 120 (2002); Greg Johnson, *Civil Union, A Reappraisal*, 30 VT. L. REV. 891 (2006).

27. In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court struck down the Texas sodomy statute as a violation of individual privacy rights under the Due Process Clause.

28. Many recent polls reported on one Web site found that a majority of respondents favored either civil unions or gay marriage. According to a recent CNN poll, 40% of those polled favored allowing gay marriage. A Quinniepieac University poll in 2006 found that 44% approved civil unions, and 24% approved gay marriage. *A Quinnipiac University Poll*, PollingReport.com, Nov. 13–19, 2006, http://pollingreport.com/civil.htm.

point that, in June 2007, more than three fourths of the members voted against putting the issue on the 2008 ballot for a voter referendum.[29] In the years to come, it is quite possible that gays will gain marriage rights through the political process in other states.

If this does not happen—and it seems likely that legislatures in many states will balk at this reform—the issue will be decided by courts.[30] In my view, courts ultimately will conclude that civil unions are not an acceptable substitute for marriage, and that the principle of equality embodied in the Equal Protection Clause of the Fourteenth Amendment requires states to treat equally individuals who want to register their commitment to an intimate partner, whether the partner is of the same or opposite sex. Advocates for same-sex marriage have labeled civil unions "separate but equal," like segregated schools and public services in the Jim Crow South. To some extent, as defenders of civil union statutes have argued, this is unfair. Civil union statutes, unlike Jim Crow laws, aim to expand the rights of gays and lesbians; they offer legal benefits and protection that were not previously available.[31] It is not coincidental that states at the forefront in enacting civil union statutes are those that already had in place statutory protections of gays in the areas, such as employment and housing. Nonetheless, in a real sense, civil union statutes, like racial segregation laws, are discriminatory in that they are enacted for the purpose of excluding a disfavored group from a legally privileged status available to others. As described by one legislature, the purpose of creating civil union status is to "preserv[e] the traditional, historic nature and meaning of the institution of civil marriage."[32] Legislatures acting with this purpose must think that marriage would be harmed or diminished if gay and lesbian couples were allowed entry and that segregation is necessary to maintain a special status for heterosexual couples.

States have been hard pressed to justify maintaining a separate and parallel category for same-sex couples without conceding that civil unions occupy a second-class status in relation to marriage. Once civil unions are

29. *See* Belluck, *supra* note 24.

30. Congress has enacted the Defense of Marriage Acts prohibiting recognition of same-sex marriage under federal law, and many states have followed suit. 28 U.S.C. § 1738C. See the discussion of state DOMA's and state constitutional amendments banning same-sex marriage. Kavan Peterson, *50-State Rundown on Gay Marriage Laws*, Stateline.org, (Nov. 3, 2004), http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15576. at www.stateline.org. Last visited 8/14/07.

31. Whether civil union statutes are analogous to Jim Crow laws has been the subject of debate among gay advocates. *See* Johnson, *supra* note 26.

32. This statement of purpose was included in the Massachusetts bill (Senate Bill No. 1275 (2003)) creating civil unions, enacted in response to *Goodridge v. Dep't of Pub. Health*. The proposed statute was rejected as unconstitutional by the Massachusetts Supreme Court. Opinion of the Justices to the Senate, 802 N.E. 565 (Mass. 2004).

authorized, state arguments about marriage as a superior setting for procreation and child rearing become meaningless, as couples in civil unions receive available state benefits that support this function. Although defenders of civil-union statutes emphasize that the differences between marriage and civil unions are nominal, the very act of insisting on a separate status for gay couples with a different name belies this claim. Clearly, the distinction is important or legislatures would reform the traditional law through the simpler step of opening marriage to same-sex couples, the response sought by gay advocates. By creating a new category to which gay couples are assigned, states assure that the intangible benefits of marriage that adhere to its historical traditions as a core legal status are preserved for heterosexual couples. The value of these benefits is evident in the act of creating separate categories. In the absence of substantial justification, this unequal treatment represents unacceptable discrimination against gay people in violation of equal protection principles.

III. Considering the Alternatives to Marriage

If my analysis is correct, courts eventually will follow the lead of the Massachusetts Supreme Court in concluding that civil-union statutes violate equal protection principles. At that point, as I suggested at the outset, states have three options: to open marriage to same-sex couples on the same terms as apply to opposite-sex couples; to abolish marriage altogether; or to abolish marriage and replace it with a new legal status of civil unions. Currently, polls suggest that a majority of citizens oppose gay marriage, and a substantial minority of opponents object fervently.[33] This opposition should not deter lawmakers from offering the law's benefits to gays and lesbians; intense public controversy often has surrounded the extension of civil rights to minority groups. Nonetheless, given the controversy surrounding gay marriage, the suggested alternatives, both of which meet the constitutional criterion of treating all couples equally, deserve serious consideration.

A. Can the Government Alter or Abolish Marriage?

A preliminary question is whether states have the authority to abolish civil marriage or replace it with a new status. The Supreme Court has characterized the right to marry as a fundamental right—one of the "basic civil rights of man."[34] Can a fundamental right be categorically abolished or transformed? As to the latter question, I think the answer is clearly

33. *See* Lawrence v. Texas, *supra* note 27.
34. Skinner v. Oklahoma, 316 U.S. 535 (1942).

"yes. Supreme Court opinions delineating the right to marry have dealt with regulatory criteria that differentially burdened categories of individuals in illegitimate ways. As long as the government does not discriminate, it can change the legal attributes of marriage—as has happened often over the years. The right to marry does not mean that individuals have a right to any *particular* set of rights, privileges, obligations, or benefits. Surely, a state legislature could abolish spouses' elective shares of decedents' estates without generating a constitutional claim. The government also could replace marriage with civil unions open to all couples on equal terms. The Massachusetts Supreme Court suggested as much in emphasizing that the legislature would have been on solid ground if, instead of creating a separate civil-union statute for gays, it had "jettison[ed] the term marriage altogether." The problem with the Massachusetts legislature's proposed civil-union statute was that it resulted in two unequal categories, a defect that would be cured if civil unions were to replace marriage.[35]

Whether the government could abolish marriage altogether is a closer question. The state cannot abolish negative rights that protect citizens from excessive intrusion by the state in protected activities, such as the right of free speech, religion, or family privacy.[36] But, the right to enter civil marriage is an *affirmative* right, defined solely by the government's creation of the licensing system and of the status with its attendant legal attributes. This difference is important; it leads me to conclude that as a matter of constitutional doctrine, lawmakers probably could abolish marriage altogether.[37] Cass Sunstein has analogized the right to marry to the right to vote, another affirmative, fundamental right. He points out that the Supreme Court has held that the state has no obligation to hold elections for particular offices.[38] If elections are held, however, the right to vote requires that citizens be treated equally. Similarly, the Supreme Court, in describing marriage as a fundamental right, has focused on the importance of equal treatment, holding that particular individuals or groups cannot be unduly burdened in their ability to exercise the right. Thus, legal marriage is subject to the mandates of equal protection and due process, but—although the Court has never addressed the issue—it is plausible to infer that a state likely could abolish civil marriage altogether—as long as it acted to further some neutral policy end. More problematic, in my view, would be aboli-

35. Opinions of the Justices to the Senate, 802 N.E.2d 565, n.4 (Mass. 2004). "If. . . the legislature were to jettison the term "marriage" altogether, it might well be rational and permissible."

36. Negative rights include the right to religious expression, speech, and privacy.

37. Cass Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081 (2004–05).

38. *Id.* at 2096.

tion for the discriminatory purpose of avoiding extension of the right to marriage to gays and lesbians.[39]

B. Abolishing Marriage—A World of Contract

What is the case for abolishing civil marriage? Some feminists have argued for abolition to extinguish an outdated family form that is defined by its history as an oppressive patriarchal institution.[40] Marriage has been a source of oppression to women who continue to be disadvantaged by gendered marital roles that shape the behavior of contemporary spouses. Beyond the harm that marriage inflicts on women who marry, the exclusive status of marriage as the only legally sanctioned family form has harmed individuals in nonmarital families. This was so, historically, both because the tangible benefits of marriage were not available to other families, and because the law explicitly sanctioned nonmarital families. Although these punitive policies have moderated over time, the harm continues, critics argue, as long as marriage is legally favored. Finally, abolitionists argue that civil marriage cannot escape its deep religious roots. Its identity as a religious sacrament continues to shape marriage and to influence attitudes and behavior in ways that are inappropriate in a secular society that values the separation of church and state.[41]

Those who favor abolition emphasize that marriage is declining as a favored family form. Over the past half century, they point out, the percentage of families based on marriage has declined dramatically. As more individuals choose nonmarital family arrangements, continuing to privilege marriage undermines those families and offers little social benefit.[42] Some abolitionists argue for parity among family forms, with none receiving a privileged status.[43] Others, most famously Martha Fineman, favor the caretaker-dependant dyad (often mother and child) as the core family form privileged by the law, in recognition that the primary function of families is to care for society's dependency needs. On Fineman's view,

39. The Court has held that the government can cease to provide a service even if it does so with a discriminatory purpose. In *Palmer v. Thompson*, the Court found no constitutional violation when a municipality closed its swimming pools to avoid integration. But citizens do not have a fundamental right to public swimming pools, a distinction that the Court might find to be important. *Palmer*, 403 U.S. 217 (1971).

40. *See* Polikoff, *supra* note 2; FINEMAN, *supra* note 2; Fineman, *supra* note 2; Stacey, *supra* note 2; COONTZ, *supra* note 4; STACEY, *supra* note 4; Case, *supra* note 5.

41. *See* Case, *supra* note 5.

42. A comprehensive demographic summary of changes in family form can be found in IRA MARK ELLMAN ET AL., 3 FAMILY LAW: CASES, TEXT, PROBLEMS (1998). Among legal scholars, Martha Fineman famously has made this argument for abolition of marriage. FINEMAN, *supra* note 2. *See also* Polikoff, *supra* note 2; Stacey, *supra* note 4.

43. *See* Polikoff, *supra* note 2.

adult couples in intimate relationships can undertake obligations to one another through contract, should they desire legally enforceable commitments, but no formal legal status follows from their decision to form a family.[44]

Putting aside possible constitutional problems with simply abolishing marriage and the political implausibility of such a move, this reform would be undesirable because the formal registration of commitment, whether in the form of marriage or civil union, serves many useful functions as a basis of family formation.[45] As compared with cohabitation, formal unions are likely to be more stable and enduring and to offer greater protection to dependent family members. A core function of the family in society, and one that justifies its protected legal status, is to provide care for family members unable to care for themselves—most importantly, children, but also adults during periods of illness or infirmity due to disability or old age. Families that perform this function well are less likely to burden society than families that are unable to satisfy members' dependency needs. We have substantial evidence that marriage compares favorably with nonmarital families in this regard. Moreover, there is reason to believe that many of the benefits of marriage would adhere in civil unions, about which we have much less information.

1. The Stability of Formal Unions

Families that include two adults have advantages over single-adult families because couples can pool resources and share the burden of dependency with one another. Among family units based on adult couples, much research indicates that marriages are more stable and welfare-enhancing unions than are informal cohabiting relationships.[46] To be sure, marriage is less stable than was true in an earlier era, but even with a divorce rate that has leveled off at about forty percent, marriages last considerably longer than do informal unions. Cohabiting couples typically either marry or break off the relationship within a few years and only 10% of informal relationships last five years—whereas, even today, 60% of marriages endure for the spouses' joint lives.[47] Moreover, cohabiting individuals

44. *See* Fineman, *supra* note 2.

45. The argument in this section is adapted from E. Scott, *Marriage, Cohabitation, and Collective Responsibility for Dependency*, 2004 U. Chi. Legal Forum 225.

46. Much evidence supports this statement. *See* Steven L. Nock, Marriage in Men's Lives: A Comparison of Marriage and Cohabitation (1998); Steven L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. Fam. Issues 53 (1995); Linda J. Waite, *Does Marriage Matter?*, 32 Demography 483 (1995).

47. Larry L. Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 Popul. Stud. 29 (2000) (only 10% of couples continue to live together in informal unions for over five years).

express lower levels of commitment than do spouses and also are less likely to agree with one another on this aspect of their relationship. Research indicates that cohabitants are more likely than spouses to engage in acts of sexual infidelity and domestic violence, and that marriage partners express greater satisfaction with their relationships. Finally, spouses are more likely to share assets and income and to mingle their finances than are cohabitants.[48]

The differences between marriage and cohabitation, in part, can be attributed to a complex web of social norms and conventions that surround marriage. This structure of social meaning, developed over centuries, signals the importance of marriage and creates behavioral expectations for spouses who reinforce their commitment to one another and contribute to the stability of this relationship.[49] In contrast, sociologists describe cohabitation as "under-institutionalized."[50] Behavioral expectations in informal unions vary among couples; no well-defined template of social norms encourages the parties to act toward one another in ways that reinforce the relationship.

The extent to which the social norms and conventions that reinforce commitment and stabilize marriage will shape the social meaning of civil unions is uncertain. It is an issue I will address later in this essay. Nonetheless, there is reason to believe that the civil union will share many beneficial aspects of marriage as a family form, because, like marriage, it is based on a formal commitment that includes the agreement by the parties to undertake serious legal obligations to one another. Formal commitment is important in several ways. First, it functions as a sorting and matching mechanism, signaling each party's serious intentions for the relationship to the partner and to the community.[51] The formality of marriage and civil unions separates those who want commitment from those whose romantic intentions are more casual. The nature of the commitment and its seriousness are indicated by its formality, by the requirement of

48. *See* Nock, *supra* note 46, at 74–75; Linda J. Waite, *Trends in Men's and Women's Well-Being in Marriage*, *in* THE TIES THAT BIND, 379–83 (Linda Waite ed., 2000). Waite found that engaged cohabiting couples had domestic violence rates comparable to married couples (a probability of 3.6 percent over the coming year). The probability for cohabiting couples with no plans to marry was 7.6 percent.

49. *See* Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901 (2000).

50. *See* Nock, *supra* note 46.

51. As Eric Posner put it, each party's choice to marry signals that she\he is a "good type," a responsible person ready to undertake a long-term committed relationship. Eric Posner *Family Law and Social Norms*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT 260 (F.H. Buckley ed., 1999). Also on the signaling function of marriage, *see* Michael Trebilcock, *Marriage as a Signal*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT 245–55 (F.H. Buckley ed., 1999); William Bishop, *Is He Married? Marriage as Information*, 34 U. TORONTO L.J. 245 (1984).

legal action for entry and exit, and by the set of legal obligations that the parties undertake in entering the union.[52] As in marriage, each party entering a civil union agrees to provide the other with mutual care and support and to share income and property acquired during marriage—including a part of his or her estate upon death.[53] Each party also implicitly agrees to be bound by the legal default rules for termination of the union.

2. Formal Unions and Financial Security for Dependent Family Members

The legal commitment that defines marriage and civil-union status has another important function that distinguishes formal unions from informal cohabitation. The legal rights and obligations undertaken by the parties upon entering formal unions can provide substantial financial protection to dependent family members. In intact relationships, formal enforcement of these legal duties will be rare—but also will seldom be necessary.[54] Family members living together typically share a standard of living, and strong social norms encourage spouses to provide care and support to one another and to other family members.[55] But, if the union dissolves, the legal rules that provide for financial support and for the sharing of property *are* enforced. These default rules can be understood as the dissolution terms of the marriage or civil union contract, and they provide dependent spouses or partners with some measure of financial protection.[56]

The quality of that protection depends on doctrine regulating the termination of marriages and civil unions, of course, and current law is far from optimal. Nonetheless, even today, the legal framework regulating

52. Legal scholars have long recognized that formal requirements serve these functions. Lon Fuller famously described legal formalities as serving three functions in contract law: an evidentiary function of clarifying the terms and meaning of the contract; a cautionary function of encouraging deliberation by the parties in executing the agreement; and a channeling function of providing a simple external test of an intention by the parties to undertake a particular set of legally enforceable obligations. These functions are evident in the legal formalities associated with marriage. Lon Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799, 800–01 (1941).

53. The duty of care and support is embodied in the necessaries doctrine, under which spouses are liable to third parties who provide "necessaries" to the other spouse including medical care, shelter, and other needs. N.C. Baptist Hosp. v. Harris, 354 S.E.2d 471 (N.C. 1987).

54. *See* McGuire v. McGuire, 59 N.W.2d 336 (Neb. 1953) (holding that legal obligation of spousal support is not enforceable in intact marriage). As I have argued elsewhere, there are good reasons not to have legal enforcement of financial obligations in intact marriages, reasons that would apply to civil unions as well. Disputes in ongoing relationships are better resolved through means other than adversarial adjudication. *See* Elizabeth Scott & Robert Scott, *Marriage as Relational Contract*, 84 Va. L. Rev. 1225, 1230 (1998).

55. The husband who fails to provide adequately for his dependent wife and children, despite having the means to do so, will be the target of social disapproval.

56. *See* Scott & Scott, *supra note* 54.

divorce—that would also apply to the termination of civil unions—provides far greater financial protection than dependant partners in informal unions receive when their relationships end. Even when a couple live together for many years in a marriage-like relationship and have an informal understanding that property acquired during their relationship is to be shared, contract claims in this context are uncertain and difficult to prove.[57] The American Law Institute, in its Principles of the Law of Family Dissolution, has sought to improve the financial status of dependant parties in informal unions by creating a domestic partnership status that attaches after a period of cohabitation. A.L.I. Domestic Partners are then subject to the property and support obligations of marriage.[58] But whether a relationship qualifies for this status can only be determined *ex post,* when the cohabitants separate; thus, it cannot provide the financial protection to dependent partners that marriage or civil unions offer.

The upshot is that formal, intimate unions are likely to enjoy greater temporal stability than informal family relationships and also are more likely to provide financial security to dependent family members. These attributes contribute to care giving in ways that relieve society of a burden that it would otherwise be obliged to assume, and justify maintaining a family form based on formal registration of commitment by intimate partners—either marriage or civil unions. I have argued elsewhere that the social benefits of marriage justify government policies that encourage couples in intimate relationships to formalize their commitment and that reward them for undertaking serious family obligations.[59] As critics have observed, however, conferring special legal benefits on marriages generates inequalities and may disadvantage other families. In the next section, I explore the question of whether the inequalities created by the legal privileging of formal unions would be less pernicious in a world in which civil unions replaced marriage.

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57. Even in long-term unions that appear to be marriage-like, courts often fail to find sufficiently clear understanding for contractual enforcement. *See,* e.g., Friedman v. Friedman, 24 Cal. Rptr. 2d 892, 901 (Ct. App. 1993); Morone v. Morone, 429 N.E.2d 592 (N.Y. 1992); Tapley v. Tapley, 449 A.2d 1218 (N.H. 1982). Some courts and legislatures have found that a written agreement between cohabiting parties is necessary for enforcement of financial obligations. Posik v. Layton, 695 So. 2d 759 (Fla. Dist. Ct. App. 1997); MINN STAT §§ 513.075, 513.076. Since few cohabiting couples execute written agreements, a writing requirement means that few claims will be recognized. *See* Jennifer K. Robbennolt & Monica Kirkpatrick Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Therapeutic and Preventative Approach,* 41 ARIZ. L. REV. 417 (1999).

58. AMERICAN LAW INSTITUTE PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, DOMESTIC PARTNERSHIPS (2002). The *A.L.I. Principles* only deal with *inter se* disputes, and not with government benefits. *Id.* at § 6.01.

59. *See* Scott, *Marriage, Cohabitation, supra* note 7, at 252–55.

C. Should Civil Unions Replace Marriage?

If both marriage and civil unions offer the advantages of a family form based on the registration of commitment, why should lawmakers consider replacing marriage with civil unions? The effects of this legal reform are uncertain, of course, and my analysis of necessity is speculative. Nonetheless, it is plausible that such a move might have several salutary effects. American society in the twenty-first century is secular, committed to gender equality, and accepting of diverse family forms, values that are *not* embodied in the traditional conception of marriage as a social institution. Although marriage has evolved considerably in recent generations, it continues to be influenced by powerful historical forces that conflict with contemporary values. These forces are clearly evident in the debate over gay marriage and, as I have suggested, they have led critics such as Fineman and Polikoff to argue for abolishing marriage altogether. The civil union, in contrast, is a thoroughly modern, secular construction, and as such, is less likely to be defined by the historical traditions and values that surround marriage. The new status may ameliorate the legitimate concerns of marriage critics, while retaining many of the benefits of formality. Replacing marriage with civil unions also may assure equal treatment of gay and straight couples with fewer collateral costs than a policy of opening marriage to gay couples.

1. The Benefits of a Secular Status

The first advantage of civil-union status over marriage is that it is wholly secular. Marriage is a religious sacrament as well as a legal status, and its civil and religious dimensions are inextricably linked. To be sure, some couples today are married by secular authorities such as judges, but the modern status of marriage continues to be embedded in its historical tradition as a religious institution. In a society committed to the separation of church and state, the close association of a government-created status with religious practice and belief is problematic.

In the Anglo-American tradition, legal and religious marriages have long been merged in ways that distinguish us from many European countries. In the mid-eighteenth century, when the British Parliament first began to regulate marriage, it required licensing through the Anglican Church for most couples, and ecclesiastical courts had jurisdiction over marital disputes.[60] Marriage has become more secular over time, but for many people its identity as a religious sacrament and as a social and legal institution is inseparable. Contemporary American law continues to pro-

60. *See* Case, *supra* note 5, at 1767 (discussing *Act for the Better Preventing of Clandestine Marriages*, 26 Geo. 2).

mote this conflation. In all states, members of the clergy are authorized by statute to solemnize legal marriages in religious ceremonies.[61] In many European countries, by contrast, civil and religious marriages are entirely separate. Couples in Germany and Belgium, for example, can marry in a church, but this has no legal effect; civil marriage must be performed by a government official.[62] In light of these distinctions, it may not be happenstance that the formal recognition of gay unions and the extension of civil marriage to gay couples have generated far less political controversy in Europe than in this country.

The melding of civil and religious marriage means that civil marriage is not a separate and distinct status, as might be expected in a country committed to separation of church and state. Less obviously, it also means that for many religious sects, particularly Protestant denominations, religious marriage is defined purely by state regulation. Thus, for example, in contrast to Judaism and Catholicism, the termination of Protestant marriages is regulated solely by state divorce law.[63] Mary Anne Case has argued that this conflating of religious and legal marriage may explain why conservative Protestants are the most fervent opponents of same-sex marriage, insisting that the institution of marriage itself will be debased if civil marriage is open to gays.[64] Although this argument often puzzles neutral observers, it makes sense if one remembers that, for these adherents, the religious and civil meanings of marriage are indistinguishable and gay marriage violates core religious beliefs. This may also explain why some opponents of gay marriage are willing to tolerate civil unions, as this move preserves marriage from debasement.

Perusal of the political debate about same-sex marriage confirms that evangelical Christians and other conservative advocates frequently invoke religious rhetoric in opposing extending legal marriage to gays. President Bush, for example, in a statement criticizing the *Goodridge* decision, stated, "Marriage is a sacred institution between a man and a woman," and vowed to do whatever was "legally necessary to defend the sanctity of

61. Couples must apply to the state for a marriage license and demonstrate that they are free of sexually transmittable diseases in most states, but the marriage may be solemnized by a clergyman. *See* MODEL MARRIAGE AND DIVORCE ACT § 206.

62. *See* CAROLYN HAMMOND & ALISON PERRY EDS., 2 FAMILY LAW IN EUROPE 297 (2002).

63. *See* Case, *supra* note 5, at 1795. The termination of marriage in Judaism and Catholicism is regulated by religious doctrine. The Catholic Church does not recognize divorce; annulment is available under some circumstances that are elaborately defined under canon law. A Jewish wife cannot divorce unless she receives the get from her husband

64. *See* Case, *supra* note 5, at 1793–95. Catholics and Jews are less opposed to gay marriage than Americans in general. Laura R Olson et al., *Religion and Public Opinion About Same-Sex Marriage*, 87 SOC. SCI. Q. 340–60 (2006). In light of this analysis, it becomes less surprising that Spain, a Catholic country, is one of the few to allow gay couples to marry.

marriage."[65] Conservative Christians generally believe that gay sexual contact is sinful; many invoke biblical authority to make this point. The late Rev. Jerry Falwell, for example, associated gay marriage with the degradation of Sodom and Gomorrah and predicted a similar fate for America in the near future if, as he anticipated, the Supreme Court prohibits laws banning same-sex marriage.[66] Dr. James Dobson and Pat Robertson, Christian leaders who play prominent roles in Republican party politics, frequently cite Scripture in arguing against same-sex marriage.[67] In general, the advocacy movement against gay marriage is fueled significantly by religious fervor.

Replacing civil marriage with civil unions may produce several beneficial effects. First, the disaggregation of religious marriage from the status that confers government benefits and privileges is far more consonant with First Amendment values. This is not to say that a First Amendment challenge of civil marriage is likely to be successful; civil marriage has important secular purposes, and thus is likely to be upheld under the Supreme Court's test of excessive government entanglement in religion under the Establishment Clause of the First Amendment.[68] Nonetheless, the conflation of religious and civil marriage causes the kind of harm that the Founders sought to avoid in insisting on the separation of church and state. On the issue of gay marriage, adherence to religious orthodoxy has contributed to discrimination against a disfavored group. Some opponents of gay marriage seek to impose their religious views on the rest of society, with the goal of excluding gays and lesbians from a privileged legal status of constitutional importance.

Beyond this, substituting civil unions for marriage may diffuse the intensity of the opposition to gay marriage and promote greater civility and rationality in political discourse. The hostile and defensive posture of Christian advocates in large part is due to their belief that the core religious institution of marriage is threatened by the movement to extend legal marriage to gays and lesbians. By separating the civil and religious

65. *See* A. Miller, *Letting Go of a National Religion: Why the State Should Relinquish All Control Over Marriage*, 38 LOY. L. REV. 2185, 2205 (2005) (quoting George W. Bush concerning the Massachusetts court's decision in *Goodridge*, http://www.whitehouse.gov/news/releases/2003/11/20031118-4.html. (Nov. 18, 2003)).

66. According to Falwell, "When [the Supreme Court recognizes gay marriage], we have a modern day Sodom and Gomorrah. We have a corrupt society where the family is trashed and everybody loses." Public Broadcasting Service, "Assault Against Gay America," http://www.pbs.org/wgbh/pages/frontline/assault/interviews/falwell.html. *See also* What We Believe: JFM's Definitive Stance on Homosexuality, JERRY FALWELL MINISTRIES, Sept. 1999, *available at* http://www.soulforce.org/article/527.

67. *See generally* JAMES DOBSON, MARRIAGE UNDER FIRE (2004); PAT ROBERTSON, BRING IT ON (2006).

68. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1226 (1998).

status, this threat is mitigated. Adherents can be assured that the meaning of marriage will not be debased and that the civil status is separate and distinct. Although many conservatives may not like the idea of civil unions open to all couples who meet certain neutral requirements, the complaint that the legal status is no longer grounded in religion will not be heard.

It is possible that conservatives who oppose gay marriage on religious grounds will simply decline to enter civil unions, on the ground that they do not want to have the same status as gay couples. Should this happen, civil-union status might fail to replace marriage as a core social institution. As fewer couples choose civil unions, its stature as a stable family form might decline generally, which would be undesirable, given the benefits of unions based on formal commitment in satisfying dependency needs. This response seems somewhat unlikely, however. Under the hypothesized regime, civil unions would carry all the government benefits and privileges of civil marriage today, none of which would be available on the basis of religious marriage. Beyond this, many legal regulations assign to spouses *inter se* rights and duties that most married couples would desire—surrogate medical decision-making and inheritance rights, for example—and that would have to be achieved through considerable effort by couples who do not marry. Most religious couples likely will enter civil unions, undertaking important *legal* obligations to one another, even if religious marriage embodies their emotional and moral commitment more fully.

2. Civil Unions and Gender Equality

Replacing marriage with civil unions could have another salutary effect. Historically, marriage was a deeply patriarchal institution that bound wives to their husbands in relationships of subordination and dependency. The law has come to express an egalitarian vision of marriage, but, despite formal equality, traditional marital roles continue to reinforce the dependency and vulnerability of women. It is primarily for this reason that feminists have argued for the abolition of marriage and some lesbian scholars have rejected access to marriage as a goal for the gay community.[69] Abolishing marriage and replacing it with civil-union status may attenuate the influence of traditional gender norms.

The history of the law's role in supporting patriarchy in marriage is familiar and need not be rehearsed in any detail here. At common law, husbands enjoyed virtually complete legal dominion over their wives, and

69. Fineman, *supra* note 2; Nancy Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage*, 79 Va. L. Rev. 1535 (1993).

differentiated marital roles were embedded in the legal regulation of marriage. The husband governed his family; he had the authority to control his wife's property; and to discipline her and his children and the duty to support them. Wives, as *femmes* covert, had no separate legal identity. They were obliged to obey their husbands and to care for their homes and families.[70] Change began in the nineteenth century with the enactment of Married Women's Property Acts, which allowed wives to purchase, control and transfer their own property,[71] but only in the second half of the twentieth century was the legal subordination of wives to husbands subject to systematic reform. As gender became a target of equal protection challenges in the 1970s, laws that treated husbands and wives differently were abolished or reformed, such that over the past few generations, formal gender equality in marriage has been established in law. On issues as varied as child custody, support, property distribution, the choice of marital names and residence, and duties to third-party creditors, husbands and wives are no longer distinguished *in law* on the basis of gender.[72]

These legal reforms are important, but they have not transformed marital roles, which continue to be gendered in important ways. Most women take their husbands' names and assume primary responsibility in the marriage for home making and child rearing.[73] Although the majority of married women are employed today, many tailor their job responsibilities to their domestic duties to a far greater extent than men do, such that wives earn substantially less income than do their husbands. Even highly educated women with professional training in law and business tend to sacrifice career advancement to accommodate family responsibilities, often by working part-time or dropping out altogether when they have children.[74] When marriages end in divorce, women have lower incomes than their former husbands do, partly because wives typically invest less in their own human capital during marriage, and partly because they overwhelmingly are awarded custody of children after divorce.[75] The upshot

70. For a discussion of husbands' right to discipline their wives at common law, *see* Reva Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

71. *See* discussion of Married Women's Property Acts *in* JESSE DUKEMINIER ET AL., PROPERTY 313–18 (2006).

72. The trend toward formal gender equality can be seen in changes in child-custody law since the 1970s. Before that time the tender-years presumption favoring mothers was the dominant rule. This rule was replaced by the formally gender-neutral best interest standard in the 1970s and 1980s, partly in response to Equal Protection challenges. *See* discussion in ELLMAN, ET AL., FAMILY LAW, *supra* note 13 at 559–61.

73. *See* discussion in Elizabeth Scott, *Pluralism, Parental Preference and Child Custody*, 80 CAL. L. REV. 615 (1992).

74. *See* Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG., Oct. 26 2003.

75. Ninety percent of children are in their mothers' physical custody. Although having custody imposes financial costs on women, most mothers care a lot about having custody. *See*

is that in the twenty-first century, gendered marital roles contribute to women's financial vulnerability and to their underepresentation in positions of power and influence in society.

Not everyone regrets the persistence of differentiated marital roles, of course. Indeed, social conservatives deplore the weakening of gender norms that regulated traditional marriage, decrying the increasing workforce participation among mothers and the trend toward nonmarital families without a male head of household.[76] An important tenet of the "family values" movement is that children need both a mother who devotes herself to their care as well as a strong father to provide financial resources and moral guidance. Advocates emphasize that marriage increases the likelihood that children will be raised "in a single family union, known and loved by both their mother and father."[77]

This commitment to gendered marital roles can be discerned in the arguments made by opponents of gay marriage. Although liberal supporters of marriage focus on the value of simply having two parents bound together by formal commitment,[78] for many conservatives, these two parents must be a mother and a father. David Blankenhorn, for example, opposes extending legal marriage to same-sex couples because, in his view, heterosexual marriage is the only fully adequate setting for raising children. As he states in his recent book, "What a child wants and needs more than anything else are the mother and the father who together made the child, love the child, and love each other."[79] Children need a mother and father *because* they have very different roles, grounded in biology, but reinforced through gender norms that have regulated marriage for centuries. At the heart of the movement to preserve marriage for heterosexual couples is the urge to retain gendered spousal and parenting roles.

Critics of gay marriage offer little in the way of credible social science evidence to support the claim that children need a father and mother for healthy normal development. While considerable evidence supports the conclusion that children fare less well in nonmarital families than in families based on an intact marriage, the gender orientation of parents *per se* has not been found to affect children's development significantly.[80]

Scott, *supra* note 73.

76. *See* Graglia, *supra* note 1.

77. INSTITUTE OF AMERICAN VALUES, MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES (2005).

78. I put myself in this camp. *See generally* Scott, *supra* note 7.

79. DAVID BLANKENHORN, THE FUTURE OF MARRIAGE 3 (2007).

80. For the most comprehensive study and analysis of single-parent families, *see* IRWIN GARFINKEL & SARA S. MCLANAHAN, SINGLE MOTHERS AND THEIR CHILDREN (1986); SARA S. MACLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS (1994). For research comparing children raised by lesbian parents with those raised by a

Studies measuring a range of psychological adjustment factors have found few differences between children raised by lesbian parents and those raised by their biological parents.[81] In short, on the basis of available research evidence, this policy argument against same-sex marriage does not hold up under scrutiny. Indeed, allowing gay and lesbian couples to marry may enhance the stability of gay families, to the benefit of the children in these families.[82]

Civil unions are removed from the historical patriarchal influences that defined traditional marriage and, thus, are less likely to be subject to gender norms that regulate spousal roles. Largely an innovation of the past decade, civil-union status, to date, has been offered primarily to gay and lesbian couples. Although individuals in gay relationships may sometimes assume differentiated roles of wage earner and caregiver, in general, gay couples are less subject to gender norms (and more likely to have egalitarian roles) than are married couples.[83] Couples in civil unions are "partners," not husbands and wives, a difference that seems more than nominal. By entering civil unions rather than marriage, both gay and straight couples may be less likely to fall into traditionally prescribed spousal roles. Moreover, the fact that civil unions are open to both gay and straight couples may contribute to the unsettling of the gender roles that have defined marriage. To be sure, opening marriage to gays might also have some of the desired unsettling effect, but the impact of adopting a status without a history of gender hierarchy seems likely to be greater.

The impact on gender inequality of abolishing legal marriage in favor of civil unions will be marginal, of course. Many couples will continue to adopt gendered marital roles as inherent in their conception of religious marriage. Moreover, it would be naive to believe that the legal status alone defines gender roles in marriage. The relationship between law and social norms is dynamic, not uni-directional, and the gender norms that have traditionally defined marriage may well influence the behavior of couples in civil unions. Nonetheless, the impact of these norms seems likely to be diluted somewhat in civil unions, and the proposed reform may expedite the trend toward more egalitarian roles in intimate unions.

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mother and father, and finding few differences, see Charlotte Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025 (1992). Michael Wald offers a comprehensive analysis of research on children with gay parents, including a critique of research offered by opponents of gay parents. Michael Wald, *Adults' Sexual Orientation and State Determinations Regarding Placement of* Children, 40 FAM. L.Q. 381 (2006).

81. Patterson, *supra.* note 80.

82. Opponents of gay marriage would likely respond that more gay couples would have children if gays could marry.

83. G.M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 L. & SEXUALITY 133, 163 (1991).

3. CIVIL UNIONS AND DISCRIMINATION AGAINST NONMARITAL FAMILIES

Finally, replacing legal marriage with civil unions may mitigate some of the harms that have resulted from the elevated legal and social position of marriage in American society, and the correspondingly inferior status of nonmarital families. Critics of marriage object to its privileged status which, if not solely created by the state, was strongly reinforced under traditional law by a framework of legal protections, benefits, rights, and obligations that surround marriage, together with punitive policies directed at nonmarital families. This framework signaled clearly that marriage was the only acceptable basis for an intimate relationship. The interwoven nature of civil and religious marriage also contributed to the venerated social position of marriage, and to powerful norms that sanctioned extramarital unions and nonmarital families as immoral. Although draconian policies have been abolished and tolerance for family diversity has gained force in recent years, marriage continues to enjoy a social position superior to that of nonmarital families.[84] In contrast, the civil union is untainted by any history of exclusivity and moral superiority, and replacing marriage with this status might reduce the social stratification of family forms, without abandoning incentives that encourage couples to formalize their commitment.

It is surprising to consider how recently the exclusive legal status of marriage was maintained by discriminatory policies that stigmatized non-marital families. Until the 1970s, children born to unmarried women were subject to many legal disabilities, often not qualifying for entitlements and government benefits offered to children of married parents.[85] Also into the 1970s, cohabitation outside of marriage was a criminal offense in many states. At a minimum, informal unions received no legal recognition or protection, with courts declining to enforce contracts between parties in "meretricious relationships.[86] Many of these legal dis-

84. That marriage continues to have an elevated social status relative to other families is evident in polls finding that a large majority of young individuals view marriage as an important part of their life plans. Jocelyn Noveck & Trevor Tompson, *Poll: Family Ties Key to Youth Happiness*, ASSOC. PRESS, Aug. 19, 2007, *available at* http://news.yahoo.com/s/ap/20070819/ap_en_ot/youth_poll_happiness. Low-income unmarried mothers aspire to marriage, but express doubts about the availability of appropriate partners. Kathryn Edin & Joanna M. Reed, *Why Don't They Just Get Married? Barriers to Marriage Among the Disadvantaged*, 15 FUTURE OF CHILDREN. 117 (2005).

85. Legal discrimination against children of unmarried mothers began to break down in the late 1960s, partly in response to a series of Supreme Court cases finding constitutional violations in discriminatory statutes. In 1968, the Supreme Court ruled that a Louisiana law that barred a child of an unmarried mother from recovering in a wrongful death action violated the Equal Protection Clause of the Fourteenth Amendment. Levy v. Louisiana, 391 U.S. 68 (1968). *See also*, Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972).

86. In 1976, the California Supreme Court led the way in concluding that contractual understandings between cohabiting parties regarding support or property should be legally enforced. Marvin v. Marvin, 557 P.2d 106 (Cal. 1976). *Marvin* cites changing social attitudes about

abilities have been removed in the past generation or so, but the historic distinctions continue to have a lingering harmful effect on the status and welfare of individuals in nonmarital families. For critics, this inequality and implicit discrimination are intolerable and justify the abolition of marriage; for marriage traditionalists, it is the natural order of things.

To some extent, marriage has an elevated status today for reasons that are quite distinct from the lingering impact of discriminatory policies. The social utility of marriage as a stable family form, described earlier, serves as a modern justification for its special legal status that is not grounded on an attribution of moral superiority over other families. The legal benefits that are part of marriage function to encourage couples to undertake formal commitments to assume family responsibilities and reward them for doing so. This privileging is justified, on my view, so long as it is undertaken on the basis of nondiscriminatory intent, is not excessive, and is part of a comprehensive policy of family support.[87] What is not justified, and is not compatible with contemporary values, is residual discrimination and hostility to other family forms, based on the moral superiority of marriage. This undermines the legitimacy of modern marriage in much the same way as does the lingering conception of legal marriage as a religious and patriarchal institution.

The goal of preserving the position of marriage in the hierarchy of families has played a role in conservative opposition to the A.L.I. Domestic Partnership Principles. As described earlier, the Principles direct that unmarried couples who live together for a prescribed cohabitation period automatically incur the financial rights and obligations of marriage upon dissolution.[88] These proposed reforms have been subject to criticism on autonomy grounds,[89] but for ideological critics, the problem with the Principles is that they blur the line between marriage and cohabitation, and thereby diminish the exclusive and superior status of marriage. Professor Lynn Wardle described the Principles as part of "the war on the traditional family," while to another critic, the *A.L.I. Principles* embody the "drastic notion" that "marriage is just one arrangement among many."[90]

The residue of moral superiority surrounding marriage as a family form

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cohabitation as a reason to abandon the law's position that these contracts were against public policy.

87. Scott, *supra* note 7.

88. *See* A.L.I. PRINCIPLES, *supra* note 58, at §§ 6.01-6.06.

89. *See* Elizabeth Scott, *Domestic Partnerships, Implied Contracts and Law Reform, in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, 331 (2006); Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 856–57 (2005).

90. *See* John Leo, *Marriage on the Rocks*, U.S. NEWS & WORLD REP., Dec. 16, 2002, at 47.

also appears to play a role in the dispute surrounding gay marriage. States defending marriage laws justify the exclusion of gays as necessary to "preserv[e] the traditional, historic nature and meaning of the institution of civil marriage."[91] The message seems to be that marriage is unique and superior to other families and must be preserved as such. Gay advocates in turn demand access because marriage *is* superior to other family forms—even one that carries all the tangible benefits of marriage.

Civil unions have an advantage over marriage in that they lack the historical associations with policies of discrimination that reinforced the moral superiority of marriage over other families. For this reason, in a civil-union regime, the package of legal benefits and privileges that accompany the status is more likely to be understood as a straightforward mechanism to encourage and reward the desirable social activity of formal commitment by intimate partners and not as evidence of the continuation of an illegitimate hierarchy. As I have argued, formal unions are likely to function fairly effectively to satisfy society's dependency needs, as compared to other families. Thus, the privileged status of civil unions can be justified purely in functional terms—as a *quid pro quo* for the couple's agreement to alleviate society's burden—that are quite distinct from the traditional rationale for marital privilege. Therefore, it may be possible to offer legal benefits that will make civil unions attractive to couples in intimate relationships, without perpetuating the invidious distinctions that have elevated marriage above other family forms.

Some social stratification of families will continue to exist in a civil-union regime, and the legal privileging of the status will contribute to that hierarchy. To an extent, this is inevitable and not undesirable. Society benefits if many individuals aspire to relationships based on formal commitment, and so long as civil unions are open to all couples, without discriminatory exclusions, the social costs are relatively modest. Concerns about social stratification are mitigated if the package of government benefits and protections assigned to civil unions is calibrated to achieve the purposes of incentive and reward, but is not excessive. Moreover, other families are (and should be) entitled to some of the legal benefits of civil unions, and may be eligible for other benefits needed to provide adequate support and care.[92] The upshot is that the special treatment accorded civil unions can be calibrated to minimize stigmatizing distinctions between formal unions and other families. Indeed, the reform of

91. Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

92. Some legal benefits are conferred on the basis of family status, not marriage. For example, "family members" are protected under New York City's rent control ordinance. *See* Braschi v. Stahl Assoc. Co., 543 N.E.2d 49 (N.Y. 1989). Government benefits to children generally do not depend on their parents' marital status.

replacing marriage with civil unions in itself is a step toward this goal.

The notion of replacing marriage with civil unions that are available to all couples seems fanciful at first, but, on reflection, warrants serious consideration. Ultimately, the advantages of the reform derive from the fact that civil unions are not bound intrinsically to historical traditions that are discordant with contemporary values. By enacting the proposed reform, lawmakers would be writing on a clean slate creating a family form for the twenty-first century. Civil unions are thoroughly secular; they are not embedded in a religious heritage. Nor are they linked to a powerful tradition of patriarchy that continues to shape spousal roles. Finally, civil unions have never been held up as the only morally acceptable and legally sanctioned family form. At the same time, civil unions offer many of the benefits of marriage as a family form. Like marriage, civil unions can function desirably as a signal, allowing individuals searching for a committed relationship to identify one another. In terms of tangible consequences—the legal rights, duties, benefits, and privileges—civil unions and marriage are identical. As with marriage, the parties' commitment to be bound by this legal framework clarifies their mutual expectations, and contributes to the stability of the union and the financial security of dependent family members. In short, the case for replacing legal marriage with civil unions is that the reform has the potential to retain many of the concrete benefits of marriage, while escaping the historic associations and traditions that continue to surround marriage, but are problematic in the twenty-first century.

If universal civil unions are also more acceptable to opponents of gay marriage than the alternative of opening marriage to same-sex couples, this would be another benefit of the proposed reform. As the debate over abortion has shown over the past thirty-plus years, moral issues on which various groups in society are deeply divided generate enormous social costs and distract lawmakers from other important matters. Gay marriage also has been a polarizing issue in the political arena, generating costs (including opportunity costs); a satisfactory resolution of the controversy is desirable. It is hard to predict whether opponents of gay marriage would prefer civil unions as a more acceptable solution to the social and constitutional challenge that we face. On the one hand, in a civil-union regime, religious marriage will be preserved as separate and distinct from the legal status. In conservative sects, this means only unions of a man and a woman. On the other hand, as Mary Shanley has suggested, conservatives might view the reform as the realization of their worst fears, the destruction of marriage by liberals who fail to appreciate its value.[93] It may be

93. Shanley & McClain, *supra* note 10, at 12.

that extending marriage to same-sex couples would be experienced as less radical and disruptive. The Massachusetts experience with gay marriage supports the hypothesis that the moral panic that accompanies the opening of marriage to same-sex couples is likely to be short lived. In that state, as politicians and citizens learned that the world did not end when gays married, enthusiasm for a state constitutional amendment prohibiting gay marriage rapidly dissipated.[94] Ultimately, it is unclear which of these alternative legal reforms is likely to be more palatable politically and in this regard to generate lower costs.

IV. The Case for Marriage

The argument for replacing marriage with civil unions should have considerable appeal to those who recognize the social benefits of marriage but are troubled by the outdated values and historic traditions that continue to define this legal institution. Thus far, I have described the potential advantages of this reform, which are substantial. But are there disadvantages? What, if anything, would be lost if lawmakers abolished legal marriage and replaced it with civil unions?

There can be no certainty in the response, of course, but the reform proposal, at a minimum, carries the risk that the new legal status will simply not be as desirable, stable, or satisfactory as marriage. It may be that the aspects of marriage that we hope to set aside by adopting a modern secular status cannot be readily disaggregated from the values and traditions that give marriage its rich meaning and contribute to its effectiveness as a family form. For example, an advantage of civil-union status, as I have described it, is that it is not associated with a history of excessive privilege coupled with punitive sanctions toward other families. But the elevated status of marriage historically was linked to its respected position in society and to its importance in the lives of individuals undertaking marital commitment. Will that be lost in a civil-union regime? Further, the ceremonies and traditions that surround marriage and, more importantly, the intricate web of social norms regulating spousal behavior contribute to the stability of marriage, reinforcing the commitment of husbands and wives. The critical question is whether these norms and conventions that are critical to the stability and intangible value of marriage will transfer to civil unions.

Traditional marriage was governed by gender norms defining the roles of husband and wife, but it was also regulated by what I have called *commitment norms*, that shape the behavior of husbands and wives in ways that promote cooperation in the relationship and reinforce their long-term commitment to one another. Over time, norms of loyalty, trust, reciproci-

94. *See supra* note 24.

ty, emotional sharing, openness, and sexual fidelity have come to define marriage as a uniquely special relationship, and together these norms form a template for cooperative spousal behavior that is likely to deter opportunistic defections. Commitment norms are enforced by the community—today, this is mostly through gossip and social disapproval—and by the spouses themselves.[95] Importantly, these norms are also internalized by individuals who are socialized to have an understanding of appropriate spousal behavior and to feel guilty when they violate these norms. Although marital norms probably function less effectively than they once did to encourage cooperative behavior in marriage, they continue to operate in ways that contribute to the stability of marriage. Thus, extramarital dalliances may be more common than they were a century ago, but most cheating spouses still feel guilty and act surreptitiously, knowing that their conduct is subject to social disapproval. In short, commitment norms assist spouses to achieve their ambitious goal of a mutually satisfying, lasting, intimate relationship, through times when they might be tempted to act in ways that undermine the marriage, despite their initial (and ongoing) commitment. As such, these norms play a critically important role in contributing to stability and satisfaction in marriage.

Will these important social norms form the behavioral expectations of couples in civil unions? Possibly, they will, particularly if couples enter civil unions with the same seriousness of purpose that characterizes most individuals entering marriage. The new status may be understood as a secular and egalitarian union, but one that retains the traditional meaning of marriage as a relationship based on mutual long-term commitment and cooperation. But we cannot know *ex ante* what will be the social meaning of civil unions.[96] It is possible that the legal reform will be accompanied by uncertainty about this new status and about the behavior expected of partners. And it is possible that over time, the social meaning of the civil union will evolve as a more shallow relationship than marriage—a union of short-term convenience rather than long-term commitment.

An analogy to informal intimate relationships should be considered. As I suggested earlier, sociologists have observed that informal unions are less stable than marriage, in part, because cohabitation is "underinstitu-

95. These norms were enforced by the law, of course, in the era of fault grounds divorce. Although informal enforcement of the norms surrounding marriage is much weaker today than traditionally, social disapproval of infidelity and admiration of lasting marital commitment continues. *See* examples in Scott, *Social Norms*, *supra* note 49. Even in 2007, for example, Rudy Guiliani's three marriages are discussed as a possible campaign liability. Skidhar Pappu, *8 Million Stories in the Naked City and One Chracter Keeps Popping Up,* WASH. POST, C1, 11/17/07.

96. *See generally* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

tionalized; it lacks a clear behavioral template that promotes cooperation and stability.[97] Morever, for this reason, the communities (friends, relatives and associates) of cohabiting couples play a minimal role in enforcing norms that reinforce commitment. The same might be true of civil unions. Partners entering civil unions will know that it is not legal marriage, but might be unclear about the meaning they should assign to the difference; perhaps, in a civil union regime, only religious marriages will be seen as grounded in commitment. If civil unions are not undertaken with the same seriousness of purpose that characterizes marriage, and if they are not regulated by commitment norms, they are likely to be less stable unions than even modern marriages.

But civil unions differ from informal relationships in important ways that lawmakers can exploit to promote the likelihood that they will take on much of the social meaning of marriage as a relationship of lasting commitment, and that the social norms that support marital commitment will transfer to the new family form. Unlike cohabitation, civil unions involve a formal legal commitment. The government can signal that prospective partners are undertaking the same set of serious legal obligations as do spouses. Both publicity about the reform and formal notice to parties of the nature of the duties they are undertaking upon entering a civil union will underscore that the legal attributes of civil marriage are fully incorporated in this status. In general, the registration process should include formalities that emphasize the solemnity of the occasion and the significance of the change in status that the parties have chosen.[98] For example, the posting of banns for a period before the registration itself, a mandated commitment ceremony before a judicial or administrative official and other formal elements surrounding the process signal that the parties are doing more than acquiring a license. These innovations can provide a substitute for the ceremonial elements of marriage for couples who do not choose religious marriage in addition to civil-union status. Finally, no relaxing of the legal obligations or reduction of the privileges that formerly were a part of marriage should follow the transition to civil unions. If anything, legal protection of dependent partners should be enhanced as civil unions are introduced, signaling that formal unions carry serious responsibilities. In general, maintaining and reinforcing the legal framework of marital obligations and benefits is essential if the civil union is to take on the social meaning of marriage as a special long-term relationship of mutual commitment and dependency.

97. *See* Nock, *supra* note 46.

98. *See supra*, note 52 (describing Lon Fuller's famous analysis of the important functions of formality in contract law).

Many factors besides law will shape the social meaning of civil unions, however, just as many historical influences have determined the social meaning of marriage. Over centuries, extralegal traditions and conventions have become a part of marriage, acknowledging and enhancing its stature as a core institution. For example, wedding ceremonies, rings, engagement and wedding announcements, and anniversaries announce the importance of marriage and invite community recognition of the commitment the couple has undertaken. Encouraging the continuation of these traditions when couples enter civil unions would be desirable, but this is a job for norm entrepreneurs, and not lawmakers.

In truth, lawmakers can take some of the steps I have suggested to promote the likelihood that civil unions will incorporate the positive attributes of marriage, but they cannot determine the social meanings that this new status will acquire. Thus, evaluating whether the reform we are considering would be good social policy is a tricky business for those who favor the potential advantages of the civil union as a status that is less likely than marriage to be encumbered by outdated values, but who also value the stability and richness of marriage as a relationship governed by norms that promote commitment. The challenge involves assessing risks that are uncertain, but also determining how much risk is acceptable to achieve the benefits of reform. Some marriage critics are so troubled by the effects on contemporary families of the historical traditions associated with marriage that they will happily undertake the reform, even at the risk of creating a less stable family form. Others who are more optimistic about the potential of marriage itself to evolve into an institution that is compatible with modern values will be reluctant to abandon marriage for an alternative union with uncertain value.

Ultimately, although I am intrigued with the possible social benefits of the reform I have examined, I conclude that I am in the latter camp. Marriage has changed a great deal over the past half century; it is less sharply gendered and less infused with moral superiority than was the traditional institution. The law has played an active role in fostering these changes and can continue to reform marriage itself to reflect modern values. For example, opening legal marriage to gay couples will promote tolerance and gender equality, and licensing reforms that separate religious from civil marriage can underscore that legal marriage is a secular status. Although a civil-union regime may advance the goals of gender equality, secularism, and tolerance, there are no guarantees that this will happen, and, even if it does, the costs may be substantial. The social meaning of marriage as a stable union grounded in commitment has evolved over centuries and may be lost if marriage is replaced by civil unions. That is

a high price—and one that I am reluctant to pay.

Undertaking a thought experiment is interesting, but ultimately frustrating. We simply cannot know what the impact would be of the reform I have examined. A civil-union regime might result in substantial social change for good or bad—or it might make little difference at all, a possibility that I have not considered. In contrast to the current two-tiered system, replacing marriage with *universal* civil unions might be, in fact, simply a nominal change. On my view, this is an issue on which states can function quite usefully as laboratories for legal innovation. Should some states choose to experiment with this reform, over time it is likely to become clear whether the civil union should be adopted as the core family form of the twenty-first century.