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Just last month, the University of Vermont announced that gay employees have until the end of 2001 to enter into a civil union[1] with their partners or they will lose their domestic partner benefits.[2] The new policy will revoke the University's long-standing commitment to ensure unmarried employees the same health and family benefits that are routinely extended to married employees. As we have argued for years, the denial of employment benefits to unmarried employees is "an equal pay for equal work" issue. If married employees receive health care, bereavement leave, or family sick leave for the benefit of their families, then unmarried employees are entitled to the same compensation. Sadly, in the wake of the gay community's historic success in achieving a state status fully equal to marriage, domestic partnership — an equally historic success — begins to die a slow death.

It is sobering to see how quickly a 25-year social justice battle to expand the circle of families who may receive some of the legal, economic, and social supports provided to married families can screech to a halt. Many wonder whether Vermont's civil union law is a compromise to, or a victory for "marriage rights" because it does not incorporate the term "marriage." While I am left wondering whether either could be considered a full victory for our families if the result is the repeal of the hard-won recognition that *all* families, whether married or not, deserve similar economic and legal supports.

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[1] *See* Baker v. State, 744 A. 2d 864 (Vt. 2000). In response to the Vermont Supreme Court decision in *Baker*, the state legislature passed a "civil union" law allowing same-sex partners to certify their relationship with the State, thus entitling them to all of the rights and benefits of civil marriage. *See* VT. STAT. ANN. tit. 18, §§ 5164, 5160, 5162 (Supp. Sept. 2000). *See also* VT. STAT. ANN. tit. 15 § 1202 (Supp. Sept. 2000).

[2] Associated Press, David Gram, University of Vermont Links Benefits to Unions (Sept. 27, 2000) (on file with author).

Certainly the proposition that employers are not entitled to pay unmarried workers less than married workers has been long been settled. Yet, the marriage/civil union advocates who have promised that the battle for civil marriage is not intended to undo the movement for equal family benefits for all families have failed to express any public outrage over this hasty retreat from family equality principles. Scores of lesbian and gay employees stand to lose their benefits or be coerced into the state's civil union relationship as a result of the University's change of policy. The lesbian and gay employees simply wish to hang on to the benefits that they had every right to believe are simply part of a fair, equitable, and discrimination-free policy of equal pay for equal work. Now, the University has turned "back to the future." Now, the employees have discovered that their own community has collaborated in re-creating the system in which only those who marry or become civil union partners are entitled to equal workplace benefits, while every other family is once again left to struggle in the margins.

I, for one, am greatly distressed by such a result. It is neither just nor essential to concede that the legitimate price for marriage is the loss of laws and policies, which acknowledge non-marital families within our own community and outside of the lesbian, gay, bisexual, and transgender ("LGBT") communities. These are the changes that have allowed people to remain in their homes upon the death of a life partner,[3] enforce property and contractual agreements,[4] obtain bereavement leave for the death of a partner,[5] and establish a legal claim as a second parent to children they are raising with a partner,[6] despite their unmarried status.

In 1990, even the federal government began to count unmarried partners as a significant demographic of family life in the United States.[7] These social and policy changes enacted over the last 20 years, and hundreds others like them, have allowed us to

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[3] Braschi v. Stahl Assoc., 543 N.E. 2d 49 (N.Y. 1989).

[4] *See* Marvin v. Marvin, 557 p. 2D 106 (Cal . 1976). *See also* Crooke v. Gilden, 414 S.E. 2d 645 (Ga. 1992).

[5] *See* N.Y. CITY ADMIN. CODE § 3-244, 3-240 (McKinney 2000 & Supp. Jul. 2000). The Majority of domestic partner policies extend benefits to unmarried workers regardless of whether they are in same-sex or different-sex relationships.

[6] *See In re* B.L.V.B., 628 A2d 1271 (Vt. 1993).

[7] U.S. Dep't of Commerce, Economics & Statistics Admin., Bureau of the Census, *1990 Census of Population: Summary of Social, Economic, and Hiring Characteristics available at* http://www.census.gov/prod/www/abs/decenial.html

view families, not just through the lens of formal documents and state conferred entitlement, but also, through the day-to-day functions of caregiving and commitment. In large measure, the work of feminist and lesbian and gay family advocates has widened the boundaries around family structures in order to fairly disburse the privileges associated with being considered a "legitimate" family.

The University of Vermont's swift departure from the broader principles of both workplace equity and family recognition signals the trouble ahead for our community's family advocacy efforts. I fear that we are on a collision course in which either marriage or non-marital family recognition must win out, but neither can co-exist. The University's change warns us of the need to step back to review our goals and strategies in an effort to ally our community's mutual goals of achieving full recognition and support for all families; as well as its subset, civil marriage for same-sex couples. All sides of the so-called "lesbian and gay marriage debate"[8] have learned enough, through the years of vigorous debate and strategizing, to understand the critical importance of both broad-based family recognition and access to civil marriage. What we have not done is sufficiently acknowledge this probable collision course of ideals — the social justice ideal of full family recognition and the civil rights ideal of gay-inclusive marriage laws.

One obstacle to our inability to reconcile these two goals has been the limited structures in which families function from a legal and policy perspective. There is a huge gap between being married and being unmarried. If you marry, your mutual commitment is assumed, supported, and valorized; if you are unmarried your relationship is either overlooked as socially insignificant or demonized as socially destructive — whether you are gay or straight. Our system has very few ways to acknowledge and value mutually supportive relationships that are either not premised on sexual intimacy or, if sexually intimate, are non-marital by choice. Parenthood suffers some of the same problems. With some exceptions, you are either a

[8] By this I refer to Bill Eskridge's characterization of the Tom Stoddard-Paula Ettelbrick perspectives on the role of marriage as a strategy of lesbian and gay family recognition which were published in OUT/LOOK Magazine (1989). *See* WILLIAM ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 51, 52–85 (1996). The pieces are republished in SUZANNE SHERMAN, LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES (1992).

full parent with the power to assert that relationship in any forum, or a "biological stranger"[9] with no legally cognizable relationship to the child that you raised, cared for, and nurtured.

I have a few ideas for adopting a strategy of defining a continuum of family structures that could address family and caregiving needs beyond marriage and marriage-like relationships. Already, four separate structures exist at the state level: traditional man/woman marriage, covenant marriage (available in Louisiana), civil unions (available in Vermont), and domestic partnership registry (available in California). All of these are structured as marriage or marriage-like relationships. I add to the mix something I call "designated family partnership" as well as functionally recognized relationships. There are, naturally, many others to propose and, undoubtedly, some flaws or difficulties in my proposal. My main goal, however, with my esteemed group of colleagues present at this symposium, is to propose strategies out of the all or nothing approach of marriage, or the potentially divisiveness of seeing one important struggle defeat another.

I must start though with a few basic premises. First, we cannot and should not abandon the progress made in restructuring family definitions to meet the needs of more families. As Justice O'Connor and some of her colleagues acknowledged this summer in *Troxel v. Granville*, family structures have changed visibly and dramatically in the last few decades.[10] By necessity, these demographic and cultural shifts call for changes to law and policy so that the needs of all families can be addressed. Even a majority, or at least a plurality, of the Supreme Court has acknowledged that maintaining old rules that force families into certain acceptable and unacceptable boxes, as opposed to restructuring the rules to better accommodate everyone's interests, is ill-advised. In order to meet the right balance, the better choice is to allow legislators and policy makers to explore the perimeters of the law and family structure.

If the Supreme Court of the United States is prepared to redefine some of the basic rules and structure of family, we should certainly not abandon our efforts. The LGBT community's 20-year advocacy for definitions of family that are lesbian and gay inclusive does not come only from our need to "work around" the marriage laws. Many of us also believe in a commitment to social justice for

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[9] *See* Alison D. v. Virginia M., 572 N.E. 2d 27 (N.Y. 1991).
[10] Troxel v. Granville, 530 U.S. 57 (2000).

all families, gay and non-gay families alike. Those who fail to conform to the legal and social structures of family and sexuality — as enforced primarily through marriage — are nonetheless entitled to the expanding number of privileges and benefits awarded to families who conform.

Second, our contributions to unlatching family structure norms from institutionally- or ideologically-based to more functionally-based should not be viewed as a stepping stone strategy on the way to marriage. Rather, increased recognition for non-formalized family structures is a strategic goal to be realized as co-existent with marriage, not obliterated by it.

Our cultural message of "Love Makes a Family" has helped courts, legislators, and policy makers re-think the essence of marriage-like family relationships and parenting relationships. As a result, thousands of workplace policies now extend benefits to domestic partners. Dozens of states regularly grant second parent adoptions and thereby create legal structures with two parents of the same sex. A growing number of state courts recognize that biology is not a necessary component to parenting. In addition, uncountable numbers of hospitals, day care centers, medical offices, schools, social service agencies, or business catering to the public no longer assume in their practices or written policies that marriage is the only relationship a couple may have with one another to be considered family.

The term "domestic partner" has become part of our family lexicon. Most gay-cognizant straight people use the term "partner" to refer to lesbian and gay couples. Many have even incorporated the word as their own reference point for their spouses. We have substantially shifted the cultural view of family to include people who are not married, gay or straight. This is a path well-worth continuing.

Third, the current system of government and private disbursement of seemingly endless family benefits and privileges to the formalized few discriminates cruelly against the non-formalized many. There is simply no rational reason, from a personal or policy perspective, to deny federal family sick and medical leave benefits to unmarried partners to enable them to care for one another with the same devotion as married people. There is no rationale that can support denying Social Security survivor benefits to a lesbian who just lost her partner of 25 years while providing full benefits to a

fourth spouse who was not even living with the deceased in the final months of their 2 year marriage.

For our own community's sake as well, we must find solutions to family recognition that go beyond the all or nothingness of marriage, as there will be many lesbian and gay couples who, for any number of reasons, will not choose marriage even if it is widely available. At the same time, those of us who are firmly committed to full family recognition must take into account the sincere, personal commitment that many in our community have to marriage. Precisely because of the deep cultural meaning associated with marriage and our outrage over the complete exclusion of our most cherished relationships, marriage will and should be one of the many demands we make for full family recognition.

At last, I get to my very preliminary proposal to consciously create a continuum of family recognition options that span conservative proposals for covenant marriage to proposals for allowing those who function as family to be acknowledged as such on a case-by-case basis. Some options assume a marriage-type relationship signified by sexual intimacy and/or parental caregiving. Some assume that any group of people who care for one another should be supported by our laws and policies. As a group, they are presented to deviate from the idea that only marriage or even marriage-like relationships make a family. It is my belief that all can co-exist. And, all start with the basic premise, which I share, that family relationships are central to our needs as human beings and our structure as a society. So, here are the options that could conceivably co-exist in each state to allow for more people to gain the benefits associated with family policy.

COVENANT MARRIAGE

I present the option of covenant marriage primarily to illustrate the point that a state may adopt co-existing forms of marriage. The Louisiana covenant marriage law[11] is a response to no-fault divorce laws, which conservative advocates believe have made marriage a revolving door. Among other things, a covenant marriage is more difficult to terminate, requiring parties to live separate and apart for two years before seeking a divorce. A traditional marriage in Louisiana may be terminated after a month of separation.

[11] *See* LA. REV. STAT. ANN. § 9:272 (West Supp. 2000).

In the interest of equality, covenant marriage, of course, should be open to same-sex couples, though I am quite happy to leave it as is.

TRADITIONAL MARRIAGE

Traditional marriage should be accessible on a sex-neutral basis. Furthermore, same-sex couples who want *marriage*, it would be wiser to present and argue the case as a civil and human rights issue and *not* as a benefits issue. Marriage serves as a potent and strongly symbolic reminder of the status that certain people have as full and equal citizens. If miscegenation laws can be struck down because they help sustain a system of White Supremacy, then gender-exclusive marriage laws should also be struck down because they contribute to a system of patriarchal privilege and heteronormativity. Period.

If our common goal is to truly spread out family-related benefits beyond those who are civilly married, then we must not premise our constitutional arguments for marriage on the denial of benefits. Vermont's marriage law presents a case in point. First, citing the benefits as the main desire for marriage serves only to reinforce the central role of marriage as the sole means by which benefits are extended, and leaves the process by which economic and legal benefits as disbursed unchallenged. As a result, concurrent efforts to keep in place domestic partner policies that extend benefits beyond married partners are undermined. Second, the primacy of the benefits argument in *Baker v. State* was ultimately fatal to the plaintiffs' claim to marriage.[12] Instead of forcing the court to confront the deep cultural and political symbolism of marriage, and the way marriage creates political and social hierarchies or acceptance that are repugnant to constitutional equality, the emphasis on the benefits of marriage, and the use of the Common Benefits Clause of the Vermont constitution, let the court and the legislature off the hook by giving them the option of addressing the less controversial issue of benefits while denying the infinitely more controversial issue of marriage.

On the other hand, if we persist in arguing the benefits rationale for same-sex marriage, then we need to seriously consider arguing the expansion of marriage to include more than just two people. Our families do not neatly fit into the 2-person marriage

[12] *Baker*, 744 A. 2d 864.

structure. For example, in a growing number of cases, lesbians and lesbian couples have developed close personal relationships with men, either individually or in couples, through their mutual desire to become parents. Children in these families have three or four parents as part of their intact family structure. But, the uneven recognition of the individual relationships within these families is a source of tremendous insecurity for both the children and the adults. If, our community argues that civil marriage is the only acceptable route to full family recognition and the main argument for marriage is to gain benefits, then we must not limit ourselves to advocating for only 2-person coupled relationships. We must not pretend that these families fit squarely within the marriage structure constructed to promote heterosexual reproduction and sexual monogamy.

A much more honest and inclusive marriage position is one that acknowledges the dilemma that our family structures present to the reproductive premise of heterosexual marriage. *If* same-sex marriage advocates view marriage as the preferred forum for benefits, procreation and childrearing, then the distinct procreative and childrearing structures of a growing number of lesbians and gay men must be accommodated as well.

CIVIL UNIONS

Civil unions provide a very interesting opportunity for re-creating a truly civil form of family recognition that is not steeped in the religious, patriarchal, and hetero-centric traditions of marriage. Like marriage, civil unions should be available to same-sex and different-sex couples alike. While the disadvantage is that a civil union still reveres the two person, sexually intimate family structure, the advantage is that it would allow a means of fully acknowledging mutual commitment for many to whom marriage is personally untenable. For example, many bisexuals in relationships with partners of a different sex resist marriage because of the inconsistency between their bisexual identity and the projection of heterosexuality inherent in marriage. Likewise, many "straight" supporters of the LGBT community, feminists, progressives, and sex radicals refuse to marry for any number of reasons, ranging from personal identity to personal politics. Even if civil marriage were available to all same-sex couples tomorrow, many lesbian and gay couples, as well, would convey their conscientious objection by

refusing to marry. Yet many are likely to view civil unions as a viable alternative that is less antagonistic to their personal identities.

Civil unions present another advantage — they provide a clean historical slate upon which to build. Unencumbered by social expectation, moral requirements, or procreative mandate, civil unions offering a rare opportunity to create and shape the meaning of family and the relationship among the participants. Instead of disparaging civil unions as nothing but a "separate but equal" compromise to marriage, I think we seize the opportunity to define the social significance of civil unions. Through civil union laws, we can re-tool the law's approach to family structures and decision-making, especially with regard to the legal meaning and consequences of procreation and childrearing.

For instance, we can re-define the equitable rules that govern custody and visitation, especially since Vermont's civil union law was designed for same-sex couples. Agreement to parent, not biology, would define the rights of persons included in the parenting structure of the relationship. This could include not only a lesbian couple, but the male donor/father as well. Decisions regarding child custody should not deliberately prefer the biological parent(s) over the non-biological parent(s). Non-biological lesbian co-parents should have full and equal standing in all custody and visitation matters unless the couple made a clearly different decision at the outset. Courts could assume that known donors are *not* the fathers *unless,* at the outset, there is clear and convincing evidence that all parties intended him to be a recognized father. We should develop statutory and common law concepts of the "donor/father" — a person whose role in a child's life is not that of a full father within the meaning of the law, but is significant enough to ensure a right of visitation and a continued relationship should a falling out occur between him and the child's mother(s) — to help move us beyond the all or nothingness of parenthood.

The trend among state activists is to introduce civil union laws as a starting point for discussing same-sex relationship recognition using the Vermont law as a model. Since the Vermont civil union law mostly incorporates straight marriage law into the tenets of civil union law, I propose that we consider this an opportunity to re-draft sections of the law to remove the procreative and patriarchal assumptions that may still exist in the statute.

DOMESTIC PARTNERSHIP

The confusing nature of the direction of family recognition is most obvious when examining domestic partnership. Originally intended as an "equal pay for equal work" employment concept, domestic partnership has blossomed into a full-fledged legal status accomplished by a couple registering with a municipality or, now, the State of California. While couples may register in dozens of cities or the State of California, the short-coming of domestic partnership is that its public manifestation has included very few benefits, if any, unless one of the parties is employed by the public entity that allows for registration. This reality has lead to domestic partnership being bashed as "second class citizenship" by some in our community who do not do not know its genesis. Personally, I believe that it is a mistake to move domestic partnership from the private employment context into the public recognition arena *without* establishing a concise meaning and purpose for such laws.

First, domestic partnership should be available to same- and different-sex couples alike. Far too many domestic partnership policies include only gay couples because they are founded on the faulty premise that the central problem with employment benefits policies is that unmarried gay employees are denied benefits because they cannot marry. From my perspective, the real problem is that employers discriminate against all unmarried employees by denying them equal benefits for their partners and children. The trend toward gay-only benefits serves only to reinforce the centrality of marriage in employment benefits structures: you are entitled to benefits is either you *are* married or you *cannot* marry by law. But, if you *choose* not to marry, you are out of luck, and thousands of dollars in health coverage. Needless to say, this approach only compounds the discrimination and denies "equal pay for equal work."

Second, we should define domestic partnership to be a vehicle by which a defined set of benefits and privileges can be accessed. Right now, the California model by which a domestic partner registry is created with the goal of, over time, attaching new benefits, privileges and responsibilities, presents a very unstable legal status. For example, let's say my partner is a state employee. We register as domestic partners because it is the only way that she can put me on her health care plan, but we have no personal desire otherwise to have the state involved in our relationship. Over time, and in the

name of lesbian and gay equality, the legislature begins passing disparate laws defining the rights and responsibilities of domestic partners, many of which go well beyond the level of state involvement or consequences we have chosen for our relationship. They may even be inconsistent with the decisions we have made in formal estate and personal planning documents. The expectations we had when we registered have now shifted dramatically and inconsistently with our wishes, leaving us the unpleasant choice of either succumbing to the new rules in order simply to keep the employment benefits, or dissolving our partnership and losing the employment benefits. Dramatic shifts in the meaning of domestic partnership, even for the right reasons, are likely to be very unsettling for anyone who registered their partnership without any clear idea of the legal consequences they may be undertaking. This, then, is the primary reason to settle on a concise meaning for domestic partnership.

For the sake of discussion, I propose that domestic partnership encompass the bundle of issues related to a shared residence and health-related rights and benefits. Tenancy rights, property insurance, and domestic violence laws are some of the elements connected to shared residency. Health benefits, healthcare decision-making, family and medical leave, access to each other's health records, and hospital and nursing home priority visitation are some of the many things that help ease the burden of caring for one another. Something along these lines would help us develop a concise meaning of domestic partnership that the outside world can begin to understand and acknowledge, while at the same time address a finite number of specific concerns for family partners related to their shared residency and caregiving commitment.

I have an alternate proposal for domestic partnership as well. That is, to simply *not* take domestic partnership into the public realm at all. Rather, leave domestic partnership just to the realm of employment benefits as we continue to convince more employers to provide family benefits to unmarried employees.

Designated Family Partnership

I would like to propose my own concept of what I call, for the moment, a "designated family partnership." By my definition, family partnership is a mutual caregiving relationship one may develop with one or more other adults that is publicly recognized to take the

place of the next of kin in a set number of circumstances. Sexual intimacy need not be the core component of a designated family partnership. In fact, the point of this proposal is to give official recognition, within our law and policy, to the variety of family-type caregiving relationships that are not sexually intimate. Moreover, many close day-to-day caregiving relationships may exist between people who live across the street, across town, or across the country; thus, living together in a shared domestic environment is not a necessary component of a designated family partnership. I use the word "family" to incorporate the common perception of family, those who love and care for one another, into non-blood, non-sexual family structures. Under my statutory scheme, the closest family member may be a best friend, a former lover, a cousin, a niece, a current lover, or a parent.

Unlike the one-way designation of a health care proxy, for example, my proposal anticipates a mutuality between the designated family members. The goal is to expedite the support delivery among these individuals, which is currently only allowed for those who are spouses, children, or other formally recognized family members or individuals. Here, there should be no "coupled" boundaries that are the limitations of most other family recognition approaches. For example, person A could enter into a family partnership with both person B and person C without it seeming inconsistent, non-monogamous, or polygamous. Sexual intimacy is not necessarily the point or result of the relationship. For starters, family and medical leave, health care decision-making, estate administration, or next-of-kin status for burial purposes are just a few of the many areas ripe for developing this concept.

My plan is to develop a bill that would incorporate these ideas. I hope that many of you will be available to give me your reactions, comments, and "critiques" about this idea.

DE FACTO FAMILY RELATIONSHIPS

Finally, although I believe there are benefits to developing a wider continuum of formal statutory schemes for recognizing a broader range of family relationships, many of the cases from our own community illustrate the importance of recognizing function over form in specific circumstances where no formal structure has been utilized. The New York Court of Appeals' decision in *Braschi v. Stahl Associates*, for example, was remarkable because the court

was guided by the policy goals of the state legislature.[13] The legislature sought to prevent unjust evictions of family members living in the rent-controlled apartment of the primary tenant.[14] By granting the request of a surviving gay partner to be treated as family for purposes of this particular law, the Court's result most closely adheres to the legislature's goals. The Court analyzed the way the couple functioned as family, rather than dismiss them as failing to meet the formalized requirement of family.[15]

As LGBT lawyers and advocates, we have long argued that the underlying policy goals of family support or equal pay for equal work issue should guide the decisions of employers, courts, and others faced with a question about whether a particular family structure should be supported and valued, despite the fact that it does not conform with the norms of marriage. Even if same-sex marriage or my range of family recognition vehicles were enacted tomorrow, there would still be lesbian, gay, bisexual, transgender, and straight couples who would not formalize their family relationships for any number of reasons. I do not believe that their refusal to conform, to even our new social norms, should leave them in the margins of family recognition.

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13 *Braschi*, 543 N.E. 2d 49.
14 *Id.*
15 *Id.*