

Boston University School of Law

Scholarly Commons at Boston University School of Law

Faculty Scholarship

2003

Intimate Affiliation and Democracy: Beyond Marriage?

Linda C. McClain

Boston University School of Law

Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship



Part of the [Family Law Commons](#)

Recommended Citation

Linda C. McClain, *Intimate Affiliation and Democracy: Beyond Marriage?*, 32 Hofstra Law Review 379 (2003).

Available at: https://scholarship.law.bu.edu/faculty_scholarship/546

This Article is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact lawlessa@bu.edu.



Hofstra University School of Law

Legal Studies Research Paper Series

Research Paper No. 04-06

Intimate Affiliation and Democracy: Beyond Marriage?

Linda C. McClain

Hofstra Law Review, Vol. 32, p. 379, 2003

This paper can be downloaded without charge from the
Social Science Research Network Electronic Paper Collection at:

<http://ssrn.com/abstract=588422>

INTIMATE AFFILIATION AND DEMOCRACY: BEYOND MARRIAGE?

*Linda C. McClain**

I. INTRODUCTION: DOES THE PLACE OF MARRIAGE = THE PLACE OF FAMILIES?

The place of marriage and its relation to the place of families in a just and fair constitutional democracy reverberates as one of the most challenging questions posed in debates over family law and policy. What is government's interest in intimate affiliation and in families? What is the connection between the forms that intimate affiliation takes and the vitality of the Nation's constitutional democracy? On the one hand, some voices urge that government should properly support and promote marriage, defined as the union of one man and one woman, as the proxy for the form of family best able to undergird constitutional democracy by allowing realization of the goods associated with family life and carrying out the important functions society assigns to families.¹ On the other hand, critics of marriage's privileged place contend that it is an imperfect and inadequate proxy for these purposes: it fails to represent the full range of forms of intimate affiliation capable of fostering family members' capacities for self-government, of allowing the realization of such goods as interdependence, mutual support, and friendship, and of performing the vital function of nurturing children and other dependents.² On this view, government should look beyond marriage—

* Professor of Law, Hofstra University School of Law. E-mail: lawlcm@hofstra.edu. This Article takes its title from the final panel of the Conference on Marriage, Democracy, and Families, held at Hofstra University School of Law on March 14-15, 2003. I moderated that panel. Thanks to Hofstra research librarian Cindie Leigh for valuable help with sources.

1. See, e.g., Lynn Wardle, *The Bonds of Matrimony and the Bonds of Constitutional Democracy*, 32 HOFSTRA L. REV. 349, 372 (2004) (noting that society seeks to further important interests in the fostering of families centered around marriage).

2. See generally Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239 (2001) (arguing that marriage as a concept limits the development of family policy by precluding considerations of other solutions to social problems).

even if expanded to include same-sex marriage—to recognize and support a broader range of forms of families, such as the (single) parent-child bond, the bonds of extended and complex families, and the bonds of friendship.³

The United States Supreme Court's recent decision in *Lawrence v. Texas*,⁴ which overruled *Bowers v. Hardwick*⁵ and struck down a Texas law that prohibited same-sex sodomy, but not heterosexual sodomy, raised the stakes in these debates even higher. Even as the Court found a relevant family resemblance between the intimate sexual relationships of heterosexual married (and unmarried) couples and those of same-sex couples, using the language of “respect” to characterize what was due to such same-sex couples, it carefully put to the side the issue of official recognition of same-sex relationships of the sort marriage would provide.⁶

Echoing dissenting Justice Scalia, who warned readers not to believe the majority's disclaimer about same-sex marriage and chastised it for taking sides in the cultural war over homosexuality, some commentators on *Lawrence* also purport to read the judicial writing on the wall.⁷ Depending on one's normative and political commitments, *Lawrence*'s recognition of constitutional protection of the intimate sexual relationships of same-sex couples leads either to increased hope for taking the further step of securing recognition of same-sex marriage, or to increased fear that, without measures such as the proposed Federal Marriage Amendment, both marriage and families face destruction. Voicing such fears, conservative family organizations criticize *Lawrence* as a blow to the “natural family” because it might open the door to recognizing same-sex marriage and repudiating the special gender complementarity of male and female that is the “fundamental nature” of

3. See Judith Stacey, *Toward Equal Regard for Marriages and Other Imperfect Intimate Affiliations*, 32 HOFSTRA L. REV. 331, 346 (2003).

4. 123 S. Ct. 2472 (2003).

5. 478 U.S. 186 (1986).

6. See *Lawrence v. Texas*, 123 S. Ct. at 2478, 2481-82, 2484. When this Article was in the final editing stage, the Supreme Judicial Court of Massachusetts issued an opinion in which it concluded that “limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under the Massachusetts Constitution.” *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (2003). Although, in this Article, I refer at a few points to the *Goodridge* opinion, I will not undertake a full discussion of it.

7. See *Lawrence*, 123 S. Ct. at 2496-98 (Scalia, J., dissenting). For an example of conservative opponents heeding Justice Scalia's warning, see, Gerald V. Bradley, *Stand and Fight: Don't Take Gay Marriage Lying Down*, NAT'L REV., July 28, 2003, at 26.

marriage.⁸ And yet, it is not only the slippery slope to same-sex marriage that alarms such critics. They fear a move beyond marriage itself, as society has known it and as much state and federal law defines it (a union of one man and one woman), in two additional senses. First, family law and policy might open up to extend marriage to “every conceivable combination of male and female,” including polygamy and polyamory (or group marriage).⁹ Second, an even steeper slippery slope could lead to the abolition of marriage itself, as a distinct legal category, in favor of a “system of flexible relationship contracts” that could extend to “polygamists, polyamorists, or even cohabiting relatives and friends.”¹⁰ Thus, the proposed Federal Marriage Amendment, supported by the Bush Administration, would ward off these distinct threats by defining marriage *throughout the United States* as the union of one man and one woman and by prohibiting state and federal judges from construing state laws and constitutions to confer marriage-like benefits on nonmarital couples.¹¹ Yet, even as self-identified “pro-family” groups view the ascent of such a flexible system as calamitous and socially destructive, some proponents of a more realistic and pluralistic family law and policy would welcome it.¹²

8. See, e.g., Karen S. Peterson, *Sodomy Ruling Gives Hope to Man, But Others Say Court Has Hurt “Natural” Family*, USA TODAY, June 27, 2003, at 5A; Evelyn Nieves, *Family Values Groups Gear Up for Battle Over Gay Marriage*, WASH. POST, Aug. 17, 2003, at A6 (quoting the opinion of Focus on the Family’s Glenn Stanton that passing the Federal Marriage Amendment is the top priority for it because: “For us, . . . this is a fundamental question of how do male and female complement one another. It’s the fundamental nature of marriage.”).

9. See Stanley Kurtz, *Beyond Gay Marriage*, WEEKLY STANDARD, Aug. 4, 2003, at 26.

10. *Id.*

11. See Federal Marriage Amendment, H.J. Res. 56, 108th Cong. (2003) [hereinafter Marriage Amendment]. The proposed amendment was most recently introduced in the House of Representatives on May 21, 2003. It reads:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

Id. For President Bush’s support, see *State of the Union*, N.Y. TIMES, Jan. 21, 2004, at A18.

12. See *infra* Part III for a discussion of proposals by Judith Stacey and Martha Fineman. After *Lawrence*, journalist Michael Kinsley attracted attention for his proposal to resolve the controversy over same-sex marriage by abolishing marriage as a government-sanctioned institution, leaving religious institutions and other private organizations to offer various forms of marriage. Kinsley argues that “marriage is used as a substitute for other factors that are harder to measure, such as financial dependence or devotion to offspring,” and that “[i]t would be possible to write rules that measure the real factors at stake and leave marriage out of the matter.” Michael Kinsley, *Abolish Marriage: Let’s Really Get the Government Out of Our Bedrooms*, WASH. POST, July 3, 2003, at A23.

This roundtable, “Intimate Affiliation and Democracy: Beyond Marriage?”¹³ brought together a rich diversity of perspectives on the question, “should family law and policy move beyond marriage?” These answers ranged from an emphatic “no,” based on a defense of traditional marriage’s historical link to generating civic virtue and the dangers posed to the polity by any redefinition of marriage,¹⁴ to an equally emphatic “yes,” accompanied by a call to abolish marriage as a state-sponsored institution (relegating adult intimate relationships to the realm of private contract) and to center family law around the parent-child, or caretaker-dependent relationship.¹⁵ In between these two opposing answers (offered, respectively, by family law scholars Lynn Wardle and Martha Fineman), are theologian and marriage movement figure Don Browning’s defense of marriage, properly reconstructed (what he calls the “equal-regard mother-father partnership”),¹⁶ and arguments by legal scholar Martha Ertman and sociologist Judith Stacey for a more pluralistic family policy that would show respect—or, as Stacey would extend Browning’s term, “equal regard”—both for marriage (including same-sex marriage) and for a broader array of contemporary family forms.¹⁷ Finally, panelist Suzanne Goldberg cautioned that skepticism may be in order about positing any significant relationship between forms of intimate self-government and democratic self-government.¹⁸

This spectrum of views concerning how best to answer the question “beyond marriage?” has analogues in ongoing public discussion over whether marriage should maintain its favored place in family law and policy and whether government should promote marriage. Thus, canvassing the thoughtful answers presented on this panel (and published in this Symposium) offers a productive opportunity to assess

13. A descriptive summary of the panel discussions that took place at this conference is available at http://www.hofstra.edu/academics/law/law_marriage_panels.cfm (last visited Jan. 18, 2004).

14. See Wardle, *supra* note 1, at 355.

15. See Martha Albertson Fineman, Remarks at the Hofstra University School of Law Conference on Marriage, Democracy, and Families (Mar. 14, 2003) (presenting her paper, *The Meaning of Marriage*, at Panel on “Intimate Affiliation and Democracy: Beyond Democracy?”) (videotape on file with Hofstra Law Review). Fineman’s paper will be a chapter in her forthcoming book, *THE AUTONOMY MYTH*.

16. Don Browning, *Critical Familism, Civil Society, and the Law*, 32 HOFSTRA L. REV. 313, 314 (2003).

17. See Martha Ertman, Remarks at the Hofstra University School of Law Conference on Marriage, Democracy, and Families (Mar. 14, 2003) (videotape on file with Hofstra Law Review); see generally Stacey, *supra* note 3.

18. See Suzanne Goldberg, Remarks at the Hofstra University School of Law Conference on Marriage, Democracy, and Families (Mar. 14, 2003) (videotape on file with Hofstra Law Review).

the strengths and weaknesses of these answers and to clarify what is at stake in this broader public conversation.¹⁹ I also map out these answers to illuminate significant points of convergence and divergence among the panelists, as well as to situate my own answer.

To the question, “should family law and policy move beyond marriage?,” I answer “yes and no.” I embrace moving beyond marriage in three relevant ways: (1) moving beyond “traditional” marriage to embrace more firmly sex equality, or equality within families, as a guiding norm for governmental efforts to support and encourage marriage; (2) moving beyond “traditional marriage,” defined as the union of one man and one woman, to recognize and support same-sex marriage as a step toward greater equality among families; and (3) moving beyond marriage by extending governmental support and recognition to other forms of committed, intimate relationships. But I also argue that society should not move wholly beyond marriage to abolish it as a legal category, relegating all adult intimate relationships to the realm of private contract. I cannot fully elaborate my approach in this forum, but in other writing I contend that a just and fair approach to the place of families in our constitutional democracy should attend to fostering capacity, equality, and responsibility. Two relevant dimensions of equality include equality within and equality among families.²⁰ This framework will guide my engagement with my co-panelists’ diverse perspectives.

II. ARGUMENTS THAT FAMILY LAW AND POLICY SHOULD NOT MOVE BEYOND MARRIAGE

A. *Defending Marriage: A Plea Not to “Change the Domestic Habits of the Americans”*²¹

Lynn Wardle’s contribution to this Symposium emphasizes the role of marriage in constituting virtuous citizens. Revisiting ground made

19. In order that readers of my evaluation of these views have the benefit of consulting the authors’ own articulations of their positions, I confine my focus to the three panelists whose contributions appear in this Symposium (Don Browning, Judith Stacey, and Lynn Wardle) and to panelist Martha Fineman, who presented a chapter from her forthcoming book, *THE AUTONOMY MYTH*. I am grateful to the other two panelists, Martha Ertman and Suzanne Goldberg, for the insightful presentations they made at the Conference, but I do not address their remarks here.

20. See LINDA C. McCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* (forthcoming) [hereinafter *THE PLACE OF FAMILIES*].

21. Wardle, *supra* note 1, at 376 (quoting FRANCIS GRUND, *ARISTOCRACY IN AMERICA* 212-13 (Harper 1959) (1839)).

familiar in recent years by proponents of reviving civil society, he invokes historical texts extolling the role of the marital family as the “seedbed of republican civic virtue,” the generator of domestic habits that in turn would undergird the constitutional republic.²² Wardle contends that the Founders viewed the marriage-based family as the “foundational unit of society and the seedbed of government,” and that this view also features in constitutional jurisprudence about families and contemporary political theories stressing civic renewal.²³ By contrast, he warns, efforts to redefine marriage, by, for example, legalizing same-sex marriage, or to abolish marriage (as Fineman proposes), would “change the domestic habits of Americans” in ways that “inevitably would lead to a radical variation of our constitutional government.”²⁴ The stakes are high: “Our Constitution was founded on a particular vision of marriage. An abolition or radical redefinition will have extreme consequences for our government, probably within a generation.”²⁵

But what, exactly, was this “particular vision of marriage”? How did those in the founding era believe it generated virtue? Is this particular vision still resonant or appropriate today? Wardle invokes this vision of marriage without any apparent critical reflection on or critique of it. Nowhere in his account is the paradox that even as political ideology extolled married women, in their roles as wives and mothers, for generating civic virtue in their husbands and sons, the legal system denied them personal self-government within marriage, and all women were excluded from full participation in democratic self-government and from conceptions of the virtuous citizen.²⁶ Indeed, even as a man’s role as husband, and head of the household, was thought to expand his

22. See *id.* at 107-08. For contemporary calls to renew civil society that identify marriage’s role as a “seedbed of civic virtue,” see COUNCIL ON CIVIL SOCIETY, A CALL TO CIVIL SOCIETY (1988) [hereinafter CIVIL SOCIETY]; Mary Ann Glendon, *Forgotten Questions*, in SEEDBEDS OF VIRTUE 3 (Mary Ann Glendon & David Blankenhorn eds., 1995) (noting accord among authors in collection as to the detrimental impact of the “weakening of child-raising families” on the development of virtuous citizens); NAT’L COMM’N ON CIVIC RENEWAL, A NATION OF SPECTATORS: HOW CIVIC DISENGAGEMENT WEAKENS AMERICA AND WHAT WE CAN DO ABOUT IT (1998), available at http://www.puaf.umd.edu/affiliates/civicrenewal/finalreport/table_of_contentsfinal_report.htm (last visited Dec. 20, 2003) (calling for an increase in two-parent families and a reduction in teenage and nonmarital births). See generally MARY ANN GLENDON, RIGHTS TALK (1989) (arguing that contemporary rights talk neglects the role of civil society in generating the virtues necessary for ordered liberty).

23. See Wardle, *supra* note 1, at 361, 364.

24. *Id.* at 128.

25. *Id.* at 130.

26. See generally LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES (1998) (discussing the civic obligations from which women were excused because of their family obligations and the role this played in denying women participation in government).

capacity for citizenship, a woman's role as wife carried with it diminished capacity and legal disabilities, some of which continued well into the last century.²⁷ As historian Michael Grossberg observes, the model of the "republican family" of the late eighteenth and early nineteenth century was that of a "well-ordered society: 'a little commonwealth,'" in which the husband served as governor.²⁸ And even though the rise of the model of "companionate" marriage led to a decreasing emphasis upon patriarchal marriage, this more "egalitarian" model of marriage still assigned greater authority to the husband and, in charging homes "with the vital responsibility of molding the private virtue necessary for republicanism to flourish," enhanced "the importance of women's family duties."²⁹

Is it this "particular vision" of marriage that Wardle wishes to embrace as a generator of civic virtue? Constitutional jurisprudence itself has repudiated important components of this "particular vision" that established the husband as "head" of the household and wife as dependent, just as changes within family law have brought a move from the hierarchical household to marriage as an equal partnership with duties and rights not linked to sex.³⁰ Thus, these legal revolutions have changed significantly "the domestic habits of the Americans."³¹ But rather than signaling the demise of the republic, courts and legislatures have praised these changes as appropriate "transformations" (as Massachusetts' highest court recently put it) of the institution of marriage to bring it more into line with important constitutional commitments to individual liberty and equal citizenship.³²

27. See NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 7 (2000); MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 25-27 (1985); see generally HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* (2000) (discussing the role that marital separation played in the development of independent legal rights of women).

28. GROSSBERG, *supra* note 27, at 4-5.

29. *Id.* at 6-8.

30. See generally LESLIE J. HARRIS & LEE E. TEITELBAUM, *FAMILY LAW* (2d ed. 2000); D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW* 245-396 (2d ed. 2002) (containing a collection of cases, essays, and legislation tracking the changing nature of marriage and of roles and responsibilities within marriage).

31. *Id.* at 128 (quoting FRANCIS GRUND, *ARISTOCRACY IN AMERICA* 212-13 (Harper 1959) (1839)).

32. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 897, 898 (1992) (striking down spousal notification provision in abortion law and repudiating the common law's allocation to husbands of authority over wives as "no longer consistent with our understanding of the family, the individual, or the Constitution"); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 966-67 (Mass. 2003) (describing marriage as "an evolving paradigm" and how courts and legislatures have ameliorated the common law's "harshness" toward wives); *Jersey Shore Med. Ctr.-Fitkin Hosp. v.*

Contemporary arguments about the place of marriage in generating civic virtue usefully bring to the fore what I believe is an important dimension of the place of families: fostering the capacities for personal and democratic self-government.³³ However, I also contend that any contemporary argument for the role of families in generating civic virtue that appeals to the historical role of marriage as a seedbed of virtue must reckon with the historical link between civic virtue and sex inequality. It must consider whether it is possible to offer a contemporary argument for the marital family's role in fostering virtue that respects the public value of sex equality and takes into account the transformation of the institution of marriage itself in light of norms of equal rights and responsibilities for men and women. In other writing, I have argued that some contemporary calls to renew civil society and shore up civic virtue fall short of facing these challenges.³⁴ I am sympathetic to Wardle's effort to argue for an important civic role for marriage, but I find that his account of the place of marriage similarly falls short.

Wardle invokes historical texts extolling marriage's civilizing role, and its place as a seedbed of democracy, without considering how the prevailing legal and social norms delineated proper gender roles and prescribed a gender complementarity that denied married women personal self-government. He does not adequately confront the question "if contemporary legal and social norms embrace a model of marriage that affirms equal rights and responsibilities for husbands and wives, and repudiate a form of gender complementarity based on fixed, hierarchical gender roles, what implications does this have for thinking about marriage as a seedbed of civic virtue?" Can historical arguments for the family's role in generating virtue find persuasive contemporary translations? For example, does gender complementarity offer a persuasive contemporary justification for defining marriage exclusively as the union of one man and one woman?

Gender complementarity is a key argument Wardle offers against redefining marriage to include same-sex unions.³⁵ Like many opponents

Estate of Baum, 417 A.2d 1003, 1008, 1009, 1010 (N.J. 1980) (rejecting as an "anachronism" and in conflict with constitutional norms the common law doctrine of a husband's liability for a wife's "necessaries"; adopting a gender-neutral rule more in keeping with the idea that "interdependence is the hallmark of a modern marriage"); *People v. Liberta*, 474 N.E.2d 567, 574, 579 (N.Y. 1984) (striking down marital rape exemption as not justifiable under notions of the constitutional right of privacy).

33. I elaborate this idea of fostering capacity in *THE PLACE OF FAMILIES*, *supra* note 20.

34. See Linda C. McClain, *The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality*, 69 *FORDHAM L. REV.* 1617, 1643-53 (2001).

35. See Wardle, *supra* note 1, at 374.

of same-sex marriage, he contends that “[t]he bonding of male and female are essential features of human existence and of marriage.”³⁶ It is this type of bond that secures the bonds of citizenship. But how? What form does this complementarity assume? Wardle speaks of contemporary marriages in terms of instilling civic skills of “mutual respect and cooperation” and urges a paradigm of “interdependence” to describe the “richness, mutuality, and practical reciprocity” of many marriages.³⁷ But are these types of qualities unique to heterosexual intimate, committed relationships? More seems to be at work: the “core and essence of marriage” is “the integration of the universe of gender differences . . . associated with sexual identity”; the male-female union “[bridges] the sex-divide” and thus sustains a “complex form of social interdependency.”³⁸

What reliance does Wardle’s contemporary appeal to gender complementarity place upon marriage’s historical role in “bridging” the sex-divide, or in “integrating” gender differences? Does he mean to affirm or disavow this history? For example,

the ideal of marriage as a ‘school of affection,’ and a foundation for national morality had a gendered dimension, reflecting eighteenth-century assumptions about differences between the sexes: marriage, by associating men with women, would ‘gentle’ men, subdue their selflessness and egotism, and develop those qualities of the ‘heart’ and good manners that undergird the social virtues.³⁹

The law of marriage integrated the two sexes by establishing—indeed mandating—a binary or dyadic relationship between husband as head of household and economic provider and wife as dependent and dutiful provider of domestic services.⁴⁰ Integration also found expression in the fiction of marital unity, which served both as explanation and justification for the suspension of a wife’s separate civil existence, her lack of legal capacity, and her lack of protection of her bodily integrity

36. *Id.* at 126; see Nieves, *supra* note 8.

37. See Wardle, *supra* note 1, at 353, 373-74.

38. *Id.* at 126 (quoting DANIEL CERE, MARRIAGE/PARENTHOOD, LAWS OF DISSOLUTION 5, 14-15 (March 12, 2003)).

39. Linda C. McClain, *The Place of Marriage in Democracy’s Formative Project*, 11:3 THE GOOD SOCIETY 50, 51 (2002) (discussing COTT, *supra* note 27, at 18-21); see Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1520-21 (1997) (arguing that the Supreme Court’s rhetoric, in *Reynolds v. United States*, 98 U.S. 145 (1878), about monogamous marriage as the foundation of democratic government relied upon Francis Lieber’s idea of marriage, which viewed women as different in nature and role from men and as fulfilling their highest potential as wives and mothers).

40. See Strassberg, *supra* note 39, at 1617.

in the case of spousal rape and assault.⁴¹ Well into the twentieth century, notions of the complementary roles of husband and wife, and women's special responsibilities for domestic life, rationalized limitations on married women's participation in economic, civic, and political life.⁴² Such notions also had implications for how families, other institutions of civil society, and schools should prepare boys and girls to assume their proper roles.

Evolving notions of gender equality and of the requirements of equal protection and freedom from discrimination have changed the nation's "domestic habits" with respect to what form of gender complementarity marriage law mandates or permits. Indeed, constitutional precedents forbid states from using family law to perpetuate forms of gender complementarity once thought acceptable but now viewed as "archaic stereotypes."⁴³ Far from being a static feature of marriage, fixed by law, gender roles are dynamic and subject to individual revision and negotiation. To be sure, social norms about men and women, and husbands and wives, continue to exert a force on how married persons understand the role of husband or wife.⁴⁴ But, as Fineman's presentation on this panel elaborated, the shift to a gender-neutral and more egalitarian conception of marriage opens up far more room for couples to pour their own meanings into marriage.⁴⁵

As is true of an appeal to the marital family's role in generating virtue, an appeal to gender complementarity must attempt to offer a translation in keeping with contemporary public values and legal norms. Surely more critical reflection than Wardle offers is due upon the question of the evolving place of gender complementarity in marriage, and of law's repudiation of the form embedded in the Founders' "particular vision of marriage." I believe that critical reflection and an attempt at translation are especially incumbent when proponents of gender complementarity invoke it as a ground for resisting the expansion of marriage to include the union of same-sex intimates. Otherwise,

41. On the fiction of marital unity and the legal consequences of coverture, see WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 442-45 (reprinted in WEISBERG AND APPLETON, *supra* note 30, at 253-54).

42. See, e.g., *Hoyt v. Florida*, 368 U.S. 57, 61-62 (1961) (upholding state law exempting women from the jury list unless they volunteered as a reasonable classification in light of fact that "woman is still regarded as the center of home and family life").

43. See generally *Orr v. Orr*, 440 U.S. 268 (1979); *Stanton v. Stanton*, 421 U.S. 7 (1975).

44. On this point, see, for example, Steven L. Nock, *The Future of Public Laws for Private Marriage*, 11:3 THE GOOD SOCIETY 74 (2002); Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1922 (2000).

45. See *infra* Part III.B for discussion.

defending restrictive marriage laws by simple reference to historical understandings of marriage as the union of one man and one woman (as, for example, some states have done in the challenges to their marriage laws) fails to address the question: why should these definitions continue to apply if the set of complementary sex-linked rights and obligations has given way, in light of evolving constitutional norms, to a set of gender-neutral rights and obligations?⁴⁶ It is both possible and important to offer a contemporary argument for the place of families in fostering civic virtue. By contrast, I do not believe that the appeal to gender complementarity is a persuasive ground for opposing same-sex marriage.⁴⁷

Wardle also insists that heterosexual marriage provides the best environment for rearing children, because such marriages “model inter-gender relations and show children how to relate to persons of their own and the opposite gender.”⁴⁸ This is also a frequent ground for opposing same-sex marriage, yet here too, I believe that the appeal to gender complementarity is not a persuasive argument against redefining marriage to include same-sex unions. Wardle contends that parenting by heterosexual parents is more optimal for children, but other scholars sharply contest this claim.⁴⁹ Studies indicate that gay- and lesbian-headed families fare as well or better than heterosexual couples on

46. For an example of such an appeal, see Brief of Defendants-Appellees at 17-18, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (No. SJC-08860) [hereinafter Brief of Defendants-Appellees] (challenging Massachusetts' marriage laws in a case recently decided before its Supreme Judicial Court). I discuss the challenge to Massachusetts's law and the State of Massachusetts's appeal to gender complementarity in Chapter 6 of *THE PLACE OF FAMILIES*, *supra* note 20. See also Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives*, 59 OHIO ST. L. J. 19, 115-24 (1998) [hereinafter *Toleration*] (discussing same-sex marriage); Linda C. McClain, *Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage*, 66 FORDHAM L. REV. 1241, 1242 (1998) [hereinafter *Deliberative Democracy*] (critiquing natural law arguments against same-sex marriage).

47. See *Goodridge*, 798 N.E.2d at 972-73 (Greany, J., concurring) (calling for critical reexamination of assumptions about historically accepted roles of women and men within marriage); cf. Strassberg, *supra* note 39, at 1623 (concluding that a contemporary argument in favor of monogamy and against polygamy, which attends to constitutional norms of sex equality, supports, rather than opposes, extending marriage to same-sex couples).

48. Wardle, *supra* note 1, at 375.

49. Compare Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 863-64 (contending that social science literature suggests that children in same-sex families are harmed by the intimate relationships of their parents and arguing for a rebuttable legal presumption of harm) with Carlos A. Ball and Janice Farrell Pea, *Warring With Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 255-56 (1998) (rebutting Wardle's assessment of the social science literature and arguing that gay and lesbian parents should be evaluated individually on the basis of their ability to be good parents instead of on an assumption based on sexual orientation).

measures pertaining both to the quality of the adult-adult relationship and to effective parenting.⁵⁰ Indeed, a number of state courts and legislators have supported recognizing parental rights for both members of a same-sex couple (for example, through second-parent adoption) because of their capacity to be responsible, loving parents and to foster child well-being.⁵¹ Once a state moves in this direction of greater legal protection because this is in the best interests of children, these steps toward equality among families seem on a collision course with claims that children's best interests require opposite-sex parents because of unique parenting roles linked to sex difference.⁵²

In ruling that the Common Benefits Clause of Vermont's Constitution required that the benefits and protections incident to marriage flowed to same-sex couples as well as heterosexual couples, the court found that the State could not justify excluding same-sex couples from these benefits either as a means of furthering its interest in "promoting a permanent commitment between couples for the security of their children" or in "promoting child rearing in a setting that provides both male and female role models."⁵³ Legislative efforts to remove affirmative obstacles to same-sex couples legally adopting and rearing children reflected a public policy "diametrically at odds" with the state's assertion of such exclusion.⁵⁴ Instead, the court found same-sex and

50. See SUZANNE J. JOHNSON AND ELIZABETH O'CONNOR, *THE GAY BABY BOOM: THE PSYCHOLOGY OF GAY PARENTHOOD* (2003); Jane E. Brody, *Gay Families Flourish as Acceptance Grows*, N.Y. TIMES, July 1, 2003, at F7 (discussing Johnson and O'Connor book and profiling various families).

51. See, e.g., *Adoption of Tammy*, 619 N.E.2d 315, 317-20 (Mass. 1993) (finding that allowing the biological parent and her intimate same-sex partner to adopt the child served the child's best interests because each was a functional parent, and favorably citing testimony that child was "extremely well-adjusted, bright, creative [and] cheerful."); *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999) (noting that the Vermont legislature had removed barriers to nonmarital couples, including same-sex couples adopting children); *In the Matter of Adoption of Two Children by H.N.R.*, 666 A.2d 535, 539-41 (N.J. Super. Ct. App. Div. 1995) (construing New Jersey's adoption statute to permit adoption by biological mother's same-sex partner). See generally Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990) (calling for further judicial developments along these lines).

52. For example, Massachusetts has taken such steps, see *supra* note 46, but nonetheless in its defense of its marriage laws argued that the legislature "could rationally believe that limiting marriage to opposite-sex couples serves the Commonwealth's legitimate interest in fostering a favorable setting for child-rearing." Brief of Defendants-Appellees, *supra* note 46, at 117. The Supreme Judicial Court of Massachusetts rejected this argument. See *Goodridge*, 798 N.E.2d at 962-63 ("Protecting the welfare of children is a paramount State policy. Restricting marriage to opposite-sex couples, however, cannot plausibly further this policy.").

53. *Baker*, 744 A.2d at 881, 884.

54. See *id.* at 884.

opposite-sex couples similarly situated in desiring to enter into marriage to provide security and stability for their family.⁵⁵ And when the Vermont legislature passed the law creating civil unions for same-sex couples (with the benefits and obligations linked to marriage), it noted: “The state has a strong interest in promoting stable and lasting families, including families based upon a same-sex couple.”⁵⁶ Like Vermont’s Supreme Court, it stressed meritorious sameness between same-sex families and marital families:

Despite long standing social and economic discrimination, many gay and lesbian Vermonters have formed lasting, committed, caring, and faithful relationships with persons of their same sex. These couples live together, participate in their communities together, and some raise children and care for family members together, just as do couples who are married under Vermont law.⁵⁷

Such appeals to sameness have supported appropriate movement in the direction of equality among families. Yet, nonharmful—and even meritorious—differences may also counsel support for such equality. As my co-panelist Judith Stacey has found, Wardle correctly criticizes some studies for minimizing differences between same-sex and opposite-sex households.⁵⁸ However, to the extent that there are detectable differences in the impact on children from being raised by homosexual rather than heterosexual parents, these differences, rather than diminishing child well-being, may be salutary (for example, children in same-sex households appear to have a less rigid view of gender roles and identity).⁵⁹

In sum, the issue of the relationship between family forms and values and constitutional democracy is a challenging one. Wardle

55. See *id.* at 889. In *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *17 (Haw. Cir. Ct. 1996), *aff’d*, 950 P.2d 1234 (Haw. 1997), the Hawaii Circuit Court rejected the state’s argument that optimal development of children required that families consist of married, biological (or at least heterosexual) parents in light of expert testimony that gay and lesbian parents can be “as fit and loving parents, as non-gay men and women and different-sex couples.” It found that the State could not satisfy its burden of showing a compelling interest that justified excluding gay men and lesbians from marriage and therefore was an unconstitutional denial of equal protection of the laws. Nonetheless, the voters of Hawaii authorized a constitutional amendment that declared that “[t]he legislature shall have the power to reserve marriage to opposite-sex couples.” HAW. CONST. art. 1, § 23.

56. An Act Relating To Civil Unions, 2000 Vt. Acts & Resolves 91 (codified at VT. STAT. ANN. tit. 15, § 1201-1207 (Supp. 2001)).

57. *Id.*

58. See Judith Stacey & Timothy J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 160, 161 (2001).

59. See *id.* at 162-64.

usefully highlights this issue, and notes that we share an interest in arguing for an important civic role for marriage and families.⁶⁰ But his account insufficiently attends to equality within or among families, two dimensions of equality that I contend should inform thinking about the place of families. Let me be clear: I do not charge Wardle with embracing, in whole cloth, all the social and legal inequality that is part of marriage's history. Yet his failure to repudiate this history explicitly and to clarify how a contemporary argument for gender complementarity would respect women's equal citizenship limits the persuasiveness of his approach. Similarly, I do not find Wardle's appeal to gender complementarity as a precondition for optimal child development persuasive, and do not believe that it can sustain his plea not to change the "domestic habits of the Americans"⁶¹ by extending marriage to same-sex couples.

B. Defend but Reconstruct Marriage: "Critical Familism"

My co-panelist Don Browning also answers "no" to the question of whether society and family law should move beyond marriage.⁶² But by contrast to Wardle's straightforward appeal to tradition, Browning advocates a cultural strategy of "critical familism."⁶³ The core of critical familism is reconstructing family and marriage to support the "equal-regard mother-father team with equal privileges and responsibilities in both the public worlds of politics and employment and the more private realms of home, child rearing, and intergenerational care."⁶⁴ The "critical" component of this "familism" stems from its commitment "to expose, critique, and reform distortions of social, economic, and political power that function to block or undermine the free formation and support of the equal-regard mother-father partnership."⁶⁵ A theologian, Browning maintains that the principles for this critique may be drawn from Jewish and Christian traditions, as well as from contemporary moral philosophy.⁶⁶ Moreover, as Browning explains in other work, these traditions, which have "had so much to do with shaping American lore and law about families are now interacting with other powerful

60. See Wardle, *supra* note 1, at 349, 378.

61. *Id.* at 128 (quoting FRANCIS GRUND, *ARISTOCRACY IN AMERICA* 212-13 (Harper 1959) (1839)).

62. Browning, *supra* note 16, at 329.

63. See generally *id.*

64. *Id.* at 101.

65. *Id.* at 102.

66. See *id.*

traditions—Islamic, Hindu, Buddhist, neo-Confucian, Native American—that not only want social space to exercise their own family identities but eventually will want their say on issues pertaining to the larger public philosophy concerning families.⁶⁷ Thus, the eventual goal of critical familism is looking for analogies among all of these religious traditions pertinent to marriage and family.⁶⁸

Browning describes “critical familism” as primarily a “cultural strategy—indeed a religiocultural strategy—to be carried out principally by the institutions of civil society.”⁶⁹ This “reweaving the social tapestry” to renew a marriage culture will require the cooperation of government, religious, cultural, and other institutions of civil society, and the market.⁷⁰ Thus, family law “should do nothing to undermine this normative model,” but instead should support it.⁷¹

Critical familism defines marriage primarily “with its child rearing tasks envisioned as central.”⁷² Drawing not only on theological and philosophical, but also evolutionary biology sources, it stresses the “momentously important cultural accomplishment of human males joining the mother-infant dyad and contributing to the provision and care for their offspring and consorts.”⁷³ Like much of the marriage movement, critical familism views anchoring men within families as one important reason that society should support and promote marriage. In other writing, Browning calls this the “male problematic,” or “the primordial male tendency to procreate but not to care for offspring or mate.”⁷⁴ It is notable that even Browning, whose call for a “critical” marriage culture is the strand within the marriage movement most embracing of the need for sex equality as part of a contemporary public philosophy of marriage, identifies this “male problematic,” and views marriage as the best institutional framework for anchoring male

67. DON S. BROWNING & GLORIA G. RODRIGUEZ, *REWEAVING THE SOCIAL TAPESTRY* 22 (2002).

68. For example, Browning played a role in organizing a conference held at Emory Law School on religions of the book. *See* Brochure, *Sex, Marriage and Family & The Religions of the Book: Modern Problems, Enduring Solutions* (announcing the presentation of an international conference on March 27-29, 2003), *available at* <http://www.law.emory.edu/cist/documents/SMF-Brochure.pdf> (last visited Jan. 18, 2004).

69. Browning, *supra* note 16, at 314-15.

70. BROWNING & RODRIGUEZ, *supra* note 67, at 93.

71. Browning, *supra* note 16, at 314.

72. *Id.* at 314.

73. *Id.* at 319.

74. DON S. BROWNING ET AL., *FROM CULTURE WARS TO COMMON GROUND* 22 (2d ed. 2000).

commitment.⁷⁵ He suggests that the contemporary challenge is to secure men's responsibility to women and children without supporting patriarchal control within families (for example, he rejects Biblical interpretations that ordain male "headship" as authority over wife and children in favor of interpretations that support mutuality and equal access by men and women to the responsibilities of public and domestic realms).⁷⁶

Precisely because critical familism views this cultural task of uniting the male with the mother-infant unit as the core of marriage, it is uneasy about moving beyond marriage.⁷⁷ Such moves, it warns, could undermine, rather than support, the equal-regard mother-father team.⁷⁸ It calls for "a range of universal supports and remedies for all families with children," but cautions against moving beyond marriage, by "efforts to delegatize the marital relation and grant legal status only to parenthood, or perhaps mainly to mothers."⁷⁹ This, Browning warns, could require "heroic redefinitions of inherited cultural patterns," and would be "ineffective and culturally destructive."⁸⁰ Similarly, in his co-authored works on the family, he has taken a position against "the extension of marriage-like privileges through the institution of domestic partnership," because this poses a "threat to the institution of marriage."⁸¹ On the issue of same-sex marriage, critical familism takes no stand, because of the complex scholarly issues it raises and the ongoing public debate over it.⁸²

Does critical familism offer a persuasive answer to the question "beyond marriage?" Certainly, its reconstructive approach to marriage holds great promise, and is more in keeping with contemporary constitutional and social norms of sex equality than a stance of defending traditional marriage. But I will contend that its reconstructive impulse does not extend far enough in the direction of equality among families. Moreover, other features of critical familism may limit its suitability as the basis for a public philosophy about families, and a guide to family law and policy. I will focus on four aspects of critical familism: (1) its call for reconstructing rather than simply shoring up

75. *See id.*

76. *Id.*

77. *See id.* at 322-23; BROWNING & RODRIGUEZ, *supra* note 67, at 121-22.

78. *See* BROWNING, *supra* note 74, at 322-23; BROWNING & RODRIGUEZ, *supra* note 67, at 121-22.

79. Browning, *supra* note 16, at 327.

80. *Id.*

81. BROWNING & RODRIGUEZ, *supra* note 67, at 159-61.

82. *Id.*

marriage; (2) its insistence that religious traditions about family and marriage should contribute to shaping public policy; (3) its vision of marriage as a way of solving the problem of connecting men to the mother-infant dyad; and (4) its internal tension between seeking to support all families with children and warning against family law and policy developing alternatives to marriage.

First, in contrast to many figures in the marriage movement who express ambivalence about, or reject, sex equality as a guiding norm for how to support marriage, Browning expressly embraces equality within marriage as a norm that emerges through critical retrieval of marriage traditions.⁸³ Thus, critical familism appears committed to undertake the reconstructive work that many defenses of marriage (for example, Wardle's appeal to tradition) do not: retrieving *and critiquing* tradition rather than simply affirming it. For example, rather than offering a religious defense of gender complementarity based on biblical teaching about the husband being the head of the household and the wife having a duty to obey, Browning and his associates at the Religion, Culture, and Family Project at the University of Chicago are critical of Christian pro-family groups who espouse this form of gender complementarity.⁸⁴ Critical familism's recognition of the need for critical engagement with cultural and religious tradition is laudable. It has an affinity to important efforts by feminist scholars to challenge monolithic presentations of "culture" and of "religion" that purportedly justify gender subordination. Such challenges seek to bring to light internal contestation and dissent over what culture and religion teach.⁸⁵

But even though critical familism embraces sex equality as a guiding norm for heterosexual marriage, it is uneasy with a form of sex equality that would affirm and support motherhood outside of marriage, and it does not counsel support for same-sex marriage. Because it views the father-mother equal-regard team as the aspirational norm for family formation, other families seem to feature only as examples of "family disruption,"⁸⁶ or as "heroic" attempts at family redefinition.⁸⁷ I believe

83. I address the marriage movement in Chapter 5 of my forthcoming book, *THE PLACE OF FAMILIES*, *supra* note 20.

84. See BROWNING ET AL., *supra* note 74, at 231-46.

85. See generally UMA NARAYAN, *DISLOCATING CULTURES* (1997) (discussing the problems that arise from assumptions regarding the understanding of the concept of "culture"); Madhavi Sunder, *Piercing the Veil*, 112 *YALE L.J.* 1399 (2003) (discussing how female activists in Muslim communities and countries have challenged entrenched religious and political leadership's interpretation of the role of women in Islam).

86. See Browning, *supra* note 16, at 327.

87. *Id.*

that a viable and just approach to family law and policy must have more room for family diversity, as I discuss below.

Second, Browning argues that cultural renewal of marriage must rest upon a public philosophy of marriage, which enlists the language of health (for example, claims that marriage fosters adult happiness and child well-being), but also the language of religion.⁸⁸ Browning further contends that “positions on family theory informed by explicitly religious sources have the right to enter into deliberations aimed to shape public policy,” provided that they “advance their arguments in publicly accessible ways.”⁸⁹ Such a public philosophy, which would be a more comprehensive cultural and moral framework within which to understand marriage, would engage with and critically retrieve not only marriage “classics” of the Western tradition, such as Biblical and theological texts and teachings about marriage, but also seek to develop analogies among a broader range of cultural and religious traditions, including (as noted above) Islam, Hinduism, Buddhism, neo-Confucian, and Native American religions.⁹⁰

There is an interesting parallel here between Browning’s argument and calls to renew civil society that identify fashioning a “public moral philosophy” as a key to civic and moral renewal and view religious institutions as playing a key role in generating that philosophy.⁹¹ In addition, the claim that out of these Western classics would emerge a public philosophy about marriage on which there would be widespread cultural agreement has some resemblance to political liberalism’s appeal to an overlapping consensus, where persons can draw upon their comprehensive moral views to find agreement about important political principles or public values.⁹² But Browning quests for a *comprehensive* public moral philosophy and looks to religious texts as the source of the values and moral claims, or what he calls “intrinsic moments,” that are the ends associated with marriage.⁹³ Is such a philosophy—drawn especially from religious sources—possible or appropriate, given the diversity of views that people hold about sexuality, family, and

88. See generally Don S. Browning, *The Language of Health Versus the Language of Religion: Competing Models of Marriage for the Twenty-First Century*, in REVITALIZING THE INSTITUTION OF MARRIAGE FOR THE TWENTY-FIRST CENTURY 29-43 (Alan J. Hawkins et al., eds., 2002).

89. Browning, *supra* note 16, at 317.

90. See BROWNING & RODRIGUEZ, *supra* note 67, at 26-43; Browning, *supra* note 16, at 323.

91. See CIVIL SOCIETY, *supra* note 22, at 21.

92. See JOHN RAWLS, POLITICAL LIBERALISM 15 (1993); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 801 (1997).

93. BROWNING & RODRIGUEZ, *supra* note 67, at 75.

marriage, and given the fact that marriage is also a civil status, a state-recognized relationship?

How will Browning's project address a second form of diversity: diversity *within* specific religious traditions? There are contests within religious communities over how best to interpret the import of such traditions on such matters as family, marriage, and the respective family roles of men and women.⁹⁴ If government is to play a role in supporting and promoting such a public philosophy developed through dialogue with these traditions, to whom will it listen as representing such traditions? For example, feminist legal scholar Mahdavi Sunder contends that "religious communities are internally contested, heterogeneous, and constantly evolving over time through internal debate and interactions with outsiders."⁹⁵ One result of this process is that "[t]oday, individuals seek reason, equality and liberty not just in the public sphere, but also in the private spheres of religion, culture, and family."⁹⁶ Yet too often, when courts and legislatures confront claims based on religion, they view religion as static and unchanging, and "defer to fundamentalist claims to discriminate in the name of religion or culture, thwarting the claims of dissenting women and other advocates of change."⁹⁷

This problem of thwarting dissent and calls for change is especially worrisome given that religious and cultural traditions often assign to women special responsibilities for transmitting and preserving tradition, and it is precisely in the areas of family and marriage that religious and cultural teachings about the respective capacities, rights, and duties of men and women have been invoked to justify large constraints on women's agency.⁹⁸ Moreover, as Uma Narayan observes, in battles over "Third-World" traditions and Westernization, "selective appropriations" of Western modernity often have accompanied a heightened emphasis upon preserving women's distinctive spiritual roles in the domestic sphere.⁹⁹ Browning also recognizes that criticism can come from within traditions themselves.¹⁰⁰ But how would critical familism take steps to

94. See, e.g., Sunder, *supra* note 85.

95. *Id.* at 1402-03.

96. *Id.*

97. *Id.* at 1425.

98. See generally AYALET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS (2001) (discussing the ways in which legal accommodations to distinct cultural groups can serve to reinforce the hierarchal and patriarchal structures within such groups); see NARAYAN, *supra* note 85, at 14-20.

99. See NARAYAN, *supra* note 85, at 28-29.

100. BROWNING & RODRIGUEZ, *supra* note 67, at 36.

ensure that interpretations least compatible with women's equal citizenship do not crowd other voices out of the public square?

In a quest for a public philosophy about marriage and families, critical familism's definition of equal-regard by reference to equal rights and responsibilities would be in competition with other religious interpretations of the equality of men and women that embrace different rights and responsibilities for women and men in family life and in other spheres of society.¹⁰¹ Notably, even critical familism's embrace of equal regard cautions that this does not mean suppressing "the distinctiveness of being male and female," and that, guided by a "strenuous love ethic of regarding the other with equal seriousness," husband and wife "should work together to determine their responsibilities and privileges in light of respective talents, inclinations, and realistic constraints."¹⁰² For example, Browning mentions the "asymmetrical nature of male and female investments on certain matters such as procreation and child care," and notes that equal-regard "does not necessarily imply moment by moment identical treatment."¹⁰³ But will his further guideline, that it *does* require "equality over the marital life cycle," prevail over competing interpretations of religious teachings about equality amidst differences that would justify differential rights and responsibilities *throughout the marital life cycle* based on differential capabilities? As I argued in critiquing Wardle's defense of marriage, this sort of differential assignment, if also embraced by governmental efforts to support families, would violate contemporary norms of family law and requirements of equal protection.

The quest for a public philosophy about marriage raises a significant question: could there be consensus on the personal and social goods linked to and values embedded in marriage? Is such a public philosophy necessary if government is to play a role—as current welfare legislation proposes it should do—in promoting "healthy marriage?"¹⁰⁴ I agree with Browning that *if* government is to play a role in creating a "critical marriage culture," then sex equality should inform such a public

101. See Lindsey E. Blenkhorn, Note, *Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S. CAL. L. REV. 189, 193, 194 (2002) (discussing model of equality within Islam that views potential capabilities of men and women as equally important but different).

102. BROWNING & RODRIGUEZ, *supra* note 67, at 36-39.

103. Browning, *supra* note 16, at 317.

104. See Personal Responsibility, Work, and Family Promotion Act of 2003, H.R. 4, 108th Cong. § 103 (2003) (passed by the House); Compassion and Personal Responsibility Act, S. 5, 108th Cong. § 103 (2003) (pending in the Senate). Both bills include funds for the promotion of marriage.

philosophy. This is especially important as lawmakers contemplate using religious organizations to engage in marriage promotion. I further agree with Browning that a public philosophy that arises out of critical engagement with, rather than simple affirmance of, tradition should reject models of family premised on a hierarchy of male leadership. But I would go further than critical familism and argue that such critical engagement counsels critique of such measures as the Defense of Marriage Act¹⁰⁵ and the pending Federal Marriage Amendment.¹⁰⁶ Such laws and proposed laws merely entrench marriage as the union of “one man and one woman” because of tradition, and fail to look at how this marriage definition entailed forms of gender complementarity associated with earlier family systems of gender hierarchy, some of which were rooted in religious teachings as well as cultural traditions.¹⁰⁷ As I argued above in critiquing Wardle’s defense of gender complementarity, critical reflection upon the evolution within law away from such hierarchy and sex-linked roles toward marriage as an equal partnership with mutual rights and obligations also calls into question whether the union of one man and one woman must be an essential of marriage and a prerequisite for realizing the goods linked to marriage. I contend that critical reflection would lead to the conclusion that marriage law should extend to two adults of the same sex who are prepared to enter into the committed, intimate, interdependent relationship entailed by marriage.¹⁰⁸

My third and fourth concerns about critical familism arise from its vision of marriage as solving the “male problematic.” Browning contends that a central reconstructive task of critical retrieval of cultural and religious traditions about marriage is to reformulate “the understanding of male authority and male responsibility” in order to disentangle this responsibility (father’s willing investment in mothers and children) from patriarchal marriage and anchor it in equal-regard

105. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

106. See Marriage Amendment, *supra* note 11.

107. See *supra* text accompanying notes 39-41; *Deliberative Democracy*, *supra* note 46, at 1249-50 (critiquing the Defense of Marriage Act). On the import of this move away from fixed gender roles for the same-sex marriage debate, see Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 *LAW & SEXUALITY* 9, 16-17 (1991).

108. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (“[I]t is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.”); see generally Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 *B.C. L. REV.* 265, 292 (2000); see also David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 *MICH. L. REV.* 447, 465 (1996) (arguing that the ends marriage law serve fit closely with the needs of same-sex couples).

marriage.¹⁰⁹ I fear that conceiving marriage's central task in this way assigns to women a special role of taming, or domesticating, men. And I also worry that this focus prevents critical familism from moving far enough toward supporting equality among families.

Marriage's role in taming men and women's special role as gatekeepers in matters of sexuality, reproduction, and family, are both featured in contemporary discourse about marriage as an important justification for promoting marriage.¹¹⁰ In much of this rhetoric, the portrait of the place of marriage in civilizing men and the harm to society if men are not civilized through marriage insults men's moral capacity even as it unjustly burdens women with the task of taming men. Moreover, the continuing hold of some of the hierarchical notions of marriage that Browning would repudiate—such as men as heads of household and leader/provider—raises important questions about whether the supposed “male problematic” may be solved in a way compatible with sex equality. Do men, for example, need the perk of being “head of the household” in order to accept the responsibility the roles of husband and father entail? Even if there are, as Browning contends, evolutionary as well as cultural roots to this “male problematic,” contemporary constitutional and family norms of women's equal citizenship demand that the problem be solved in a way that does not support or perpetuate sex inequality.¹¹¹ Moreover, the argument that marriage civilizes men also features in some arguments in favor of same-sex marriage, suggesting that it may be the institution of marriage, and the sort of commitment it symbolizes, rather than the heterosexual bond, that brings about this salutary effect of anchoring male commitment.¹¹² Yet the marriage movement generally does not support same-sex marriage.¹¹³

Parallel to a “male problematic,” critical familism identifies a “female problematic,” or the tendency of women to “suppress their own needs and raise children without paternal participation, sometimes under

109. BROWNING & RODRIGUEZ, *supra* note 67, at 36-38.

110. See THE PLACE OF FAMILIES, *supra* note 20.

111. See *supra* Part II.A for a critique of gender complementarity. For the idea of sex equality as an important public value and part of civic virtue, see McClain, *supra* note 26.

112. See WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 8-10 (1996).

113. See, e.g., Maggie Gallagher, *What Is Marriage for? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 790 (2002) (critiquing *Baker v. State*, 744 A.2d 881 (Vt. 1999), for denying marriage's “great universal anthropological imperative” of encouraging ties between fathers, mothers, and their children). *But see* David Brooks, *The Power of Marriage*, N.Y. TIMES, Nov. 22, 2003, at A15 (chastising other conservatives in the marriage movement for failing to “insist on gay marriage”).

great stress and at great cost.”¹¹⁴ Marriage, it contends, solves this problem.¹¹⁵ But, if such a problematic exists, is the only feasible or just way to solve it through promoting marriage? One logical inference from the marriage movement’s claim that the mother-child bond is strong, even apart from marriage, and less precarious than the connection between women and men and between fathers and children, might be that we should premise family policy (as my co-panelist Martha Fineman argues)¹¹⁶ on supporting that bond.

Critical familism’s insistence upon putting the equal-regard mother-father team at the core of a public philosophy about marriage and families creates an internal tension between seeking to support all families with children and warning against family law and policy developing alternatives to marriage. Because critical familism seeks to keep bundled together the sexual or conjugal bond and the parenting bond, marriage appears to be the best institutional arrangement. Single-parent families, on this view, must appear as disrupted or fragmented families because they deviate from the “mother-father team”; thus, while Browning is concerned to support all families, he also critiques welfare programs for contributing to family “fragmentation,”¹¹⁷ and he warns against separating the parental relation from the marriage tie.¹¹⁸

By contrast, as I shall next discuss, the complex family arrangements described in my co-panelist Judith Stacey’s contribution to this Symposium offer examples of families in which securing men’s investment in the children they father need not be linked to a male-female marital bond. I think that Stacey is right to attempt to extend Browning’s important idea of “equal-regard” beyond the marital family. Thus, my final point of disagreement with Browning’s critical familism is that I contend that respect for equality among families—and for women’s and men’s personal self-government in the areas of intimacy and family—should inform a policy of supporting not only marriage but also other forms of family that can foster orderly social reproduction and allow realization of the values and goods associated with families. This approach is appropriate in a constitutional democracy characterized by reasonable moral pluralism and that accords respect (as the *Lawrence*

114. BROWNING ET AL., *supra* note 74, at 106.

115. *See generally* Browning, *supra* note 16.

116. *See generally* MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH-CENTURY TRAGEDIES* (1995); Fineman, *supra* note 2 (arguing that family policy concerns should be focused less on marriage and more on the bond between mother and child).

117. *See* Browning, *supra* note 16, at 323.

118. *See id.* at 109.

Court indicates)¹¹⁹ to persons' exercise of personal autonomy free from unwarranted governmental interference in matters of sexual intimacy, reproduction, and family.¹²⁰ As the *Lawrence* Court recognized, this constitutional liberty flows to individuals even when persons condemn their sexuality based upon "profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives."¹²¹ I believe that a fair inference to be drawn from *Lawrence*'s account of toleration and its language of "respect" is that such respect for personal self-government in a reasonably morally diverse or pluralistic society would require not just protection against the coercive force of the criminal law, but also would restrict government's ability to favor and promote heterosexual marital families as the best and exclusive family form worthy of support.¹²²

My critique of critical familism should not obscure what I believe are its attractive elements: its insistence upon "equal-regard" as a constitutive norm for marriage and its quest to generate a public philosophy about families that critically engages and reconstructs, rather than reifies, tradition.¹²³ Moreover, it also has a self-described "radical edge," which would support governmental efforts to contain the reach of the market and to encourage business and industry to adopt workweeks and structures more conducive to parents enjoying the privileges and responsibilities of participation in civic and economic life as well as in the tasks of childrearing and intergenerational care.¹²⁴ Indeed, it strikes me that this element of critical familism (present, to some extent, in the broader marriage movement)¹²⁵ may be a valuable piece of common ground with many feminist approaches to family. For example, at a time when the Bush Administration and Congress seek to raise the required workweek for welfare recipients from thirty hours to forty hours per

119. 123 S. Ct. 2472, 2481 (2003).

120. I draw support from the account of how political liberalism views the family in Rawls, *supra* note 69, at 789-90. As noted *supra* text accompanying note 4, *Lawrence* speaks of respect for intimate decisionmaking in the context of barring the state's use of the criminal law to invade the home and punish consensual, private, sexual conduct. *See id.* at 2484.

121. *Lawrence*, 123 S. Ct. at 2480.

122. *See generally Toleration*, *supra* note 45 (explaining this idea of toleration as respect).

123. *See generally* Browning, *supra* note 16.

124. *Id.* at 113-14.

125. *See, e.g.*, COALITION FOR MARRIAGE, FAMILY, AND COUPLES EDUCATION, INSTITUTE FOR AMERICAN VALUES, RELIGION, CULTURE, & FAMILY PROJECT, UNIVERSITY OF CHICAGO DIVINITY SCHOOL, THE MARRIAGE MOVEMENT: A STATEMENT OF PRINCIPLES (2000), *available at* <http://www.marriagemovement.org/html/report.html> (last visited Jan. 18, 2004) (listing as a principle of the marriage movement the request that government not "discourage marital interdependence by penalizing unpaid work in homes and communities").

week, and to eliminate supposed disincentives to marriage by imposing this same forty hour requirement on single-parent and two-parent families, proponents of critical familism advocate a thirty hour workweek for single parents, and a total of sixty hours for a two-parent family.¹²⁶ Shifting the focus to how to facilitate the sort of parental investment that secures good conditions for child rearing, and thus child well-being, could offer an important standpoint from which to critique such welfare policies.

III. ARGUMENTS THAT FAMILY LAW AND POLICY SHOULD MOVE BEYOND MARRIAGE

A. *Move Partially Beyond Marriage to “Equal-Regard” for “Functional” Families*

Answering a qualified “yes” to the question, “beyond marriage?,” sociologist Judith Stacey picks up on Browning’s language of equal-regard to call for a more pluralistic and realistic family policy that would support and show respect for marriage (including same-sex marriage) as well as for “intimate affiliations formed beyond marriage.”¹²⁷ Viewing the abolishment of marriage as unrealistic (even though she concurs with much of Fineman’s diagnosis of marriage’s unjustifiable position of privilege), she instead argues that “we should work to further democratize, pluralize, and decenter marriage, rather than to eliminate it.”¹²⁸ Stacey argues that “[f]amily diversity is an irreversible feature of the postmodern family landscape” (what she calls the “postmodern family condition”).¹²⁹ Thus, she takes issue with Browning’s assignment of primacy to the mother-father dyad, which unites conjugal and parental passions through marriage.¹³⁰ She counters by stating that part of the postmodern family condition is precisely a “disjuncture between

126. Compare Browning, *supra* note 16, and BROWNING ET AL., *supra* note 74, at 327-28, with The Personal Responsibility, Work, and Family Promotion Act of 2003, H.R. 4, 108th Cong. § 110, and The White House, News & Policies, February 2002, *Working Toward Independence*, at <http://www.whitehouse.gov/news/releases/2002/02/welfare-reform-announcement-book-all.html> (last visited Jan. 18, 2004).

127. See Stacey, *supra* note 3, at 331-33.

128. *Id.* at 113.

129. *Id.* at 108. For elaboration on her idea of the postmodern family, see JUDITH STACEY, *BRAVE NEW FAMILIES: STORIES OF DOMESTIC UPHEAVAL IN LATE TWENTIETH-CENTURY AMERICA* (1998); JUDITH STACEY, *IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE* (1996).

130. See Stacey, *supra* note 3, at 331-33.

conjugal and parental passions” (for example, through “high rates of divorce, delayed marriage, cohabitation, and unwed parenthood”).¹³¹ To view marriage as the solution leaves out of the “conjugal fold” millions of citizens for whom marriage remains out of reach because of poor economic and employment prospects, because the law excludes them (in the case of same-sex couples), or because they choose to remain outside of marriage.¹³² Her alternative is a more “democratic and pluralist approach” to marriage and families that moves partly beyond marriage (as presently defined) to allow same-sex marriage and to establish a form of registered kinship to accommodate a broader array of families not structured around an adult-adult dyad (be it opposite sex or same sex).¹³³ In effect, she urges support and equal regard for all “functional” families.¹³⁴

To support her argument for this broader form of equal regard, Stacey shares the stories of two “exemplary, ‘equal regard’” families, in which gay men and lesbians combine and disaggregate the conjugal and parental bonds in complex ways.¹³⁵ She contends that even recognizing same-sex marriage would not adequately protect and support these “lesbigay” families.¹³⁶ For example, in one such family, the biological parents, a lesbian and a gay man who are close friends and have a cooperative parenting relationship with each other, are not sexual intimates.¹³⁷ Rather, they and their same-sex partner each form a household, and these partners also function as parents toward their partner’s biological children.¹³⁸ Marriage between these same-sex partners would not protect the parental status of the partner who is not a biological parent, but plays a parental role.

These families deserve protection, Stacey argues, because they “are creating familial and community models that others can profitably emulate and . . . that law and society should facilitate.”¹³⁹ Just as sociologist Pepper Schwartz has argued that “peer marriage,” or an egalitarian form of marriage that challenges traditional gender scripts,

131. *Id.* at 112.

132. *See id.*

133. *See id.* at 114.

134. *Id.* at 102 (employing distinction between “ideological” and “functional” families used in Michael Grossberg’s presentation at the Conference on Marriage, Democracy, and Families, held at Hofstra University School of Law, on March 14-15, 2003).

135. *Id.* at 102-07.

136. *Id.* at 111.

137. *See id.* at 102-04.

138. *See id.* at 104-05.

139. *Id.* at 111.

offers a vanguard that society might profitably follow in an effort to increase marital satisfaction to reduce divorce,¹⁴⁰ Stacey appeals to such “lesbigay” families, who must “forge their intimate affiliations beyond the gendered scripts of heterosexual conjugality and reproduction,” as a vanguard of family diversity.¹⁴¹ Thus, she claims that intimate partners in such families approach family formation and parenting with heightened deliberation and agency.¹⁴²

Stacey’s portraits offer an important example of the practical reality of how contemporary families may diverge from the marital family urged by Wardle and even the “equal-regard” heterosexual model advocated by Browning. They also offer a useful challenge to persons, like myself, who believe that an important step toward equality among families would be recognition and support of same-sex marriage. The particular families Stacey profiles may need forms of family recognition and support *beyond* same-sex marriage. Thus, same-sex marriage may be a necessary step toward equality and may closely fit the needs of many same-sex couples; reports on the impact of Vermont’s civil union legislation reinforce this claim.¹⁴³ But it may not be a sufficient step for other families.

What sort of measures beyond marriage would offer support and recognition for “functional families” that do not fit the marriage model? Stacey advocates developing a kinship registration system, by analogy to that proposed by the Law Commission of Canada, in its report, *Beyond Conjugalilty: Recognizing and Supporting Personal Adult Relationships* [hereinafter *Beyond Conjugalilty*].¹⁴⁴ What should the goals of such a system be?

In the complex families described by Stacey, one motivating concern is to secure the parent-child relationship between de facto (but not biological) parents and the children whom they nurture.¹⁴⁵ This consists both of recognizing and protecting the parental rights of such

140. See PEPPER SCHWARTZ, LOVE BETWEEN EQUALS: HOW PEER MARRIAGE REALLY WORKS (1994); Pepper Schwartz, *Peer Marriage*, 8 RESPONSIVE COMMUNITY 48, 51 (1998).

141. Stacey, *supra* note 3, at 339.

142. See *id.* at 32-33.

143. See generally *supra* note 107; see OFFICE OF LEGISLATIVE COUNCIL, REPORT OF THE VERMONT CIVIL UNION REVIEW COMMISSION (Jan. 2002), available at <http://www.leg.state.vt.us/baker/Final%20CURC%20Report%20for%202002.htm> (last visited Jan. 19, 2004) (detailing same-sex persons’ reports of the benefits of civil unions).

144. See LAW COMM’N OF CAN., BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS (2001), available at http://collection.nlc-bnc.ca/100/200/301/lcc-cdc/beyond_conjugality-e/pdf/37152-e.pdf (last visited Jan. 19, 2004) [hereinafter BEYOND CONJUGALITY].

145. See Stacey, *supra* note 3, at 348.

caretakers and of providing children with a more legally secure affiliation to all their parents, whether biological or de facto. Does family law already recognize situations in which more than two persons may have parental rights and responsibilities, or at least claim a protected relationship to a child? One relevant analogy might be the emerging protection of the biological parent-child relationship in “open” or “cooperative” adoptions, in which a biological parent’s surrender of the custodial and decision-making rights to an adoptive parent need not preclude all contact between the biological parent and adopted child (for example, visitation rights).¹⁴⁶ Similarly, some legal scholars call for models of adoption that allow for more legal protection of the relationship between the birth mother and her adopted child, and for more cooperation between the birth and adoptive parents.¹⁴⁷

Another possible analogy might be blended families, in which a child might have two biological parents as well as one or more stepparents. For example, the noncustodial parent to the children may retain parental rights and responsibilities, but the spouse of the custodial, biological parent is a stepparent and may not only share in childrearing but may also have some legally enforceable parental rights and responsibilities.¹⁴⁸ Interestingly, to reduce the conflicts and acrimony that may plague such blended families,¹⁴⁹ some stepmothers and biological mothers are forming “co-mother” alliances to foster better cooperation for the sake of the children.¹⁵⁰ Moreover, some research indicates that children in blended families whose noncustodial mothers continue to play a part in their lives fare better than children whose mothers do not, again suggesting the value of models that would support more complex family arrangements.¹⁵¹

146. See *Groves v. Clark*, 982 P.2d 446, 449 (Mont. 1999) (holding that a “best interests” of the child standard should govern judicial evaluation of whether to enforce a visitation agreement made between a biological parent and adoptive parents); see also WEISBERG & APPLETON, *supra* note 30, 1200-05.

147. See, e.g., DRUCILLA CORNELL, *AT THE HEART OF FREEDOM: FEMINISM, SEX, AND EQUALITY* 96-130 (1998).

148. See, e.g., *Harmon v. Dep’t of Social Services*, 951 P.2d 770, 774 (Wash. 1998) (interpreting Washington’s statute imposing support obligations on a stepparent).

149. See E. MAVIS HETHERINGTON & JOHN KELLY, *FOR BETTER OR WORSE: DIVORCE RECONSIDERED* 181-201 (2002) (detailing challenges faced by stepfamilies).

150. See Alex Witchel, *Wives No. 1 and No. 2 Bury the Scandals*, N.Y. TIMES, May 12, 2002, § 9, at 1 (reporting that a biological mother and a stepmother formed “CoMamas Association,” www.comamas.com, and wrote a book, *STEPWIVES: 10 STEPS TO HELP EX-WIVES AND STEPMOTHERS END THE STRUGGLE AND PUT THE KIDS FIRST*).

151. See Tamar Lewin, *Differences Found in Care With Stepmothers*, N.Y. TIMES, Aug. 17, 2000, at A16.

The adoption and blended family models have limits, since these families sometimes arise out of family crisis, dissolution, and disruption, rather than in the deliberative, reflective way that Stacey attributes to the “lesbigay” families she studies. Third party visitation statutes offer another model for moving beyond the dyad in structuring kinship obligations, although the Supreme Court has held that such statutes must give sufficient deference to the wishes of a fit parent.¹⁵² But my point in bringing up these examples is that family law already has had to reckon with family arrangements in which conjugal and parental ties, or passions, are not in perfect alignment. Its efforts to do so suggest that society has an interest in facilitating the capacity of such families to function.

A kinship registration system may be a promising approach to the issue of how to foster equality among families.¹⁵³ In this forum, I cannot fully address all the important issues that necessarily would arise in setting about to design such a system. Here I will confine myself to noting some of the challenges that may be most pertinent to Stacey’s call for equal-regard for a broader range of families. First, one argument often made for favoring marriage over other forms of intimate association, and for linking privileges and benefits to marital status, is that persons who marry assume ethical and legal responsibilities to each other.¹⁵⁴ The mere status of cohabitation, by contrast to marriage, does not give rise to such legal consequences.¹⁵⁵ Some marriage proponents fear that nonmarital partners seek rights without responsibilities.¹⁵⁶ Although persons who marry may enter premarital and marital agreements that, to some extent, allow them to avoid some of these responsibilities, in the absence of such a contract, marriage is a legal relationship of mutual obligation, support, and economic interdependency (although sometimes this economic partnership has most relevance upon divorce).¹⁵⁷

152. See *Troxel v. Granville*, 530 U.S. 57, 72, 75 (2000).

153. See *BEYOND CONJUGALITY*, *supra* note 144, at 118-23 (offering suggestions for designing a registration scheme and drawing on domestic partnership and kinship registration schemes in other countries).

154. See, e.g., Milton C. Regan, *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435, 1457-58 (2001).

155. See *id.*

156. See, e.g., *id.* at 1441, 1457.

157. See David Westfall, *Forcing Incidents of Marriage on Unmarried Cohabitants: The American Law Institute’s Principles of Family Dissolution*, 76 NOTRE DAME L. REV. 1467, 1481 (2001).

In a kinship registration system, will registrants assume a menu of obligations to each other similar to those linked to marriage, in exchange for which government will link their registered status to marriage-like protections and benefits? Should registrants be offered various options with different packages of rights and obligations? Would this be an appropriate way for government to help facilitate persons ordering their intimate lives? Or, as Milton Regan contends, would any step in this direction of “calibrated commitment,” or offering a menu of choices about one’s level of commitment to an intimate partner, undermine the very ideal of commitment to another person upon which marriage depends? Thus, Regan argues that “law should be most willing to extend legal recognition of or protection for cohabitation when doing so reinforces an ethic of care and commitment in intimate relationships.”¹⁵⁸

How might proponents of kinship registration schemes respond to Regan’s concerns? One possible response is to note that many domestic partnership schemes (both municipal and state) include in the definition of who qualifies as a domestic partner that persons undertake to be responsible for each other in various ways.¹⁵⁹ To this extent, they appear to express an ideal of mutual responsibility and interdependency. At the same time, Regan might respond that, unlike the rights and responsibilities created by the status of marriage, a domestic partnership does not create obligations of support that survive the end of a relationship, nor do most such schemes create property interests either during or at the end of the relationship by analogy to schemes of marital property, equitable distribution, and community property.¹⁶⁰ However, the limited extent of many domestic partnership laws may reflect less on what sorts of responsibilities partners are willing to assume than on public policy concerns that creating alternatives to marriage may make marriage less necessary or attractive (as well as, in the case of local domestic partnership laws, the limited authority of municipalities, as compared to states, to regulate in the area of family law).¹⁶¹

Second, protecting the “lesbigay” families that Stacey describes through kinship registration might be a politically feasible step precisely because these families still hold to one important part of the

158. Regan, *supra* note 154, at 1450.

159. See, e.g., CAL. FAM. CODE §§ 297(a), (b)(2) (2001); HAW. REV. STAT. §§ 572C-1, 572C-6 (2003); see also Craig Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1187 (1992) (discussing various municipal ordinances).

160. See, e.g., CAL. FAM. CODE §§ 299.5(b)-(e).

161. See *supra* Part II.B (discussing critical familism’s opposition to marriage equivalents).

conventional marital dyad: a monogamous, sexual bond between two, rather than more, adults. These “postmodern” “lesbigay” families offer persuasive evidence that it may be possible to provide a secure and nurturing environment for children in complex family arrangements in which more than two adults may serve as parents to a child and in which intimate sexual affiliation does not exist between the biological parents or unite all the persons acting as parents to a child. Yet, in a sense, these families might be said to combine conjugal and parental passions in an important way: same-sex adult intimate partners also share parenting responsibilities, even though one parent is a biological parent, and the other is not.

By contrast, equal regard for a broader array of families would also seek, as Stacey proposes, to move beyond the sexual dyad to protect intimate affiliation involving more than two sexual partners.¹⁶² Already, social conservatives fear that *Lawrence*'s protection of a same-sex couple's sexual intimacy is but a prelude to clamorings for protections of polygamy and polyamory.¹⁶³ On this panel, for example, Martha Ertman offered examples of unconventional families in which sexual affiliation deviates from the monogamous dyad.¹⁶⁴ I suspect that this type of move beyond marriage will be much more controversial precisely because of how deeply entrenched the ideal of the exclusive, monogamous couple is in this Nation's social norms about sexual intimacy.¹⁶⁵ Some scholars contend that there are principled reasons to favor and protect the monogamous sexual dyad (whether heterosexual or homosexual) over plural sexual groupings.¹⁶⁶ Other scholars urge that perhaps a reexamination of the prohibition on polygamy or group marriage is in order.¹⁶⁷

In this Article, I cannot give full consideration to the debate over focusing family law on a sexual affiliation between two persons, rather than among more than two persons. But I will note two concerns that would guide my evaluation of it. One issue is determining what equal regard for such plural groups would entail and what specific forms either of state action, or restraint from action, is appropriate or is sought. To return to the *Lawrence* court's framework, what form of “respect” for

162. See Stacey, *supra* note 3, at 347.

163. See Kurtz, *supra* note 9.

164. See Ertman, *supra* note 17.

165. See generally COTT, *supra* note 27.

166. See, e.g., Strassberg, *supra* note 39, at 1520-26.

167. See David Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 80-81 (1997).

their intimate choices do groups of sexual intimates seek? Is it freedom to pursue their intimate lives without state intervention in the form of criminal sanction? Do they seek equal civil rights in terms of not allowing their form of sexual affiliation to be a basis for discrimination in such areas as housing and employment? Do they argue that government has no business favoring or disfavoring any form of sexual affiliation, or of using intimate sexual relationships as a basis for assigning rights, obligations, and privileges?¹⁶⁸ Or do they instead seek to broaden the definition of state-supported families, contending that plural sexual groups, or polyamorous groups, who stand ready to assume relational responsibilities toward each other should receive the set of benefits and protections for their relationships that flow from marriage? If so, is marriage to be the appropriate benchmark of that set, or would a different menu of choices be desirable?

A second concern is: when groups of sexual intimates also produce and rear children, how will parental rights and responsibilities attach to the group? What impact will these arrangements have on child well-being? It has been possible to bring social science research to bear on the issue of gay and lesbian parenting in order to offer strong evidence of the capacity of gay men and lesbians to be loving, capable parents and to produce flourishing, healthy children.¹⁶⁹ Does any comparable literature exist about children in plural family settings? If one believes, as I do, that a functional approach to families should be one important guide to how best to support families, then it is appropriate to ask about how such complex families actually function in terms of fostering child well-being and orderly social reproduction.¹⁷⁰

Finally, in addition to these two concerns, one concern about a kinship registration scheme is whether a focus on sexual affiliation, or the conjugal bond, is too narrow, and whether equality among families requires moving "beyond conjugality." As the Canadian report, *Beyond Conjugality* suggests, a kinship registration system might also include close adult personal relationships that involve neither sexual affiliation to another adult, nor a caretaking relationship to a child.¹⁷¹ I believe that there is some merit to this proposal.

168. See *infra* Part III.B for discussion of Martha Fineman's critique of the sexual family.

169. See *supra* text accompanying note 50.

170. On this functional approach, see Rawls, *supra* note 92, at 779.

171. At the Conference on Marriage, Democracy, and Families conference, for example, Nancy Polikoff presented a paper, *Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201, 217 (2003), arguing in support of such a move, and citing the report BEYOND CONJUGALITY, *supra* note 143.

As the Vermont Supreme Court in *Baker v. State*¹⁷² noted, state recognition and support of marriage rests in part on the assumption that it may foster the security and stability of this intimate, committed relationship; thus, extending the benefits and obligations of marriage to same-sex couples would welcome them into this “family” of state-sanctioned relationships and provide them similar benefits.¹⁷³ If this basic premise of the facilitative role of state support and recognition is sound, then why limit it to marriage? Why not extend it to a more diverse range of family forms? As the Law Commission of Canada found, “[m]arriage, from the point of view of secular state authority, is a means of facilitating in an orderly fashion the voluntary assumption of mutual rights and obligations by adults committed to each other’s well-being.”¹⁷⁴ However:

[Marriage] is no longer a sufficient model to respond to the variety of relationships that exist in Canada today. Whether we look at older people living with their adult children, adults with disabilities living with their caregivers, or siblings cohabiting in the same residence, the marriage model is inadequate. Some of these other relationships are also characterized by emotional and economic interdependence, mutual care and concern and the expectation of some duration. All of these personal adult relationships could also benefit from legal frameworks to support people’s need for certainty and stability.¹⁷⁵

I believe that this call to move “beyond conjugality” issues a valuable challenge that provides the opportunity for critical reflection upon the facilitative role of government in supporting intimate affiliation.¹⁷⁶ To be sure, developing a kinship registration system would entail many contextual inquiries and assessments. For example, as the Law Commission proposed, it could require examining what legitimate ends government pursues when it uses relationship status as a criterion (for example, using marriage as a proxy for the assignment of certain benefits and obligations) and whether law should be revised to cover a

172. 744 A.2d 864 (1999).

173. *See id.* at 886.

174. BEYOND CONJUGALITY, *supra* note 144, at 129.

175. *Id.* at 113-14. For an example of a close adult personal relationship that might fit these criteria, see Alex Witchel, *Savoring the Chemistry of Southern Cooking*, N.Y. TIMES, May 7, 2003, at F1 (reporting on the close relationship between two chefs, an eighty-seven-year-old African-American woman and a forty-year-old white gay man who lives with and cares for her, noting that they “have forged a genuine family, with a devotion too rarely seen among blood relations”).

176. For other discussion of this report in this symposium, see Polikoff, *supra* note 171.

broader range of relevant relationships.¹⁷⁷ I believe that it would also focus on issues concerning the goods linked to and functions assigned to the marital family, whether marriage is an adequate or imperfect proxy for families deserving governmental support, and inquiries about under what conditions families may engage in orderly social reproduction. Notwithstanding the challenges these developments would face, I believe that moving toward a registration system would be a promising step toward fostering greater equality among families.

B. *Why Not Move All the Way Beyond Marriage?*

A radically different approach to the question “beyond marriage” is to move wholly beyond marriage and to center family law and policy around something else entirely. Thus, Martha Fineman argues for abolishing marriage.¹⁷⁸ She would not just de-center or “pluralize” marriage, as Stacey suggests, by supporting marriage plus a range of registered kinships, but would dethrone marriage in the sense of removing it from its exclusive place of power and prominence in family law and policy.¹⁷⁹ Indeed, Fineman objects to the place of marriage as “perhaps our only clear family policy,” and contends that “clinging” to marriage limits the coherent development of family policy and precludes examining other solutions to “social problems involving children and poverty.”¹⁸⁰

Fineman would “abolish marriage as a legal category” and disaggregate the functions marriage is expected to serve.¹⁸¹ The adult-adult heterosexual affiliation thought to lie at the core of marriage would cease to define “family” and to be the basis for state regulation, subsidy, and protection.¹⁸² Instead, sexual affiliates would negotiate the terms of their relationships under a regime of contract law.¹⁸³ Heterosexuality would no longer be the state-preferred norm; indeed, the state would have minimal interest in the regulation of sexuality (except for

177. See BEYOND CONJUGALITY, *supra* note 144, at 118 (detailing four-part method). In colloquy at the Conference on Marriage, Democracy, and Families, Canadian legal scholar Mary Jane Mossman observed that government officials estimated that applying the methodology proposed in *Beyond Conjugality* to all relevant Canadian laws would require an impractically lengthy process. See Mary Jane Mossman, *Conversations About Families in Canadian Courts and Legislatures: Are There “Lessons” for the United States?*, 32 HOFSTRA L. REV. 171 (2003).

178. See Fineman, *supra* note 2, at 245.

179. See *id.* at 253.

180. Fineman, *supra* note 15; see also FINEMAN, *supra* note 115, at 269.

181. Fineman, *supra* note 2, at 261.

182. See *id.*

183. See *id.* at 261.

prohibiting forced sex and protecting children).¹⁸⁴ Fineman contends that taking the husband-wife relationship out of family law reveals what is left: the dependency of the child (or other family members incapable of caring for her or himself).¹⁸⁵ It is this caretaking function served by families, argues Fineman, that is the most important contemporary function assigned to families and it is that function that should be the focus of state recognition, protection, and subsidy.¹⁸⁶

Fineman's proposed thought experiment—abolishing marriage and substituting contract for status—is a bracing one. She puts several challenges to persons, such as myself, who quest for an approach to equality among families that retains marriage but also supports and recognizes other forms of family. Is holding onto marriage supportable? Or is she correct in contending that, “for all relevant and appropriate societal purposes” we do not need the legal institution of marriage at all?¹⁸⁷ We don't need marriage as a legal category around which to build social policy; caretaking would be a more appropriate connection.¹⁸⁸ Therefore, she contends, we could transfer to the caretaker-dependent relationship all the social and material subsidies now associated with marriage.¹⁸⁹

To respond to Fineman's challenge, I will pose some challenges in return. This may help to highlight the stakes in moving wholly beyond marriage, as she suggests, or, as I suggest, retaining marriage but extending the facilitative role of the state to supporting other family relationships as well (or a “marriage plus” approach).

At the outset, it is useful to understand how Fineman arrives at her proposals. She interprets several trends within family law that may be characterized as moves “beyond marriage” and also takes into account changing patterns of family formation. Most significant among these legal trends is the move toward contract: within family law, persons who marry are increasingly able to use private contract to set and alter the terms of their relationship.¹⁹⁰ Fineman notes that this permits individuals to pour their own meanings into marriage.¹⁹¹ But she questions whether it is possible to point to any core meanings or functions of marriage

184. *See id.* at 262, 271 n.66.

185. *See id.* at 266-67.

186. *See* Fineman, *supra* note 15.

187. *See* Fineman, *supra* note 2, at 245.

188. *See id.*

189. Fineman, *supra* note 15.

190. *See* Fineman, *supra* note 2, at 259.

191. *See id.*

(other than the caretaking relationship) that could be defended by publicly supportable reasons.¹⁹²

Fineman also contends that the extension of family rights and responsibilities independent of marital status makes marriage less central a category; indeed, she questions whether society needs, or can justify, marriage's privileged place as the basis for state distribution of social and economic goods.¹⁹³ Fineman further factors in two significant shifts: first, away from legal disfavor of divorce to a regime of no-fault divorce, and second, away from marriage as a hierarchical relationship between the husband/head of household and the wife/dependent to marriage as an equal partnership.¹⁹⁴ Added to these legal changes are changes in patterns of family formation, so that many households take forms other than the marital family.

Is Fineman's scheme preferable to the sort of marriage plus approach that I support, which has some affinities to Stacey's conception of equal regard? I will highlight the most salient factors that lead me to prefer a marriage plus approach and to be cautious about Fineman's approach. In particular, I discuss the facilitative role of governmental recognition and support of intimate relationships and why a model of private contract may not be as facilitative.

One rationale for Fineman's embrace of contract as a way to organize sexual affiliates' relationships is that society no longer uses marriage to manage the problem of female dependency, but instead recognizes women as possessing the capacity to contract, to earn, and to order their intimate lives. No longer do legal disabilities attach to married women, impairing their capacity for economic citizenship, and the gender complementary of the husband-wife provider/caretaker dyad has given way to a norm of equal partnership. Thus, Fineman notes that one rationale for allowing premarital agreements has been recognition that adult women possess the capacity to contract and do not need the special protection and solicitude of the state. If society has already moved this far toward contract, and private ordering, why not move all the way to private contract? Fineman contends that replacing marriage with contract is a necessary step toward gender equality.¹⁹⁵

I resist removing adult-adult sexual affiliation from the definition of family and relegating it solely to private contract. To do so seems to undervalue adult-adult *interdependency* and to miss the important

192. *See id.* at 245.

193. *See id.*

194. *See* FINEMAN, *supra* note 115, at 158-59.

195. *See* Fineman, *supra* note 2, at 262.

facilitative role government may play in supporting such forms of adult affiliation. Surely, Fineman is right that we should shed no tears over the demise of state-sanctioned gender complementarity that left wives dependent on husbands and hindered women's capacity for responsible self-government. But even if this "dependency" piece of the family is no longer a salient one, compared with, for example, the dependency of children, family law has transformed this piece into *interdependency*, through duties of mutual support between husbands and wives.¹⁹⁶ This transformation of a feature of marriage so directly bound up, as Fineman observes, with gender hierarchy¹⁹⁷ is a useful example of how marriage as a legal form may foster, rather than hinder, mutuality and equality within families.

Along with interdependency are bundled other goods associated with adult-adult intimate affiliation: goods such as commitment, friendship, relational responsibility, and taking an interest in the well-being of another person. As some family law scholars contend, marriage remains the most potent symbol of such a commitment.¹⁹⁸ Arguments for recognizing same-sex marriage stress the importance of official recognition and support of committed intimate relationships.¹⁹⁹ As discussed above, *Baker v. State* commented on the facilitative role of such official recognition and support, just as the Canada Law Commission contends that nonconjugal adult relationships would also benefit from such support.²⁰⁰ Would a regime of private contract be an adequate substitute? I am skeptical. I think it is a move in the wrong direction to make such relationships private rather than allowing a broader range of relationships to benefit from governmental recognition and support.

To be sure, Fineman makes a very valuable point when she speaks of the many individualized meanings that marriage allows, in the wake of the erosion of state-enforced sex-linked duties and the ascent of contractual freedom to avoid some of the economic consequences of

196. On this transformation, see Wiggins, *supra* note 107, at 283.

197. See Fineman, *supra* note 2, at 262.

198. See generally Regan, *supra* note 154; MILTON REGAN, FAMILY LAW AND THE PURSUIT OF INTIMACY 1-5 (1993).

199. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 949 (Mass. 2003) (observing that each plaintiff challenging exclusion from marriage law "attests a desire to marry his or her partner in order to affirm publicly their commitment to each other and to secure the legal protections and benefits afforded to married couples and their children"). I discuss this in Chapter 6 of *THE PLACE OF FAMILIES*, *supra* note 20.

200. See *supra* text accompanying notes 172-73; see generally, BEYOND CONJUGALITY, *supra* note 144.

marriage.²⁰¹ Anyone seeking (as I do) to retain a place for marriage in family law and policy should take up her challenge of whether it is fair for government to use marriage as a relevant status for the assignment of various rights and obligations. Of course, my contention is that marriage may not deserve its *exclusive* status, but that a move, for example, toward registered kinship would remedy this form of inequality. But Fineman's discussion of the power of contract to alter the terms and to pluralize the meanings of marriage²⁰² usefully invites questions about fairness. If a married couple, for example, bargains to eliminate any economic obligations to each other and to minimize any economic interdependency, is it fair to let them invoke marital status as a basis for receiving special economic benefits from employers and insurers that are premised on the expectation of such interdependency? Or is this an example of seeking rights without responsibilities? Does the focus on the formal status of marriage divert attention from whether other types of families in fact embody such interdependency (or in the case of parent-child, dependency)?

Fineman's proposal would not remove governmental recognition and support from all family forms. In particular, the caretaker-dependent relationship would be the appropriate status to which government would link benefits and supports. As Fineman puts it, her objective is "to replace the marital family and its sexual and reproductive affiliation as the core tie, with the caretaking family and its relationship of care and dependency as useful to the objective of social policy."²⁰³ I resist exiling the adult-adult relationship from what counts as family, and replacing it solely with the caretaking family. On the one hand, I believe that the sort of family diversity Stacey and Fineman describe render it unrealistic to quest for the type of perfect alignment of sexual (or conjugal) and parental passion sought by marriage promoters (like Wardle and Browning) who want to re-enshrine marriage's place as the exclusive institution within which to order sexuality, reproduction, and parenting.²⁰⁴ But I would quest for more inclusive solutions to family definition, such as supporting and recognizing the complex family arrangements of the "lesbigay" families described by Stacey, rather than

201. See Fineman, *supra* note 15.

202. See *id.*

203. See *id.*

204. See, e.g., *Goodridge*, 798 N.E.2d at 962 (observing that Massachusetts "affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual").

excluding significant dimensions of family life, such as the range of emotional, sexual, and reproductive connections that may unite adults in a marriage, or in a nonmarital committed, intimate relationship. I am not persuaded that the disaggregation of the adult-adult connection from the parent-child connection that Fineman proposes is the best way to address the forms of inequality among families she powerfully describes. Indeed, perhaps the best argument in favor of her proposal is that it directly seeks to remedy this inequality by shifting the valuation of nonmarital, single-parent families from deviant to normal and deserving.²⁰⁵

Is there any other remedy for this inequality? Why not include marriage and other forms of registered kinship as deserving forms of family, along with the caretaking family? There may be a risk that failure to include adult-adult affiliations would send a message that they do not implicate any public concerns. Is this a message that is desirable? For example, as Mary Lyndon Shanley observes, “the public does have an interest in the terms of marriage” and in “promoting equality of husband and wife, both as spouses and as citizens.”²⁰⁶ I believe that Fineman makes a very useful point when she suggests that “we are making certain assumptions about the capabilities and capacities of marriage as distinguished from other types of family relationships—assumptions that may no longer be warranted about its unique ability to accomplish certain societal functions.”²⁰⁷ As I argue in other work, focusing on capacity in this way is one impetus supporting a move to greater equality among families. Perhaps my central point of divergence from Fineman is that I do not believe that it is necessary or desirable to go all the way beyond marriage to foster this equality.

To be sure, in contrast to my argument that contract is not facilitative enough, Fineman might well counter that not only is a regime of contract facilitative and flexible, but it, unlike marriage, does not come with the baggage of sex inequality. Yet, as the recent American Law Institute *Principles of the Law of Family Dissolution* suggests, there may be forms of inequality that arise in intimate relationships that warrant concern and that caution against too heavy a reliance on contract alone.²⁰⁸ Fineman refers to the *Principles* as offering further evidence of

205. On the use of “deviant” to label such families, see FINEMAN, *supra* note 115, at 101-42.

206. Mary Lyndon Shanley, *Just Marriage*, BOSTON REVIEW, at <http://bostonreview.net/BR28.3/shanley.html> (originally published in the Summer 2003 issue of BOSTON REVIEW).

207. See Fineman, *supra* note 15.

208. See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 7.01, 7.05 (2002) [hereinafter ALI PRINCIPLES].

marriage becoming more like other relationships, and the extension of the category of “domestic partner” to couples outside of marriage as evidence that there is less need for a “well-established system of default rules imposed by the state,” since the focus is less on formal status of marriage, than on the “nature and quality of the relationship that the parties have crafted.”²⁰⁹ She is certainly correct that the *Principles* do not view the absence of formal marriage as dispositive of the question of whether parties in an intimate relationship have any responsibilities to each other. Yet, far from evidencing the declining significance of marriage and the ascent of private ordering, the *Principles* instead seem to indicate marriage’s continuing force as a relevant analytical category and source of analogy and may even extend its reach. They would impose rules and policies governing marriage and divorce to persons formally outside of marriage but who have the same status because of the nature of their relationship.²¹⁰

In what sense is this moving beyond marriage? It is more a move to status than to contract, since one animating premise is that “formal contracts can never be the exclusive source of the rights and obligations that arise between persons who live in a family relationship.”²¹¹ For if the default rule used to be that nonmarried intimate partners needed to make an express contract in order for their relationship to trigger responsibilities and economic consequences, the *Principles* instead assume that, absent an express contract, nonmarital partners who have a marriage-like relationship should be brought under the umbrella of marriage law. Although the *Principles* would permit couples to contract with each other and expressly avoid economic consequences attaching to their common life, even here policy concerns and concerns for capacity would put limits on contract. By contrast to Fineman’s approach, the *Principles* seem to judge that it is not desirable to leave it wholly in the hands of the bargaining individuals whether their intimate relationships will have any consequences, leading some commentators to critique the *Principles* for its discarding of autonomy of such partners, as well as its conflation of marriage and cohabitation.²¹²

209. See Fineman, *supra* note 15.

210. ALI PRINCIPLES, *supra* note 208, at 33-37.

211. *Id.* at 37. The American Law Institute project did not address the issues of governmental recognition of nonmarital relationships or of what sorts of benefits should flow from third parties to partners in such relationships.

212. See Elizabeth Scott, Remarks at the Hofstra University School of Law Conference on Marriage, Democracy, and Families (Mar. 14, 2003) (presentation at Panel on “Families in Legal and Political Theory”) (videotape on file with Hofstra Law Review).

Fineman does not dwell on the uneasiness the *Principles* express about contract as a vehicle for organizing family life, or on its stated reasons for limiting the reach of contract. By contrast to the historical form of sex-linked incapacity arising out of disabilities attending the status of wife, contemporary concerns about constraints on capacity focus more on the context of family relationships and the extent to which bargaining in this context “may disarm [a person’s] capacity for self-protective judgment, or their inclination to exercise it, as compared to parties negotiating other kinds of concerns.”²¹³ Moreover, the *Principles* also note important policy concerns about the economic interdependency that may arise between adult partners, particularly when they rear children together and otherwise invest in family life.²¹⁴ Although Fineman indicates that her approach would inevitably have some default rules and ameliorating doctrines to accompany contract, I worry that she is overly sanguine about matters of capacity and contract. Admittedly, it is fine line between rejecting contract in a way that may reinforce *stereotypes* about women’s incapacity (as Fineman rightly criticizes) and being wary of contract because the problem of “disarming” one’s capacity for protective judgment may especially affect women, given continuing patterns of how women invest disproportionately to men in family life.²¹⁵

In sum, rather than dethrone marriage and confine the definition of “family” to the caretaking family, I would support including adult-adult intimate affiliation along with caretaking as valuable forms of family deserving support and recognition. I do not deny that private contracts about intimate association may be facilitative and should have a place in a just and fair approach to family law. Fineman’s thought experiment poses a burden of persuasion and justification on those, like me, who believe there is a place for marriage—and other government-supported forms of adult intimate affiliation—in an account of the place of families, but I believe that is a burden that can be met.

IV. CONCLUSION

In this Article, to the question “should family law and policy move beyond marriage?,” I have answered “yes and no.” Due regard for

213. *Id.*

214. *See id.*

215. Fineman herself has helpfully pointed out that women and men live “gendered lives,” such that systems of formal equality may not help secure women’s substantive equality. *See generally* MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY* (1991). On the limits of a contract model, see Shanley, *supra* note 206.

equality within families as well as equality among families should inform family law and policy. In responding to the warning that any evolution in the definition of marriage threatens marriage's role as a "seedbed of civic virtue," undergirding constitutional democracy, I have contended that the simple appeal to historical definitions of marriage—and to gender complementarity—are not persuasive. More promising are efforts to engage with and reflect critically upon tradition and, as Massachusetts' highest court recently expressed it, view marriage as an "evolving paradigm" that, over time, better instantiates ideals of liberty and equality.²¹⁶ Such critical engagement and reflection, I have argued, supports an argument that a logical next step in the law's evolution from marriage as a hierarchical relationship in which husband and wife have sex-linked rights and duties to marriage as an equal partnership is to recognize same-sex marriage.

This Article has also taken up arguments that equality among families requires not simply recognizing same-sex marriage, but moving beyond marriage, either by extending governmental support and recognition to other forms of committed, intimate relationships between adults or by redefining "family" around the parent-child, or caretaker-dependent relationship. To these arguments, I have agreed that some movement beyond marriage is an appropriate step toward equality among families, whether it be through a kinship registration system or some other means of according official recognition and support to forms of intimate association other than marriage. However, I have resisted the proposal to move wholly beyond marriage. I have done so both because of the important, facilitative role that official recognition and support of marriage accords to those who marry and because of the limits of private contract as a basis for establishing and regulating intimacy. Yet calls to move beyond marriage do pose a challenge to those who (like myself) believe that marriage (re-defined to include same-sex marriage) justly continues to have a place in our constitutional democracy as a symbol of commitment and as an institution triggering a panoply of benefits, rights, and obligations. That challenge is to work toward a family law and policy that, on the one hand, supports and recognizes marriage, because of the personal and social goods it fosters (including its role in orderly social reproduction), but, on the other, does not use marriage as the exclusive proxy for those forms of family capable of fostering such goods, and thus also warranting support and recognition. Meeting that challenge will be a vital next step in developing the "evolving paradigm"

216. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 966-67 (Mass. 2003).

2003]

BEYOND MARRIAGE?

421

of the public institution of civil marriage, as well as an approach to family law and policy that is more attentive to equality among families.