CHALLENGE AND TRADITION

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Introduction

Shortly before the 1993 ceremony in which Tom Stoddard and Walter Rieman entered a civil union, Tom mused to an inquiring journalist: "Gay rights is about challenging tradition, and what's more traditional than a wedding?"[1] I don't believe Tom was fretting over the contradiction. I believe he was smiling at the irony.

The relationship between challenge and tradition in a democratic society is a complicated and marvelous thing. The key to appreciating that relationship is knowing that we tolerate diversity not only for the comfort of people who can be labeled "different" but also—and more importantly—because toleration makes it possible for traditions to expand and to be enriched. To say this is not to deny that good traditions can be corrupted. The tradition of brightening winter days with gift-giving and ceremonies of light can be corrupted by competitive consumerism and product-promoting displays. But festivals of light and love can also be enriched by *diyas*, Obon lanterns, Yule logs, menorahs, or *kinara*.

Many are eager to celebrate the decision in *Obergefell v. Hodges* as a civil rights—and, indeed, a human rights—victory.[2] Many others are reluctant to celebrate *Obergefell* because celebrating the right to marry lends legitimacy to a patriarchal, puritanical institution that has been a tool for policing intimate conduct and degrading non-conforming lifestyles. I observe the debate between eager and reluctant celebrants with the strong feeling that both sides are right: we should celebrate loudly and confidently but take care to do so constructively. In what follows, I will explain why we should celebrate and suggest how we can do so in ways that further the cause of human freedom and dignity rather than strengthen patriarchy, puritanism, panoptic policing, and bigotry.

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1. Richard Cohen, *Tom and Walter Got Married*, New Yorker, Dec. 20, 1993, at 55.

2. 135 S. Ct. 2584 (2015).

Part I argues the *Obergefell* decision should be celebrated as a human rights victory, not only because it justly ends exclusionary practices that had stigmatizing and costly consequences for gay and lesbian people, but more importantly because it recognizes that family liberty is a necessary aspect of the dignitary and civic status that was constitutionally guaranteed to the people of the United States in the aftermath of chattel slavery and civil war. Part II will then describe just some of the ways the institution of marriage is being reshaped as greater deference is given to the liberty interests of all people in their choices about intimacy and family formation. Part III speculates briefly about how this reshaping process might be enlightened now that our understanding of marriage officially includes both same- and different-sex unions. Finally, Part IV questions how traditional concepts of parenthood will adapt as same- and different-sex couples use adoption and reproductive technologies to welcome children into their homes.

I.
Family Liberty as a Right of Free Citizenship

Movements for LGBTQIA civil rights have much in common with, and have often been in solidarity with, movements for the civil rights of other minorities and for the rights of women. In the United States, movements of sexual and gender minorities are perhaps most often compared with the African-American civil rights movement. As a consequence, *Loving v. Virginia*,[3] in which the Supreme Court upheld the right of white and non-white people to intermarry,[4] has been looked to as the constitutional case most pertinent to the marriage rights of gender and sexual minorities.[5]

Loving is pivotal to the constitutional moves by which the Supreme Court upheld the right of homosexual marriage. However, its relevance has been only partially recognized. *Loving* is commonly and

3. 388 U.S. 1 (1967).

4. It was important to the Court's reasoning that the anti-miscegenation laws at issue were not symmetrical; they were titled "An Act to Protect Racial Integrity" and designed to protect the "white race" from contamination. *Id.* at 11 ("The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.").

5. The analogy between anti-miscegenation laws and prohibitions of same-sex marriage is, however, imprecise. Same-sex marriage restrictions did not render gay and lesbian people rootless. Unlike enslaved people, they remained the children of parents and not property of owners. Their inability to lay down new officially recognized family roots was not complete; they were able to marry if they bent to the egodystonic imperative of choosing different-sex partners.

rightly understood as having decided on equal protection grounds that states may not interfere with a person's choice to marry across lines distinguishing the white race and all others.[6] But *Loving* is just as important for having established that marriage recognition is *itself* a fundamental right. In the words of the Court:

> These [anti-miscegenation] statutes deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the pursuit of happiness by free men.[7]

In looking both to the equal protection and the substantive due process grounds for invalidating anti-miscegenation laws, the Court called forth principles that speak to two conspicuous ways that marriage rights of African-Americans have been constrained in the United States: they speak not only to the racial restrictions that were at issue in *Loving* but also to the slave laws under which recognition of the marriages of African-American people were denied entirely. Marriage is not just something that must be granted to different kinds of people equally; it is a right *that must be granted* unless there is a compelling interest in denying it. The difference is significant. In the same-sex marriage context, it is the difference between saying that singling out same-sex couples for exclusion from the institution of marriage would have to be strongly justified and saying that the institution of marriage is so important that *any* significant constraints upon it must be specially justified. In the African-American context, it is the difference between recognizing, as *Loving* did, a right of choice in marriage partners regardless of race and understanding, as *Loving* also did, that participation in the institution of marriage is a civic entitlement.

I speak of civic entitlement and free citizenship as those ideas are understood from the antislavery perspective that is the genius of our reconstructed constitution. The constitutional amendment that was the basis for the *Obergefell* decision is a Reconstruction amendment. The Reconstruction amendments—the Thirteenth, Fourteenth and Fifteenth—were structured most importantly to sketch out what it would mean to be a free person in a polity that had overthrown slavery. As I will show, Reconstruction's founders understood that the denial of family recognition had been a hallmark of slavery and that family recognition would be an essential component of free citizenship.

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6. *See* Loving, 388 U.S. at 9.
7. *Id.* at 12.

The centrality of family status denials to practices of enslavement is now well recognized. Orlando Patterson, one of slavery's most thoughtful and learned students, has described enslavement as a *social death* attributable to three overlapping factors: degradation, powerlessness, and "natal alienation."[8] Natal alienation is classification, not as child or parent, but as rootless object, available for sale or exploitation. It was a defining feature of enslavement in the United States:

> American slaves, like their ancient Greco-Roman counterparts, had regular sexual unions, but such unions were never recognized as marriages; . . . both sets of parents were deeply attached to their children, but the parental bond had no social support.[9]

The legislators who drafted and approved the Fourteenth Amendment did not use the terms social death or natal alienation, but they saw clearly the consequences of regarding men, women, and children as rootless objects. They had lived through a passionate national debate over slavery, and they had lived through a prolonged and bloody war fought, ostensibly if not entirely, to resolve the slavery question.[10] Like all politically conscious Americans, federal legislators had been bombarded with stories of slavery's disregard of family ties. For them, the legal formalities that nullified adult partnerships and parent-child bonds had been translated into heartbreakingly true accounts of parents and children forcibly separated for sale, hiring-out, or use on an owner's distant property.[11] As a result, they spoke directly—albeit in what are now understood to be shockingly patriarchal terms—to the need to assure that formerly enslaved people would have rights of family. Senator Jacob Howard of Michigan, for example, specifically addressed rights of home and family as he responded to colleagues who claimed that Congress lacked the authority to enforce general citizenship rights on behalf of freedmen:

> [The slave] had no rights, nor nothing which he could call his own. He had not the right to become a husband or a father in the eye of the law, he had no child, he was not at liberty to indulge the natural

8. *See* ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH 1–14 (1982).

9. *Id.* at 6.

10. W.E.B. DuBois wrote that "[t]he duty then of saving the Union became the great rallying cry of [the] war. . . . The only thing that really threatened the Union was slavery and the only remedy was Abolition." W.E.B. DUBOIS, BLACK RECONSTRUCTION 1860-1880 45 (1935). For other analyses of the causes of the Civil War, see SHELBY FOOTE, THE CIVIL WAR: A NARRATIVE (1974); JAMES MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA (1988).

11. Accounts of this kind are collected in PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 100–08 (1997) [hereinafter NEGLECTED STORIES].

> affections of the human heart for children, for wife, or even for friend. . . . What definition will you attach to the word "freeman" that does not include these ideas?[12]

Representative John Farnsworth of Illinois had spoken similarly in the House of Representatives:

> What vested rights [are] so high or so sacred as a man's right to himself, to his wife and children, to his liberty, and to the fruits of his own industry? *Did not our fathers declare that those rights were inalienable*?[13]

The understanding that free citizenship entailed family recognition seems to have gone unquestioned in the post-war period. Indeed, between 1865 and 1870, all eleven states of the former Confederacy revised their laws to recognize marriages between former slaves who had become free citizens by virtue of the Reconstruction amendments.[14]

By contrast, the laws prohibiting marriage between black and white people were not immediately understood to have been incompatible with Reconstruction's declaration of multi-racial United States citizenship, but survived until they were invalidated by the *Loving* Court a century after the Civil War. To note this is not to defend anti-miscegenation laws or belittle their subordinating effect. Anti-miscegenation laws were, as the *Loving* court recognized, a supremacist insult conceived to maintain racial hierarchy. Nonetheless, the laws that made enslaved people officially rootless were more potent and more plainly incompatible with free citizenship than were the laws forbidding interracial marriage. Anti-miscegenation laws signaled degradation. But the social death achieved by natal alienation was something more. It marked a distinction between people and property. It didn't just separate enslaved people and free people; it legitimized disregard of any of an enslaved person's intimate choices and relationships. This

12. CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866).

13. CONG. GLOBE, 38th Cong., 2d Sess. 200 (1865). For additional evidence of Congressional views regarding the relationship between freedom and/or citizenship and rights of family, see NEGLECTED STORIES, *supra* note 11, at 113–14.

14. *See* Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299, 316 n.87, 316 n.100, 324 n.123, 325 n.127, 326 n.131, 331 n.167, 332, 334 n.185, 335 n.193, 336 n.196 (2006) (compiling Tennessee [1866], Louisiana [1868], Virginia [1866], South Carolina [1865, modified in 1872], North Carolina [1866], Florida [1866], Arkansas [1866], Mississippi [1865], and Georgia [1866] statutes respectively); Reginald Washington, *Sealing the Sacred Bonds of Holy Matrimony Freedmen's Bureau Marriage Records*, 37 PROLOGUE, no. 1, 2005, at 1, http://www.archives.gov/publications/prologue/2005/spring/freedman-marriage-recs.html (describing Alabama [1865] and Texas [1870] statutes).

disregard was an even greater affront to human dignity than the mandatory segregation that was its sequel.

Laws barring same-sex marriage are superficially akin to anti-miscegenation laws, but they carry the additional potency that was carried by absolute legal denials of slave marriages. To bar a group altogether from an institution as central as marriage to personal, civic, and social life is more than a denial of equal protection. It is more demeaning than mandatory separation. It is akin to imposing the social death that isolated enslaved people from the body politic and made them vulnerable to being treated as objects that could be separated for the profit, or at the pleasure, of their owners.

To celebrate constitutional respect for the right to marry and for liberty in marriage choice is not to deny that marriage is a system of social control or that, as such, marriage can have negative and inhibiting, as well as positive and empowering, consequences. Katherine Franke, a thoughtful scholar of gender, sexuality, and family law, draws attention to the negative consequences of access to marriage. To demonstrate the negative consequences of having the right to marry, Franke has written movingly of the disadvantages African-Americans suffered when emancipation brought legal recognition of their family ties, family rights, and family responsibilities.[15] She documents the callous treatment of women and children officially liberated by the military enlistment of their husbands and fathers.[16] She rightly observes that supremacist white officials looked upon marriage as a "civilizing" influence for a primitive people.[17] She also rightly observes that with marriage recognition came vulnerability to prosecutions for bigamy, adultery, child or spousal support and the like,[18] and that these vulnerabilities were more serious for their potential to entrap people of color in convict labor systems.[19] It does not follow, however, that family recognition was either a curse or a hollow victory for the formerly enslaved. On this point, I confess that I speak personally: as the descendant of a woman of color who waged and won a seemingly futile legal battle in Virginia in 1782 for recognition of a natal tie and the release of herself and her children from bondage.[20] But I speak also as a student of slavery in the United States who must balance the disabilities that can flow from family recognition against the

15. *See* KATHERINE FRANKE, WEDLOCKED (2015).
16. *Id.* at 42–50.
17. *Id.* at 123–26.
18. *Id.* at 153–87.
19. *Id.* at 137–41.
20. November and December 1872 Court Records, Halifax County, Virginia (copies on file with the author).

sexual liberties,[21] usurpations of parental authority,[22] and forcible family separations[23] that were common characteristics of slavery.

Family law is, to be sure, a system of social control. But to exclude a class of people from pervasive systems of family recognition—and regulation—is to set that class of people apart from the social contract. *Obergefell*'s demand of inclusiveness therefore warrants celebration as a human rights victory. Celebration should, however, be followed by dedication to assuring that family law systems limit human freedom only in ways that are reasonable for a diverse and mutually respectful collection of people.

II.
Family Recognition and Cultural Change

A distinguished philosopher was recently asked whether he thought gay and lesbian people should marry now that the right to do so has been secured. The questioner was concerned that to marry was to strengthen and endorse an institution steeped in patriarchal and puritanical tradition. The philosopher, himself a married man, acknowledged the complexities of the question and the seriousness of the questioner's concern. He then responded that he thought it reasonable to seek change both from without and from within an institution like marriage.[24]

The prospect of change from within was central to the arguments in *Obergefell* and in other same-sex marriage cases. Those opposed to same-sex marriage were filled with foreboding.[25] They argued that marriage would lose its traditional meaning and moral force; that child-bearing would become promiscuous; and that children would

21. Neglected Stories, *supra* note 11, at 174–79.

22. *Id.* at 90–99.

23. *Id.* at 99–108.

24. Anthony Appiah, Remarks at NYU School of Law (Dec. 3, 2015) (paraphrased with permission).

25. *See, e.g.*, Brief for Idaho Governor C.L. Butch Otter as Amici Curiae Supporting Respondents at 31, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571 & 14-574) ("Amicus firmly believes that States choosing to redefine marriage in genderless terms likely subject themselves—and their children—to substantial risks, including increased fatherlessness, reduced parental financial support, reduced performance in school, increased crime, substance abuse and abortions, and greater psychological problems . . . ."); Brief for Scholars of Fertility & Marriage as Amici Curiae Supporting Respondents at 19, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571 & 14-574) ("The extension of marriage to same-sex couples constitutes a redefinition of marriage that would fundamentally alter the nature of the institution by severing its connection to procreation."). *See generally* Kenji Yoshino, Speak Now: Marriage Equality on Trial (2015) (presenting a comprehensive review of the issues typically litigated in this context).

lack a measure of stability that different-sex marriage assured. The time has come for a fresh look at the question of change in the institution of marriage.

The fact is that in the pre-*Obergefell* years marriage change was not a mere possibility but a dynamic and ongoing process. The laws and practices governing domestic relations are—and have been for decades—undergoing rapid and often bewildering change that has little or nothing to do with same-sex partnering. Marriage rates have fallen.[26] The age of first marriages has increased.[27] Married couples have fewer children, and many have none.[28] Wives usually work.[29] Husbands sometimes stay at home.[30] Child care is more evenly divided and more often delegated to preschools and informal or professional caregivers.[31] Multiple, sequential marriages are common.[32]

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26. According to a 2014 study by the Pew Research Center, the percentage of married adults dropped from 72.2% in the 1960s to 50.5% in 2012. Richard Fry, *New Census Data Show More Americans Are Tying the Knot, but Mostly It's the College-Educated*, PEW RESEARCH CTR. (Feb. 6, 2014), http://www.pewresearch.org/fact-tank/2014/02/06/new-census-data-show-more-americans-are-tying-the-knot-but-mostly-its-the-college-educated/ (relying on data from the Decennial Census between 1920–2000, and the American Community Survey between 2006–2012).

27. According to the American Community Survey data, the median age of first marriage as of 2014 was 29.5 for men and 27.6 for women. In the 1950s, before this trend began, the median age was 23 and 20, respectively. *See Median Age at First Marriage*, U.S. CENSUS BUREAU (2014), http://factfinder.census.gov/faces-/tableservices/jsf/pages/productview.xhtml?pid=ACS_12_1YR_B12007&prodType=table.

28. *See* Jonathan Vespa et al., *America's Families and Living Arrangements: 2012*, U.S. CENSUS BUREAU (Aug. 2013), https://www.census.gov/prod/2013pubs/p20-570.pdf ("Between 1970 and 2012, the share of households that were married couples with children under 18 halved from 40 percent to 20 percent."); *see also The American Family Today*, PEW RESEARCH CTR. (Dec. 17, 2015), http://www.pewsocialtrends.org/2015/12/17/1-the-american-family-today/ ("While in the early 1960s babies typically arrived within a marriage, today fully four-in-ten births occur to women who are single or living with a non-marital partner.").

29. *See Working Wives in Married-Couple Families, 1967-2011*, U.S. BUREAU OF LABOR STATISTICS: THE ECON. DAILY (Jun. 2, 2014), http://www.bls.gov/opub/ted/2014/ted_20140602.htm ("Among married-couple families, 53 percent had earnings from both the wife and the husband in 2011, compared with 44 percent in 1967. Couples in which only the husband worked represented 19 percent of married-couple families in 2011, versus 36 percent in 1967."); *see also Wives Earning More than Their Husbands, 1987–2006*, U.S. BUREAU OF LABOR STATISTICS: THE ECON. DAILY (Jan. 9, 2009), http://www.bls.gov/opub/ted/2009/jan/wk1/art05.htm ("In 1987, 18 percent of working wives whose husbands also worked earned more than their spouses; in 2006, the proportion was 26 percent.").

30. *See* Gretchen Livingston, *Growing Number of Dads Home with the Kids*, PEW RESEARCH CTR. (June 5, 2014), http://www.pewsocialtrends.org/2014/06/05/growing-number-of-dads-home-with-the-kids/#fn-19605-1 ("While most stay-at-home parents are mothers, fathers represent a growing share of all at-home parents—16% in 2012, up from 10% in 1989.").

31. *See* Sarah J. Glynn, *Fact Sheet: Child Care*, CTR. FOR AM. PROGRESS (Aug. 16, 2012), https://www.americanprogress.org/issues/labor/news/2012/08/16/11978/fact-

Divorce rates rose in the recent past but seem to be stabilizing.[33] Unmarried cohabitation is common,[34] as are single-parent families,[35] families spanning more than two generations,[36] and families that blend

sheet-child-care/ ("In most U.S. families, all of the adults work. Fewer than one-in-three children today have a full-time, stay-at-home parent. In 1975, only a generation ago, more than half of all children had a stay-at-home parent—usually the mother. Because most parents work outside the home, most children under five years old receive child care from someone other than a parent. Almost one-quarter [23.4 percent] of children under the age of five are in some form of organized child care arrangement, which includes day care centers, nurseries, and preschools. This includes one-third [33 percent] of those with an employed mother and more than one-quarter [28.6 percent] of those whose mothers are not employed but are in school.").

32. *See* Gretchen Livingston, *Four-in-Ten Couples Are Saying "I Do," Again*, PEW RESEARCH CTR. (Nov. 14, 2014), http://www.pewsocialtrends.org/2014/11/14/four-in-ten-couples-are-saying-i-do-again/ ("Among adults who are presently married, roughly a quarter (23%) have been married before, compared with 13% in 1960. . . . Divorced or widowed adults are about as likely to remarry today (57% have done so) as they were more than 50 years ago. . . . These findings are based on a Pew Research Center analysis of data from the 2013 American Community Survey, as well as the 1960 and 1980 censuses.").

33. According to demographers at the University of Minnesota, divorce rates are on the rise for married persons over the age of 35. Among younger couples, divorce rates are either declining or stable. Sheela Kennedy et al., *Breaking Up Is Hard to Count: The Rise of Divorce in the United States, 1980–2010*, 51 DEMOGRAPHY 587 (2014), http://link.springer.com/article/10.1007%2Fs13524-013-0270-9; *see also* Christopher Ingraham, *Divorce Is Actually on the Rise, and It's the Baby Boomers' Fault*, WASH. POST (Mar. 27, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/03/27/divorce-is-actually-on-the-rise-and-its-the-baby-boomers-fault/.

34. *See* Neil Shah, *U.S. Sees Rise in Unmarried Parents*, WALL ST. J., Mar. 10, 2015, http://www.wsj.com/articles/cohabiting-parents-at-record-high-1426010894 ("Just over a quarter of births to women of child-bearing age—defined here as 15 to 44 years old—in the past five years were to cohabiting couples, the highest on record and nearly double the rate from a decade earlier, according to new data from the Centers for Disease Control and Prevention for 2011 to 2013. By contrast, the share of births involving women who are unmarried and not cohabiting fell slightly over the same period, data from the CDC's National Survey of Family Growth show."); *see also* Casey Copen et al., *First Marriages in the United States: Data from the 2006–2010 National Survey of Family Growth*, CTR. FOR DISEASE CONTROL (Mar. 22, 2012), http://www.cdc.gov/nchs/data/nhsr/nhsr049.pdf (reporting that women cohabitating before marriage increased from 3% to 11% between 1982 and 2010).

35. According to the Pew Research Center, the rate of households run by an unmarried parent, most of whom are single, has risen from 9% in 1960 to 19% in 1980 and to 34% in 2013. Gretchen Livingston, *Fewer than Half of U.S. Kids Today Live in a 'Traditional' Family*, PEW RESEARCH CTR. (Dec. 22, 2014), http://www.pewresearch.org/fact-tank/2014/12/22/less-than-half-of-u-s-kids-today-live-in-a-traditional-family/; *see also How the American Family has Changed*, PEW RESEARCH CTR. (Dec. 22, 2014), http://www.pewresearch.org/files/2014/12/FT_Family_Changes.png (noting that the "single-parent" category includes a small share of children living with two parents who are cohabiting or in a same-sex marriage).

36. *See* Vern L. Bengtson, *Beyond the Nuclear Family: The Increasing Importance of Multigenerational Bonds*, 63 J. MARRIAGE & FAM. 2, 5 (2001) (arguing that family relationships across several generations are becoming increasingly important in American society).

children from multiple marriages.[37] And new technology has both expanded and complicated parenting opportunities.[38]

Changes in the laws of domestic relations have come apace. Husbands have lost legal control of their wives' property.[39] Divorce has become no-fault.[40] Gender presumptions about child custody have morphed or vanished.[41] The legal status of parents has become more fluid.[42] Contractual obligations owed to non-marital partners are being considered and reconsidered.[43]

The time has come to think constructively about the effect that authorization of same-sex marriage will have on our marriage practices and on the laws that seek to govern them. To begin that process, I

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37. *See* Sarah Halpern-Meekin & Laura Tach, *Heterogeneity in Two-Parent Families and Adolescent Well-Being*, 70 J. MARRIAGE & FAM. 435 (2008). In 2009, "16 percent of children lived with a stepparent, stepsibling or half sibling." Press Release, U.S. Census Bureau, Census Bureau Reports 64 Percent Increase in Number of Children Living with a Grandparent Over Last Two Decades (Jun. 29, 2011), https://www.census.gov/newsroom-/releases/archives/children/cb11-117.html; *see Living Arrangements of Children: 2009*, U.S. CENSUS BUREAU 18 (Jun. 2011), https://www.census.gov/prod/2011pubs/p70-126.pdf.

38. *See, e.g.*, Christine Organ, *How Technology Has Changed Our Parenting Lives*, WASH. POST (Feb. 23, 2015), https://www.washingtonpost.com/news/parenting/wp/2015/02/23/how-technology-has-changed-our-parenting-lives/ (describing benefits and disadvantages of technology for parents); *Parenting in the Age of Digital Technology: A National Survey*, CTR. ON MEDIA & HUMAN DEV. SCH. OF COMMC'N, NORTHWESTERN UNIV. 3–7 (June 2014), http://cmhd.northwestern.edu/wpcontent/uploads/2015/06/ParentingAgeDigitalTechnology.REVISED.FINAL_.2014.pdf (detailing key findings of a study on how parents use new digital technology).

39. NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 52 (2000).

40. *Id.* at 196.

41. *See* Herma Hill Kay, *No-Fault Divorce and Child Custody: Chilling Out the Gender Wars*, 36 FAM. L.Q. 27, 29–31, 33–34, 39 (2002).

42. DEBORAH H. SIEGEL & SUSAN LIVINGSTON SMITH, EVAN B. DONALDSON ADOPTION INST., OPENNESS IN ADOPTION: FROM SECRECY AND STIGMA TO KNOWLEDGE AND CONNECTIONS 23 (2012), http://aap.uchc.edu/reading/pdfs/2012_03_OpennessInAdoption.pdf (reporting that 95% of adoptions have some degree of contact, up from 79% in 1999 and 36% in 1987); *see* Maria Cancian et al., *Who Gets Custody Now? Dramatic Changes in Children's Living Arrangements After Divorce*, 51 DEMOGRAPHY 1381, 1387 (2014) (looking at Wisconsin court records to determine that equal joint custody rose from 5% to 27% between 1986 and 2008 and unequal joint custody rose from 3% to 18% during the same time period).

43. *See, e.g.*, Diana Adams, *Equality for Unmarried America: Expanding Legal Choice for America's Diverse Families*, 4 CHARLOTTE L. REV. 231, 234–38, 247–48 (2013) (comparing rights available to same-sex partners in various states); Stasia Rudiman, *Alimony and Cohabitation From Then to Now*, 22 J. CONTEMP. LEGAL ISSUES 568, 582–87 (2015) (describing changing approaches regarding cohabitation); *see also* CAL. FAM. CODE § 297-297.5 (West 2016) (establishing domestic partnerships); ME. REV. STAT. ANN. tit. 19, §§ 650-A, 650-B (2016) (defining marriage as the union of two people and recognizing same-sex marriages performed out of state); N.J. STAT. ANN. §§ 26:8A-1 to -13 (West 2016) (establishing domestic partnerships).

suggest just three areas in which ongoing change could be enlightened by consideration of the needs and preferences of same-sex couples: marital property arrangements, child care arrangements, and the enforcement of relational norms. In each of these areas, lawmakers' contemplation of both same- and different-sex marriages might increase opportunities, and suggest mechanisms, for structuring domestic arrangements that are egalitarian, child-centered when children are or may be involved, and tailored to the needs of the parties involved.

For purposes of this essay, I put aside intriguing questions about the extent to which choice in domestic arrangements is a constitutional entitlement. Evolving rights of privacy and autonomy may one day be understood to go beyond freedom of choice regarding marriage,[44] procreation,[45] consensual sexual activity,[46] and manner of death[47] to include freedom of choice regarding control and allocations of marital property, parenting arrangements, or relational norms. But the regulation of such matters is already loosening, tightening, and otherwise changing in ways that respond to the interests and arguments of married and unmarried couples as they negotiate or litigate the terms of their relationships.

Every type of law evolves in response to the interests and advocacy of those who use the law to structure their relationships and settle their disputes. I speculate below about how the legitimization of same-sex marriage might constructively affect ongoing change in laws relating to partners' economic and parental ties.

III.
The Terms of Economic Partnership

The law's understanding of the economic terms of intimate partnership has long been determined in accordance with the presumptions that men are breadwinners and women are homemakers and caregivers. These presumptions have been turned upside-down, not only by same-sex partnerships, but also by radical changes in the economic and social status of women. The greatest changes in domestic relations law have resulted from the overthrow of "head and master"

44. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967).

45. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851, 926–27 (1992); Roe v. Wade, 410 U.S. 113, 152–55 (1973); Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

46. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003).

47. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 728 (1997); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278–79 (1990).

rules. Under these rules, wives were without legal identity,[48] most of a couple's property was controlled by the husband,[49] men were the presumptive custodians of children of divorce,[50] women were legally obligated to serve and care for their husbands,[51] and the couple's whereabouts and living conditions were controlled by the husband.[52] From "antislavery weddings"[53] to the campaign for women's property acts to litigation challenging such things as male preferences in the administration of estates[54] and laws under which women alone were entitled to alimony,[55] domestic relations law has been moved toward gender neutrality. As a result, courts and legislatures have struggled to envision and enforce egalitarian coupling.

It used to be that the terms of marriage were officially—if not effectively—fixed by one-size-fits-all, traditional notions of propriety. An old chestnut of family law cases held in 1940 that a husband's contract to forego his employment and travel with his wife in exchange for a monthly sum was void as against public policy because it violated the norm that husbands functioned in the marketplace while wives managed the domestic sphere. "[M]arriage," the court said in *Graham v. Graham*, "is not merely a private contract between the parties, but creates a status in which the state is vitally interested and under which certain rights and duties incident to the relationship come into being, irrespective of the wishes of the parties."[56] It followed that the couple could not set enforceable terms of their union but were bound by official norms: "As a result of the marriage contract . . . the husband has a duty to support and to live with his wife and the wife must contribute her services and society to the husband and follow him in his choice of domicile."[57] A couple's agreement to a different arrangement was held to be "contrary to public policy and unenforceable."[58]

48. *See* Katherine Shaw Spaht, *The Last One Hundred Years: The Incredible Retreat of Law from the Regulation of Marriage*, 63 LA. L. REV. 243, 288–89 (2003).
49. *See id.* at 289–90.
50. *See* Kathleen Nemechek, *Child Preference in Custody Decisions: Where We Have Been, Where We Are Now, Where We Should Go*, 83 IOWA L. REV. 437, 439–40 (1998).
51. Kerry Abrams, *Citizen Spouse*, 101 CAL. L. REV. 407, 416 (2013).
52. Spaht, *supra* note 48, at 291–92.
53. NEGLECTED STORIES, *supra* note 11, at 42–49 (considering "anti-slavery weddings," weddings in which opponents of chattel slavery likened the condition of wives to the condition of slaves and vowed to maintain egalitarian partnerships).
54. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971).
55. *See, e.g.*, Orr v. Orr, 440 U.S. 268 (1979).
56. 33 F. Supp. 936, 938 (E.D. Mich. 1940).
57. *Id.*
58. *Id.*

An admonition to be "gender neutral" or "gender blind" would protect against falling into gender stereotypes as the *Graham* judge did. But gender neutrality is not enough of a guide for thinking through the equities of the Grahams' (or any other couple's) situation. What other principles might be useful in determining what each member of the couple gained or sacrificed during a relationship, and what each had a right to expect at its dissolution?

Courts and legislatures have searched for such principles in cases involving the claim that has come to be known as "palimony." *Marvin v. Marvin* was a California case that introduced the notion of "palimony" as a heuristic for figuring out what was owed to whom when unmarried couples broke up after living for a space of years in a situation that resembled an old-fashioned marriage.[59] After establishing that the laws of California would henceforth permit enforcement of express or implied contracts between unmarried but cohabiting parties, the plaintiff was left with no award, the courts having found that she had profited from the partnership while it lasted and was not entitled—either as a matter of express or implied contract—to expect support or compensation after the relationship ended.[60] The ultimate rulings in this case unsettled presumptions of female dependence and male responsibility.

But what presumptions will seem warranted as lawmakers consider the arrangements of same-sex couples and defaults to patriarchal models are precluded? For example, is there an implicit obligation to support a long-term romantic partner who has become economically dependent? Or has such a person been fully compensated—or perhaps unjustly enriched—by the support she or he received during the relationship? Is this something couples should be free to decide for themselves? Or, is the government right to privatize to some extent its welfare obligations to the needy by requiring individuals to support their needy former partners?

Gender differences with respect to economic opportunity should perhaps affect our thinking about what is just in situations of this kind; we may favor a public policy that takes these differences into account, at least with respect to rehabilitative support. But couples may welcome and benefit from opportunities to be more self-determined and explicit about the economic terms of their relationships. And, lawmakers may be usefully enlightened by the exercise of considering

59. 557 P.2d 106 (Cal. 1976).
60. *Id.* at 122–23.

couples' economic arrangements without resorting to gender-determined responses.

IV.
The Terms of Shared Parenting

Significant divorce and adoption rates, increases in rates of single parenting, varied uses of extended biological or fictive kinship networks, and increasing uses of reproductive technology immensely complicate the law's role in fixing and enforcing parental rights and obligations. The late Justice Scalia once announced that both nature and law require that a child have only one father,[61] but it is far from clear that a one-father/one-mother rule can be made to fit all families. Indeed, Scalia spoke in a case involving a child who recognized two fathers—one a biological parent and the other the spouse of the child's mother. The child's wish to maintain a legal relationship with each of the men she recognized as a father was squelched by Justice Scalia's pronouncement and by the State of California's legal presumption that when a child is born to a married woman, that woman's husband is the child's father.[62] What will Justice Scalia's law do with a child born of one woman from the egg of another woman and the sperm of a third woman's husband? Will the child inevitably be assigned a father and a mother? Or might the wishes of adults consenting to a co-parenting arrangement be honored? On the other hand, might life partners make different decisions about adoption or parenting, with one assuming full parental responsibility and the other assuming a role akin to that of "extended family"?

Merle Weiner has initiated what may become a groundbreaking conversation about the sharing of parental obligations and rights. In an important new book, she has proposed that when the biological or legal parents of a child are not or are no longer married, their status as co-parents should be formalized as a legally recognized relationship—somewhat like marriage or civil union—with some terms that are mandatory and some that are open for negotiation between the parties.[63] There are reasons to welcome such a proposal. The prevalence of blended families has made care-giving collaborations across nuclear households common. And, the interests of children require that these care-giving collaborations be as comfortable and predictable as

61. Michael H. v. Gerald D., 491 U.S. 110, 118 (1989) ("California law, like nature itself, makes no provision for dual fatherhood.").

62. *Id*.

63. Merle H. Weiner, A Parent-Partner Status for American Family Law 2 (2015).

possible. In addition, open adoptions have become more prevalent and have been found compatible with healthy identity formation for adopted children. Finally, the development and increased use of reproductive technologies inevitably increases the situations in which more than two adults are biologically or experientially related to single children.

Same-sex couples are more likely than different-sex couples to adopt children and utilize reproductive technologies. Moreover, same-sex couples problematize rigidly-gendered thinking about child care, just as they problematize rigidly-gendered thinking about economic partnership. Post-*Obergefell,* courts, legislatures, and couples will be required to think differently about the rights and obligations of parenthood. Fresh thinking may yield opportunities to be more rational, more flexible, and more child-centered in determining what legal ties children should have to the adults in their lives.

Conclusion

Nancy Cott's turn-of-the-century account of the relationship between public and private influences on conceptualizations of marriage suggested that a "disestablishment" of marriage wrought radical changes in the period beginning in the 1970s. Cott used the term "disestablishment" to describe a privatization of family norms analogous to their secularization in Europe as non-religious law unseated papal control.[64] She pointed to birth control access, abortion choice, "no-fault" divorce, decriminalization of consensual sexual conduct, and recognition of pre- and post-nuptial and cohabitation agreements as legal developments that gave people greater control and choice in their intimate lives. This move toward autonomy in personal life is a natural, and potentially positive, development in a society that is tolerant but at the same time ready to restrain practices that cause demonstrable harm to others or reduce social welfare. Writing in the year 2000, Cott observed, however, that resistance to same-sex marriage stood as an anomalous and intransigent obstacle in a path that seemed in other respects to lead to a regime in which couples would be freer to choose the terms of their intimate partnerships. The obstacle that seemed immovable in 2000 has now been removed. Choices about intimacy and family-building are now freer than most of us imagined they could become in such a short space of time. Lawmaking about family rights and responsibilities now encompasses an unprecedented variety of

64. Nancy F. Cott, Public Vows: A History of Marriage and the Nation 212–13 (2000).

family forms, and lawmakers are forced to make family law in contexts that defy patriarchal presumptions. The opportunity for intelligently ordered liberty in the realm of domestic relations has never been so great.