

REFLECTIONS ON *OBERGEFELL* AND THE FAMILY-RECOGNITION FRAMEWORK'S CONTINUING VALUE

Suzanne B. Goldberg*

Unlike a typical law review essay, I offer reflections here based largely on my own past work in LGBT rights advocacy. Together with related scholarship, I rely on these experiences to argue that the “family recognition” framework underlying earlier advocacy has value going forward, even after the Supreme Court’s ruling in favor of nationwide marriage equality.

When I started as a staff attorney at Lambda Legal, a national LGBT legal advocacy group, in the fall of 1991, I wasn’t thinking about marriage litigation. Instead, my earliest work on “relationship recognition,” as we called it then, involved urging private employers to adopt domestic partner benefits policies.

My first work trip brought me to Johns Hopkins University, where I remember sitting with a small group talking about how best to argue in favor of such a policy. Equal pay for equal work was the premise, with arguments that individuals with same-sex partners were substantially underpaid when they did not receive the same health insurance for a partner that their coworkers received for their spouses.

Another early project involved securing legal recognition for parents raising a child jointly with a same-sex partner who was the child’s legally-recognized parent. Although states generally recognized spouses as the legal parent of any children born into a marriage, the parents who my colleagues and I worked for could not marry their partners. Instead, they were typically deemed “legal strangers” to their children in the eyes of the state.

In the first of these cases that I worked on, I went with a colleague to New Jersey and met our clients—and their young daughter who, happily, was busier jumping on her bed than focusing on the legal issues at hand. The court ultimately allowed the “second-parent” adoption in their case,¹ as did many courts around the country.² But in states that did not allow second-parent adoption or recognition through de facto parenting or other equitable theories, parents and children were denied legal recognition of their relationship and, in

* Herbert and Doris Wechsler Clinical Professor of Law, Columbia Law School. With thanks to many colleagues in academia and advocacy, and with enduring appreciation for Paula Ettlbrick.

¹ See *In re Adoption of a Child By J.M.G.*, 632 A.2d 550, 554 (N.J. Super. Ct. Ch. Div., 1993); see also Joan Garry, *Pride Month Forum*, ST. GEORGE’S EPISCOPAL CHURCH (June 3, 2012, 3:00 PM), <http://www.stgeorges-maplewood.org/content/pride-month-forum-joan-garry> (noting the first second-parent adoption in New Jersey).

² For current information on the availability of second-parent adoption, see *Second-Parent Adoption Laws*, FAMILY EQUALITY COUNCIL http://www.familyequality.org/get_informed/equality_maps/second-parent_adoption_laws/ (last visited Oct. 26, 2015). For an early and influential article, see 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).

cases of conflict between the parents, separated from each other without recourse.³

Also on my docket was work for binational couples whose relationships were unrecognized by American law and who were, literally, kept from each other at American borders. While the U.S. government prioritizes family-based immigration, allowing spouses and even engaged couples to petition for immigration rights without regard to national quotas and other limitations, same-sex couples were, here too, legal strangers to each other.⁴

Working together with Immigration Equality, I helped draft what was then known as the Permanent Partners Immigration Act, which Congressman Jerrold Nadler first introduced in the House of Representatives in 2000.⁵ The idea was to provide a mechanism for family-based immigration that did not require marriage. This was the reason for the bill's focus on "permanent partners,"⁶ as anything sounding like marriage had no conceivable chance of success at that time.⁷

Couples' stories were central to the advocacy effort. The Lesbian and Gay Immigration Rights Task Force, as Immigration Equality was known then, started a "story collection" project, and couples met with members of Congress and their staff, sharing wrenching accounts of falling in love and being kept from each other by American immigration law.⁸ The bill, later renamed the Uniting

³ See, e.g., *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29-30 (N.Y. 1991) (denying standing to non-biological mother who sought visitation with the child she had parented jointly since birth with child's biological mother; the biological mother denied Alison D. contact with her son after the couple's relationship ended); see also, e.g., *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 219 (Cal. Ct. App. 1991) (denying parental status to non-biological mother who had parented two children jointly since birth with children's biological mother and was then denied contact after the couple separated). Cf. Suzanne B. Goldberg, *Family Law Cases As Law Reform Litigation: Unrecognized Parents and the Story of Alison D. v. Virginia M.*, 17 COLUM. J. GENDER & L. 307 (2008) (presenting detailed discussion of the *Alison D.* case). For discussion of a more recent case, see, e.g., John Leland, *Parenthood Denied by the Law*, N.Y. TIMES (Sept. 12, 2014), http://www.nytimes.com/2014/09/14/nyregion/after-a-same-sex-couples-breakup-a-custody-battle.html?_r=0.

⁴ See generally Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 WM. & MARY J. WOMEN & L. 537 (2010) (discussing barriers to relationship recognition for same-sex binational couples).

⁵ *Id.* at 607 (discussing first introduction of the bill).

⁶ Permanent Partners Immigration Act of 2000, H.R. 3650, 106th Cong. (2000).

⁷ When the bill was introduced, the federal Defense of Marriage Act had passed just a few years earlier, some states still had laws that criminalized sexual relationships of same-sex couples, and not a single state allowed same-sex couples to marry. See 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006); *Lawrence v. Texas*, 539 U.S. 558 (2003). For a thoughtful review of earlier efforts to repeal antigay immigration measures, see generally Barney Frank, *American Immigration Law: A Case Study in the Effective Use of the Political Process*, in CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS, 714 (John D'Emilio, William B. Turner, & Urvashi Vaid eds., 2000).

⁸ For an early newsletter from the Lesbian and Gay Immigration Rights Task Force reviewing some of the organization's outreach strategies, see *The Lesbian and Gay Immigration Rights Task Force*,

American Families Act, became a beacon for so many lesbian and gay couples who did not want to enter a sham marriage and would or could not let immigration law end their relationships.

Looking back, it might seem that marriage was the obvious fix for these problems and that all efforts should have concentrated there rather than on some broader idea of family recognition. This Essay aims to be a corrective to that conclusion, not for the sake of the historical record but instead to highlight the value of the family-recognition frame for advocacy and analysis today.

To offer this context is not to diminish marriage's many direct benefits, including for the workplace, parenting, and immigration issues just described. The widespread embrace of marriage, including the Supreme Court's endorsement in *Obergefell v. Hodges*,⁹ has likewise had a cultural impact that should not be understated. Marriage is perhaps the most traditional rite of passage in American life, and equal access to it for same-sex couples has propelled increased acceptance of gay people into the fabric of American society in ways that marriage equality's most ardent advocates had hoped.¹⁰

Still, one of the benefits of gay people's "strangers to the law" status for so many years is the insight into why marriage, alone, is not the answer for law that touches on families. Many have written extensively on this point. Nancy Polikoff's work, for example, including *Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law*, illustrates why broader, context-sensitive family recognition law will correspond more closely to lived experience and, consequently, achieve greater justice and equity.¹¹

Paula Ettelbrick's earlier writing, most prominently "*Since When is Marriage a Path to Liberation?*,"¹² likewise makes a strong case for non-marriage-based family recognition. From a different vein, Martha Fineman's vulnerability framework explains why interdependent relationships, rather than

PRINCETON UNIVERSITY, <http://tigernet.princeton.edu/~ffr-gala/LGIRTF%20article.htm> (last visited Dec. 28, 2015).

⁹ 135 S. Ct. 2584 (2015).

¹⁰ For earlier writing on the cultural benefits of marriage equality, see, e.g., WILLIAM N. ESKRIDGE, *THE CASE FOR SAME SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996); JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* (2004); ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* (1996); Mary C. Dunlap, *The Lesbian and Gay Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 L. & SEXUALITY 63 (1991); Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, *OUT/LOOK*, Autumn 1989, at 8, reprinted in part in WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 818 (3d ed. 2011).

¹¹ See Nancy Polikoff, *Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law*, Address at University of Washington Law School, (Apr. 28, 2008). See also KATHERINE FRANKE, *WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY* (2015) (commenting on the risks posed by marriage equality for lesbian and gay couples and gay people more generally).

¹² See Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, *OUT/LOOK*, Autumn 1989, at 8, reprinted in part in WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 818 (3d ed. 2011).

adult intimate partnerships, should be the basis for legal recognition and support.¹³

From each of these vantage points, the value of retaining a family-recognition framework, and situating marriage as but one option within it, becomes clear. As shown by the writings just mentioned, this is not a new point. Still, post-*Obergefell*, it is worth reiterating for several reasons.

First, one of the more “traditional” arguments against the privileging of marriage—the entanglement of marriage with the legal and social oppression of women¹⁴—no longer has the cultural traction it once did. Nearly all forms of legally-sanctioned second-class status for wives were ended more than a generation ago, and in some instances, far longer ago than that.¹⁵ Indeed, many students today would likely be surprised to learn that married women could not own businesses or choose to retain their premarital surname.

Even while social distinctions between wives and husbands remain powerful in many quarters, the law’s role in creating them is no longer as obvious. The increasing visibility of married same-sex couples reinforces that social norms, not law, give these distinctions their staying power.¹⁶

Second, marriage has in fact provided a solution to many family-recognition problems highlighted by lesbian and gay advocates over the years. As noted above, employees can now marry their partners and receive benefits; couples can marry and secure their children’s legal relationships to both parents; and same-sex binational couples can now have their relationships recognized under immigration law, for example.

In light of these changes, it may well be puzzling to policy makers in the public and private sectors, as well as to students and others, why broader recognition remains so important. Some of this puzzlement is playing out as major employers withdraw the domestic partner benefits they have offered to their employees.¹⁷ From IBM and Verizon to the U.S. Department of State and

¹³ For a sampling of Martha Fineman’s extensive body of work addressing vulnerability as a basis for legal and policy response, see, e.g., *VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS* (Martha Albertson Fineman & Anna Grear eds., 2013); Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713, 1718-20 (2012); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 9 (2008); Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 267-70 (2010).

¹⁴ See, e.g., Ettlbrick, *supra* note 12.

¹⁵ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595-96 (2015).

¹⁶ Advocates and scholars advanced this position many years ago when considering the possible benefits of advocacy for marriage equality for same-sex couples. See, e.g., Stoddard, *supra* note 10.

¹⁷ For data on domestic partner benefits offerings by private employers, see BUREAU OF LABOR STATISTICS, NAT’L COMPENSATION SURVEY: TABLE 44 (March 2014), <http://www.bls.gov/ncs/ebs/benefits/2014/ownership/private/table44a.pdf>.

individual states, these employers typically grant their workers just a brief grace period in which to marry or lose benefits.¹⁸

Even prior to nationwide marriage equality, some courts had begun to impose a marriage-like filter on family-recognition claims, using the existence of legal statuses such as civil unions as the basis for rejecting arguments for functional family protection. In *Debra H. v. Janice R.*, for example, the New York Court of Appeals allowed a non-biological mother standing to seek visitation with the child she was raising with the child's biological mother only because the two women were in a civil union when the child was born.¹⁹ The court expressly rejected Debra H's arguments that her joint parenting of the child with her former partner could be the basis for enabling her to retain contact with the child.²⁰ Now, with marriage widely available, one can easily imagine other courts treating marriage as *the* key to obtaining family recognition.

Yet the normative and consequentialist arguments that propelled much of the pre-marriage equality work in this area²¹ remain important in *Obergefell's* wake and thus worth cataloguing, once again. Though they overlap in important respects, I separate them here into economic, discrimination, and normative cases. Given this Essay's limited scope, I make each in an abbreviated fashion.

First, the economic case. The argument is that privileging married couples over other interdependent couples, whether in workplaces or family law, has two types of negative economic consequences—one for employers and, in some instances, the state, and the other for unmarried interdependent couples, which I will address in the discrimination discussion below.

¹⁸ Tara Siegel Bernard, *Fate of Domestic Partner Benefits in Question After Marriage Ruling*, N.Y. TIMES (June 28, 2015), http://www.nytimes.com/2015/06/29/your-money/fate-of-domestic-partner-benefits-in-question-after-marriage-ruling.html?_r=0; see, e.g., Michael Dresser & Carrie Wells, *With Same-Sex Marriage Now Available, State to End Benefits to Domestic Partners*, BALT. SUN (May 3, 2013), http://articles.baltimoresun.com/2013-05-03/features/bs-md-domestic-benefits-20130502_1_domestic-partners-health-benefits-state-employees; Michael K. Lavers, *Exclusive: State Department to Phase Out DP Benefits*, WASH. BLADE (Oct. 19, 2015, 9:00 PM), <http://www.washingtonblade.com/2015/10/19/exclusive-state-department-to-phase-out-dp-benefits/>; Stephen Miller, *Poll: Many Will Now Drop Domestic Partner Benefits*, SOC'Y FOR HUMAN RESOURCE NETWORK MGMT., (revised Aug. 20, 2015), <http://www.shrm.org/hrdisciplines/benefits/articles/pages/domestic-partner-benefits-poll.aspx>; Laura Lorenzetti, *Looking to Stay on Your Partner's Insurance? It May Be Time to Get Married*, TIME (June 26, 2015), <http://time.com/3938225/same-sex-benefits-marriage/>.

¹⁹ *Debra H. v. Janice R.*, 930 N.E.2d 184, 197 (N.Y. 2010).

²⁰ Cf. Suzanne B. Goldberg, Harriet Antczak, & Marc Musico, *Family Law Scholarship Goes To Court: Functional Parenthood And The Case Of Debra H. v. Janice R.*, 20 COLUM. J. GENDER & L. 348 (2011).

²¹ While my arguments here focus on legal and policy responsiveness to interdependent adult couples, as this was the focus of much LGBT rights advocacy prior to marriage equality, most can be carried over to broader family recognition arguments made by Martha Fineman and Nancy Polikoff, among others.

In workplace contexts, where benefits typically amount to one-third of an employee's compensation,²² the emergence of negative economic consequences for ending domestic-partner benefits may seem counterintuitive. Expenditures for health coverage, for example, amount to a tiny percentage of employers' benefits costs,²³ but they are not cost free. Still, as human resources specialists have observed, non-marriage-based benefits can be a valuable tool for recruiting and retaining talent,²⁴ particularly as Americans are increasingly likely to marry later or not at all.²⁵

These benefits do not stop at health coverage.²⁶ Consider, for example, the unpaid leave required under the Family and Medical Leave Act,²⁷ which is intended to "to balance the demands of the workplace with the needs of families."²⁸ The FMLA and similar employer-sponsored provisions, such as paid bereavement leave, death benefits, and even family picnics, bring significant benefits in employee goodwill, retention and productivity that may well outweigh the costs of denying these benefits to unmarried employees who have interdependent caregiving roles similar to their married counterparts.²⁹

The same is true for states. By providing support only through marriage-based partnerships, state law and policy can have the effect of rendering non-marital families more economically vulnerable than others and potentially more dependent on the state. This is certainly the case where children are denied

²² See *Employer Costs for Employee Compensation*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS (Sept. 9, 2015), <http://www.bls.gov/news.release/ecec.nr0.htm>.

²³ See, e.g., *Domestic Partner Benefits: Facts and Background*, EMP. BENEFIT RESEARCH INST. (Feb. 2009), <http://www.ebri.org/pdf/publications/facts/0209fact.pdf>; Michael A. Ash & M.V. Lee Badgett, *Separate and Unequal: The Effect of Unequal Access to Employment-Based Health Insurance on Same-Sex and Unmarried Different-Sex Couples*, 24 CONTEMP. ECON. POL'Y 582 (2006).

²⁴ Allen Smith, *Dropping (or Keeping) Domestic-Partner Benefits Has Ramifications*, SOC'Y FOR HUMAN RES. MGMT. (July 10, 2015), <http://www.shrm.org/legalissues/federalresources/pages/ramifications-domestic-partner-benefits.aspx>.

²⁵ See D'Vera Cohn et al., *Barely Half of U.S. Adults Are Married – A Record Low*, PEW RESEARCH CTR. (Dec. 14, 2011), <http://www.pewsocialtrends.org/2011/12/14/barely-half-of-u-s-adults-are-married-a-record-low/> (finding marriage down 5% from 2009 to 2010); but see 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/> (reporting that "the uptick in new marriages is concentrated among adults ages 35 and older.").

²⁶ See American Bar Association Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339, 405 (2004) (collecting information on the array of family-related workplace benefits and their interactions with civil unions and domestic partnership recognition).

²⁷ See generally 29 U.S.C. §§ 2601–2654 (2015) (requiring covered employers to provide unpaid leave for up to 12 weeks for, *inter alia*, care of spouses, children and parents).

²⁸ 29 U.S.C. § 2601(b)(2) (2015).

²⁹ See, e.g., M.V. Lee Badgett et al., *The Business Impact of LGBT-Supportive Workplace Policies*, WILLIAMS INST., 5 (May 2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Business-Impact-LGBT-Policies-Full-May-2013.pdf>.

insurance, inheritance, and other benefits because the adult who functioned as their parent was never married to the child's legal parent. While urging all parenting partners to marry before having children might be one solution, the myriad ways in which that proposition does not correspond to the reality of family life ought to be apparent, even apart from normative or constitutional concerns.

The second argument for the family-recognition frame's continuing value sounds in discrimination. Most basically, this is the same argument we made a couple of decades ago—that to treat some employees or parents or immigration partnership applicants differently from others because they are not married to their interdependent partner may be discriminatory. In the employment context, in particular, the availability of marriage for lesbian and gay employees does not change the fact that unmarried employees with partners are receiving less compensation than their married counterparts.

A distinct point related to discrimination is that in many parts of the United States, and much of the world, antigay discrimination remains rampant. In many U.S. jurisdictions, there is little or no protection against housing,³⁰ workplace,³¹ or public accommodations discrimination.³² Consequently, laws and policies that require gay people to marry to receive recognition for their partnerships place same-sex couples in what can be a terrible catch-22. The U.S. Department of State's decision to make benefits contingent on marriage³³ is particularly striking as employees may be deployed to locations where their marriages are not only not recognized but also deemed criminal.³⁴

³⁰ See, e.g., Amira Hasenbush & Christy Mallory, *Employment and Housing Discrimination Based on Sexual Orientation and Gender Identity in Idaho*, WILLIAMS INST. 1, 6 (May 2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/IdahoNDReport-May-2014.pdf> (documenting discrimination against LGBT residents of Idaho).

³¹ See Christy Mallory & Brad Sears, *Evidence of Employment Discrimination Based on Sexual Orientation and Gender Identity: An Analysis of Complaints Filed with State Enforcement Agencies*, WILLIAMS INST., 1-2 (Oct. 2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Employment-Discrimination-Complaints-2008-2014.pdf> (noting which states prohibit discrimination based on sexual orientation and how these laws are accessed in practice).

³² See, e.g., Christy Mallory, Sarah Liebowitz, & Amira Hasenbush, *Employment, Housing, and Public Accommodations Discrimination Based on Sexual Orientation and Gender Identity in Missouri*, WILLIAMS INST. (Sept. 2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/MissouriNDReport-Nov-2013.pdf>; Christy Mallory & Sarah Liebowitz, *Local Laws and Government Policies Prohibiting Discrimination Based on Gender Identity in New York*, WILLIAMS INST. (May 2013), <http://williamsinstitute.law.ucla.edu/research/workplace/ny-local-gi-laws-jun-2013/>.

³³ Michael K. Lavers, *Exclusive: State Department to Phase out DP Benefits*, WASH. BLADE (Oct. 19, 2015, 9:00 PM), <http://www.washingtonblade.com/2015/10/19/exclusive-state-department-to-phase-out-dp-benefits/>.

³⁴ Natasha Bertrand, *Here are All the Countries Where it's Still Illegal to be Gay*, BUS. INSIDER (May 23, 2015, 12:13 PM), <http://www.businessinsider.com/countries-where-its-illegal-to-be-gay-2015-5> (noting seventy-six nations have laws criminalizing sexual intimacy between same-sex partners, with some authorizing the death penalty). In addition to criminalization, many jurisdictions support antigay hostility or refuse to intervene to protect gay people from violence.

Third is the normative case for insisting on family recognition. The argument, in essence, is that the world will be a more fair and just place to the extent that law and policy correspond to the ways in which people actually live their lives. Here, too, the argument is little different from what it was years ago, except that it comes in a context of even greater awareness of family diversity, thanks in part to the marriage equality movement.

Just one example here, again from personal experience. Although many of the same-sex couples I represented in various contexts would have married if marriage had been available to them, there was nothing about their unmarried state that rendered their interdependent relationships unworthy of recognition. Similarly, the amicus briefs I wrote in numerous marriage cases, including *Obergefell*, focused on the commitment of states not to interfere with individuals' choices of spouse absent unreasonable coercion, generally on the view that these choices were protected by due process or not otherwise of interest to the state.³⁵

What we can learn from both these couples and state practice is that there is no magic to marriage—though not in the sense that marriage is not special, as it surely is to many people and governments. Instead, the point is that marriage is too blunt a proxy for interdependence. To the extent that state or private actors seek to limit family benefits only to those who marry, on the ground that same-sex couples now have access, they fail to recognize what the marriage debate should have taught all of us—that marriage is undoubtedly important but is hardly the only entrée into meaningful interdependence for adults, gay and nongay alike.

See, e.g., Ishaan Tharoor, *Gambia's president threatens to slit the throats of gay men*, WASH. POST. (May 5, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/05/12/gambias-president-threatens-to-slit-the-throats-of-gay-men>.

³⁵ For a collection of these briefs, see *Family Recognition*, COLUM. L. SCH. SEXUALITY AND GENDER L. CLINIC, <http://web.law.columbia.edu/sexuality-gender-clinic/issues/family-recognition> (last visited Dec. 28, 2015).