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Essay

WEDDING BELL BLUES*: THE POSITION OF UNMARRIED PEOPLE IN AMERICAN LAW

Jennifer Jaff**

> It is terrible to be alone, it makes the earthling shiver, but is not the sea alone in its mightiness, is not God alone, are not they harmonious, each, and with the Universe too? Then cannot the human soul be great, true, pure, free alone? Yes, I know it. I feel it, I exalt in it, but alas I am so human, my vanity makes me suffer so, when I see myself passed by because forsooth I am a cipher in the world's esteem if I lack the initial figure of a man at my left.[1]

Unmarried people are treated with disfavor by society, and this disfavor is reflected in the law. When people talk about socially and legally disadvantaged minorities, unmarried people are rarely, if ever, included. This bias makes increasingly less sense as the number of unmarried people in America continues to increase.[2] Even as more and more people are opting out of

* L. NYRO, WEDDING BELL BLUES (1966).

** Visiting Assistant Professor, University of Miami School of Law. B. A. 1981, Queens College, CUNY; J. D. 1984 Georgetown University Law Center. Member of the New York Bar.

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1. L. CHAMBERS-SCHILLER, LIBERTY, A BETTER HUSBAND 168 (1984) (quoting Emily Howland, Diary, Feb. 10, 1861).

2. *See infra* notes 157-162 and accompanying text.

marriage in favor of alternative lifestyles,[3] the law remains unresponsive to their reality, and continues to reflect a bias in favor of marriage and "traditional" family relationships.[4]

As we come to better understand the politics of heterosexual relations,[5] the significance of alternative lifestyle choices has grown. Celibacy and homosexuality, both of which exclude marriage, have become important political choices, especially for women. In these and other circumstances, the choice to remain unmarried is a real choice, not an absence of choices. Some people choose to not marry[6] because they want to focus on their careers;[7] others, especially feminists, have come to appreciate the fundamental and inherent inequality in male-female relations,[8] and have opted out of those relations. For some women, "to be 'anti-sex'. . .is to refuse to affirm loyalty to this political system of inequality whose dynamic is male control and use and access to women. . . ."[9] Thus, at least in some instances, the choice to remain unmarried is a political choice to refuse to engage in activities that perpetuate male dominance. Yet, the law's preference for marriage burdens that choice.

The purpose of this Article is to demonstrate the nature and scope of that burden. In Part I, I review society's attitude toward unmarried people and show how the law embodies that attitude. In Part II, I make constitutionally-based arguments in favor of eliminating marital status distinctions in the law. I will argue, first, that there is a fundamental right to choose to remain unmarried;[10] and, second, that the states' alleged justification for marital status distinctions—the promotion of family values—does not even rationally relate to the promotion of marriage. Thus, marital status distinctions should be invalidated.

In the course of examining the relation, or lack thereof, between the promotion of the family and the promotion of marriage, I will begin to look at what we mean by the "family." In Part III, I will examine that issue more closely, arguing that the notion of the "traditional" family is oppressive to women, people of color and homosexuals.[11] I will then discuss alternative,

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3. *Id.*

4. *See infra* notes 17-94 and accompanying text.

5. *See generally* A. DWORKIN, INTERCOURSE (1987).

6. I use this somewhat awkward phraseology intentionally. Rather than saying that people have the right not to marry, which makes it sound like a negative action or non-action, I use the phrase "right to not marry" to show that this can be a positive choice—people can affirmatively and actively choose to remain unmarried.

7. *See* NEWSWEEK, June 2, 1986, at 55.

8. *See generally* A. DWORKIN, *supra* note 5; C. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND THE LAW 6-7 (1987).

9. C. MACKINNON, *supra* note 8, at 7-8.

10. This is not an article about rights. *See infra* notes 95-96 and accompanying text.

I use the language of choice throughout this Article; however, I do not intend to intimate that choices are or can be made entirely freely. Feminist scholarship has demonstrated that "biases based on socially constructed notions of gender . . . currently skew the choices of women and men. . . ." Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice* (Book Review), 96 YALE L.J. 914, 939 (1987). I would argue that this is true of racial and sexual preference biases as well. Indeed, my point is that unmarried people—single people, minorities, gays—cannot choose freely because their choice is burdened by the preference for marriage.

11. There is clearly a class-based strand here, also. The values represented by marriage and the "traditional" family are decidedly middle-class values; thus, the poor are also negatively affected by

less oppressive concepts of the family, and ways to convert those concepts into law.

My agenda here is four-fold. First, I want to sensitize people to the legal position of unmarried people.[12] Second, I want to encourage the reformulation of interpersonal relations: to move the focus away from formal status toward a perspective that values the nature of the relations themselves. This goal is tied to my third desire, to encourage recognition of and respect for alternative lifestyles. Finally, I want to identify a basis for coalition-building among minority groups by demonstrating some of the interests that these groups have in common.

I do not want to appear to be advocating the elimination of all distinctions among relationships. For there to be a real choice, as I believe there is and must be, there must be a difference among options. Eliminating distinctions can have two negative consequences: first, it can eliminate choices by merging options; and, second, it can leave us with no basis for making allocative decisions. In other words, if we want to be able to say that some persons should collect, say, survivorship benefits from Social Security but other persons should not, and that the distinction between the two should be based on the nature and degree of the relations between them and the decedent, we must be able to identify a standard according to which to make these decisions. My point is that formal legal status — marriage — is no longer an acceptable distinguishing factor.

My reasons for this will be explored in Part III. However, I should be clear about what I see as being at stake here. For many, marriage signifies commitment, emotional security and stability. These, I think, are good values. What I want to call into question is the claim that marriage and only marriage represents a choice in favor of these values. Marriage can no longer be used as shorthand for these values, for when it is, those who choose alternative lifestyles are made to seem value-less when, in fact, they are not.[13] In other words, by equating marriage with good morals, those who choose alternative lifestyles, whether they be feminists, gays or people of color, are stigmatized. My critique is of that stigmatization.

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the preference in favor of marriage. This article omits a class-based analysis of that preference only because it has been well done by others. E. ZARETSKY, CAPITALISM, THE FAMILY, AND PERSONAL LIFE (1976); M. BARRETT & M. MCINTOSH, THE ANTI-SOCIAL FAMILY (1982).

12. The mention of unmarried people in this Article includes unmarried couples, homosexuals, and single, divorced and widowed people. Though not all people who fall into this broad category have chosen their marital status (e.g., widowed people), they all experience the social and legal consequences of that status.

13. The relation between law and morality is certainly indefinite, in at least two ways. First, there is the chicken and egg problem: do moral values become embodied in law or does the law establish preferences which influence moral values? The second problem is the larger, more difficult one: can and/or should the law attempt to create, embody or reflect morality at all? In other words, if marriage and the family are built on moral, emotional commitments, should the law somehow acknowledge those commitments? In this Article, I deal with these issues in a descriptive rather than prescriptive sense. In an ideal world (the prescriptive sense), the family would be defined by its members. If they felt like a family, they would be treated like one. However, in the real world (the descriptive sense), disputes arise that, in our society, are treated as legal disputes in which the law must decide which relations to recognize and which not to give legal significance. In this sense, law and morality are, in fact, related. Whether or not they should be is a question that will be left for another day.

Marriage is an essential, definitional component of the "traditional" family.[14] Thus, the preference for marriage often means a preference for the "traditional" family, and a critique of the preference for marriage can also mean a critique of the "traditional" family. As I will explain in Part III, the "traditional" family has been characterized by male dominance and hierarchy; and, because the "traditional" family is a white, heterosexual ideal, that ideal works to exclude people of color and homosexuals from the norm. The sexist, racist and sexually oppressive values inherent in the "traditional" family are what I mean to attack through a critique of the preference for marriage.

PART I: EXAMPLES OF DISTINCTIONS BASED ON MARITAL STATUS

This section explores the ways in which law and society have treated unmarried people. The examples I have chosen vary in a number of ways. First, some involve the legal system while others do not. In other words, some of these examples demonstrate society's attitude toward unmarried people as expressed through historical accounts or the media; others are strictly legal examples; still others represent an interplay between law and society. I have included all of these types of examples both to demonstrate the full scope and nature of the preference for marriage, and to try to give an accurate account of the experience of unmarried people in America. This experience is fashioned not only by the law; thus, to give a complete rendition of this experience, one must go beyond strictly legal examples.

The second, more significant way in which these examples vary is that they pertain to different sub-categories of unmarried people. Some, particularly the examples of social attitudes toward unmarried people, burden single people; others relate to unmarried people as couples or groups; still others relate to both of these sub-categories. Indeed, people who choose to not marry do not all make the same choice. Some choose to live alone; others choose to live with others but without marriage. In this sense, the interests of unmarried people are not homogeneous.

On the other hand, there are ways in which the interests of all unmarried people are the same. All unmarried people—perhaps even all or most people in general—are interested in preserving the full range of options available to them. Thus, what I will argue should be protected is choice. When the range of options is skewed by the preference for marriage, choices become burdened in unjustifiable ways. This negatively affects everyone whose choice departs from the preferred status: marriage.[15]

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14. *See infra* notes 225-230 and accompanying text.

15. There are also distinctions based on marital status that burden married people and, thus, benefit unmarried people. For example, in the employment area, though the federal equal employment opportunity guidelines do not specifically protect against discrimination on the basis of marital status, many states have attempted to fill this gap. Casenote, *Employment Discrimination Based on Marital Status*: Cybyske v. Independent School District No. 196, 11 WM. MITCHELL L. REV. 277, 279 n.5 (1985). However, "[s]tate courts remain divided .... as to whether marital status refers only to whether one is married or if it includes the identity or situation of one's spouse." *Id.* at 279.

The classic example would include anti-nepotism policies which prohibit the hiring of relatives. For example, in New York, the Human Rights Law prohibits discrimination on the basis of marital status. N.Y. EXEC. LAW § 296 (McKinney 1982). However, the New York Court of Appeals has

In addition, I suspect that these sub-categories of unmarried people are not in fact as different as they appear. Those who choose to live alone do not choose to be alone. People who we call "single" have chosen an alternative lifestyle in which they live apart from their relations; however, that does not mean that those relations do not exist or are not as important as relations between people who live together or even between people who are married. Though a decision to marry or to cohabit may signify commitment, such a commitment can exist without external signs, or without the kinds of external signs that are easily or traditionally recognized. In other words, by equating commitment with marriage, or even with cohabitation, we devalue the many important commitments that do not take these forms. Neither sub-category of unmarried people necessarily represents a choice in favor of isolation; both may represent choices in favor of alternative forms of relations, all of which may be characterized by love and commitment. In this sense, the distinction between single people and other unmarried people is a false one.

Finally, the distinctions themselves, whether they apply to singles or groups of unmarried people, are similar in that they all stem from values or norms associated with marriage. In other words, certain values or norms are thought to be promoted by marriage, and not promoted or even undermined by an absence of marriage. Distinctions based on marital status reflect society's attitude towards the perceived presence or absence of these values or norms in the lives of married and unmarried people. Thus, I have organized these distinctions according to four values or norms—the division of gender roles, interdependency, parenting and permanence or stability[16]—to demonstrate that these qualities are thought to be present in marriage and absent in the lives of unmarried people. The preference for marriage operates not only through the specific examples of differential treatment of unmarried people, but also through the broader value structure which these examples embody.

A Woman's Place: Gender Roles

Most social commentary about unmarried people has focused on unmarried women and their departure from women's traditional role as wife and mother. Historically, women's choice to remain unmarried has been viewed as a "challenge . . . to traditional attitudes about women's role and

held that a wife who was fired based on an employer's anti-nepotism rule was not discriminated against because she was married, but because she was married to a supervisory employee in the same establishment. Manhattan Pizza Hut, Inc. v. New York State Human Rights Comm'n., 51 N.Y.2d 506, 415 N.E.2d 950, 434 N.Y.S.2d 961 (1980). In other words, had the woman been married to a person other than the supervisory employee, she would not have been fired. *Id.* Though some jurisdictions have held to the contrary in nearly identical factual situations, *e.g.*, Kraft, Inc. v. Minnesota Dept. of Human Rights, 284 N.W.2d 386 (Minn. 1979); Washington Water Power Co. v. Washington State Human Rights Comm'n., 91 Wash. 2d 62, 586 P.2d 1149 (1978), these cases show that the burden of distinctions based on marital status does not always fall on unmarried people.

16. I arrived at these four values or norms inductively. In other words, after locating all of the examples to which I refer in this section, I began to see these four categories emerging. This is not to say that these are in any way "natural" categories; the way these examples have broken down undoubtedly has much to do with my perspective. Certainly, other groupings could be made. However, when reflecting on all of the examples to find some kind of organizing principle, I saw them as falling into these categories. Thus, I began with the examples and induced categories from them rather than using an opposite, deductive approach.

women's destiny . . . ."[17] Society has responded to that challenge, whether real or perceived, by characterizing unmarried women in negative ways. For example, unmarried women are called "old maids"[18] or "spinsters"[19] while unmarried men are called "bachelors." These terms demonstrate the tone of society's view of unmarried women.

Throughout history, the legal rules relating to marriage have been used to define women's proper role. As Blackstone reported:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection and cover, she performs everything . . . .[20]

Married women lacked the capacity to enter into contracts, to sue, or to be sued; furthermore, they could not dispose of property without their husbands' consent.[21] Wives were thought to be totally dependent on their husbands; the husband determined where and how she would live, and had control over all of his wife's property, including wages.[22] Though many of these laws were changed by the Married Women's Property Acts,[23] women are still uncompensated for domestic labor[24] and forced to adopt their husband's choice of domicile.[25] Thus, the legal consequences of marriage still determine the role of women in a number of significant ways.

While the legal trappings of marriage have been used to define women's proper role, unmarried women have been stigmatized for their refusal to adopt that role. Historically, marriage alone was thought to be "that state in which women's character would be most fully developed"; a "few authors went so far as to say that . . . marriage was the only true life for women. . . ."[26] Thus, unmarried women were not complete, not fulfilled; in short, they were not real women.

Unmarried women had limited occupational opportunities. Many were

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17. L. CHAMBERS-SCHILLER, *supra* note 1, at 15 (1984).

18. *Id.*

19. *Id.* at 219 n.10.

> The origin of the word "spinster" is interesting. In England the word was in use from the mid-fourteenth century to denote one (usually a woman) whose occupation was spinning. From the seventeenth century on, this occupation title shifted to designate an unmarried woman; and in the eighteenth century the term began to imply as well a woman not only unmarried, but beyond the usual age of marriage — an old maid.

Leonardo, *Warrior Virgins and Boston Marriages: Spinsterhood In History and Culture*, FEMINIST ISSUES, Fall 1985, at 47.

20. W. BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 442-45 *reprinted in* L. KANOWITZ, SEX ROLES IN LAW AND SOCIETY: CASES AND MATERIALS 61 (1973).

21. G. DOUTHWAITE, UNMARRIED COUPLES AND THE LAW 7-8 (1979).

22. Olsen, *The Myth of State Intervention in the Family*, 8 U. MICH. J.L. REF. 835, 847-49 (1985).

23. E. B. WARBASSE, THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN 1800-1861, 137-247 (1987).

24. Olsen, *supra* note 22, at 851.

25. L. CHAMBERS-SCHILLER, *supra* note 1, at 8.

26. *Id.* at 15. Further documentation of historical attitudes toward unmarried women can be found in the fiction of the times. For example, George Gissing's novel, The Odd Women, first published in 1893, tells the story of three unmarried women and their inner struggle to find contentment. G. GISSING, THE ODD WOMEN (1977). Gissing wrote: "The life of an unmarried woman is a wretched one; every man who is able ought to save one of them from that fate." *Id.* at 93.

teachers[27]; others worked in textile mills.[28] Domestic service was "everyone's last choice."[29] In addition, "[w]hatever an unwed daughter's age, her parents never recognized her as fully self-governing."[30] Fathers "retained responsibility for [their] daughter[s] and held a claim on [their] services."[31] Indeed, many unmarried women "felt a conflict between their vocational lives and their domestic duties,"[32] just as working mothers do today. Unmarried women were expected to maintain a family's social connections, and to remain "on call" for their families throughout their lives.[33] The tension that these women felt between their personal goals and desires and their family ties had tragic results for many single women who "retired into illness or depression."[34] In addition, because unwed women did not often become mothers, they were seen as "less than fully female," as "unnatural," as "biologically and socially deviant."[35] Thus, unmarried women were socially disadvantaged in work, family and public opinion for refusing to adopt women's traditional role.

Things have not changed as much as we would like to think. A recent episode in which the American media painted a picture of unmarried women as unfulfilled and unhappy is illustrative. In a recent cover story, *Newsweek* magazine reported the results of a recent study of marriage patterns in the United States.[36] According to the report, "college-educated women born in the mid-'50's who are still single at 30 have only a 20 percent chance of marrying. By the age of 35 the odds drop to five percent. Forty-year-olds are more likely to be killed by a terrorist: they have a minuscule 2.6 percent probability of tying the knot."[37] The story went on to report the "hysteria" that this study had generated among single women,[38] and that the message of the study "clearly came as a slap in the face to this generation's best and brightest women."[39] The article claimed that one of the main reasons that people are waiting longer to marry than they used to is that they are more selective in choosing mates now.[40]

Of particular interest, the article distinguished between unmarried men and women. It argued that men's feelings of self-worth come from work, but women's self-worth comes from marriage,[41] and concluded that women suffer "the anguish of being single," which is compounded by women's concern that their biological clock will run out before they have a chance to marry

27. L. CHAMBERS-SCHILLER, *supra* note 1, at 32 ("Between 1825 and 1860, roughly one-fourth of all native-born, New England women taught school for some years of their lives").
28. *Id.*
29. *Id.* at 31.
30. *Id.* at 107.
31. *Id.*
32. *Id.* at 109.
33. *Id.* at 112.
34. *Id.* at 173.
35. *Id.* at 167.
36. *Too Late For Prince Charming?*, NEWSWEEK, June 2, 1986, at 54-61.
37. *Id.* at 55.
38. *Id.*
39. *Id.* at 56.
40. *Id.* at 57.
41. *Id*

and have children.[42] The article reported that men want traditional relationships: " 'I want to come home to a dinner, not to an empty house.' "[43] The story concluded by warning that women might want to think about marrying "sooner than later,"[44] so that they will not run out of time.

The ABC News program called "After the Sexual Revolution" reported the results of the same study.[45] A tearful professional woman was interviewed, lamenting over her fear of remaining alone.[46] The clear message was that "[f]reedom and independence [turn] to loneliness and desperation."[47] Women who "put career first are paying a heavy price."[48]

Neither of these reports said that women should get married. Still, the traditional picture of unmarried women as sad, lonely, unfulfilled and desperate comes through clearly. Women's choice to remain unmarried, to reject women's traditional role in perhaps the most fundamental way, is burdened by this social stigma. The gender roles established through the legal rules that accompany marriage are thought to be the morally and socially correct roles for women. Unmarried women are made to feel morally and socially incorrect for their refusal to adopt the role that has been created for them through the legal institution of marriage.

One final example from my own experience will show that these negative attitudes toward unmarried women have very real effects.[49] Florida insurance law provides that an insurance company may not refuse to insure any person because of his or her marital status.[50] In practice, however, at least one large insurance company that services the Miami area has adopted internal rules which refuse renter's insurance to any household unless someone is at home all day, every day.[51] This policy excludes not only all single persons, but also married or unmarried two-worker families: households in which no one occupies women's traditional role. Thus, these companies have acted to reinforce women's traditional role as housewife, as well as women's traditional financial dependence on their spouses. This latter aspect of marriage—women's traditional financial dependence on their husbands—is the focus of the following section.

Interdependency

As recently as 1986, the Supreme Court upheld Social Security laws that distinguish among beneficiaries on the basis of marriage.[52] The latest case in this area involved a challenge to a statutory authorization of payment

42. *Id.*
43. *Id.* at 61.
44. *Id.*
45. *After the Sexual Revolution*, ABC News Transcript (August 1, 1986), at 15.
46. *Id.* at 16.
47. *Id.* at 14.
48. *Id.* at 15.
49. I have included one or two personal examples in this article because I believe in what Mackinnon has called feminism's "methodological secret," the use of our own experiences as our data bases. C. MACKINNON, *supra* note 8, at 5.
50. FLA. STAT. ANN. § 626.9541(x)(1) (1984).
51. Telephone interview with S. John Costa, Allstate Insurance Co. (July 8, 1985).
52. Bowen v. Owens, 106 S. Ct. 1881 (1986). *See also* Mathews v. DeCastro, 429 U.S. 181 (1976); Califano v. Jobst, 443 U.S. 282 (1979); Simon, *Rights and Redistribution in the Welfare State,*

of survivor's benefits to widowed spouses who remarried after age 60 but not to "similarly situated" divorced widowed spouses.[53] The Court reasoned that "[t]he idea that marriage changes dependency is expressed throughout the Social Security Act;"[54] and that the use of "marital status as a general guide to dependency"[55] is neither "arbitrary [n]or irrational."[56] Though the Court reasoned that the Social Security Administration has been moving, albeit slowly, to eliminate this distinction,[57] the Court's reasoning here and in the past indicates that it finds no constitutional infirmity in this legislation.[58]

As the language of this case demonstrates, married people are presumed to be interdependent, and unmarried people are presumed not to be. This presumption operates in many situations involving allocative decisions. For example, tax laws have always distinguished between married and unmarried persons, though the burdens and benefits of these laws have shifted over the years.[59] Also, worker's compensation is generally restricted to the worker's legal spouse.[60]

Intestate succession laws also embody the presumption that married people are financially interdependent and unmarried people are not. This presumption is expressed in this context by the fact that a married decedent's estate normally passes to his or her spouse, while an unmarried decedent's estate does not, despite even long-term cohabitation with another person. The assumption is that married people wish to continue to support their spouses after their death, but that no such assumption can be made regarding unmarried people.

For example, in New York, for property to pass intestate to a "significant other," there must be a "lawful matrimonial status" between the parties.[61] Otherwise, the decedent's estate passes to his or her parents or the state.[62] The obvious response is that, to opt out of this plan, all one need do is leave a will. However, certain kinds of property—co-op apartments in New York, for example—cannot be transferred by will to a "friend" without the approval of the Board of Directors, though the same property can be bequeathed to a lawful spouse or child without such permission.[63] Thus, in some circumstances, with respect to certain kinds of property, only a formal marriage or blood relation will protect the decedent's intent. This is so because partners in a formal marriage are presumed to have been interdepen-

38 STAN. L. REV. 1431, 1482-83 (1986); Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1145 (1981).

53. *Bowen*, 106 S. Ct. at 1881.

54. *Id.* at 1885 (citing Califano v. Jobst, 434 U.S. 47, 52 (1977)).

55. *Id.*

56. *Id.*

57. *Id.*

58. *See supra* note 52 and accompanying text.

59. Noonan, *The Family and the Supreme Court*, 23 CATH. U.L. REV. 255, 264 (1973); Blumberg, *supra* note 52, at 1157; Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFFALO L. REV. 49 (1972).

60. Blumberg, *supra* note 52, at 1140.

61. N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 note 65 (McKinney 1978).

62. *Id.*

63. T. STODDARD & E. BOGGAN, THE RIGHTS OF GAY PEOPLE 73 (1983).

dent during their lifetimes, and to want to continue to provide for their surviving spouse after their death, whereas the intentions of unmarried people are presumed to be different. Though unmarried people, single or living together, may in fact be financially interdependent during their lives, that fact is not acknowledged at their death. The presumption that marriage alone is characterized by interdependency is even stronger than reality in some situations.

Parenting

It is clear from a number of cases that both married and unmarried people have a right to choose in matters relating to procreation, including contraception[64] and abortion.[65] However, strange as it may seem, that does not mean that unmarried people have any legally protected interest in being parents. Though there appears to be tension between these two statements, when viewed in the context of the preference for marriage, any apparent inconsistency is resolved. Because we, as a society, believe that the best situation for a child is to have two married parents, we can justify facilitating an unmarried woman's efforts to avoid pregnancy while not supporting her efforts to become a parent. We encourage childlessness in unmarried people.

For example, unmarried people are discouraged from being foster parents despite the obvious fact that, for many foster children, a married couple is not available as an alternative. Though some foster care regulations distinguish between married and unmarried applicants due to a desire to prevent homosexuals from being foster parents,[66] their prescriptions are couched in terms of marital status, with no explicit reference to sexual preference. For example, the Massachusetts foster care regulations establish a hierarchy for foster care placements, beginning with the child's own home and working down to unmarried persons and, finally, community residences.[67] In addition, placements with single persons or unmarried couples "require the written approval of the Commissioner," though no other placements must meet that requirement.[68] Thus, placements with unmarried people are more strictly scrutinized than any others.

A second example will show that this attitude is present not only when parent (or applicant) and child are not blood relations, but also in situations involving unmarried, biological parents and their children. In June 1986, a newborn child, "Baby Jesse," was turned down for a heart transplant by Loma Linda University Medical Center because his parents were unmarried.[69] The hospital eventually reconsidered, but not until the parents agreed to sign over custody of the infant to his grandparents.[70] The alleged justification for this was that a young, unwed couple might not be "up for an

64. Eisenstadt v. Baird, 405 U.S. 438 (1972).
65. Roe v. Wade, 410 U.S. 113 (1973).
66. *New Policy on Foster Care: Parenting By Gays Almost Ruled Out*, Boston Globe, May 25, 1985, at 1, col. 3.
67. MASS. REGS. CODE tit. 110, § 7.101 (1986).
68. *Id.*
69. N.Y. Times, June 15, 1986, at 1, col. 1.
70. *Id.*

awesome responsibility."[71] This incident demonstrates society's deep and pervasive bias in favor of marriage in illustrating the ease with which decisionmakers assume that marital status and the ability to take responsibility are essentially connected.

Professor Linda Lacey has documented a number of other examples in which the law's bias toward marriage burdens unmarried peoples' choice to become parents.[72] She reports that "many [adoption] agencies have rules which prohibit single parent adoption . . . ."[73] In addition, she says, the Attorney General of Oklahoma issued an opinion in 1983 prohibiting artificial insemination of single women.[74] "A 1979 study showed that only 10% of all doctors who perform artificial insemination will perform the procedure on single women."[75] These examples are further evidence of the nature and degree of the burden unmarried people face when attempting to become parents.

These examples also demonstrate the assumptions that we make regarding the ability and propriety of unmarried people as parents. Marital status is used as shorthand for the values associated with parenting; unmarried people are assumed to be less capable of loving and caring for a child than married people. The underlying notion seems to be that marriage instills values and capabilities associated with parenting in people who, before or in the absence of the marriage ceremony, did not have those capabilities. Though it certainly would be helpful if good parenting skills could be transmitted that easily, all of our information about child abuse, for example, indicates that such is not the case. Marriage in itself does not make good parents; the absence of marriage, too, in itself, does not make parents bad ones.

Permanence and Stability

One of the underlying reasons for preferring that parents be married is that marriage signifies permanence and stability. These values are expressed through the notion of the home. The home is seen as the locus of family life; a "good" home is thought to be one headed by a married couple.

Not surprisingly, then, housing law is riddled with examples of marital status distinctions. Many laws and zoning ordinances restrict occupancy to "families." When "family" is defined narrowly to include only people who are related by blood or marriage, unmarried people are excluded.

For example, federal public housing legislation limits low income housing to "families."[76] The term "families" is defined to include single persons who are elderly, handicapped, displaced, the "remaining member of a tenant family," and "other single persons," provided that "in no event shall more than fifteen percent of the units under the jurisdiction of any public housing

71. *Id.* at 16, col. 1.
72. Lacey, *The Law of Artificial Insemination and Surrogate Parenthood in Oklahoma: Roadblocks to the Right to Procreate*, 22 TULSA L.J. 281 (1987).
73. *Id.* at 282.
74. *Id.* at 283.
75. *Id.* at 290 n.47.
76. 42 U.S.C. § 1437 (1974).

agency be occupied by single persons."[77] In addition, preference must be given "to those single persons who are elderly, handicapped or displaced."[78] Thus, single persons are treated differently than collectivities. Their numbers are limited, and the young single person is given the lowest priority.

Some states have passed legislation prohibiting discrimination on the basis of marital status in housing. For example, Colorado has a statute prohibiting discrimination on the basis of marital status in any aspect of housing.[79] However, this statute does not "apply to or prohibit compliance with local zoning ordinance provisions concerning residential restrictions on marital status."[80] Oregon has a similar statute prohibiting marital status discrimination in selling, renting or leasing real property.[81] However, this section does not apply if "the application of this section would necessarily result in common use of bath or bedroom facilities by unrelated persons of opposite sex."[82] Thus, these statutes tend to take away with one hand much of what they have given with the other.

There are a number of cases interpreting zoning ordinances which restrict land use to single-family dwellings. The seminal case on this issue is *Village of Belle Terre v. Boraas*.[83] In that case, six students challenged a zoning ordinance restricting the property they were renting to single-family use.[84] The word "family" had been defined by the village to mean "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit . . . ."[85] The students challenged the constitutionality of the ordinance on a number of grounds, including the rights to travel and to privacy.[86] The Court upheld the ordinance, reasoning that the goal of "lay[ing] out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people" is a legitimate one.[87]

A number of state courts have echoed this sentiment. In a recent case in New York, the New York City Rent Control Law, which restricted cohabitation to "related persons," was held to prohibit two lesbians from living together.[88] In *City of Newark v. Johnson*,[89] the Essex County, New Jersey court held that a "family" is "one or more persons . . . related by blood, marriage or adoption"[90]; and that this definition worked to the exclusion of foster children.[91] These cases as well as a number of others[92] demonstrate

77. 42 U.S.C. § 1437(a)(2) (1974).
78. *Id.*
79. COLO. REV. STAT. § 24-34-502(1)(a) (1973).
80. COLO. REV. STAT. § 24-34-502(2) (1973).
81. OR. REV. STAT. § 659.033 (1987).
82. OR. REV. STAT. § 659.033(3) (1987).
83. 416 U.S. 1 (1973).
84. *Id.* at 2-3.
85. *Id* at 2.
86. *Id.* at 7.
87. *Id.* at 9.
88. Avest Seventh Corp. v. Ringelheim, 109 Misc. 2d 284, 440 N.Y.S.2d 159 (1981).
89. 70 N.J. Super. 381, 175 A.2d 500 (1961).
90. *Id.* at 384, 175 A.2d at 501.
91. *Id.* at 385, 175 A.2d at 503.
92. Fraydun Enter. v. Ettinger, 91 Misc. 2d 119, 397 N.Y.S.2d 301 (1977); Stafford v. Sands Point, 200 Misc. 57, 102 N.Y.S.2d 910 (1951); Cassidy v. Triebel, 337 Ill. App. 117, 85 N.E.2d 461

how a restriction of land use to single-family occupancy can work to the detriment of unmarried people—students, homosexuals and other cohabitants.

The preference for marriage thus works to exclude unmarried people from establishing a shared home in some jurisdictions. This is so not only because relationships among unmarried people are presumed to be less permanent and stable than relations between married couples, but also to make it difficult, if not impossible, for relations among unmarried people to become permanent and stable. It is not just that sexual relations between unmarried people are thought to be immoral and so unmarried people should not be permitted to cohabit. "Social outrage is power protecting itself; it is not morality."[93] The preference for marriage is used to perpetuate itself; in the name of morality, unmarried people are prevented from forming stable, permanent relationships that are not characterized by marriage. As a result, the notion that unmarried people do not have stable and permanent relationships is reinforced, and so the preference for marriage as the vehicle for stable and permanent relations is reaffirmed. In this way, the preference for marriage feeds on itself, justifies itself, and becomes an increasingly powerful ideal.

Summary

The foregoing illustrates the frequency and scope of distinctions based on marital status. All of these distinctions flow from values or norms associated with marriage. If marriage means "good" values or norms—the traditional division of gender roles, interdependency, parenthood and permanence and stability—then the absence of marriage is seen as the absence of those values or norms.

This collection of examples of distinctions based on marital status is not exhaustive; still, it demonstrates that a preference for marriage exists in both law and society, and that unmarried people are burdened by that preference in significant ways.[94] Distinctions based on marital status, however varied,

(1949). *See also* New York Post, Oct. 6, 1987, at 9, col. 5. (New York Supreme Court rules that an unmarried survivor to a "live-in" relationship cannot take over the rent-stabilized apartment of his or her deceased lover; only members of a decedent's "immediate family" may take over such an apartment). *But see infra* notes 179-184 and accompanying text.

93. A. DWORKIN, *supra* note 5, at 160.

94. Bulloch v. United States, 487 F. Supp. 1078 (D.N.J. 1980); Casenote, *Loss of Consortium and the Unmarried Cohabitant*: Bulloch v. United States, 1981 B.Y.U. L. REV. 437; Note, *Extending Consortium Rights to Unmarried Cohabitants*, 129 U. PA. L. REV. 911 (1981). Other examples include the fact that, though a few jurisdictions have begun to allow recovery for loss of consortium between cohabitants, Bulloch v. United States, 487 F. Supp. 1078 (D.N.J. 1980); Casenote, *supra;* the general rule continues to be that cohabitants, and, in some cases, even common law wives, cannot recover for loss of their partner's consortium. Felch v. Air Florida, Inc., 562 F. Supp. 383 (D.D.C. 1983) (cohabitants); Kiesel v. Peter Kiewit & Sons' Co., 638 F. Supp. 1251 (D. Haw. 1986) (common law wives). Also, in a case in which a police informant claimed that a municipality had a duty to protect both the informant and his girlfriend, the court held that, though there would be a duty on the part of the municipality to protect the informant's "family," that duty did not extend to the girlfriend. Miller v. United States, 561 F. Supp. 1129 (E.D. Pa. 1983). Finally, at least one court has held that a woman in a "non-formalized marital relationship" cannot invoke the marital privilege against testifying before a grand jury. *In re* Grand Jury Proceedings Witness Ms. X, 562 F. Supp. 486 (D.C. Cal. 1983).

reflect the deep attachment that we as a society have for the values and norms associated with marriage. However, only the preference for marriage itself justifies the belief that those values and norms do not and cannot exist outside of marriage. In the sections that follow, I will argue that this belief cannot be justified by either law or modern morality. The point is not to argue about rights, but to show, first, that the legal arguments against the preference for marriage can be made in ways that have been accepted by courts in other contexts, and, second, that these arguments advance the concerns not just of unmarried people, but of feminists, gays and people of color. The point, really, is to sensitize the reader to the baseless but pervasive legal and social bias against unmarried people.

THE CONSTITUTIONAL PROTECTION OF UNMARRIED PEOPLE

As I have just said, this article is not about rights. In other words, I do not claim to have fashioned a legal argument that, through the mere exercise of logic or legal method, deduces favorable outcomes for unmarried people from the general premises set forth in the Constitution. I eschew any such claim because I believe that legal rules are extremely manipulable and, therefore, cannot determine results in a particular case.[95] Consequently, "rights" analysis is at best meaningless and at worst harmful because it purports to protect when, in fact, its manipulability makes any meaningful protection impossible.[96]

Rather, this section is designed only to show that strong, credible, legal arguments can be made to support the elimination of distinctions based on marital status. The purpose of this endeavor is two-fold: first, once we see that the argument can be made fairly and easily, it becomes apparent that it does not prevail only because, as a society, we choose to adhere to our preference for formal marriage. It follows, then, that it is possible to choose otherwise. In other words, I make these legal arguments to demonstrate that distinctions based on marital status are upheld only because of judicial and legislative acceptance of the strong social bias in favor of formal marriage, and not because legal avenues to change do not exist.[97]

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95. *See, e.g.*, Tushnet & Jaff, *Critical Legal Studies and Criminal Procedure*, 35 CATH. U.L. REV. 36 (1986) (legal rules cannot determine results in particular cases).

96. Jaff, *Hiding Behind the Constitution: The Supreme Court and Procedural Due Process in* Cleveland Bd. of Educ. v. Loudermill, 18 AKRON L. REV. 631 (1985). *But see* Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987).

97. If legal rules are manipulable, then the choice of one or another outcome in a particular case is informed not by precedent but by a variety of other forces. *See, e.g.*, Tushnet & Jaff, *supra* note 95 (the choice of how to interpret a legal rule is necessarily based on factors other than the rule itself). Thus, though the legal arguments both for and against eliminating marital status distinctions can be made, the decision as to which argument is more persuasive has more to do with our collective judgments about marriage and the family than with the merits of either argument. This is supported by the extent to which judges discuss social norms in these cases, and the observation that the decisions in these cases often depend largely on a judge's view of what the norm is. For example, in Marvin v. Marvin, 18 Cal. 3d 600, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), the California Supreme Court, in awarding palimony to an estranged cohabitant despite the lack of formal marriage, noted that "[t]he mores of society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many." *Id.* at 684, 557 P.2d at 122, 134. Cal. Rptr. at 831. Thus, this

Second, I offer the analysis to show that the arguments on behalf of unmarried people can strengthen arguments made in favor of the rights of women, people of color and homosexuals. This may help to identify a basis for coalition building among these groups. The fact that the legal arguments advance the concerns of all minorities evinces their shared perspectives and needs. A more unified strategy on the part of these groups would increase their strength and, thus, their political clout. My aim is to encourage this unification by demonstrating the shared interests of these minorities.

The Right To Not Marry

a. *Standard of Review*

Regulations that have the effect of penalizing the decision to not marry should be given the same judicial treatment as other marriage-related decisions.[98] The constitutional framework for this argument is a kind of hybrid substantive due process/equal protection analysis such as that fashioned by the Supreme Court in *Eisenstadt v. Baird*.[99] In *Eisenstadt*, the Court reasoned that the fundamental right to privacy "must be the same for the unmarried and the married alike,"[100] thereby superimposing equal protection analysis on the right to privacy.

The development of constitutional doctrine leading up to *Eisenstadt* and continuing through *Roe v. Wade*[101] and its progeny is a fascinating story in itself.[102] In the early twentieth century, the Supreme Court used the four-

court recognized a change in social mores regarding marriage and the family, and based its decision on that change. In contrast, the United States Supreme Court has repeatedly clung to the values which the California court thought were outmoded. For example, in refusing to set aside an order for adoption challenged by an unwed father, the Court said: "The institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society." Lehr v. Robertson, 463 U.S. 248, 257 (1983). Thus, the Court's view of social norms regarding marriage led it to refuse to protect the unwed father's parental rights. (One should note, however, that in *Lehr* the Court also rejected the centrality of the "mere" biological relation between parent and child in determining parental rights, thus adopting a fairly progressive notion of parenthood. *Id.* at 260). Therefore, it appears that a court's view of what the existing social norms are tremendously influences the outcome of these cases.

98. The reader should keep in mind that I am making this argument to demonstrate that it can be made; to show that this argument is as strong as others that have been accepted by the courts. However, as I have explained, I am generally opposed to rights analysis, *see supra* notes 95-96 and accompanying text, and I suspect that this argument might not be successful in our current judicial climate. Indeed, Professor Tribe, in his brief in Bowers v. Hardwick, 106 S. Ct. 2841 (1986), made an argument similar to the one that I make in this Article. He lost. *See* Brief for Respondent at 11, Bowers v. Hardwick, 106 S. Ct. 2841 (1986). However, this argument is not a losing one because of any doctrinal deficiency; instead, the preference for marriage causes judges to reject this argument.

99. 405 U.S. 438 (1972). The marriage and family cases have been decided on equal protection grounds, Department of Agriculture v. Moreno, 413 U.S. 528 (1973), or on substantive due process grounds, Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974). The analyses are virtually identical, though, in theory, equal protection involves "a 'rigid tier' system rather than the 'flexible balancing' afforded under substantive due process." Note, *Development in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1194 (1980). However, "[i]t doesn't matter whether such cases are analyzed in equal protection terms. . . .or in substantive due process terms. . . .Either doctrinal approach will serve whenever the law draws a classification that restricts the exercise of a significant liberty." Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 668 (1980).

100. *Eisenstadt*, 405 U.S. at 453.

101. 410 U.S. 113 (1973).

102. For an excellent, in-depth discussion of the right to privacy, see Note, *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521 (1986). I will focus only upon the relevant phases of that development.

teenth amendment due process clause to strike down economic legislation.[103] The Court applied a "reasonableness" test and asked whether the state's interference with economic liberties was a reasonable exercise of its police power.[104] By the late 1930s, however, that approach had been repudiated in the economic sphere.[105]

Nevertheless, in non-economic areas, the due process clause has provided justification for invalidating social legislation. In 1923, the Court struck down a statute that prohibited teaching foreign languages to young children.[106] The Court held that the statute interfered with the liberties protected by the fourteenth amendment, and that it had no "reasonable relation" to a legitimate state objective.[107] Two years later, the Court invalidated a state statute that required children to attend public schools on similar grounds.[108]

In 1942, the Court modified this analysis, creating the hybrid equal protection/substantive due process model on which I base my argument. In *Skinner v. Oklahoma*[109], the Court "first invoked fundamental interest analysis in the equal protection context."[110] There, the Court struck down a statute that authorized the sterilization of habitual criminals.[111] The Court held, first, that "marriage and procreation are fundamental to the very existence and survival of the race,"[112] thus couching the right in terms of a fourteenth amendment liberty interest. The Court then shifted to a discussion of the equal protection clause's prohibitions against unequal treatment. It reasoned that the law was unconstitutional because other criminals who had committed similar crimes would not be subject to the same deprivation.[113] Thus began the doctrine that fundamental rights derived from the fourteenth amendment's liberty interest must be shared by all, equally.

The Court used the same kind of analysis in *Loving v. Virginia*.[114] There, the Court invalidated a Virginia statute that prohibited interracial marriage, reasoning that the right to marry is fundamental and so could not be denied to some people but not to others solely on the basis of a racial classification.[115]

Eisenstadt falls into this same category of cases. There, the Court held that the fundamental right to privacy must be applied equally to both married and unmarried people.[116] *Eisenstadt* dealt with access to contracep-

103. Lochner v. New York, 198 U.S. 45 (1905).
104. *Id.* at 56.
105. G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 744 (1986) [hereinafter G. STONE].
106. Meyer v. Nebraska, 262 U.S. 390, 396-7 (1925).
107. *Id.* at 403.
108. Pierce v. Society of Sisters, 268 U.S. 510 (1927).
109. 316 U.S. 535 (1942).
110. G. STONE, *supra* note 105, at 751.
111. *Skinner*, 316 U.S. at 536-38.
112. *Id.* at 541.
113. *Id.*
114. 388 U.S. 1 (1966). Though the bulk of the *Loving* opinion centers on a pure equal protection analysis, the Court seemed to blend equal protection with due process analysis toward the end of the opinion. *Id.* at 12.
115. *Id.* at 12.
116. *Eisenstadt*, 405 U.S. at 453.

tives[117]; but strong arguments can be made in favor of applying the *Eisenstadt* rationale to a broader context.

The test used in these cases is: (1) does the challenged legislation or regulation interfere with the exercise of a fundamental right;[118] (2) if so, does the legislation or regulation create classifications which at least rationally relate[119] to the state's purpose or interest in the legislation, which purpose must be important or legitimate enough[120] to justify the infringement on the fundamental right?[121] For my purposes, the question is whether classifications based on marital status bear even a rational relation to a valid state interest.[122]

b. *The right to not marry is fundamental*

Through a long line of cases, the Supreme Court has firmly established that the right to marry is fundamental.[123] This right has been characterized as a right to privacy in the marriage relation[124] and as freedom of choice in matters of marriage and family life.[125] Using the *Eisenstadt* framework,[126] then, the move to finding a fundamental right to not marry is an easy one to make. Certainly, the choice of whether or not to marry is a choice relating to marriage and family life. If the choice to marry is fundamental[127] then, under *Eisenstadt*, that choice must be protected regardless of how it is resolved.

Eisenstadt dealt with the issue of whether a state could prohibit the distribution of contraceptives to unmarried people.[128] *Eisenstadt* followed *Griswold v. Connecticut*, which held that prohibitions on the distribution of contraceptives to married people violated the penumbras which emanate from the Bill of Rights.[129] All of the opinions in *Griswold* are based explic-

117. *Id.* at 440.

118. Griswold v. Connecticut, 381 U.S. 479 (1965); Zablocki v. Redhail, 434 U.S. 374, 383-87 (1978).

119. *Moreno*, 413 U.S. at 533; Belle Terre v. Boraas, 416 U.S. 1, 8 (1974); *LaFleur*, 414 U.S. at 643.

120. *Moreno*, 413 U.S. at 533 (legitimate); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 61 (1976)(important); *Zablocki*, 434 U.S. at 388 (important).

121. Other cases in this line of precedent employ slightly different standards of review. *See, e.g.*, Carey v. Population Serv. Int'l., 431 U.S. 678, 691 (1976) (legislation must be "substantially related" to the state's interest); Loving v. Virginia, 388 U.S. 1, 11 (1967) (classification "must be shown to be necessary to the accomplishment of some permissible state objective"); Califano v. Jobst, 434 U.S. 47, 53 (the classification must be relevant).

122. It must be noted that in other cases and other areas of law, the existence of a fundamental right triggers strict scrutiny, under which the test is whether the regulations are "justified by compelling state interests, and narrowly drawn to express only those interests." *Carey*, 431 U.S. at 686 (citing Roe v. Wade, 410 U.S. 113, 155-56 (1973)). Certainly, "every outright prohibition on marriage must pass the test of strict judicial scrutiny . . . ." Karst, *supra* note 99, at 672. However, since the Court, in the majority of right to privacy cases, has not applied strict scrutiny, I will use the lowest level of scrutiny, the rational basis test, to show that distinctions based on marital status do not meet even the most relaxed analysis.

123. *Zablocki*, 434 U.S. at 383; *Loving*, 388 U.S. at 12; Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

124. *Griswold*, 381 U.S. at 486; Boddie v. Connecticut, 401 U.S. 371, 374 (1970).

125. *Carey*, 431 U.S. at 685.

126. Eisenstadt v. Baird, 405 U.S. 438 (1972). *See supra* note 99 and accompanying text.

127. *Loving*, 388 U.S. at 12.

128. *Eisenstadt*, 405 U.S. at 440-42.

129. *Griswold*, 481 U.S. at 484.

itly on the special nature of the marriage relation. For example, Justice Douglas said: "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."[130] Thus, because the *Griswold* opinions focused so intently on the marriage relation, the question of its applicability to unmarried persons was left open.

That question was resolved in *Eisenstadt*. The Court said:

> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[131]

That same reasoning arguably applies beyond the narrow area of contraception. If the right to marry cannot be interfered with, then neither can the right to not marry. It is the choice of whether or not to marry, like the choice of "whether to bear or beget a child,"[132] which is or should be protected.

A number of courts and commentators have followed this logic and reasoned that the right to marry implies the right to not marry; and that the protection given to marriage and married persons must also be given to unmarried persons.[133] In *Stanley v. Illinois*, the Supreme Court held that if married fathers had to be granted a hearing on fitness before termination of parental rights, so, too, must unmarried fathers.[134] The unmarried father's due process rights must be equal to the married father's. A number of state courts have also addressed this issue. In the sodomy area, for example, some state courts have held that "to suggest that deviate acts are heinous if performed by unmarried persons but acceptable when done by married persons lacks even a rational basis."[135]

Many commentators, in discussing the *Griswold/Eisenstadt* line of cases, have drawn the same conclusion. Bruce Hafen (grudgingly) has said that "ultimately, any distinctions between the rights of married and unmar-

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130. *Id.* at 486.

131. *Eisenstadt*, 405 U.S. at 453 (emphasis in original).

132. *Id.*

133. *But see* Dronenburg v. Zech, 741 F.2d 1388, 1393-94 (D.C. Cir. 1984) (Judge Bork reasoned that the *Eisenstadt* rationale could not be extended to other contexts).

134. Stanley v. Illinois, 405 U.S. 645 (1972).

135. Commonwealth v. Bonadio, 415 A.2d 47, 51 (Pa. Sup. Ct. 1980). *See also* People v. Rice, 80 Misc. 2d 511, 363 N.Y.S. 2d 484 (1975) (distinction between married and unmarried persons with respect to sodomy laws has no rational basis).

It is not clear where the Supreme Court stands on this point. Of course, in Bowers v. Hardwick, 106 S. Ct. 2841 (1986), the Court upheld the constitutionality of the Georgia sodomy statute as applied to homosexuals. The Court has also denied a petition for certiorari in a case in which a state court struck down a sodomy statute as applied to unmarried heterosexuals. Post v. State, 715 P.2d 1105 (Okla. Crim. App.) *cert. denied*, 107 S. Ct. 290 (1986). Thus, it is unclear whether the Court would differentiate between married and unmarried heterosexuals, or whether it would draw the line between homosexual and heterosexuals, married or not.

ried persons. . .might be impermissible; the freedom to marry arguably implies the freedom not to marry."[136] Richard Saphire has argued that any reading of the Supreme Court's privacy cases which narrowly limits them to protecting only marital and procreative decisions is "at best a minimalist account of these cases."[137] In addition, both Louis Henkin and Kenneth Karst have argued that "the right to associate includes the right not to associate."[138] Karst, in arguing for a "freedom of intimate association," speaks of a "freedom of nonassociation," which protects against rape and unwanted pregnancy, both of which are characterized as "coerced associations."[139] To this, I would only add that the freedom of nonassociation ought also to protect against the subtle state coercion to marry that exists in many laws and regulations.[140]

Thus, in addition to the explicit language in *Eisenstadt*, numerous courts and commentators agree that the fundamental right to marry implies a fundamental right to not marry; and that whatever protections are afforded to married people can logically be extended to unmarried people.

The State Interest

Once the existence of a fundamental right to choose to not marry is accepted, the analysis shifts to a consideration of the state's interest, and the relation between the legislation or regulation and that interest.[141] Of course, the state can restrict or regulate marriage when it has an adequate reason for doing so. For example, a state may prohibit incestuous marriages, marriages between people of very young ages, or bigamy.[142] However, "there is a limit beyond which a state may not constitutionally go."[143] For example, a state may not intrude on an individual's due process rights merely for administrative convenience.[144]

In the privacy cases, the most common alleged state interest is the promotion of family values.[145] In this section, I will argue that the promotion of the family does not entail the promotion of marriage and, thus, that the state's interest in the promotion of family values is not even rationally related to distinctions based on marital status.

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136. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy — Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 510 (1983). Hafen argues, however, that these cases signify the weakening of important traditions of the family: that the traditions of the family and the individual are separate but mutually reciprocal; that maintaining the link between duty and liberty is essential to the preservation of our society; and that the cases which individualize rights (like *Eisenstadt*) are destructive. *Id.* at 569-74.

137. Saphire, *Gay Rights and the Constitution: An Essay on Constitutional Theory, Practice and* Dronenburg v. Zech, 10 U. DAYTON L. REV. 767, 787 (1985).

138. Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1420 (1974); Karst, *Freedom of Intimate Association*, 89 YALE L.J. 624, 638 (1980).

139. Karst, *supra* note 138, at 638.

140. *See supra* notes 17-94 and accompanying text.

141. *See supra* notes 118-123 and accompanying text.

142. *Zablocki*, 434 U.S. at 392 (Stewart, J., concurring).

143. *Id.*

144. *LaFleur*, 414 U.S. at 647.

145. *Eisenstadt*, 405 U.S. at 448; Belle Terre v. Boraas, 416 U.S. 1, 9 (1973); Hafen, *supra* note 136, at 470; Karst, *supra* note 138, at 681.

a. *The Limits of the Police Power*

The state's interest in most of the privacy cases is usually couched in terms of the promotion of the family.[146] The Court has always felt that the "institution of the family is deeply rooted in this nation's history and tradition."[147] Under the police power, states can protect their citizens from "that which is hostile to the welfare of the general public and contrary to good morals."[148] "The police power is not confined to elimination of filth, stench, and unhealthy places."[149] States have a "legitimate interest in preserving a 'family' style of living . . . ."[150]

However, there are important limits on the state's police power. There is a "private realm of family life which the state cannot enter."[151] The state may not attempt to control "the genetic or intimate internal family relations of human beings"[152] or "to cure or prevent most anti-social conduct."[153] "Conformity alone is clearly not a compelling state objective; and, the state's 'essentially unfocused and ill defined' interest in preserving a 'decent society' can rarely be demonstrated with sufficient particularity to satisfy constitutional requirements when fundamental rights are abridged."[154] Thus, the state has some interest in the promotion of family values, but in many cases, that interest alone is not enough to justify significant intrusions on fundamental rights.[155]

However, even if the state's police power includes the power to promote family values in all cases, the promotion of family values does not entail the promotion of marriage.

b. *Marriage and Morals*

In the past, it was not uncommon for courts to hold that cohabitation without marriage was illicit or illegal.[156] Recent trends, however, suggest

146. *Eisenstadt*, 405 U.S. at 448.
147. Moore v. East Cleveland, 431 U.S. 494, 503 (1977).
148. Orloff v. Los Angeles Turf Club, 36 Cal. 2d 734, 740, 227 P. 2d 449, 453 (1951).
149. *Belle Terre*, 416 U.S. at 9.
150. State v. Baker, 81 N.J. 99, 109, 405 A.2d 368, 372 (1979).
151. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
152. White Plains v. Ferraioli, 34 N.Y. 2d 300, 305, 357 N.Y.S. 2d 449, 452, 313 N.E. 2d 756, 758 (1974).
153. Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 253-54, 281 A. 2d 513, 520 (1971).
154. Note, *supra* note 99, at 1210-11. *Accord* Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 620 (1977) ("professedly beneficient, paternalistic motives should not be an automatic justification even for regulation that stops short of proscription"); Chambers, *The "Legalization" of the Family: Toward a Policy of Supportive Neutrality*, 18 U. MICH. J.L. REFORM 805, 817 (1985) ("In my view the family should not be seen as a tool of the state. It should be seen as a buffer from the state . . . ."); Richards, *The Individual, the Family, and the Constitution: A Jurisprudental Perspective*, 55 N.Y.U. L. REV. 1, 33 (1980) ("neither the moralistic nor the paternalistic judgments can, however, be sustained in the circumstances of contemporary life").
155. There is, of course, a large body of literature discussing the proper role of the state vis-a-vis the family. *See, e.g.*, Olsen, *supra* note 22, at 835 (the notions of intervention and nonintervention are incoherent and prevent us from focusing on the "realities of people's lives."); Chambers, *supra* note 154, at 805 (the state must achieve a delicate balance between neutrality and support with respect to the family). *See also infra* notes 253-66 and accompanying text.
156. Stevens v. Anderson, 75 Ariz. 331, 256 P. 2d 712 (1953); Cargill v. Hancock, 92 Idaho 460,

that the weight of authority has shifted. In *Marvin v. Marvin*, the court noted the "pervasiveness of nonmarital relationships," and reasoned that "to equate the nonmarital relationship of today to such a subject matter [prostitution] is to do violence to an accepted and wholly different practice."[157] Today, "nearly three million men and women of all social classes regard themselves as 'couples' and live together outside of marriage — a number that has more than doubled since 1970 and quadrupled since 1960."[158] In the early 1970s, Lenore Weitzman noted that "present standards of public morality are such that it is not unusual for people to have intimate relations or to live together without marrying."[159] This was echoed in 1976 by Mary Ann Glendon, when she said that "informal marriage is increasingly common . . . and increasingly accepted"[160] and by Phyllis Beck in 1979, when she reported that "nontraditional alliances are now socially and legally supportable."[161] Thus, it is well established that the attitudes and actions of both law and society have changed drastically with respect to the moral character of cohabitation and marriage.[162] Marriage no longer has the moral significance it once did. Neither is it the necessary foundation for the family.

c. *Marriage and the Family*

The declining moral significance of marriage has changed society's notion of the family. The family is no less important to us as a society, but our understanding of the family has evolved so that marriage is no longer an essential, definitional component of it. Increasingly, the courts have begun to "recognize those family relations unlegitimized by a marriage ceremony."[163]

The Supreme Court has vacillated on this issue. In *Smith v. Organization of Foster Families for Equality and Reform*,[164] the Court held that procedures for removal of children from foster homes did not violate procedural due process. The Court said that "biological relationships are not [the] exclusive determination of the existence of a family," noting, however, that marriage, a non-biological relation, is the "basic foundation of the fam-

444 P. 2d 421 (1968); Fineman, *Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation*, 1981 WIS. L. REV. 275.

157. Marvin v. Marvin, 18 Cal. 3d 660, 683, 557 P.2d 106, 122, 134 Cal. Rptr. 815, 831 (1976). *See also* Kozlowski v. Kozlowski, 80 N.J. 378, 403 A. 2d 902 (1979) (enforcing implied contract between two adult nonmarital partners); Latham v. Latham, 547 P. 2d 144 (Or. 1976) (enforcing agreement between nonmarital partners).

158. Chambers, *supra* note 154, at 805.

159. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1243 (1974).

160. Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 686 (1976).

161. Beck, *Nontraditional Lifestyles and the Law*, 17 J. FAM. L. 685, 690 (1978-79).

162. I do not wish to overstate my claim about attitudes toward the moral character of marriage. Clearly, political conservatives and religious fundamentalists have stressed what they see as a need to return to traditional family values. The popular support that groups like the moral majority enjoy is evidence that, though things may have changed in fact, many people are unhappy with that change.

163. Stanley v. Illinois, 405 U.S. 645, 651 (1972); Little v. Streater, 452 U.S. 1, 13 (1981) (citing *Stanley*). *But see* notes 17-94 and accompanying text.

164. 431 U.S. 816 (1977).

ily."[165] Still, the Court went on to describe the importance of the family in terms that would seem not to entail marriage. "Thus, the importance of the family relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promoting a way of life.' "[166] The Court spoke in terms of the "psychological family," stating that "individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state law recognition of the relationship."[167] This last point — that there can be a liberty interest against state interference even in the absence of state law recognition of the relationship — would seem to apply directly to unmarried people. Thus, if one follows this logic through, there can be a recognition of a family-based right to privacy even in the absence of formal marriage.

Similarly, in *Lehr v. Robertson*,[168] the Supreme Court rejected the notion of biology as the sole determinant of family. In *Lehr*, a putative father claimed that he was entitled to notice and a hearing before his child was adopted.[169] The Court held that he was not so entitled because "the mere existence of a biological link does not merit . . . constitutional protection."[170] The Court recognized the importance of marriage in our society, and reasoned that the importance of marriage leads to "an appropriate preference for the formal family."[171] However, the Court said:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.[172]

Thus, the preference for the formal family is not absolute. The biological connection is not enough on which to base constitutional protection. It is relationships that are protected, whether they grow out of a biological connection or not.

In *Moore v. East Cleveland*,[173] the Court struck down a zoning ordinance limiting occupancy to formal spouses and children of the tenant. The Court stated that "[o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family."[174] This together with the

165. *Id.* at 843.
166. *Id.* at 844.
167. *Id.* at 846. *See also* Lehr v. Robertson, 463 U.S. 248, 257-63 (1983) (citing Smith v. O.F.F.E.R., 431 U.S. 816 (1977)).
168. 463 U.S. 248, 261 (1983).
169. *Id.* at 250.
170. *Id.* at 261.
171. *Id.* at 257.
172. *Id.* at 262.
173. 431 U.S. 494, 496 (1977).
174. *Id.* at 504.

Court's refusal to limit the notion of the family to biology[175] would seem to indicate that the Court, at times, is willing to adopt an expanded notion of the family.[176]

Finally, in *Stanley v. Illinois*,[177] an unwed father sought custody of his children after their mother's death. The Court stated: "Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony."[178] In this statement, the Court explicitly acknowledges that family relations can exist in the absence of marriage. Thus, these cases indicate that the promotion of family values does not entail the promotion of marriage.

This point is furthered by an examination of state court opinions which attempt to define the family. The bulk of these cases arises from zoning ordinances or leases which limit occupancy to "families." In addition, these cases demonstrate that, in many jurisdictions, the marriageless family has been permitted to exist for many years.

In 1916, a tenant asserted that his landlord had the right to take in lodgers despite the fact that the lease limited the use of the property to a family residence.[179] The court defined the word "family" to mean "a collection of persons living together in a home, though none of them be married."[180] In a similar case in 1943, the Supreme Court of Michigan stated "[t]he word 'family' is one of great flexibility," which could refer to "any group constituting a distinct domestic or social body."[181] More recently, the same court found that "the exclusion of groups such as defendants [a religious group] from a residential neighborhood is not in any way supportive of family values."[182] The Supreme Court of California has concluded that the goal of maintaining a moral environment for families with children by excluding groups of unrelated individuals is not legitimate.[183] In *State v. Baker*, the Supreme Court of New Jersey stated that "[a]s long as a group bears the 'genetic character of a family unit as a relatively permanent household,' it should be equally as entitled to occupy a single family dwelling as its biologically related neighbors."[184] This recitation of state court decisions demonstrates that, in many jurisdictions, the family is not defined by the presence or absence of a marriage relation at its core. Indeed, the view of the family as centered on monogamous marriage is "more of an ideological figment of the judicial or legislative imagination than an accurate picture of an

175. Smith v. O.F.F.E.R., 431 U.S. 816 (1977). *See supra* notes 164-67 and accompanying text.

176. However, the Court has repeatedly refused to consider homosexuals as constituting a family. Bowers v. Hardwick, 106 S. Ct. 2841, 2844 (1986).

177. Stanley v. Illinois, 405 U.S. 645, 646 (1972).

178. *Id.* at 651.

179. Mullins v. Nordlow, 170 Ky. 169, 176, 185 S.W. 825 (Ct. App. 1916).

180. *Id.* at 177, 185 S.W. at 828.

181. Boston-Edison Protective Ass'n v. Paulist Fathers, 306 Mich. 253, 259, 10 N.W.2d 847, 849 (1943). *See also* Robertson v. Western Baptist Hosp., 267 S.W.2d 395 (Ky. 1954).

182. Township of Delta v. Dinolfo, 419 Mich. 253, 277, 351 N.W.2d 831, 843 (1984).

183. Santa Barbara v. Adamson, 27 Cal.3d 123, 133, 610 P.2d 436, 441, 164 Cal. Rptr. 539, 544 (1980).

184. State v. Baker, 81 N.J. 99, 108-09, 405 A.2d 368, 372 (1979).

American family that did or does actually exist."[185] Thus, again, the promotion of family values does not entail the promotion of marriage and the state's interest in promoting family values does not justify the promotion of marriage.

What is entailed by the promotion of family values is the promotion of cohesiveness, connectedness, mutual respect and responsibility, and sharing.

> Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.[186]

Though these are undoubtedly aspects of a (good) marriage, they are also characteristics of some nonmarital relations.

The most common state court definition of the family is that the family is a single housekeeping unit.[187] A family is "a collective body of persons living together in one house, under the same management . . ., and directing their attention to a common object, the promotion of their mutual interests and happiness."[188] A "family" in this sense of the word can exist with or without marriage at its core.[189]

Thus, the promotion of family values does not entail the promotion of marriage. The state's interest in promoting family values does not provide justification for the preferential treatment of married over unmarried people. Therefore, there is not even a rational relation between the promotion of family values and differential treatment of married and unmarried people; and laws and regulations which distinguish between people on the basis of marital status whether explicitly or in effect, should be struck down.

> If we were to hold that the State could attempt to coerce people into marriage, we would undermine the very independent choice which lies at the core of the right of privacy. We do not doubt the beneficient qualities of marriage, both for individuals as well as for society as a whole. Yet, we can only reiterate that decisions such as whether to marry are of a highly personal nature; they neither lend themselves to official coercion or sanction, nor fall within the regulatory power of those who are elected to govern.[190]

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185. E. RUBIN, THE SUPREME COURT AND THE AMERICAN FAMILY: IDEOLOGY AND ISSUES 187 (1986).

186. Roberts v. United States Jaycees, 468 U.S. 609, 619-20 (1984).

187. Cassidy v. Triebel, 337 Ill. App. 117, 127, 85 N.E.2d 461, 466 (1949); Des Plaines v. Trottner, 34 Ill. 2d 432, 436, 216 N.E.2d 116, 120 (1966); Brady v. Superior Court, 200 Cal. App. 2d 69, 78, 19 Cal. Rptr. 242, 247 (1962); State v. Baker, 81 N.J. 99, 108, 405 A.2d 368, 372 (1979); Marino v. Borough of Norwood, 77 N.J. Super. 587, 594, 187 A.2d 217, 221 (1963); Neptune Park Ass'n v. Steinberg, 138 Conn. 357, 363, 84 A.2d 687, 691 (1951); Gabe Collins Realty, Inc. v. Margate City, 112 N.J. Super. 341, 350, 271 A.2d 430, 435 (1970).

188. Missionaries of Our Lady of LaSalette v. Whitefish Bay, 267 Wis. 609, 615, 66 N.W.2d 627, 630 (1954).

189. Indeed, according to these definitions, one might guess that many collectivities that are characterized by marriage are not families.

190. State v. Saunders, 75 N.J. 200, 219, 381 A.2d 333, 342 (1977).

You Win Some; You Lose Some

Whether or not one accepts the substance of these arguments, their strength — their logic and their precedential foundation — cannot be denied. All I have done is to expand the rationale of *Eisenstadt*[191] and to use it in a broader context. There is nothing in *Eisenstadt* itself, or in any other case, that invalidates this approach. I am not claiming that this is a winning argument; in light of the current judicial climate, it would be foolish to expect this argument to meet with the Supreme Court's approval.[192] However, the argument is as strong as *Eisenstadt* itself — perhaps stronger because *Eisenstadt* now provides the precedential foundation for equal treatment of married and unmarried people that the *Eisenstadt* plaintiffs themselves lacked.

Thus, arguments in favor of striking down legislation and regulations which make distinctions based on marital status are strong and sound. When these arguments are not made, or are made and rejected, it is not because they do not exist. Instead it is because of the deeply felt preference in favor of marriage.

If this is so—if the preference for marriage is the guiding principle in cases involving unmarried people—then why do unmarried people ever win? In other words, there would seem to be a contradiction here; if the preference for marriage is so strong, how am I able to find any cases that support the position of unmarried people? Why do unmarried people win some of the time and lose some of the time? The answer is to be found in the preference for marriage.

This point can be demonstrated by contrasting cases in which unmarried peoples' choices have been given protection with those in which they have not. For example, in *Moore v. East Cleveland*,[193] the Supreme Court invalidated a zoning ordinance which limited occupancy to single families, defined as the tenant, his or her marital partner and children. In *Village of Belle Terre v. Boraas*,[194] however, the Court upheld an ordinance restricting land use to single-family dwellings, when "family" was defined as "one or more persons related by blood, adoption, or marriage . . . ." Thus, apparently opposite results were reached in seemingly similar cases.

Indeed, both cases involved zoning ordinances limiting land use to single families; both ordinances embodied restrictive notions of the family. The only obvious difference between these cases is the nature of the parties affected by the ordinances. In *Moore*, a grandmother challenged her conviction under the ordinance for allowing her grandchildren, who were first cousins, to live with her.[195] In *Belle Terre*, six college students wished to cohabit; none of the students were related to each other by blood or marriage.[196] Though both cases involved groups of unmarried people, the dis-

191. Eisenstadt v. Baird, 405 U.S. 438 (1972).
192. *See supra* note 98.
193. 431 U.S. 494 (1977).
194. 416 U.S. 1, 2 (1974).
195. *Moore*, 431 U.S. at 496.
196. *Belle Terre*, 416 U.S. at 2-3.

tinguishing characteristics of these groups led the Court to treat them differently.

The same seeming contradiction exists in cases involving singles as opposed to groups of unmarried people. In *Stanley v. Illinois*,[197] the Supreme Court held that an unwed father was entitled to a hearing on fitness before being deprived of custody of his children. In *Lehr v. Robertson*,[198] an unwed father was denied an opportunity to be heard before his child could be adopted. Again, the cases seem alike, and, yet, come to apparently opposite results.

Again, the difference between the cases is the nature of the parties affected. The *Lehr* Court distinguished *Stanley* on the grounds that Stanley had "developed [a] parent-child relationship" while Lehr had not.[199] Stanley "had lived with his children all their lives and had lived with their mother for 18 years. There was nothing in the record to indicate that Stanley had been a neglectful father who had not cared for his children."[200] On the other hand Lehr had "never had any significant custodial, personal, or financial relationship with [his child], and he did not seek to establish a legal tie until after she was two years old."[201] Again, though both cases involved single people, a determinate distinction was drawn between them.

It may be difficult to see how the preference for marriage could operate to distinguish between unmarried people. Distinctions between married and unmarried people are easier to attribute to the preference for marriage than distinctions among unmarried people. However both of the above pairs of cases can be explained according to the preference for marriage.

In Part I, I grouped examples of marital status distinctions in terms of values or norms associated with marriage, including the division of gender roles, interdependency, parenthood and permanence and stability.[202] Those values or norms are operative here. The Moores and Stanley came closer to satisfying one or more of the values or norms associated with marriage than did the Belle Terre students or Lehr. Thus, the values or norms associated with marriage were thought to be furthered by an outcome in favor of unmarried people in these cases.

Moore, in trying to keep her "family" together, was promoting the values of permanence and stability. She was trying to provide her grandchildren with a home. The Belle Terre students seemed unconcerned with these values; they were students, transients, seeking to live together for the sake of convenience. Indeed, the *Moore* Court distinguished *Belle Terre*, reasoning that the ordinance in *Belle Terre* "affected only unrelated individuals," and so "promoted 'family needs' and 'family values.' "[203] On the other hand, the East Cleveland ordinance "slic[ed] deeply into the family itself."[204] The dif-

197. 405 U.S. 645 (1972).
198. 463 U.S. 248 (1983).
199. *Id.* at 261.
200. *Id.* at 258.
201. *Id.* at 262.
202. *See supra* note 16 and accompanying text.
203. *Moore*, 431 U.S. at 498 (emphasis in original).
204. *Id.*

ference between the cases, then, is that the Moores looked like—were, in fact— a "real" family, whereas the students in *Belle Terre* did not. The Moores' cohabitation served the values and norms associated with marriage;[205] the students' did not. Thus, the preference for marriage led the Court to distinguish between these two groups of unmarried people.

The same can be said of *Stanley* and *Lehr*. Stanley was serving the value or norm of parenthood, one of the values or norms associated with marriage. Stanley had acted like a "real" father by staying in contact with his children and wanting to care for them after their mother's death; Lehr had not.[206] The Court was willing to treat Stanley as the functional equivalent of a married father, saying that when an unwed father "acts as a father toward his children," his interest "acquires substantial protection."[207]

That the preference for marriage is what is at stake here is borne out by Chief Justice Burger's dissenting opinion in *Stanley*. Burger argued that there is no constitutional violation when a state "gives full recognition only to those father-child relationships that arise in the context of family units bound together by legal obligations arising from marriage . . . ."[208] Justice Burger also argued that Stanley could have married his children's mother or acknowledged paternity earlier.[209] Furthermore, our "common human experience" tells us that unwed fathers "rarely burden either the mother or the child with their attentions or loyalties."[210] If, in fact, Stanley was an "unusual unwed father" in that he "always acknowledged . . . his fatherhood of these children," he would not have been so "concerned with the loss of the welfare payments he would suffer as a result of [losing custody]."[211] Burger apparently believed that the good unwed father was "unusual;" the state need not "tailor its statutory definition of 'parents' so meticulously as to include such unusual unwed fathers."[212]

Thus, for Burger, marriage is an appropriate shorthand for good parenting. The majority did not disagree "that most unmarried fathers are unsuitable and neglectful parents."[213] The majority differed with Burger on only one point: not all unmarried fathers are bad, and Stanley should have had a chance to prove that he was exceptional.[214] The disagreement was not about whether the preference for marriage was valid, but only about whether it should work as an absolute presumption against unwed fathers. The message of the majority opinion is that when an unmarried person looks and acts enough like a married person in his or her acceptance and furtherance

205. An extremely close connection exists between the preference for marriage and the preference for the "traditional" family. *See infra* notes 225-230 and accompanying text. At times, as here, the two are treated as interchangeable. This indicates something deeper than sloppy analysis: the preference for marriage is one way of promoting the "traditional" family. In this sense, the two interests overlap.

206. *See supra* notes 198-201 and accompanying text.

207. *Lehr*, 463 U.S. at 261.

208. *Stanley*, 405 U.S. at 663 (Burger, J., dissenting).

209. *Id.* at 664.

210. *Id.* at 665-66.

211. *Id.* at 666-667.

212. *Id.* at 666.

213. *Id.* at 654.

214. *Id.* at 654-55.

of the values or norms associated with marriage, he or she should be considered an exception and afforded protection. Still, Stanley was not granted custody by the Court; he was given a right to be heard like other fathers whose fitness is questioned, not like married fathers whose spouse dies, who presumptively have custody of their children.[215] Thus, he was not treated the same as similarly situated married fathers. The preference for marriage may allow for exceptions, but not for really equal treatment of married and unmarried people.

Stanley and *Moore* give tacit recognition to the argument that it is not marriage per se that represents "good" values; the values associated with marriage, which I accept for the moment as "good" for the sake of argument,[216] can be and often are promoted by unmarried people. However, the fact that these are treated as exceptional cases—as cases in which unmarried people depart from the normal behavior of unmarried people—is itself harmful to unmarried people. We have seen, with respect to other minorities, the danger of treating progressive individuals as exceptions.

In *Bradwell v. Illinois*, Justice Bradley, concurring, said that women who are "unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state," are "exceptions to the general rule" that "the paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."[217] "And the rules of civil society must be adapted to the general constitution of things, and cannot be based on exceptional cases."[218] This statement is similar to Chief Justice Burger's assertions about unusual unwed fathers in his dissent in *Stanley*.[219]

However, supposedly, we have come to understand the error in this analysis. In *Frontiero v. Richardson*, the Court said that "statutory distinctions . . . often have the effect of invidiously relegating [an] entire class . . . to inferior legal status without regard to the actual capabilities of its individual members."[220] Treating those who deviate from stereotypes as exceptions reinforces the validity of the stereotype. Thus, unmarried people must seek more than protection as exceptions from the general rule, the preference for marriage. They must shatter the stereotype; they must expose and delegitimize the preference for marriage.

TOWARD A REDEFINITION OF THE FAMILY: CRITIQUE AND SOLUTIONS

In the preceding section, I have made a standard rights-based argument to show that arguments that legal distinctions based on marital status should be struck down as violative of unmarried persons' right to privacy are, at the very least, credible legal arguments.[221] I have tried to show that

215. *Id.* at 658.
216. Some of these values are critiqued in the following section. *See infra* notes 233-243 and accompanying text.
217. 83 U.S. 130 (16 Wall. 1872).
218. *Id.* at 141-42.
219. *See supra* note 212 and accompanying text.
220. 411 U.S. 677, 686-87 (1973).
221. *See supra* notes 123-220 and accompanying text.

arguments that there is a fundamental right to not marry, and that the states' justification for marital status distinctions—the promotion of family values—does not bear even a rational relation to the promotion of marriage, can be made using standard legal arguments.[222]

However, I have also said that this is not an article about rights.[223] My objection to the law's preference for formal marriage is not that this preference tramples on the "rights" of unmarried people. Instead, the roots of my objection are in politics. In this section, I will discuss my political objections to the legal and social bias in favor of marriage.

In addition, I will try to respond to the standard criticisms of my position, which claim that legal distinctions must be made, and that we need a "bright line" rule for determining which kinds of relationships should be recognized by the law.[224] For example, if intestate succession laws could not distinguish between a lawful spouse and others, how will the law determine to whom an estate should pass? These are important questions that lead us to rethink our notions of what makes certain kinds of relationships special enough so that the law ought to recognize them. In other words, we must begin to rethink what we mean by the "family."

The "Traditional" Family: Critique

Marriage and the family are not perfectly synonymous; however, neither are they totally separate. When we talk about the "traditional" family, we understand that to be "a relatively harmonious group headed by a wage-earning husband attended by a homemaking wife and two children . . . ."[225] According to this definition, marriage is an essential, definitional component of the "traditional" family. "Without marriage, created by law, acknowledged by law, privileged by law, the family is a formless biological blob."[226]

The preference for marriage, then, in effect is often an expression of a preference for the "traditional" family. In fact, the two are often collapsed together, so that the preference for marriage is a preference for the "traditional" family. For example, Judge Roger Traynor has said: "Since the family is the core of our society, the law seeks to foster and preserve marriage."[227] The preference for marriage is a tool used by judges and legislatures to accomplish the goal of maintaining the "traditional" family.

Because advocates of the "traditional" family seek to maintain it through the preference for marriage, a critique of the preference for marriage inevitably leads to a consideration of the "traditional" family. If the preference for marriage is a means to an end, and if the validity of the means can be called into question rather easily, as I have shown it can, then it would make sense to examine the validity of the end itself—the "traditional"

222. *Id.*
223. *See supra* notes 95-96 and accompanying text.
224. Clark, *The New Marriage*, 12 WILLIAMETTE L.J. 441 (1976).
225. Morse, *Family Law in Transition: From Traditional Families to Individual Liberties*, CHANGING IMAGES OF THE FAMILY 321 (V. Tufte & B. Myerhoff eds. 1979).
226. Noonan, *supra* note 59, at 270.
227. *Id.* (quoting De Burgh v. De Burgh, 39 Cal. 2d 858, 864, 250 P.2d 598, 601 (1957)).

family. Also, inasmuch as the preference for marriage is an expression of the preference for the "traditional" family, the two can be discussed as essentially one.

The view of the family that I have argued no longer reflects legal or social reality defines the family as "monogamous, marital, a sacred, private relationship, . . . paternalistic, patrilineal, justified by its primary function of procreation and the raising, socializing and education of children."[228] It is headed by a male breadwinner and a female caretaker.[229] This "traditional" family is the family whose values the state is trying to promote through the promotion of marriage.[230]

I have already shown that many courts have recognized that this "family" is no longer the norm; that "family" can refer to collectivities other than the "traditional" family with formal marriage at its core.[231] This is so, at least in part, because many courts have recognized that the "traditional" family simply no longer reflects reality.[232] However, there are more important reasons why courts should question the validity of the "traditional" family as a legal norm, and why states should question whether this is the family whose values they wish to promote.

The "traditional" family is not just obsolete; it is also a bastion of male dominance, hierarchy, racism and sexual oppression. Marriage (and, so, the "traditional" family) has always meant women's "sexual availability at will"[233] and women's economic dependence;[234] and the family has always meant the nearly absolute authority of parents over children.[235] As long as the law continues to favor these kinds of relations, male dominance and intra-familial hierarchy will persist. In addition, since this theory of the family is overwhelmingly white[236] and heterosexual,[237] racism and sexual orientation discrimination will also persist as long as the law continues to favor "traditional" families.

> Society deems the institution of monogamous marriage to be a sacred cornerstone of Christian civilization, and through the majority's agent, government, it has used the law to institutionalize that value to the exclusion of competing views of marriage—to the extent that a minority's contrary, yet profoundly religious, duty will be criminalized. In sum, marriage is what collectivism-statism says it is, and woe unto individual rights if they get in the way.[238]

The social and legal preference for marriage (and, thus, for the "traditional"

228. E. RUBIN, *supra* note 185, at 20.
229. M. BARRETT & M. MCINTOSH, *supra* note 11, at 7.
230. *See supra* notes 193-215 and accompanying text.
231. *See supra* notes 163-90 and accompanying text.
232. *Id.*
233. M. BARRETT & M. MCINTOSH, *supra* note 11, at 55.
234. Olsen, *supra* note 22, at 851.
235. *Id.* at 850-51.
236. Peery, *Federal Policy and Private Alternatives* in THE AMERICAN FAMILY AND THE STATE 427 (J. Peden & F. Glahe eds. 1986) (about one half of the black families with children are single parent families).
237. Obviously, without a male and female coupling, the "traditional" family by definition cannot exist.
238. Holzer, *Philosophic Assumptions of Some Contemporary Judicial Doctrines* in J. PEDEN, *supra* note 236, at 173 (emphasis omitted).

family) affects each of these minorities negatively, though in slightly different ways. For example, the legal preference for marriage is gender discrimination. "Marriage is the legal ownership of women, the legal intercourse that is the foundation of male authority."[239] As such, marriage perpetuates male dominance; and so the law's preference for marriage is a tool of male dominance. The legal preference for marriage is one of many forms of legal sexism.[240]

The preference for marriage is also legal racism. "[F]amily living arrangements among people who are poor and who are members of racial and ethnic minorities depart significantly from the traditional model of the white-middle-class nuclear family."[241] Thus, by stubbornly adhering to the ideology of the "traditional" family at least in part through the bias in favor of marriage, the law encourages disrespect for non-traditional family arrangements. Because racial and ethnic minorities often choose those non-traditional family arrangements, the bias against those arrangements is racist.

Clearly, homosexuals are burdened by the legal preference for marriage. Homosexuals may not legally marry,[242] and so can never constitute a "traditional" family. This has had the effect of excluding homosexuals from the protections afforded by the marriage-family-procreation-based privacy right.[243] Thus, the gay rights movement has been significantly impeded by the legal preference for formal marriage and the "traditional" family.

Therefore, the legal preference for formal marriage negatively affects all minorities: gender, racial and sexual. An attack on that preference, and on the preference for the "traditional" family, is a project that can be shared by all of these groups. As such, it is a point of commonality on which to base coalition-building. If, as Richard Delgado has said, "[v]ictimization brings us together, building in us a community,"[244] then exposing that victimization is a first step towards that community. In addition, because the prefer-

239. A. DWORKIN, *supra* note 5, at 158.

240. For other forms of legal sexism, see *id.*; Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984).

241. Karst, *supra* note 99, at 686 (citing tenBroek, *California's Penal System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257, 900 (parts I and II) (1964) and 17 STAN. L. REV. 614 (part III) (1965)). I do not wish to paint with too broad a brush here. Clearly, some ethnic and racial minorities place great importance on the traditional family. However, as the above-cited sources indicate, the number of non-traditional family arrangements is, in fact, higher among racial and ethnic minorities in general than among whites. *Id.*

I use the phrase "people of color" purposely to include more than Black Americans. Indeed, quite a few minority groups have been burdened by the preference for marriage and the traditional family. For example, there have been various attempts to "reshape the [American] Indian family into the Anglo-American mold." Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 ARK L. REV. 327, 378 (1986). In the late nineteenth and early twentieth centuries, "repeated assaults were made on every aspect of American Indian family life, from communal land ownership to the education of Indian children." *Id.* at 329. "White policy toward American Indian families reflected an attempt to reshape these families into the *ideal* white family model. . ." which "consist[ed] of a husband, wife, and at least two children." *Id.* at 330-31 (emphasis in original). Even today, "[s]ocial workers continue to expect Indian families to conform to middle-class norms." *Id.* at 378. Thus, the racism inherent in the ideal of the traditional family affects various racial and ethnic minorities.

242. T. STODDARD & E. BOGGAN, *supra* note 63, at 81.

243. Saphire, *supra* note 137, at 787.

244. Delgado, *supra* note 96, at 313.

ence for marriage has a negative impact on each of these groups, a critique of that preference, and of the preference for the "traditional" family, is liberating for these minorities.

Because marriage is a definitional component of the "traditional" family, a first step towards changing the dominant view of the family is to show that families can exist without marriage at their core. Once we have taken that step, we can then proceed to rethinking and redefining the family in more realistic and less oppressive ways.

Toward Redefining the Family

What, then, should replace the "traditional" family in our laws as well as our lives? If formal marriage is not an acceptable "bright line" test for determining rights and obligations, how else can we make those determinations?

Assuming that we agree that some kinds of relationships are deserving of the law's recognition—assuming that we want to say that because of one's relationship with a decedent, for example, the surviving partner to that relationship is entitled to share in his or her estate or to receive survivorship benefits from Social Security—we must decide how to distinguish those relationships from others if not by reference to formal legal status. Thus, we must ask what makes those relationships important or special to us.

It is not, I would argue, the formal status of those relationships that makes them important. On the contrary, people formalize their relationships because they are important rather than the other way around. These relationships take on importance because of the functions they perform for the partners in the relationship.[245] Families, however they are composed, are understood to fulfill certain needs. "[P]rovision of secure relationships for sexual activity and procreation, provision of an environment suitable for child-rearing, creation of small, self-sufficient economic units, supplying of psychological and emotional support, and provision of care in sickness and old age."[246] Perhaps the best way to describe what a family does is to say that a family is a social unit "capable of fostering relationships characterized by intimacy, trust and mutual affection."[247]

The problem then becomes how to transform this psycho-social view of the family into legal rules for determining the legal rights and obligations that flow from certain relationships. One alternative is to adapt a strategy used by Nancy Polikoff in the custody area to a broader context. Polikoff suggests using a list of criteria for determining who, between two parents, is the primary caretaker, arguing that a presumption in favor of the primary

245. E. RUBIN, *supra* note 185, at 161 (living units that perform the functions of families should not be discriminated against "merely because they do not meet legal or biological definitions of families," thereby implying that the functions performed rather than the legal or biological status of the relations are what is important).

246. *Id.* at 155.

247. O'Driscoll, *Toward A New Theory of the Family*, THE AMERICAN FAMILY AND STATE 99 (J. Peden & F. Glahe eds. 1986).

caretaker is the best rule in custody disputes.[248] These criteria include:

> (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e., transporting to friends' houses, or for example, to girl or boy scout meetings; (6) arranging alternative care, i.e., babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i.e., teaching general manners and toilet training; (9) educating, i.e., religious cultural, social, etc.; and (10) teaching elementary skills, i.e., reading, writing and arithmetic.[249]

Of course, the substance of Polikoff's proposal applies directly to custody decisions, not to determining the relative importance of all relationships. However, what I am suggesting is that Polikoff's approach can be adapted to a broader range of problems. In other words, we could develop a list of factors according to which we determine the degree of relatedness between two or more people. For example, the list might include the following factors: (1) whether finances were pooled, large purchases made together, and monthly expenses paid together; (2) whether children had been born out of the relationship, or whether foster or adoptive children had been raised by both or all parties to the relationship; (3) whether food was bought, prepared and eaten together; (4) whether the relationship was stable and enduring; (5) whether the parties to the relationship cared for each other in times of sickness; etc. To use this approach to evaluate the degree of relatedness between single people and others (as opposed to unmarried people living together), one would merely have to adjust the list of factors accordingly. For example, the list might include factors such as: (1) whether there was frequent, perhaps daily, contact between the parties to the relationship; (2) whether financial assistance was exchanged on a fairly regular basis; (3) whether childcare responsibilities were shared or exchanged; (4) whether there was a high degree of intimacy and or confidentiality between the parties; and so on. These factors would be added to those above, and a realistic determination, true to the parties' intent, could be made.

The advantages of this approach for determining the rights and obligations of parties to non-formalized relationship are numerous. First, and, for me, foremost is that the focus is not on formality, but on the nature of the relationship. This would encourage recognition of and respect for non-traditional families, thereby eliminating the oppression inherent in the notion of the "traditional" family.[250] This would also encourage people to focus on the nature rather than the fact of their relationships, causing them to reflect on those relationships and to value them when they are healthy and supportive relations or to leave them when they are characterized by oppression and pain. In addition, this more flexible approach would encourage a more contextual inquiry into the nature of relationships rather than a purely formalis-

248. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria used in Child Custody Determinations*, 7 WOMEN'S RTS. L. RPTR. 235 (1982).

249. *Id.* at 242 (quoting Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981)).

250. *See supra* notes 233-243 and accompanying text.

tic analysis. Finally, this approach would also be administratively sound[251] and realistic.

The major disadvantage of this approach is that it only works in a legal context. Though some allocative decisions typically arise in such a context (for example, Social Security determinations), others do not. There are a myriad of instances in which society's preference for marriage is expressed, but recourse to the legal system seems inappropriate. For example, Barbara Cox reports one instance in which a lesbian couple was refused a "family" membership to a Y.M.C.A. because they did not meet the Y's definition of a "family," a married couple plus dependents.[252] Though this seems like a trivial example, it demonstrates that the bias against unmarried people pervades even the most ordinary aspects of our lives.

In situations such as this one, a solution that only works in a legal context is irrelevant unless we choose to appeal to the law in every aspect of our lives. This raises fundamental questions regarding the desirable degree and nature of state intervention into the personal lives of individuals. David Chambers has argued that, as the state comes to further involve itself in the lives of those who choose alternative lifestyles, the result may be "that government has opened its arms to embrace the wayward and will end up suffocating them in the process. . . ."[253] A solution that leads to a lifetime punctuated by frequent, expensive litigation for unmarried people is problematic at best.

In addition, many people choose alternative lifestyles purposely to avoid the legal consequences of formal marriage.[254] For alternative lifestyles to be real alternatives, the differences between the legal consequences of marriage and those of other lifestyles must be preserved.[255] Without a "bright line" test, decisions to opt in or out of those legal consequences could be frustrated. Also, as options become more complex and contextual rather than formalistic, the differences among those options begin to be obfuscated.

Furthermore, formalities help those who enter into formal relationships to appreciate the legal consequences of those relationships.[256] Without formalities, parties to non-marital relationships might not be able to anticipate the consequences of those relationships until a dispute arises and is adjudicated. This would make planning difficult, and would undermine peoples' reliance interests. Though it is natural for people to want their most significant relations to have the respect of both law and society, that does not mean that they also want the state to regulate those relations. "In any case, the trade-off is between the certainty of formality and the individual's freedom of choice."[257]

Some scholars have argued that the proper legal response to alternative

251. Evidence for this statement is found in the custody cases that use this approach without administrative problems. *See supra* note 248-249 and accompanying text.

252. B. Cox, Choosing One's Family: Can the Legal System Address the Breadth of Women's Choices of Intimate Relationships? 5 (unpublished manuscript).

253. Chambers, *supra* note 154, at 825.

254. Fineman, *supra* note 156, at 325.

255. *Id.*

256. *Id.* at 326.

257. *Id.* at 328.

lifestyles depends on the specific nature of the dispute to be resolved. Martha Fineman, in discussing legal responses to cohabitation, has distinguished between relations between cohabitants and relations between cohabitants and third parties or the state.[258] She suggests that "[t]he relationship between cohabitors and third parties is easier for the system to incorporate than the relationship between the cohabitors themselves."[259] While determining the consequences of a relationship between cohabitants would require courts to "examine the intricacies of individual relations on a case by case basis," determining the relationship between cohabitants and third parties or the state is easier.[260] This latter category of disputes requires only that a court rule that lifestyle choices are "an impermissible basis for discriminatory treatment,"[261] as I argued in Part II.[262] Because these cases would not require courts to engage in a detailed evaluation of relationships, "courts should be more willing to accept these cases and more likely to decide in favor of [those who choose alternative lifestyles]."[263]

The problem with this approach is that the line between disputes requiring a contextual analysis of the relationship between two individuals and disputes that require a less fact-specific analysis is blurred. For example, disputes about Social Security survivorship benefits or intestate shares in an estate are disputes in which the surviving party to a relationship must convince the state not only that the state cannot discriminate on the basis of marital status, but also that this particular relationship is worthy of the law's recognition. In other words, a ruling that marital status distinctions are impermissible leaves open the question of how to make allocative decisions if not based on formal status. That problem is not solved by distinguishing between types of disputes.

In the end, arguments about the proper nature and degree of state intervention—about whether and how the law ought to respond to alternative lifestyles—miss the point. Fran Olsen has argued that "focusing on 'nonintervention' tends to mush and confuse the ethical and political choices we make. It directs our attention to a false issue and obscures genuine issues of ethics and policy."[264] To borrow from Professor Olsen, the problem with the law's treatment of unmarried people is not really a problem of state "intervention," but a "problem of the substance of that state behavior."[265] The question is not whether, how and how much the state should intervene, for the state's apparent nonintervention into alternative lifestyles is itself intervention in the form of the disadvantages that flow from the preference for marriage.[266] The question is how to empower unmarried people—women, homosexuals, people of color and others—so as to lessen their burden with-

258. *Id.* at 330.
259. *Id.*
260. *Id.*
261. *Id.*
262. *See supra* notes 123-190 and accompanying text.
263. *Id.*
264. Olsen, *supra* note 22, at 861.
265. *Id.* at 863.
266. *See supra* notes 17-94 and accompanying text.

out eliminating their choice. Until we agree on that goal, it is premature to focus the argument on the means of achieving it.

For now, the focus must be on understanding the implications of the social and legal preference for marriage. By using marriage as a shorthand for "good" values, those who choose alternative lifestyles are made to seem value-less. However, when we begin to understand the preference for marriage as embodying the white, middle-class male values inherent in the ideology of the "traditional" family, we also begin to see that the preference for marriage is not a moral issue,[267] but a political one.

This deeper understanding of the social and legal preference for marriage is the first step toward allowing people to define their own families for themselves, and encouraging recognition of and respect for others' definitions. If that can be achieved, perhaps non-traditional relations based on sharing, caring and community will come to be more highly valued.

CONCLUSION

What started as an argument about unmarried people has now become an argument about the family. This is no mistake. Unmarried people and the family are not mutually exclusive. Indeed, the point has been to show how issues involving the status of unmarried people inevitably lead us to rethink the ideology of the family, which is a necessary step toward eliminating the oppression of all minorities: racial, sexual and gender. This is an issue, then, on which to base coalition-building among minorities.

It has always seemed to me that there is a natural affiliation between feminists, gays and people of color. Though these groups' interests are surely not identical, all of these groups seek to eliminate various forms of hierarchy and oppression. By identifying an issue that concerns all of these interests, I hope to have helped these groups to find some common ground.

As an unmarried, single woman, I know about the legal and social attitudes toward marriage first-hand. I cannot count the times that, after hearing about my work, my career, people have responded by saying: "But what you really need is to find a man, get married, have a family." What these people fail to understand is that I do have a family. There are people in my life with whom I share mutual understanding, respect, support and intimacy. My love for them is deep, permanent, and completely fulfilling. I am single, unmarried, but I am far from alone. In the end, the family is defined by the heart, not the law.

267. This phrase can be found in MacKinnon, *Not A Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984).