WHAT MARRIAGE EQUALITY ARGUMENTS PORTEND FOR DOMESTIC PARTNER EMPLOYEE BENEFITS

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"It is unjust to use marriage as the sole trigger for familial employment benefits, denying to unmarried families fundamental protections of which they have equal need."[1] So wrote Lambda Legal, the nation's largest LGBT rights legal organization, in a 2000 amicus curiae brief submitted to the Seventh Circuit in *Irizarry v. Board of Education of the City of Chicago*.[2] Milagros Irizarry was an employee of the Chicago public school system with an unmarried, different-sex partner of more than twenty years.[3] After the Chicago Board of Education instituted domestic partner benefits, but only for employees with same-sex partners, Irizarry sued, claiming that the benefits scheme was unconstitutional because it excluded her partner.[4]

Lambda's participation as amicus curiae in 2000 came four years before the first same-sex couples married in the United States in May 2004.[5] But Lambda's brief foresaw such marriages. In *Irizarry*, the Board of Education argued that heterosexual employees could obtain the benefits by marrying their partners.[6] Lambda responded as follows:

> For plaintiff, the structural exclusion from benefits on the basis of marriage is primarily a matter of whether the state can force her to marry—that is, to change her decision about the exercise of a fundamental right that is available to her—as a condition of providing equal employment compensation and greater health security for her family. Lambda is very sympathetic to this dilemma and expects that many lesbian and gay citizens may one day share her predicament and be put to the same choice. No one's family health and security should depend on their constitutionally protected choice of whether to marry or not.[7]

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1. Brief of Amicus Curiae of Lambda Legal Defense and Education Fund, Inc. in Support of Neither Part and in Support of Reversal at 1, Irizarry v. Bd. of Ed. of Chicago, 251 F.3d 604 (7th Cir. 2001) [hereinafter *Irizarry* Amicus Brief].

2. *Irizarry*, 251 F.3d 604.

3. *Id.* at 606.

4. *Id.* at 604.

5. *See* Yvonne Abraham & Michael Paulson, *Wedding Day: First Gays Marry; Many Seek Licenses*, BOSTON GLOBE, May 18, 2004, at A1.

6. *Irizarry*, 251 F.3d at 606.

7. *Irizarry* Amicus Brief, *supra* note 1, at 12.

Judge Posner, writing for the Seventh Circuit panel that rejected Irizarry's claim, found Lambda's brief surprising.[8] But breaking down rigid distinctions based on marital status had been a longstanding part of the lesbian and gay rights agenda. This is evidenced by Lambda's support for the right of unmarried, heterosexual couples to adopt children,[9] for the parental rights of a non-biological father who raised a child with his unmarried female partner,[10] and for including unmarried couples within the definition of a family for rent control purposes.[11]

Outside of the litigation context, advocacy organizations such as the National Gay and Lesbian Task Force had been a part of the Coalition of Families that formed in conjunction with the 1979 White House Conference on Families.[12] That coalition of about fifty organizations stood for, among other things, the "elimination of discrimination and encouragement of respect for differences based on ... diversity of family type."[13] Given this history, Lambda's support for Irizarry was not at all surprising.

Over a decade later—now that lesbians and gay men have won the right to marry in nine states and the District of Columbia,[14] there is formal recognition of same-sex couples in seven additional states, and access to marriage is at the top of the gay rights agenda—Lambda Legal and other national gay rights legal and political organizations no longer affirmatively endorse the position that they asserted in *Irizarry*. I can find among them no contemporary statement that distinctions between married and unmarried couples are unjust because they deny fundamental protections to unmarried families.[15] Instead, they argue, such distinctions are unjust only where same-sex couples cannot marry and only *because* same-sex couples cannot marry. And in those places, the distinctions are unjust only as applied to same-sex couples.[16]

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8. *Irizarry*, 251 F.3d at 608–09.

9. *In re* Jacob, 660 N.E.2d 397 (N.Y. 1995). Lambda Legal Defense and Education Fund filed an amicus curiae brief on behalf of a man who wished to obtain a second-parent adoption of the child he was raising with his unmarried female partner.

10. *In re* Parentage of Scarlett Z.-D., 975 N.E.2d 755, 757 (Ill. App. Ct. 2012). Lambda Legal represented the appellant, a non-biological father who unsuccessfully asserted claims for custody, visitation, and child support.

11. Brief of Amicus Curiae of Lambda Legal Defense and Education Fund, Inc. in Support of Plaintiff-Appellant, Braschi v. Stahl Assoc. Co., 543 N.E.2d 49 (N.Y. 1989).

12. Thomas J. Burrows, *Family Values: From the White House Conference on Families to the Family Protection Act*, *in* CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 336, 340–41 (John D'Emilio, William B. Turner & Urvashi Vaid eds., 2000).

13. *See id.* at 347.

14. NATIONAL GAY AND LESBIAN TASK FORCE, RELATIONSHIP RECOGNITION FOR SAME-SEX COUPLES IN THE U.S. (2013), *available at* http://thetaskforce.org/downloads/reports/issue_maps/rel_recog_1_23_13_color.pdf.

15. One exception in this regard is *Arkansas Dep't of Human Servs. v. Cole*, 2011 Ark. 145 (2011), in which the ACLU successfully challenged under the Arkansas Constitution a ban on foster parenting and adoption by anyone—gay or straight—living with a non-marital partner.

16. The current effort that most epitomizes this position is Lambda's representation of gay

This shift turns its back on a sizable LGBT constituency—those who do not marry in a jurisdiction where marriage is available and who do not want to marry even if it becomes more widely available—in other words, the Milagros Irizarrys of the lesbian and gay community. As a practical policy matter, it is in the area of access to employee domestic partner benefits—the very issue raised in *Irizarry*—that this change is most evident and, given the importance of access to health insurance, extremely troubling.[17] In the next section of this essay I briefly describe the origin of domestic partner policies. Then I compare three written statements by LGBT rights groups, spanning eight years, articulating why employers should continue providing such benefits even after same-sex couples win the right to marry. Finally, I attempt to explain the shifting justifications contained in these statements, and then I urge a recommitment to the values that once spurred unqualified support for unmarried families.

I.
THE ORIGINS OF DOMESTIC PARTNER BENEFITS

Domestic partner benefits arose out of a series of legal and cultural changes in the 1960s and 70s that made marriage matter less. Equal employment opportunities for women increased a woman's ability to be economically self-sufficient without marrying. Sex outside of marriage, openly and without apology, became commonplace. Rigid legal distinctions between children born inside and outside of marriage disappeared, and the social stigma of bearing a child without a husband diminished dramatically. Widespread availability of no-fault divorce gave spouses the ability to exit a marriage for no reason other than personal unhappiness.[18]

Given this climate, it is unsurprising that domestic partner benefits were

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Arizona state employees in *Collins v. Brewer*, 727 F. Supp. 2d 797 (D. Ariz. 2010), *aff'd sub nom. Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011), *petition for cert. filed*, 81 U.S.L.W. 3087 (U.S. Aug. 21, 2012) (No. 12–23). Although Arizona legislation rescinded domestic partner employee benefits available to both same and different sex partners of state employees, Lambda represented only the gay employees in challenging that rescission and explicitly asserted that the rescission took benefits away only from lesbian and gay employees because heterosexual employees could retain their benefits by marrying their partners. For a thorough critique of Lambda's approach in this case, see Nancy D. Polikoff, *"Two Parts of the Landscape of Family in America": Maintaining Both Spousal and Domestic Partner Employee Benefits for Both Same-Sex and Different-Sex Couples*, 81 FORDHAM L. REV. 735 (2012) [hereinafter Polikoff, *Two Parts of the Landscape*].

17. The bright line based on marriage does even greater harm in the context of determining parentage. In Massachusetts and New York, a child born to a married lesbian couple has two parents. If that couple is not married, the child has one parent. Elsewhere I define this problem as the "new illegitimacy," the reappearance of the legal distinction between children born inside and outside of marriage, this time in the context of same-sex couples. *See* Nancy D. Polikoff, *The New "Illegitimacy": Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 721, 722 (2012).

18. For a general review of this history, see NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 23–33 (2008) [hereinafter POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE].

initially available to different-sex partners as a way of acknowledging that marriage was optional and that all employees should be able to protect the health of their partners. In 1982, the Village Voice, a New York City newspaper, became the first employer to provide such benefits.[19] In 1985, the city of Berkeley, California, became the first public employer to do so.[20] Different-sex and same-sex couples were eligible. Indeed, at the Village Voice, the impetus for including same-sex partners was the pre-existing informal policy of covering the unmarried, different-sex, cohabiting partners of employees.[21] A few jurisdictions thought outside of the "couple" box and developed policies protecting a greater diversity of family structures.[22]

Employee benefits limited to same-sex partners did not emerge until 1991. Such benefits were framed as an equity issue for same-sex couples who could not marry.[23] A development that initially signaled the diminished importance of marriage was thus transformed into a policy accepting the primacy of marriage, taking issue only with its exclusion of same-sex couples. Today, most employers providing benefits to same-sex partners also cover different-sex partners, but the percentage is diminishing and a significant minority cover only same-sex partners.[24]

Same-sex only policies obviously separate lesbian and gay employees from their straight co-workers, who must marry to protect the health and security of their families. But they do not separate lesbian and gay employees from each other. LGBT political and legal groups that define their mission as serving the interests of gay people but no one else likely believe they can serve that mission

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19. *Id.* at 49.

20. Polikoff, *Two Parts of the Landscape*, *supra* note 16, at 738.

21. When a gay labor activist, Jeff Weinstein, began working for the Village Voice in 1981, he discovered the paper's unofficial policy of covering the unmarried, different-sex, cohabiting partners of employees. He organized a gay and lesbian caucus within the union that represented the editors, writers, and clerical staff, and that caucus proposed a formal policy governing gay and straight couples, which was adopted in 1982. Desma Holcomb, *Domestic Partner Health Benefits: The Corporate Model vs. the Union Model*, *in* LABORING FOR RIGHTS: UNIONS AND SEXUAL DIVERSITY ACROSS NATIONS 103, 106 (Gerald Hunt ed., 1999).

22. In 1983, in Madison, Wisconsin, the Alternative Family Rights Task Force of the Madison Equal Opportunity Commission began a study of the needs within their community. Ultimately, the city defined domestic partners as those in a "relationship of mutual support, caring, and commitment [who] intend to remain in such a relationship in the immediate future." They had to be a "single, nonprofit housekeeping unit," and their relationship could not be "merely temporary, social, political, commercial, or economic in nature." The District of Columbia defined domestic partners as those in a "familial relationship . . . characterized by mutual caring and the sharing of a mutual residence." The coalition behind the legislation represented the city's diverse families. Not only could both same-sex and different-sex couples register, but the two people could be relatives barred from marrying, such as a grandson and a grandmother. *See* POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE, *supra* note 18, at 50–51.

23. Two large employers, Lotus Corporation and Montefiore Medical Center, implemented the first same-sex only benefit programs in 1991. *See* Associated Press, *Lotus Offers Benefits for Homosexual Pairs*, N.Y. TIMES, Sept. 7, 1991, at A12; James Barron, *Bronx Hospital Gives Gay Couples Spouse Benefits*, N.Y. TIMES, Mar. 27, 1991, at A1.

24. *See* Polikoff, *Two Parts of the Landscape*, *supra* note 16, at 739.

by supporting same-sex only policies.

The advent of same-sex marriage, however, has changed that equation. Employers with same-sex only policies, premised on the lack of access to marriage, may now eliminate those policies and require all employees to marry in order to obtain partner benefits. Indeed, even before marriage equality, the University of Vermont made the decision to eliminate its same-sex only benefits after Vermont, in 2000, became the first state to enact a status—civil unions—conferring on same-sex couples all the state-level consequences of marriage. Employees who did not enter civil unions were no longer eligible for coverage.[25]

II.
MARRIAGE EQUALITY THREATENS DOMESTIC PARTNER BENEFITS AND LGBT GROUPS RESPOND

The arrival of marriage equality in Massachusetts in 2004 magnified the urgency of this issue, as many individual gay men and lesbians learned they would lose benefits if they did not marry.[26] The major LGBT legal and political organizations had to react to these developments. The result was a joint response by Gay and Lesbian Advocates and Defenders (GLAD), the legal group that spearheaded the marriage equality litigation in Massachusetts and the other New England states, joined by ten other organizations: Lambda Legal, National Center for Lesbian Rights, Human Rights Campaign and National Gay and Lesbian Task Force (the two largest national advocacy groups), and six other organizations.[27]

In June 2004, just a month after the first same-sex couples married, this group of organizations issued a Joint Statement in Favor of Maintaining Domestic Partner Benefits.[28] The statement offered unequivocal support for family diversity, equal treatment of married and unmarried couples, and the value of determining family through assessing functional interdependence rather than relying on the bright line of marriage.[29]

The statement provided six reasons why employers should maintain domestic partner benefits. Reason number one criticized marital status

25. Nancy Remsen, *UVM Benefits Require Civil Union*, BURLINGTON FREE PRESS, Sept. 28, 2000, at 1.

26. *See* Kimberly Blanton, *Unmarried Gay Couples Lose Health Benefits*, BOSTON GLOBE, Dec. 8, 2004, at A1.

27. JOINT STATEMENT IN FAVOR OF MAINTAINING DOMESTIC PARTNER BENEFITS (2004), *available at* http://thetaskforce.org/press/releases/pr705_063004. The additional groups were Children of Lesbians and Gays Everywhere (known as COLAGE), Family Pride Coalition (a predecessor to the Family Equality Council), Institute for Gay and Lesbian Strategic Studies (later merged into the Williams Institute), Parents, Families and Friends of Lesbians and Gays (PFLAG), Pride at Work, AFL-CIO, and Alternative to Marriage Project.

28. *Id.*

29. *Id.*

discrimination[30] and said that "domestic partner benefits were originally developed to recognize family diversity in the workplace, not as a temporary solution until same-sex couples have the option of marriage."[31] Reason number two cited the statistic that 92% of employers who extend domestic partner benefits extend them to both same-sex and different-sex partners, and it urged all employers to do so.[32] Reason number three highlighted the low cost of providing the benefits and the value of the benefits in recruiting and retaining employees.[33]

Reason number four declared simply, "Employers should provide equal pay for equal work."[34] Here the groups unequivocally stated that "there is no logical reason why civil marriage should be the dividing line between which employees' families are eligible for benefits and which are not. If an employer recognizes the value of supporting employees' families," the statement read, "demonstrations of caregiving and emotional and financial interdependence . . . are a more accurate way to define who is 'family' than marriage licenses."[35]

The statement articulated two additional reasons specific to the uncertainty surrounding same-sex marriages—that some states might not recognize them and that groups in Massachusetts were working to reinstate a ban while Congress was considering a federal constitutional amendment limiting marriage to a man and a woman.[36]

The statement ended with this plea:

> We hope employers will consider carefully the factors we discuss above when considering the future of their domestic partner benefits policies, and will understand that marriage and domestic partnership can and will continue to exist side by side, two parts of the landscape of family in America.[37]

Thus, in this 2004 statement, the signatories offered practical reasons for maintaining benefits given a level of uncertainty surrounding same-sex marriages, but these practical reasons were secondary to their ideological support for uncoupling benefits from marriage and therefore covering unmarried same-sex and different-sex partners.[38]

Four years later, in 2008, GLAD released a second document defending the maintenance of domestic partner benefits, entitled "Domestic Partner Benefits:

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30. It described the original purpose of the benefits as "a way to provide fair and equal treatment to the growing diversity of employees' families, both married and unmarried, and to reduce marital status discrimination." *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

Equal Pay for Equal Work."[39] By then, in addition to civil unions in Vermont and marriage in Massachusetts, same sex couples could formalize their relationships through civil unions in Connecticut, New Jersey, and New Hampshire, and through domestic partnership in Oregon, California, and Washington.[40] In all these states, the couples attained all the state-based legal consequences of marriage.

The subtitle of GLAD's 2008 document, "equal pay for equal work," brought reason number four from the 2004 statement to the forefront and affirmatively supported benefits for couples who do not marry. GLAD characterized the benefits as "a significant form of compensation" and an issue of "fairness in the workplace."[41] This statement, however, offered a less vigorous defense of benefits for unmarried different-sex couples. GLAD acknowledged that there were many reasons why a same-sex couple might not want to marry or enter a civil union or domestic partnership.[42] It also noted that tying benefits to marriage would "exclude non-gay couples who have chosen not to marry for personal, religious, or financial reasons."[43] But entirely absent from the 2008 statement was the assertion that there is "no logical reason" for making marriage the dividing line in eligibility.

The 2004 statement did not separate the interests of same-sex couples and unmarried heterosexual couples. The 2008 statement did. It called the eligibility of unmarried heterosexual partners a "principal question" in setting up a benefits plan but then did not give GLAD's answer to that question.[44] Instead, the statement referenced a report from Stanford University saying it is "good practice" to provide such coverage, followed by a sentence noting, without disapproval, that some employers, to keep costs lower, cover only same-sex couples because heterosexuals can marry.[45]

GLAD issued its most recent statement about maintaining domestic partner benefits in 2011. By 2011, same-sex couples could marry in four of the states it serves: Connecticut, Massachusetts, New Hampshire, and Vermont, as well as in New York, Iowa, and the District of Columbia.[46] State-based equivalents, under the name civil union or domestic partnership, were in effect, or about to go into effect, in California,[47] Delaware, Hawaii, Illinois, New Jersey, Nevada, Oregon,

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39. MARY L. BONAUTO, DOMESTIC PARTNERSHIP BENEFITS: EQUAL PAY FOR EQUAL WORK (2008), *available at* http://www.glad.org/uploads/docs/publications/dp-benefits.pdf.

40. *Gay Marriage Timeline*, THE PEW FORUM (Apr. 1, 2008), http://www.pewforum.org/Gay-Marriage-and-Homosexuality/Gay-Marriage-Timeline.aspx.

41. BONAUTO, *supra* note 39.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *See* HUMAN RIGHTS CAMPAIGN, MARRIAGE EQUALITY & OTHER RELATIONSHIP RECOGNITION LAWS (2012), *available at* http://www.hrc.org/files/assets/resources/Relationship_Recognition_Laws_Map.pdf.

47. California also recognized the marriages of the 18,000 couples that married between the

Rhode Island, and Washington.[48]

GLAD's 2011 statement, "Domestic Partnership Benefits Still Matter in the Age of Equal Marriage: Marriage Does Not Mean Instant Equality for Lesbian and Gay Employees," bears little relationship to the position it took in 2004.[49] GLAD still asks employers to retain domestic partner benefits, but offers dramatically different justifications. The first four reasons from the 2004 statement are entirely absent. There is no support for recognizing family diversity, reducing marital status discrimination, or expanding same-sex only policies to include different-sex unmarried couples. There is no argument that the cost of benefits is low and that they improve recruitment and retention of employees. There is no assertion that marriage should not be the dividing line in determining eligibility for benefits or that demonstration of caregiving and interdependence is "a more accurate way to define who is 'family' than marriage licenses."[50]

There is also no mention of benefits for different-sex couples. The statement begins by noting the existence of benefits for unmarried same-sex couples in the New England states and describes those policies as "instituted in the spirit of fairness in order to provide 'equal pay for equal work.'"[51] It then differentiates same-sex couples from different-sex couples by offering reasons specifically why a *same-sex* couple might not marry: a married same-sex couple might not be able to do an international adoption and a bi-national same-sex couple might fear exposure to immigration officials and possible deportation of the non-citizen partner.[52]

The statement also remarks upon the lack of federal recognition; the possibility that the couple might fear discrimination if, in the future, they move to a state that allows employment discrimination on the basis of sexual orientation; and the risk that a spouse's benefits based on marriage might not be portable if the gay employee moves to a new job.[53]

Erecting a definitive barrier between claims on behalf of unmarried heterosexuals and claims on behalf of same-sex couples, the statement says: "Heterosexual couples do not face these risks."[54] With this, GLAD no longer even poses the question of providing benefits for such couples. They are simply

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time same-sex marriages began in June 2008 and the passage of Prop. 8 in November 2008. Strauss v. Horton, 207 P.3d. 48, 122 (Cal. 2009).

48. HUMAN RIGHTS CAMPAIGN, *supra* note 46.

49. GAY & LESBIAN ADVOCATES & DEFENDERS, DOMESTIC PARTNERSHIP BENEFITS STILL MATTER IN THE AGE OF EQUAL MARRIAGE: MARRIAGE DOES NOT MEAN INSTANT EQUALITY FOR LESBIAN AND GAY EMPLOYEES (2011), *available at* http://www.glad.org/uploads/docs/publications/dp-benefits-post-goodridge.pdf.

50. JOINT STATEMENT IN FAVOR OF MAINTAINING DOMESTIC PARTNER BENEFITS, *supra* note 27.

51. GAY & LESBIAN ADVOCATES & DEFENDERS, *supra* note 49.

52. *Id.*

53. *Id.*

54. *Id.*

off the table. Requiring heterosexual couples to marry is fine; the mistake is assuming that "gays and lesbians can now marry on the same terms as everyone else."

GLAD does plead with employers to "PLEASE RECONSIDER" requiring same-sex couples to marry.[55] But the take-away reasoning is: "Until there is more respect for marriages of same-sex couples as marriages, employers need to understand that marriage can be risky business for same-sex couples. Forcing same-sex couples to marry for health insurance may have unintended negative consequences."[56]

III.
EXPLAINING WHY LGBT GROUPS SHIFTED THEIR RESPONSE TO THREATENED ELIMINATION OF DOMESTIC PARTNER BENEFITS

It is appropriate to consider what has changed since 2004 and why GLAD so dramatically revised its basis for asking employers to maintain domestic partner benefits. For that I look at the advocacy for marriage equality, where arguments for the unique importance of marriage have made it harder for gay rights groups to stand with those couples that have the option to marry but choose not to.

Some arguments for same-sex marriage have focused on the equal worth of lesbian and gay relationships. Such reasoning has guided some court victories, most notably in Iowa in *Varnum v. Brien*, where the court considered all of the state's reasons for treating same-sex couples and different-sex couples differently and found each reason lacking.[57]

But the controversy over access to marriage for same-sex couples has also been an argument about marriage itself: its essence and its social meaning. Opponents regularly claim that same-sex marriage will change marriage in ways that are destructive to society. As I have described in depth elsewhere, these arguments are one part of a larger "marriage movement" claiming that the decline of life-long heterosexual marriage is responsible for many of our social and economic ills.[58]

The Iowa court in *Varnum* did not once glorify marriage, deem it the essential building block of society, call it uniquely valuable, or suggest that society would fall apart without it. Many articulations of support for same-sex marriage, however, in courts and in the political sphere, do make such claims; they differ from "marriage movement" reasoning only to the extent that they believe that allowing same-sex couples into marriage will not diminish these

55. *Id.*

56. *Id.*

57. Varnum v. Brien, 763 N.W.2d 862, 882–85 (Iowa 2009).

58. *See* POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE, *supra* note 18, at 63–82; Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 529, 539–42 (2009).

attributes, and might instead strengthen the institution of marriage.[59]

Consider how *Goodridge v. Department of Public Health*, the case that led to the first same-sex marriages in the United States, extolled marriage itself: "Civil marriage enhances 'the welfare of the community', . . . is a 'social institution of the highest importance' and anchors an ordered society."[60] Responding to arguments by the state and amici that same-sex marriage would destroy marriage, as it had been known, the Massachusetts court reported reassuringly that "the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished."[61] "If anything," wrote the court, "extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit."[62]

Marriage equality supporters have repeatedly invoked these same sentiments. Consider, for example, the California litigation, *In re Marriage Cases*.[63] Because California already provided all of the legal consequences of marriage to same-sex couples that registered as domestic partners, the litigation was entirely about the constitutional significance of the word "marriage." The California Supreme Court asked all parties to brief the question of whether the state could change the name for the legal relationship of "marriage" to some other name, in other words whether it would be constitutional to eliminate the word "marriage," yet preserve all of the associated rights and obligations for both same-sex and different-sex couples.[64]

Although the state of California said this would be constitutional, both the gay rights groups and the ring-wing opponents of marriage equality said it would not. The gay rights brief cited language from a 1952 case calling marriage "the

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59. David Blankenhorn, an architect of the "marriage movement" and a late convert to the side of marriage equality (indeed he was a witness against marriage equality in the *Perry v. Schwarzenegger* trial), put it this way:

> Instead of fighting gay marriage, I'd like to help build new coalitions bringing together gays who want to strengthen marriage with straight people who want to do the same. For example, once we accept gay marriage, might we also agree that marrying before having children is a vital cultural value that all of us should do more to embrace? Can we agree that, for all lovers who want their love to last, marriage is preferable to cohabitation?

David Blankenhorn, *How My View on Gay Marriage Changed*, N.Y. TIMES (June 22, 2012), http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html.

60. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 954 (Mass. 2003) (quoting French v. McAnarney, 195 N.E. 714 (Mass. 1935)).

61. *Id.* at 965.

62. *Id.*

63. *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).

64. Respondents' Supplemental Brief at 32, *In re Marriage Cases*, 183 P.3d 384 (No. S147999), *available at* http://www.nclrights.org/site/DocServer/Rymer_Supplemental_Brief081707.pdf?docID=1861.

basic unit of society."[65] From a 1976 case, it pulled the assertion that "the structure of society itself largely depends upon the institution of marriage."[66] The gay rights groups said the state's position, that an alternative to "marriage" would suffice, was inconsistent with the "intangible benefits that come from the ancient tradition of public declaration and recognition."[67]

In *Perry v. Schwarzenegger*,[68] Ted Olson's closing argument reiterated arguments that have pervaded marriage equality litigation. He referred to pronouncements from the United States Supreme Court that "[m]arriage is the most important relation in life . . . . It is the foundation of society. It is essential to the orderly pursuit of happiness."[69] He continued, "The plaintiffs have said that marriage means to them freedom, pride. These are their words. Dignity. Belonging. Respect. Equality. Permanence. Acceptance. Security. Honor. Dedication. And a public commitment to the world."[70] He reminded the Court that "the plaintiffs have no interest in changing marriage or deinstitutionalizing marriage. They desire to marry because they cherish the institution."[71] He attributed the weakening of the bonds of marriage to heterosexuals and to no-fault divorce and invoked the expert testimony that the divorce rate did not go up in Massachusetts after same-sex couples could marry there.[72]

At one point Olson noted, "Maybe lots of people don't want to get married, despite everything we've been saying about how wonderful it is."[73] This provoked laughter in the courtroom. But within that laughter lays the core of a quandary. Vigorous support for unmarried couples that have the option to marry could appear to undercut the above messages tendered on behalf of marriage equality.

The 2004 "Joint Statement in Favor of Maintaining Domestic Partner Benefits" said there is "no logical reason why civil marriage should be the dividing line [for benefit eligibility]."[74] It said that a marriage license is a less accurate way of determining family than "demonstrations of caregiving and

65. Respondents' Consolidated Supplemental Reply Brief at 14, *In re* Marriage Cases, 183 P.3d 384 (No. S147999), *available at* http://www.nclrights.org/site/DocServer/2007.08.31.Rymer.Reply_to_Supps.pdf?docID=2202 (quoting De Burgh v. De Burgh, 250 P.2d 598 (Cal. 1952)).

66. Respondents' Supplemental Brief, *supra* note 64, at 24 (quoting Marvin v. Marvin, 557 P.2d 106, 122 (1976)).

67. Respondents' Consolidated Supplemental Reply Brief, *supra* note 65, at 14.

68. Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (2012), *cert. granted sub nom.* Hollingsworth v. Perry, 81 U.S.L.W. 3075 (U.S. 2012).

69. Transcript of Proceedings at 2971, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (No. C 09–2292 VRW), *available at* http://www.afer.org/wp-content/uploads/2010/06/Perry-Vol-13-6-16-10-Amended.pdf.

70. *Id.* at 2975.

71. *Id.* at 2982.

72. *Id.* at 3000–01.

73. *Id.* at 2997.

74. JOINT STATEMENT IN FAVOR OF MAINTAINING DOMESTIC PARTNER BENEFITS, *supra* note 27.

emotional and financial interdependence."[75] Such assertions can sound like heresy in a campaign for marriage equality that concedes the superiority of marriage and asks only to be included.

Ted Olson made the conservative case for same-sex marriage in a Newsweek cover story. He wrote:

> Many of my fellow conservatives have an almost knee-jerk hostility toward gay marriage. This does not make sense, because same-sex unions promote the values conservatives prize . . . . We encourage couples to marry because the commitments they make to one another provide benefits not only to themselves but also to their families and communities. Marriage requires thinking beyond one's own needs. It transforms two individuals into a union based on shared aspirations, and in doing so establishes a formal investment in the well-being of society. The fact that individuals who happen to be gay want to share in this vital social institution is evidence that conservative ideals enjoy widespread acceptance. Conservatives should celebrate this, rather than lament it.[76]

There is little room here for acknowledging that same-sex couples have been making long-term commitments to each other and to their communities without marriage, and that heterosexuals—like Milagros Irizzary—have done the same. Nor is there respect for the wide range of family forms that both gay and straight people create to raise children, meet their economic and emotional needs, and contribute to the larger community.

Marriage is not what gives people an "investment in the well-being of society." If such an argument increases support for marriage equality, however, then LGBT rights groups appear reluctant to contradict it, and articulating the positive value of preserving domestic partner benefits for unmarried couples may seem like such a contradiction. The Human Rights Campaign signed the 2004 Joint Statement, yet its Corporate Equality Index (CEI) does not measure whether an employer extends benefits to unmarried different-sex partners. And where an employer's entire workforce lives in a state where same-sex couples can marry, the CEI does not penalize the employer for requiring all couples to marry.[77]

I would like to see LGBT legal and political groups stand up today for the principle asserted by Lambda Legal over a decade ago that "no one's family health and security should depend on their constitutionally protected choice of

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75. *Id.*

76. Ted Olson, *The Conservative Case for Gay Marriage: Why Same-Sex Marriage Is an American Value*, NEWSWEEK (Jan. 8, 2010), http://www.thedailybeast.com/newsweek/2010/01/08/the-conservative-case-for-gay-marriage.html.

77. *See* Polikoff, *Two Parts of the Landscape*, *supra* note 16, at 740.

whether to marry or not."[78] I would like to see them reaffirm the insight in the 2004 Joint Statement that marriage is a less accurate way to define family than actual caregiving and interdependence.[79] The abandonment of these values, and the people whose lives they represent, is too high a price to pay for marriage equality.

78. *Irizarry* Amicus Brief, *supra* note 1, at 12.

79. JOINT STATEMENT IN FAVOR OF MAINTAINING DOMESTIC PARTNER BENEFITS, *supra* note 27.