MARRIAGE OR LIBERATION?: REFLECTIONS ON TWO STRATEGIES IN THE STRUGGLE FOR LESBIAN AND GAY RIGHTS AND RELATIONSHIP RECOGNITION

*Edward Stein**

A great deal has changed about the legal and social situation for lesbians, gay men, bisexuals, and transgender (LGBT) people since the 1989 publication of Tom Stoddard and Paula Ettelbrick's dueling essays[1] about how the quest for same-sex marriage fit into the larger struggle for LGBT rights. In 1989, twenty-four states and the District of Columbia criminalized most forms of adult consensual sex between people of the same sex[2] and the constitutionality of such sodomy laws had been recently upheld by the U.S. Supreme Court in *Bowers v. Hardwick* in an opinion that said arguments against the constitutionality of such laws were "facetious."[3] Second, discrimination against LGBT people was legal under federal law and the law of almost every other jurisdiction in the country.[4] Third, in 1989, no state recognized same-sex relationships to a degree even remotely approaching the extent that married different-sex couples were recognized. A handful of local jurisdictions—six or seven cities (but not even one county) across the entire nation—had passed domestic partnership ordinances or laws that would register same-sex relationships and, in some jurisdictions, different-sex couples

* Professor and Director of the Program for Family Law, Policy and Bioethics, Cardozo School of Law; B.A., Williams College; Ph.D., Massachusetts Institute of Technology; J.D., Yale University.

1. Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, Fall 1989, at 9, *reprinted in* WILLIAM B. RUBENSTEIN, CARLOS A. BALL & JANE S. SCHACTER, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 678 (3d ed. 2008); Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 14, *reprinted in* RUBENSTEIN ET AL., *supra*, at 683. Both essays are also reprinted in WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 1098 (2d ed. 2004).

2. *See* Bowers v. Hardwick, 478 U.S. 186, 193-94 (1986) (citing Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 524 n.9 (1986)).

3. *Id.* at 194.

4. The three exceptions were the District of Columbia, *see* D.C. CODE § 1-2501 (1977) (replaced by § 2-1401.01 (2009)), Wisconsin, *see* WIS. STAT. § 101.22 (1982) (replaced by § 106.50 (2008)), and Massachusetts, *see* MASS. GEN. LAWS ch. 151B, § 4 (1989).

who were living together in intimate relationships, but these jurisdictions gave registered domestic partners very limited and specific benefits (such as bereavement leave for a city employee whose registered partner died).[5] Further, although various same-sex couples had been filing lawsuits demanding equal recognition for their relationships for almost twenty years, not a single judge had been persuaded to give legal recognition to same-sex couples.[6]

Since 1989, there has been substantial change in the legal and social situation for LGBT people. In 2003, in *Lawrence v. Texas*, six of the Supreme Court Justices voted to strike down Texas' sodomy law, and five explicitly overruled *Bowers v. Hardwick*, saying that "*Bowers* was not correct when it was decided, and it is not correct today."[7] Twenty states and the District of Columbia now have laws that protect against sexual-orientation discrimination, and thirteen of these also protect against discrimination on the basis of gender identity and/or gender expression.[8] Fifteen states plus the District of Columbia provide some legal recognition for same-sex relationships[9]

---

5. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 59 (1996).

6. *See, e.g.*, Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982); Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974).

7. Lawrence v. Texas, 539 U.S. 558, 578 (2003); *see also id.* at 579 (O'Connor, J., concurring) (agreeing with the result in *Lawrence* without overruling *Bowers*).

8. The states that ban discrimination on the basis of sexual orientation and gender identity/expression are Minnesota, Rhode Island, New Mexico, California, Illinois, Maine, Hawaii, New Jersey, Washington, Iowa, Oregon, Vermont, Colorado, and the District of Columbia. NATIONAL GAY AND LESBIAN TASK FORCE, STATE NONDISCRIMINATION LAWS IN THE U.S. (2008), http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_7_08_color.pdf. The states that ban discrimination on the basis of sexual orientation—but not gender identity/expression—are Wisconsin, Massachusetts, Connecticut, New Hampshire, Nevada, Maryland, and New York. *Id.*

9. States providing some legal recognition for same-sex relationships include Massachusetts (marriage), Connecticut (marriage), Iowa (marriage), Maine (marriage-as this Article was going to press, opponents of same-sex marriage have started attempting to obtain enough signatures to put a repeal of Maine's newly passed marriage law on the ballot; if they obtain enough signatures, the marriage law will not go into effect unless the majority of Maine voters vote in favor of it in a referendum), Vermont (marriage, starting September 1, 2009), New Jersey (civil union), New Hampshire (civil union-as this Article was going to press, the governor of New Hampshire was poised to sign a law legalizing same-sex marriage), California (domestic partnership; from May to November 2008, California allowed same-sex marriages, *see In re* Marriage Cases, 183 P.3d 384 (Cal. 2008)), Oregon (domestic partnership), Washington (domestic partnership), District of Columbia (domestic partnership), Maryland (limited domestic partnership), Hawaii (reciprocal beneficiary, which is the same as a limited domestic partnership), Colorado (designated beneficiary, which is the same as a limited domestic partnership). NATIONAL GAY AND LESBIAN TASK FORCE, RELATIONSHIP RECOGNITION FOR SAME-SEX COUPLES IN THE

and, in seven states, the majority of judges of the highest courts have held that the failure to give equal benefits to same-sex couples as compared to different-sex couples violates their state constitutions.[10] Socially, the changes have been more dramatic. Same-sex sexual attraction was once called "the love that dare not speak its name," but now many LGBT people are open about their desires, relationships, families, and sexual behavior. LGBT concerns are widely discussed in the national and local media, LGBT people are often favorably and compellingly portrayed in films and on television, and—compared to 1989—Americans, in general, and younger generations, in particular, have dramatically more positive attitudes towards LGBT sexuality, LGBT people, and their relationships and family. For those of us who experienced the virulent homophobia and heterosexism that was the norm in the not-so-distant past, it is hard to believe how much the situation for LGBT people has improved in the last twenty years.

The social and legal situation for LGBT people is still, however, far from perfect. There was a nascent LGBT rights movement in the United States since at least the 1940s[11] and in 1969, in New York City, the Stonewall riots—the so-called birth of the contemporary gay rights movement[12] and the "Hair Pin Drop Heard around the World"[13]—occurred. In the years after Stonewall, new political organizing around LGBT rights began and soon, more than ever before, LGBT people across America started to talk to each other about their rights, and many began to "come out" to their heterosexual friends, families, co-workers, and elected representatives. However, despite seventy years of a political movement and forty years since the movement became prominent, the legal situation for LGBT people, looked at from a national perspective, remains problematic. It is legally permissible in the

---

U.S. (2009), http://www.thetaskforce.org/downloads/reports/issue_maps/relationship_recognition_05_09_color.pdf. New York and Rhode Island, while they do not allow same-sex couples to marry (or to obtain a civil union or other such legal recognition), both recognize valid same-sex marriages from other jurisdictions. *Id.* The District of Columbia also recognizes same-sex marriages from other jurisdictions. *Id.*

10. *In re* Marriage Cases, 183 P.3d at 399; Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 481-82 (Conn. 2008); Baehr v. Lewin, 852 P.2d 44, 64 (Haw. 1993); Varnum v. Brien, No. 07-1499, 2009 WL 874044, at *906-07 (Iowa Apr. 3, 2009); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 975 (Mass. 2003); Lewis v. Harris, 908 A.2d 196, 220-21 (N.J. 2006); Baker v. State, 744 A.2d 864, 889 (Vt. 1999).

11. *See, e.g.*, JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970 (2d ed. 1983).

12. For a history of this event, see MARTIN DUBERMAN, STONEWALL (1993). For questioning of the conventional wisdom that Stonewall was a "founding event" of the LGBT rights movement in the United States, see D'EMILIO, *supra* note 11, at 231-33.

13. TOBY MAROTTA, THE POLITICS OF HOMOSEXUALITY 77 (1981).

majority of states and under federal law to discriminate on the basis of sexual orientation or gender identity in employment, housing, and in other important contexts.[14] The U.S. military, the largest employer in the United States (Wal-Mart and the Post Office are the two next largest),[15] discriminates on the basis of sexual orientation.[16] A significant majority of the states not only prohibit same-sex couples from marrying there, but they also explicitly deny recognition to same-sex relationships that have been validly celebrated in other jurisdictions.[17] And, for purposes of federal law, marriage is explicitly defined as a relationship between one man and one woman,[18] which means that legally recognized same-sex relationships (for instance, Massachusetts marriages, New Jersey civil unions, or Washington domestic partnerships) are not recognized, for example, for purposes of federal income tax law and immigration law. Hate crimes against LGBT people are still disturbingly common;[19] LGBT youth are still verbally and physically harassed in school, often with the knowledge

---

14. *See supra* notes 8-10 and accompanying text.

15. *See* U.S. Department of Defense, DOD 101: An Introductory Overview of the Department of Defense, http://www.defenselink.mil/pubs/dod101/ (last visited Apr. 1, 2009); United States Postal Service, Postal Facts, http://www.usps.com/communications/newsroom/postalfacts.htm (last visited Apr. 1, 2009); Wal-Mart, Corporate Facts: Wal-Mart by the Numbers, http://walmartstores.com/download/2230.pdf.

16. The military's official policy and the regulations that implement them include 10 U.S.C. § 654 (2006); U.S. DEP'T OF DEF., DIRECTIVE NO. 1332.30, SEPARATION OF REGULAR AND RESERVE COMMISSIONED OFFICERS (1997); U.S. DEP'T OF DEF., DIRECTIVE NO. 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION (1994); and U.S. DEP'T OF DEF., DIRECTIVE NO. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS (1994). For discussion, see JANET HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY (1999).

17. Forty states have either a law or a constitutional amendment (or both) explicitly restricting marriage in that state to one man and one woman. NPR, State by State: The Legal Battle over Gay Marriage, http://www.npr.org/news/specials/gaymarriage/map/ (last visited May 9, 2009). The list of such states includes every state but Connecticut, Iowa, Maine, Massachusetts, New Hampshire, New Jersey, New York, New Mexico, Rhode Island, and Vermont. *Id.* Almost all of the states that restrict marriage to different-sex couples also deny recognition to same-sex marriages from other jurisdictions. *See* NATIONAL GAY AND LESBIAN TASK FORCE, *supra* note 9.

18. Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2006)).

19. In 2007, 1,265 of the 7,624 reported incidents of hate crimes were motivated by sexual orientation; of these, ninety-eight percent were directed at lesbians, gay men, or bisexuals. *See* Fed. Bureau of Investigation, Hate Crime Statistics 2007, http://www.fbi.gov/ucr/hc2007/table_01.htm (last visited May 8, 2009). Additionally, in 2007, while the number of reported bias incidents nationwide decreased, there was a more than five percent increase in reported hate crimes based on the victim's sexual orientation. *Hate Crimes: Good News on Bias Incidents Based on Race and Religion; Bad News on Those Based on Sexual Orientation*, WASH. POST, Nov. 5, 2008, at A22.

and willful acceptance of teachers and administrators;[20] and LGBT people are often disproportionately targeted for arrest by law enforcement officials.[21] Public opinion polls still reflect strong negative attitudes towards LGBT people.[22]

For my contribution to this Symposium, I reflect on the changes in the legal and political landscape of America that relate to LGBT people and ask whether the advances that have been achieved are the result of LGBT people—and the organizations that represent them in the political and legal realms—seeking the right to marry. Was Tom Stoddard right when he argued for "aggressively seek[ing] full legal recognition for same-sex marriages"?[23] Was Paula Ettelbrick appropriately skeptical of having same-sex marriage as a goal, arguing instead for the "the validation of many forms of relationships,"[24] "the affirmation of gay identity and culture,"[25] "providing true alternatives to marriage[,] and . . . radically reordering society's views of family"?[26] Reflecting on the questions that emerge from these important 1989 essays should help the LGBT rights movement look forward to the next twenty years. Based on the reflections in this essay, I suggest, going forward, that the LGBT rights movement does not have to choose between a sustained and vigorous focus on marriage equality for same-sex couples, on the one hand, and a more revisionist and pluralist approach, on the other.

Stoddard's approach followed naturally in the footsteps of the civil rights movement, applying its methods to the project of obtaining equality for gay men and lesbians. In relation to marriage, this equality-centered approach built on both the landmark civil rights case of *Loving v. Virginia*, which held prohibitions on interracial marriages unconstitutional,[27] and on its constitutional progeny.[28] Ettelbrick's approach was more akin to that of early gay

---

20. EMILY A. GREYTAK, JOSEPH G. KOSCIW & ELIZABETH M. DIAZ, HARSH REALITIES: THE EXPERIENCES OF TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS 9-24 (2009), http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1375-1.pdf.

21. AMNESTY INT'L, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S. 39 (2005), http://www.amnestyusa.org/outfront/stonewalled/report.pdf.

22. *See* Lydia Saad, *Americans Evenly Divided on Morality of Homosexuality*, GALLUP, June 18, 2008, http://www.gallup.com/poll/108115/Americans-Evenly-Divided-Morality-Homosexuality.aspx (finding only 57% of those polled consider homosexuality an "acceptable alternative lifestyle" and 48% consider homosexuality "morally wrong").

23. Stoddard, *supra* note 1, at 679.

24. Ettelbrick, *supra* note 1, at 684.

25. *Id.*

26. *Id.* at 688.

27. Loving v. Virginia, 388 U.S. 1, 12 (1967).

28. Turner v. Safley, 482 U.S. 78 (1987) (holding a prison regulation restricting

liberationists, who wanted more than equal treatment in society as it existed; gay liberationists wanted to change the very structure of society, to liberate the "homosexual in everyone."[29] The gay liberationist attitude toward marriage is exemplified by the following quotation from gay rights advocate Carl Wittman:

> Traditional marriage is a rotten, oppressive institution. . . .
>
> Gay people must stop gauging their self respect by how well they mimic straight marriages. Gay marriages will have the same problems as straight ones except in burlesque. . . .
>
> To accept that happiness comes through finding a groovy spouse and settling down, showing the world that "we're just the same as you" is avoiding the real issues, and is an expression of self-hatred.[30]

Ettelbrick's position on marriage is far more muted than Wittman's. But like the early gay liberationists, Ettelbrick did not focus on equal access to marriage for LGBT people. Rather, she wanted to change how the benefits and duties typically associated with marriage are distributed, to change the role of marriage in our society, and to create alternatives to marriage. As Ettelbrick put it, the aim was to "transform our society from one that makes narrow, but dramatic, distinctions between those who are married and those who are not married to one that respects and encourages choice of relationships and family diversity."[31]

There are at least three problems with simply asking whether Stoddard or Ettelbrick was right. First, over the past twenty years, the LGBT movement[32] has not whole-heartedly adopted either Stoddard's equality approach or Ettelbrick's liberationist approach, although in the past several years, marriage equality has become a top priority and more emphasis and resources have been spent on

---

inmates' right to marry unconstitutional); Zablocki v. Redhail, 434 U.S. 374 (1978) (upholding the right to marry among noncustodial fathers owing child support).

29. Steven Epstein, *Gay Politics, Ethnic Identity: The Limits of Social Construction*, *in* FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY 239, 256 (Edward Stein ed., 1990).

30. Carl Wittman, *A Gay Manifesto* (1970), *reprinted in* WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS 380, 383 (Mark Blasius & Shane Phelan eds., 1997).

31. Ettelbrick, *supra* note 1, at 684.

32. Of course, civil rights litigation is not always controlled by national or regional civil rights organizations; sometimes individuals bring litigation even when civil rights organizations advise against doing so. The same is true for LGBT rights litigation. For discussion, see Edward Stein, *The Story of* Goodridge v. Department of Public Health: *The Bumpy Road to Marriage for Same-Sex Couples*, *in* FAMILY LAW STORIES 27, 31 (Carol Sanger ed., 2008), and William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1635-44 (1997).

marriage equality than on changing marriage or on alternatives to it. The LGBT rights organizations have not, however, exclusively focused on same-sex marriage and have devoted substantial resources to other LGBT rights issues, including workplace discrimination, education, parenting, other forms of relationship recognition, and the rights of transgender people. LGBT rights organizations have been pragmatic and strategic about the pursuit of marriage equality, opting for or accepting civil unions or domestic partnerships, discouraging litigants from pursuing their lawsuits in jurisdictions where victory seemed unlikely, and resisting bringing marriage equality cases or related cases in federal court.[33] Because neither Stoddard's nor Ettelbrick's recommended strategy was straightforwardly implemented to the absence of the other's strategy, even if we agreed that the status quo is the best result for LGBT rights that could have been achieved in the twenty years since 1989, that would not settle whether Stoddard or Ettelbrick was right.

The second problem with asking whether Stoddard or Ettelbrick was right is that it is hard to compare the present situation for LGBT people with other possible states of affairs for LGBT people that might have come into existence twenty years after 1989. As I have already noted, although the situation of LGBT people has improved dramatically since 1989, there remains ample room for improvement. An assessment of whether one strategy was right or wrong is linked to whether we focus on how full or how empty the glass is with respect to LGBT rights. In the previous paragraph, I noted that there would be a question about which strategy was right even granting that the present situation for LGBT people is the best it could have been twenty years after Stoddard and Ettelbrick wrote their essays. But even that assumption is not true: the situation for LGBT people could have been better; the glass could be fuller. Even if the quest for LGBT rights had been conducted following, for example, Stoddard's approach to the letter, there would still be a question about whether the results for LGBT movement would have been better (or no different) if Ettelbrick's approach had been followed.

The third problem with asking whether Stoddard or Ettelbrick was right is that their goals were (somewhat) different. Whereas Stoddard was focused on achieving equality, Ettelbrick was focused on social change. What would count as success for Stoddard might

33. As this essay was being written, GLAD, the organization that represented the plaintiffs in the victories for the recognition of same-sex relationships in Vermont and Massachusetts, filed a federal constitutional challenge against certain applications of DOMA. *See* Abby Goodnough & Katie Zezima, *Suit Seeks to Force Government to Extend Benefits to Same-Sex Couples*, N.Y. TIMES, March 3, 2009, at A12. The complaint is available at http://www.glad.org/uploads/docs/cases/gill-complaint-03-03-09.pdf.

not count as success for Ettelbrick (and vice versa). Still, a comparison might be possible in part because they had some goals in common.

Despite these three problems facing the project of looking backward to evaluate the different strategies recommended by Stoddard and Ettelbrick, something can still be learned by asking what has worked and what has not, by considering how far we have come over twenty years, and how we got where we are. I suggest that, looking backwards, both Stoddard and Ettelbrick were in a sense right and that both of their strategies have been successful. In retrospect, their two goals, although different, can be achieved at the same time and, further, the pursuit of these two different goals have been mutually supporting. It is possible to "aggressively seek full legal recognition for same-sex marriages"[34] and adopt a more liberationist, more pluralistic, more flexible strategy toward LGBT rights generally and the recognition of and rights for LGBT families. This dual approach to LGBT rights has worked well to accomplish a great deal for LGBT people over the past two decades and I favor this dual approach going forward.

At the end of his article, Stoddard predicted that gay people "will earn [the] right [to marry] sooner than most of us imagine."[35] It was fourteen years later that the Supreme Judicial Court of Massachusetts ruled that prohibiting same-sex couples from marrying violated that state's constitution and, for that reason, the court revised the state's common law definition of marriage so as to allow two people of the same sex to marry each other.[36] That was definitely faster than most of us would have predicted in 1989.

In fact, change came even faster. In 1993, a mere four years after the Stoddard-Ettelbrick essays appeared, same-sex couples scored a dramatic victory in Hawaii. In *Baehr v. Lewin*, the Hawaii Supreme Court unexpectedly found that prohibiting same-sex couples from marrying constituted discrimination on the basis of sex and that such sex discrimination raised constitutional concerns.[37] The case was remanded for a trial on whether Hawaii could satisfy the very heavy burden of justifying the use of sex classifications in its marriage law.[38] Although the Hawaii Supreme Court did not actually reach the question of the constitutionality of prohibiting same-sex couples from marrying, its decision was a watershed in the quest for marriage equality, as it was the first favorable appellate court

34. Stoddard, *supra* note 1, at 679.

35. *Id.* at 683.

36. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

37. 852 P.2d 44, 68 (Haw. 1993).

38. *Id.*

decision in the United States about same-sex marriage. On remand, the Hawaii trial court held that the state's justifications for prohibiting same-sex couples from marrying failed to satisfy the heavy burden required of laws that involve sex classifications.[39] The trial court ordered the state to allow same-sex couples to marry,[40] but the state appealed (and the trial court stayed its order).[41] In November 1998, before the Hawaii Supreme Court had issued a decision on this appeal, the voters of Hawaii amended the state constitution to authorize the state legislature to limit marriage to relationships between one man and one woman.[42] The state legislature promptly did just that;[43] around the same time, it also passed a reciprocal beneficiary law, which provided registered partners a small set of legal rights.[44] Thereafter, the Hawaii Supreme Court held that this constitutional amendment mooted the state constitutional challenge to Hawaii's marriage law.[45]

What happened in Hawaii is a story of victory and defeat. Although Hawaii delivered the first victory on the road to marriage equality, the Hawaii litigation ultimately failed to achieve substantial legal recognition for same-sex couples. Further, the Hawaii litigation triggered a backlash. In the three and a half years between when the Hawaii Supreme Court remanded the case and when the trial court rendered its opinion, fifteen states passed laws that effectively refused recognition in their state for valid marriages between two people of the same sex from other jurisdictions even though not a single valid same-sex marriage had yet taken place anywhere in the United States.[46] Also, in that time period, the federal Defense of Marriage Act (DOMA) was enacted, thereby exempting states from having to recognize marriages of same-sex couples from other states and defining marriage, for purposes of federal law, as between one man and one woman.[47] Many states have taken the same approach that Hawaii did and amended their state constitutions to prohibit same-sex marriage, thereby

39. Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996).

40. *Id.*

41. Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391, at *6 (Haw. Dec. 9, 1999).

42. HAW. CONST. art. I, § 23.

43. HAW. REV. STAT. § 572-1 (2005).

44. *Id.* § 572C-1.

45. *Baehr*, 1999 Haw. LEXIS 391, at *8.

46. *See* Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105, 106 (1996) (Alaska, Arizona, Delaware, Georgia, Idaho, Illinois, Kansas, Michigan, Missouri, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, and Tennessee).

47. *See* Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2006)).

"constitutionalizing" a prohibition that had not previously been explicitly articulated under state law.[48] Other states have passed even broader amendments than Hawaii, prohibiting not only same-sex marriages but also explicitly denying any recognition to other jurisdictions' same-sex marriages, civil unions, and other such relationships between people of the same sex.[49] Acknowledging that the Hawaii litigation caused a backlash is not to deny that what happened in Hawaii had positive repercussions for LGBT rights and marriage equality across the country. The Hawaii litigation raised awareness, it motivated LGBT rights advocates, and it was a stepping stone to what happened six years later in Vermont and four years after that in Massachusetts. Looking just at Hawaii, however, one might conclude that Stoddard's strategy of pursuing full marriage equality did not work.[50]

But, of course, there is much more to the United States than Hawaii. In 1999, the Vermont Supreme Court, in *Baker v. State*, unanimously held that Vermont's Constitution required that same-sex couples be able to obtain the same benefits available to different-sex couples through marriage and, thus, ordered the state legislature to give same-sex couples access to the same benefits available to married different-sex couples.[51] In response, in 2000, the Vermont legislature passed a law that created a new legal status for same-sex couples, "civil union," which mirrors marriage under Vermont law: same-sex couples obtain civil unions the same way different-sex couples get married in Vermont and all state benefits, rights, and duties that accrue to married different-sex couples in Vermont also accrue to "civilly unioned" same-sex couples in Vermont.[52] Looking solely at Vermont, it might seem that Stoddard's strategy was successful in achieving simple equality—civil unions receive the same benefits as marriages do under Vermont law. Some, however,

---

48. *See, e.g.*, ARK. CONST. amend. 83; COLO. CONST. art. II, § 31; MONT. CONST. art. XIII, § 7. At one time Minnesota's marriage law did not explicitly say that marriage is between one man and one woman. *See* MINN. STAT. § 517.02 (1967) ("Every male person who had attained the full age of twenty-one years, and every female person who has attained the full age of eighteen years, is capable in law of contracting marriage, if otherwise competent."). In 1997, Minnesota specifically amended its marriage law to exclude same-sex couples from marrying. MINN. STAT. § 517.03(a)(4) (2008).

49. For a discussion of the various state DOMAs and their constitutionality, see ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES (2006).

50. As of this writing, the Hawaii state legislature is currently debating whether to pass a civil union law. *See Hawaii Debates Same-Sex Unions*, N.Y. TIMES, Feb. 23, 2009, at A17.

51. 744 A.2d 864, 888-89 (1999).

52. VT. STAT. ANN. tit. 15, §§ 1201-1207 (2009).

would argue that civil unions are not marriages, that "separate but equal" is not equal, and, even further, that civil unions are not really equal because, for the most part, they lack "portability," that is, they are not recognized in most other jurisdictions.[53]

The flagship states for the claim that Stoddard's approach was successful are Massachusetts, Connecticut, Iowa, and Vermont. The *Goodridge* decision in Massachusetts, which was handed down four years after *Baker*, found, like *Baker*, that not giving legal recognition to same-sex couples was unconstitutional.[54] But *Goodridge* went further than *Baker*, requiring Massachusetts to allow same-sex couples to marry.[55] Some Massachusetts state legislators proposed a Vermont-style civil union approach to remedy the constitutional infirmity identified by the Massachusetts high court. However, in a decision that elaborated *Goodridge*, the Massachusetts court held that a civil union law would not remedy this constitutional infirmity because the proposed law would maintain "an unconstitutional, inferior, and discriminatory status for same-sex couples" and impermissibly exclude them from the institution of marriage.[56] Some courts that have ruled in favor of legal recognition of same-sex relationships have agreed with the Vermont court that a civil-union scheme satisfies the constitutional principles of equality and liberty,[57] while others have agreed with the Massachusetts court, finding that creating an alternative relationship-recognition scheme for same-sex couples does not comport with the principle of equality.[58]

Connecticut provides another example of a court rejecting the constitutionality of a civil-union-type scheme. Like Massachusetts, Connecticut now allows same-sex couples to marry, but its path to same-sex marriage was different. In 2005, the Connecticut legislature passed a civil union law, but unlike Vermont in 1999, it

---

53. *See, e.g.*, Marc R. Poirier, *Piecemeal and Wholesale Approaches Towards Marriage Equality in New Jersey: Is* Lewis v. Harris *a Dead End or Just a Detour?*, 59 RUTGERS L. REV. 291 (2007); Alison Leigh Cowan, *Gay Couples Say Civil Unions Aren't Enough*, N.Y. TIMES, Mar. 17, 2008, at B1. As this paper was in its final stages, the Vermont legislature passed—over the governor's veto—a law that allows same-sex couples to marry starting September 1, 2009, making Vermont the first state to embrace full marriage equality for same-sex couples without being ordered to do so by a court. Jessica Garrison, *Vermont Seals the Deal on Gay Marriage*, L.A. TIMES, Apr. 8, 2009, at A14.

54. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

55. *Id.* at 969-70.

56. Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004).

57. *See, e.g.*, Lewis v. Harris, 908 A.2d 196, 219 (N.J. 2006).

58. *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384, 399 (Cal. 2008); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 418 (Conn. 2008); Varnum v. Brien, No. 07-1499, 2009 WL 874044, at *30 (Iowa Apr. 3, 2009).

did so without being ordered by a state court.[59] Later, the Connecticut Supreme Court held, in *Kerrigan v. Commissioner of Public Health*, that the state's civil union scheme was unconstitutional because it treated people in same-sex relationships different from people in different-sex relationships by virtue of sexual orientation.[60]

If we focus on Massachusetts, Connecticut, Iowa, and Vermont, Stoddard seems to have been right: by pressing for marriage equality, same-sex couples have obtained the right to marry surprisingly fast. Today, a same-sex couple from anywhere in the United States can get married (although doing so may involve travelling to another state); their relationship, however, will not be recognized in most other states.[61] But except for in these four states—and California, which had legalized same-sex marriage after the California Supreme Court overturned a voter-approved gay marriage ban,[62] only to have same-sex marriages made illegal again six months later as the result of a voter referendum that amended the state constitution[63]—the goal of attaining full marriage equality

59. *See* CONN. GEN. STAT. § 46b-38aa (2008).

60. *Kerrigan*, 957 A.2d at 411-12.

61. The exceptions are New York, Rhode Island, and, perhaps, New Mexico. *See* Martinez v. County of Monroe, 850 N.Y.S.2d 740 (App. Div. 2008) (recognizing the validity of a same-sex marriage of a couple married in Canada); Letter from Patrick C. Lynch, Att'y Gen., State of R.I., to Jack R. Warner, Comm'r, R.I. Bd. of Governers for Higher Educ. (Feb. 20, 2007), http://www.glad.org/uploads/docs/cases/ri-ag-statement.pdf ("[W]hether based on Full Faith and Credit or on principles of Comity, Rhode Island will recognize same sex marriages lawfully performed in Massachusetts as marriages in Rhode Island."); David Abel, *Same-Sex Couples from N.M. Allowed to Marry in Mass.—Bay State Agency Clarifies Ruling*, BOSTON GLOBE, July 27, 2007, at B3 (discussing Massachusetts determination that same-sex marriage does not violate New Mexico law). These states will recognize valid same-sex marriages from other jurisdictions. Some other states may recognize valid same-sex marriages from other jurisdiction for limited purposes. *See, e.g.*, Hammond v. Hammond, No. FM-11-905-08-B (N.J. Super. Ct. Ch. Div. Feb. 6, 2009) (deciding to use New Jersey divorce law rather than civil union dissolution law with respect to a Canadian same-sex marriage). Some jurisdictions have granted divorce to couples who had civil unions. *See, e.g.*, *In re* K.J.B. & J.S.O., No. CDCD-119660 (Iowa Dist. Ct. Nov. 14, 2003); *In re* M.G. & S.G., No. 02-D-292 (W.Va. Fam. Ct. Jan. 3, 2003). Presumably, these jurisdictions would take the same approach to same-sex marriages from other jurisdictions. Other courts have refused to grant divorces to couples in civil unions or same-sex marriages from other jurisdictions. *See, e.g.*, Rosengarten v. Downes, 802 A.2d 170 (Conn. App. Ct. 2002); Lane v. Albanese, No. FA-04-4002128-S, 2005 WL 896129 (Conn. Super. Ct. 2005).

62. *Marriage Cases*, 183 P.3d at 453. Prior to this decision, California had a strong domestic partnership law.

63. Proposition 8, which was approved by the majority of California voters in November 2008, amended that state's constitution to define marriage as between one man and one woman. CAL. CONST. art. I, § 7.5. The California Supreme Court will soon decide whether that proposition was a "revision" (in which case, the appropriate

is still far from being accomplished; four states out of fifty is hardly a victory.

There are various replies to this line of argument that could vindicate Stoddard's approach. First, one could reply that there has not yet been enough time to achieve full marriage equality across the United States. After all, the LGBT rights movement only began to emphasize marriage in the mid-1990s,[64] and fifteen years is hardly enough time to change the entire nation. Compared to the time it took to legalize interracial marriage across the country, the struggle for marriage equality appears to be on the fast track. Whereas same-sex marriage litigation has been going on for forty years, litigation against prohibitions on interracial marriage started in the 1870s,[65] the first major victory was in the 1940s,[66] and the Supreme Court finally struck down all such prohibitions in 1967.[67] Critics of Stoddard's approach could note that people of the same sex in the United States had been forming close relationships with each other, living together, having sex, sharing household expenses, and taking care of each other for many decades; that there has been an LGBT rights movement in the United States since the 1940s and a visible and vocal movement since 1969; and that same-sex couples have sought marriages since 1970.

Second, Stoddard's approach can be defended by noting that the success of the aggressive pursuit of marriage equality is to be measured not only by the number of jurisdictions that legalized same-sex marriage, but by other positive results that have emerged from marriage litigation. Most notably, through marriage litigation some state courts have decided that sexual-orientation classifications warrant heightened scrutiny—a dramatic result with implications for the LGBT movement that extend beyond the quest for marriage equality. Traditionally, when courts evaluate whether a law violates

---

procedures were not followed) or an "amendment" to the state constitution. *See* Proposition 8 Cases, Nos. S168047, S168066 & S168078, 2009 Cal. LEXIS 1621, at *1 (Cal. Feb. 26, 2009).

64. The national LGBT rights organizations did not get involved in the Hawaii marriage litigation until later in the case. *See* Rubenstein, *supra* note 32, at 1637-38. Similarly, the plaintiffs in *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995), initially represented themselves but were eventually represented by Professor William Eskridge; Lambda and the local affiliate of the ACLU filed amicus briefs before D.C.'s highest court. *See* ESKRIDGE, *supra* note 5, at 100; Rubenstein, *supra* note 32, at 1638 n.72.

65. *See* Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L.Q. 611, 662 (2004).

66. *See* Perez v. Lippold, 198 P.2d 17, 18 (Cal. 1948).

67. *See* Loving v. Virginia, 388 U.S. 1, 2 (1967). For an interactive map that shows when the various states got rid of their laws against interracial marriage, see Loving Day, Legal Map, http://www.lovingday.org/legal-map (last visited May 8, 2009).

the Equal Protection Clause of the Fourteenth Amendment, the court may apply either *heightened scrutiny*—more specifically, either "strict" or "intermediate" scrutiny[68]—which entails approaching a law with great skepticism, or *rational review*, which entails approaching a law with a great deal of deference. Until 2008, most of the courts in the United States that have directly considered this question have held that sexual-orientation classifications do *not* warrant heightened scrutiny.[69] Of the several courts that held sexual-orientation classifications are suspect, all but one of these decisions were overruled or vacated.[70] In 2008, in the context of holding that prohibiting same-sex marriage is unconstitutional, the supreme courts of California, Connecticut, and Iowa held that sexual orientations warrant heightened scrutiny.[71] This means that courts in these states will take a very skeptical stance towards any laws that make use of sexual-orientation classifications, including laws outside the context of marriage. Even if Proposition 8 nullified the effect of the California Supreme Court's marriage decision,[72] laws that make use of sexual-orientation classifications in California will still face the highest Equal Protection hurdle. A defender of Stoddard's approach could, thus, point to this important result for

68. Sex classifications and classifications associated with birth status (that is, whether or not a person's birth parents were married to each other, sometimes referred to as legitimacy) receive *intermediate* scrutiny in contrast to the *strict* scrutiny that racial, ethnic, and nationality classifications receive. *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988) ("Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.").

69. *See, e.g.*, Thomasson v. Perry, 80 F.3d 915, 928 (4th Cir. 1996) (en banc) (refusing to grant heightened scrutiny for sexual-orientation classifications in the context of military's "Don't Ask, Don't Tell" policy); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (same in the context of military's policy on homosexuality); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (same in the context of the FBI); Hernandez v. Robles, 855 N.E.2d 1, 9 (N.Y. 2006) (plurality opinion) (same in the context of challenge to the constitutionality of New York's marriage laws).

70. *See, e.g.*, Watkins v. U.S. Army, 847 F.2d 1329 (9th Cir. 1988), *vacated and aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc); Equal. Found. of Greater Cincinnati, Inc. v. Cincinnati, 860 F. Supp. 417, 437 (S.D. Ohio 1994), *rev'd*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996), *reinstated on reh'g*, 128 F.3d 289 (6th Cir. 1997); Jantz v. Muci, 759 F. Supp. 1543, 1546 (D. Kan. 1991), *rev'd*, 976 F.2d 623 (10th Cir. 1992); High Tech Gays v. Def. Indus. Sec. Clearance Office, 668 F. Supp. 1361 (N.D. Cal. 1987), *rev'd*, 895 F.2d 563 (9th Cir. 1990); Tanner v. Or. Health Scis. Univ., 971 P.2d 435 (Or. Ct. App. 1998).

71. *In re* Marriage Cases, 183 P.3d 384, 401 (Cal. 2008) (holding that sexual-orientation classifications warrant strict scrutiny); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 432 (Conn. 2008) (holding that sexual-orientation classifications warrant intermediate scrutiny); Varnum v. Brien, No. 07-1499, 2009 WL 874044, at *20 (Iowa Apr. 3, 2009).

72. *See supra* notes 62-63 and accompanying text.

LGBT rights that emerged from the quest for marriage equality. Note, however, that Oregon, the only other state where courts apply heightened scrutiny to sexual-orientation classifications, reached this result in a case concerning domestic partner benefits.[73]

Third, Stoddard's approach could be defended by pointing to other successes for LGBT rights that have emerged through the quest for marriage equality. For example, while, as of September 2009, only four states will allow same-sex couples to marry, eleven other states and the District of Columbia provide some legal recognition for same-sex couples.[74] Some of these laws—domestic partnership laws, civil union laws, and reciprocal beneficiary laws—were enacted as a direct result of a court order following litigation,[75] while other nonmarital relationship-recognition schemes followed on the heels of marriage litigation that failed to achieve marriage equality.[76] These nonmarital forms of recognition for same-sex relationships could, however, be seen more as the result of Ettelbrick's approach rather than Stoddard's.

Fourth, the quest for full marriage equality has proven to be a great public relations strategy. The media attention surrounding same-sex marriage litigation has raised awareness about LGBT rights generally and shown the lives of LGBT people in the most favorable light. The marriage litigation has allowed the LGBT movement to put forward the most seemingly stable, appealing, and upstanding members of its community. In fact, the LGBT rights organizations are very much aware of this public relations role that the plaintiffs in their cases play,[77] and some judges have commented on this:

---

73. *Tanner*, 971 P.2d at 448 (holding that a state university's refusal to give domestic partner benefits to three lesbian employees violated state constitution).

74. *See supra* note 9 and accompanying text.

75. Act of Dec. 21, 2006, 2006 N.J. Laws ch. 103 (codified in part at N.J. STAT. ANN. §§ 37:1-28 to -36) (New Jersey civil union law enacted after *Lewis*); VT. STAT. ANN. tit. 15, §§ 1201-1207 (2009) (Vermont civil union law enacted after *Baker*).

76. *See, e.g.*, Act of May 22, 2008, 2008 Md. Laws ch. 590 (conferring a number of rights regarding hospital visitation, medical decisions, and funeral arrangements to domestic partners); Act of May 22, 2008, 2008 Md. Laws ch. 599 (allowing for the addition or removal of a domestic partner from property deeds without incurring recordation and transfer taxes) (both acts enacted after Conaway v. Deane, 932 A.2d 571 (Md. 2007)); Act of Apr. 21, 2007, 2007 Wash. Sess. Laws ch. 156 (granting domestic partners a number of rights and benefits related to hospital visitation and healthcare decisions); Act of Mar. 12, 2008, 2008 Wash. Sess. Laws ch. 6 (expanding rights and responsibilities of domestic partners) (both acts enacted after Andersen v. King County, 138 P.3d 963 (Wash. 2006)). For somewhat similar scenarios, see Oregon Family Fairness Act, 2007 Or. Laws ch. 99 (enacted after the adoption of OR. CONST. art. XV, § 5A (2004) and Li v. State, 110 P.3d 91 (Or. 2005)), and HAW. REV. STAT. §§ 572-1, 572C-1 (2005) (enacted after the adoption of HAW. CONST. art. 1, § 23 (1998)).

77. *See* Stein, *supra* note 32, at 42.

> [T]hese plaintiffs . . . serve as suitable standard bearers for the cause of same-sex marriage. Their lives reflect hard work, professional achievement, religious faith and a willingness to stand up for their beliefs. They are law-abiding, taxpaying model citizens. They include exemplary parents, adoptive parents, foster parents and grandparents. They well know what it means to make a commitment and to honor it. There is not one among them that any of us should not be proud to call a friend or neighbor or to sit with at small desks on back-to-school night. There is no worthwhile institution that they would dishonor, much less destroy.
>
> . . . The characteristics embodied by these plaintiffs are ones that our society and the institution of marriage need more of, not less. Let the plaintiffs stand as inspirations for all those citizens, homosexual and heterosexual, who may follow their path.[78]

Relatedly, one could argue that the positive public portrayal of LGBT people occasioned by the quest for same-sex marriage has helped to achieve the goals of the LGBT rights movement besides marriage—most notably, the decriminalization of sodomy and the passage of anti-discrimination laws. For example, Justice Kennedy, writing for the majority in *Lawrence v. Texas*, said, "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."[79] Although Justice Kennedy insisted that *Lawrence* did not involve same-sex marriage,[80] the quoted sentence suggests that he was influenced by the knowledge that same-sex couples have enduring personal relationships that sometimes involve intimate interpersonal conduct, knowledge that the quest for same-sex marriage has helped to disseminate. It is not, however, clear which direction the causal arrows go: it might be, in contrast to the general suggestion about the role of the quest for marriage equality, that the legal and social situation for LGBT people was improving before the big push for marriage equality and that it was the general success of the LGBT rights movement that facilitated success with respect to marriage equality. As an example of how the quest for marriage equality was aided by the quest for LGBT rights more generally, *Goodridge* prominently cited *Lawrence* in its second paragraph.[81] There is just as much reason to think that the decriminalization of sodomy and the passage of anti-discrimination laws protecting LGBT people has helped the movement for marriage equality as there is that the reverse has happened.

---

78. Andersen v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *12 (Wash. Super. Ct. Aug. 4, 2004), *rev'd*, 138 P.3d 963 (Wash. 2006).

79. 539 U.S. 558, 567 (2003).

80. *Id.* at 578.

81. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

Stoddard's approach does seem to have worked in some contexts, and it has done so faster than most people expected. Further, although it is hard to identify cause and effect, especially over twenty years and given the different and diffuse strategies pursued in litigation, legislation, and other contexts, Stoddard's equality approach has had a positive effect on the LGBT movement generally and on relationship recognition for same-sex couples in particular.

I turn now to the view that Ettelbrick's approach was the better one. Ettelbrick's is a pluralist and revisionary approach to marriage that aims to develop many forms of relationships, including alternatives to marriage, and to change the way society views marriage.[82] Around the time that Ettelbrick wrote her essay and soon after, advocates of alternative approaches to the recognition of same-sex relationships and LGBT families had some significant victories in obtaining a subset of the rights and benefits associated with marriage without actually getting married. The strategy in these cases was to argue that same-sex relationships are functionally equivalent to marriage in some specific ways. This functional approach to the recognition of same-sex relationships says that the law should look at the characteristics of a relationship—rather than or in addition to its formal legal status—to determine how a relationship should be treated.[83] Miguel Braschi, whose partner died from complications due to AIDS, was threatened with eviction from the rent-controlled apartment that the two men shared but that was in his deceased partner's name.[84] In *Braschi v. Stahl Associates Co.*, New York's highest court held that Braschi should "be afforded the opportunity to prove that he" was a "family member" of his deceased partner under city housing law.[85] Another case that took the functional approach concerned Sharon Kowalski, who suffered severe brain injuries in a car accident.[86] Kowalski's partner, Karen Thompson, wanted to help with Kowalski's physical therapy and to help make medical decisions for her.[87] Kowalski's father tried to block Thompson's involvement.[88] The Minnesota court in *In re Guardianship of Kowalski* treated the two women as a "family of affinity" under guardianship law.[89] In both *Braschi* and *Kowalski*,

82. Ettelbrick, *supra* note 1, at 683-88.

83. For a particular attempt to apply a functional approach to a specific benefit of marriage, see Edward Stein, *A Functional Approach to the Spousal Evidentiary Privilege*, 5 EPISTEME 374, 380-85 (2008).

84. Braschi v. Stahl Assocs. Co., 543 N.E.2d 49, 50-51 (N.Y. 1989).

85. *Id.* at 54-55.

86. *In re* Guardianship of Kowalski, 478 N.W.2d 790, 791-92 (Minn. Ct. App. 1991).

87. *Id.*

88. *Id.* at 791.

89. *Id.* at 797.

the courts held that, even though the same-sex couples involved were not married, they should be treated in the way a married couple would be treated. By looking to the features of a relationship—for example, the emotional and financial commitment and entanglement involved, the mutual reliance for shelter, food, and health care, and how the two people in the relationship have conducted themselves in their personal life—the functional approach to relationship recognition determines whether a relationship should get a benefit typically associated with marriage.[90]

Courts, however, often resist functional approaches. For example, in *De Santo v. Barnsley*, a man in a relationship with another man unsuccessfully tried to argue that their relationship constituted a common law marriage (that is, a legally valid marriage not solemnized in the usual ceremonial manner but instead created by an agreement between cohabitating parties who are capable of intermarriage).[91] The court found that a common law marriage, like marriage generally, was only between one man and one woman and, thus, that the relationship between the two men could not be a common law marriage.[92] In *Coon v. Joseph*, a man in a relationship with another man unsuccessfully sued for damages for emotional distress resulting from injuries to his partner.[93] The court held that the relationship between the injured partner and the partner who witnessed the injury was not the kind of close relationship that would give rise to damages for emotional distress;[94] only a legally recognized spousal relationship or a relationship between a parent and child would support such a cause of action.[95]

In addition to the success of the functional approach to relationship recognition, especially noteworthy in support of the position that Ettelbrick was right is the development of domestic partnership laws and the recognition of other non-marital legal relationships. In 1989, no state gave any legal recognition to same-sex couples; today, in addition to the four states that allow—or will soon allow—same-sex couples to marry, eleven states plus the District of Columbia now provide some sort of nonmarital legal recognition for same-sex couples.[96] This is substantial progress in providing alternatives to marriage, and this constitutes movement

90. *See* Gormley v. Robertson, 83 P.3d 1042 (Wash. Ct. App. 2004) (holding that property accumulations of an unmarried same-sex couple should be equitably distributed as such property of a married couple would be).

91. 476 A.2d 952 (Pa. Super. Ct. 1984).

92. *Id.* at 956.

93. 237 Cal. Rptr. 873 (Cal. Ct. App. 1987).

94. *Id.* at 874.

95. *Id.* at 876.

96. *See supra* note 9 and accompanying text.

towards a more pluralistic vision of relationship recognition. William Eskridge has described this developing pluralism as a "menu of regulatory options offered by the state."[97] The menu runs the gamut from (1) domestic partnership limited to employment benefits, (2) cohabitation that involves some economic obligations and additional benefits, (3) "cohabitation-plus" that, in addition to the obligations and benefits that go with cohabitation, provides state benefits (in part, to encourage and support economic and psychological coupling), health-care proxies, leave from work for when one's cohabitant is sick, and the like (such as Hawaii's reciprocal beneficiary law[98] or state domestic partnership laws like those in Maryland[99]), (4) civil unions or robust domestic partnerships that give the full complement (or almost) of the rights, benefits and obligations associated with marriage under state law, (5) marriage, and (6) covenant marriage, namely, marriage with only a fault-based path to divorce (adopted by a handful of states[100]).[101] No state currently offers this full menu of relationships,[102] but defenders of the success of Ettelbrick's approach could note that, since 1989, family law in the United States has been generally moving in the direction of providing more options for having one's relationship recognized.

While there are more choices for same-sex couples now than there were before 1989, this menu is more of a mapping of the logical space of possibilities than a list of options that any particular (same-sex or different sex) couple can chose. First, in most jurisdictions that have some of these options available, somewhat different options are open to same-sex couples and different-sex couples. With the exception of the five states where same-sex marriage or civil unions are available, there are differences—often quite dramatic—between the benefits available to same-sex couples and different-sex couples.[103] A few of the new forms of relationship recognition that have developed do expand the alternatives available for both different-sex couples and same-sex couples. For example, Vermont and New Jersey both created nonmarital legal relationships that give some, but not all, of the benefits associated with marriage to certain

97. WILLIAM ESKRIDGE & DARREN SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE'VE LEARNED FROM THE EVIDENCE 252 (2006) (emphasis omitted).

98. HAW. REV. STAT. §§ 572C-1 to -7 (2005).

99. *See* ME. REV. STAT. ANN. tit. 22, § 2710 (2008); MD. CODE ANN., HEALTH-GEN. §§ 6-101, 202-203 (LexisNexis 2008).

100. *See* ARIZ. REV. STAT. ANN. §§ 25-901 to -906 (2000); ARK. CODE ANN. §§ 9-11-803 to -811 (2002); LA. REV. STAT. ANN. §§ 9:275, 9:307 (2000).

101. *See* ESKRIDGE & SPEDALE, *supra* note 97, at 252-57; WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 121-26 (2002).

102. *See* ESKRIDGE & SPEDALE, *supra* note 97, at 255.

103. *See id.*

different-sex couples. In New Jersey, both different-sex and same-sex couples consisting of two people who are sixty-two years or older may register as domestic partners and receive a subset of the benefits associated with marriage in New Jersey.[104] In Vermont, blood-relatives or persons related by adoption may, regardless of their respective sexes, register as reciprocal beneficiaries and thereby receive a limited subset of benefits associated with marriage including medical decision making, abuse prevention, hospital visitation, and decision making about anatomical gifts and the disposition of remains.[105]

In some European countries where new forms of relationship recognition have been developing, the new forms are "sedimentary"—that is, when the law is reformed, a new legal rule or institution is added on top of the earlier one rather than simply replacing the earlier form.[106] With respect to relationships, when a new relationship form is created and more benefits are given to certain non-married couples, the old relationship that gave fewer benefits continues to exist; in other words, it remains as sediment. According to Eskridge, this sedimentation leads to a pluralism of types of relationship recognition.[107] If sedimentation is a robust phenomenon in the United States, this would be useful for supporters of Ettelbrick's proposal. Sometimes, some such sedimentation occurs in the United States. In 2004, New Jersey enacted its domestic partnership law, which provided some subset of the benefits associated with marriage to same-sex couples as well as to different-sex couples consisting of two people aged sixty-two or older.[108] After the New Jersey Supreme Court held that the state constitution requires that same-sex couples be able to obtain the same rights and benefits that are available to different-sex couples who marry,[109] New Jersey enacted a civil union law that provides same-sex couples access to equal benefits.[110] No longer did same-sex couples consisting of two people at least one of whom was less than sixty-two years old have the option of registering for a domestic partnership.[111] However, as noted above, a sediment of New Jersey's old domestic partnership law remained for older couples, regardless of the genders involved; no

104. N.J. STAT. ANN. § 26:8A-4.1 (West 2008) (limiting domestic partnership law to couples consisting of two people sixty-two years or older after New Jersey established civil unions for same-sex couple).

105. VT. STAT. ANN. tit. 25, §§1301-1305 (2009).

106. ESKRIDGE, *supra* note 101, at 121.

107. *Id.*

108. N.J. STAT. ANN. § 26:8A (West 2008).

109. Lewis v. Harris, 908 A.2d 196, 220-21 (N.J. 2006).

110. *See* § 37:1-28.

111. *See* § 26:8A-4(b)(5).

such sediment remained for other same-sex couples. The advent of civil unions in New Jersey thus provided only a bit of sedimentation.

In other jurisdictions where there have been advances in relationship recognition, there is little if any sedimentation. For example, before Massachusetts legalized same-sex marriage, a gay man in Massachusetts could get domestic partner benefits for his same-sex partner.[112] Now, some Massachusetts employers take the view that if such an employee wants to get benefits for his partner, the couple should get married.[113] There is no sediment in Massachusetts of the prior domestic partnership. If this general pattern holds throughout the United States, then the pluralism that Ettelbrick hoped for would not be realized.

Another potential problem for the claim that Ettelbrick's pluralism has been the more successful approach is that civil unions might not be seen as the "true alternatives to marriage"[114] for which Ettelbrick was aiming since, in terms of the benefits and responsibilities they provide under state law, they are identical to marriage. The thought is that civil unions are not really an alternative to marriage because a civil union is equivalent to marriage for purposes of state law. On this view, civil unions are not alternatives to marriage; they are second-class marriages in virtue of their failure to provide the name "marriage." Creating two classes of couples who can obtain the same substantial set of benefits and rights and calling one class "marriage" (for different-sex couples) and the other "civil union" (for same-sex couples) underscores the differential treatment for LGBT people. For this very reason, courts in Massachusetts, Connecticut, California, and Iowa have held that this two-class scheme for relationship recognition is unconstitutional.[115]

One who thinks Ettelbrick's approach was right could also point to how LGBT parenting relationships now receive broad recognition. Twenty-six states allow for second-parent adoptions, namely, they allow the same-sex partner of a legal parent of a child to legally adopt that child without terminating the legal status of the present legal parent.[116] Additionally, courts and legislatures, even many that

---

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

113. *Id.*

114. Ettelbrick, *supra* note 1, at 688.

115. *See In re* Marriage Cases, 183 P.3d 384 (Cal. 2008); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004); Varnum v. Brien, No. 07-1499, 2009 WL 874044, at *30 (Iowa Apr. 3, 2009).

116. Four states have laws that specifically authorize second-parent adoption (California, Colorado, Connecticut, and Vermont); appellate courts in seven states and

are hostile to LGBT rights, now acknowledge that same-sex couples are raising children. Further, whereas courts were not so long ago saying that LGBT people were unfit or poor parents and refused to allow them to adopt, have foster children, and/or have custody of or visitation with their own children,[117] today, decisions that treat a parent's homosexuality or bisexuality as a ground for denying parental access to children, or as a factor to be counted against LGBT people seeking to be legal parents, are now quite rare.[118] In fact, in an odd twist, some courts have recently said that LGBT parents have an *advantage* over heterosexual parents: when same-sex couples have children, they are more likely to provide stable environments for children because they can only have children by planning (that is, through assisted reproduction or adoption), while heterosexual couples sometimes produce children through "accidental procreation," which potentially leads to an unstable environment for child rearing.[119] This idea, that same-sex couples are better parents than different-sex couples because same-sex couples always plan their children and spend a great deal of time and money to get them, is a gross oversimplification as well as a very poor argument for limiting marriage to different-sex couples.[120] However, the acknowledgements

---

the District of Columbia have interpreted their state adoption law so as to allow second-parent adoption (California, Illinois, Indiana, Massachusetts, New Jersey, New York, and Pennsylvania); and trial courts in sixteen states have interpreted their state adoption law so as to allow second-parent adoption (Alabama, Alaska, Delaware, Hawaii, Iowa, Louisiana, Maryland, Minnesota, New Hampshire, Nevada, New Mexico, Oregon, Rhode Island, Texas, Washington, West Virginia). RUBENSTEIN ET AL., *supra* note 1, at 787-88. On the other hand, appellate courts in three states have held that their adoption law does not allow for second-parent adoption (Nebraska, Ohio, Wisconsin), and four states have laws that prohibit second-parent adoption (Arkansas, Florida, Mississippi, and Utah). *Id.*

117. *See, e.g.*, Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004) (adoption); *Ex parte* D.W.W., 717 So. 2d 793 (Ala. 1998) (visitation); Dep't of Health & Rehab. Servs. v. Cox, 627 So. 2d 1210 (Fla. Dist. Ct. App. 1993) (adoption); *In re* Marriage of Martins, 645 N.E.2d 567 (Ill. App. Ct. 1995) (custody); Marlow v. Marlow, 702 N.E.2d 733 (Ind. Ct. App. 1998) (visitation); Weigand v. Houghton, 730 So. 2d 581 (Miss. 1999) (visitation); S.B. v. L.W., 793 So. 2d 656 (Miss. Ct. App. 2001) (custody); *In re* Opinion of the Justices, 530 A.2d 21 (N.H. 1987) (adoption and foster care).

118. *See, e.g.*, Jacoby v. Jacoby, 763 So. 2d 410 (Fla. Dist. Ct. App. 2000) (custody); Hollon v. Hollon, 784 So. 2d 943 (Miss. 2001) (custody); V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000) (visitation).

119. *See, e.g.*, Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 867 (8th Cir. 2006); Morrison v. Sadler, 821 N.E.2d 15, 24-25 (Ind. App. 2005); Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006) (plurality opinion); *id.* at 17 (Graffeo, J., concurring); Andersen v. King County, 138 P.3d 963, 1002 (Wash. 2006).

120. *See, e.g.*, *Marriage Cases*, 183 P.3d at 431-32; *Hernandez*, 855 N.E.2d at 30 (Kaye, C.J., dissenting); *see also* Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. (forthcoming 2009); Edward Stein, *The "Accidental Procreation" Argument for*

that LGBT people are raising children, that they are procreating,[121] and that they can be good parents represent a major shift over the past twenty years and a major victory for recognizing relationships that are outside of marriage.[122] More generally, nontraditional paths to becoming a parent have increasingly become recognized. For example, surrogacy agreements have been upheld;[123] people who are not the biological parents of a child are listed as the parents on the birth certificate;[124] and, overall, the notion of who counts as a parent has expanded.[125]

Just as the definition of parent has changed, since 1989 marriage itself has changed in many ways, even aside from the existence of same-sex marriages in some jurisdictions. It has become easier over time to get divorced, especially because of the move from fault to no-fault divorce,[126] most gender asymmetries in family law have disappeared,[127] cohabitation is now recognized for some legal purposes,[128] and procreation is no longer seen as a crucial aspect of

---

Withholding Legal Recognition for Same-Sex Relationships, 84 CHI.-KENT L. REV. (forthcoming 2009).

121. Lewis v. Harris, 875 A.2d 259, 285 (N.J. Super. Ct. App. Div. 2005) (Collester, J., dissenting) ("[R]eproductive science and technology [now enable] some persons in committed same-sex relationships [to] legally and functionally procreate."), *aff'd in part and modified in part*, 908 A.2d 196 (N.J. 2006); *see also* Baker v. State, 744 A.2d 864, 881 (Vt. 1999) ("[C]hildren are being conceived by [same-sex couples] through a variety of assisted-reproductive techniques."); Castle v. State, No. 04-2-00614-4, 2004 WL 1985215, at *14 (Wash. Super. Ct. Sept. 7, 2004), *rev'd, Andersen*, 138 P.3d 963.

122. Note, however, that some courts, in the very same opinions that they praise same-sex couples as stable parents, also express sympathy for the view that same-sex couples are generally worse parents than different-sex couples. *See, e.g.*, *Hernandez*, 855 N.E.2d at 7 (plurality opinion); *Andersen*, 138 P.3d at 982-83. For discussion, see Stein, *supra* note 83.

123. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d 1133 (Mass. 2001).

124. *See, e.g.*, A.H.W. v. G.H.B, 772 A.2d 948 (N.J. Super. Ct. Ch. Div. 2000); Belsito v. Clark, 644 N.E.2d 760 (Ohio Ct. Com. Pl. 1994).

125. *See, e.g.*, Geen v. Geen, 666 So. 2d 1192 (La. Ct. App. 1995) (three parents); C.E.W. v. D.E.W., 845 A.2d 1146 (Me. 2004) (de facto parent); Jacob v. Shultz-Jacob, 923 A.2d 473, 482 (Pa. Super. Ct. 2007) (three parents); *In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005) (de facto parent).

126. *See, e.g.*, J. HERBIE DIFONZO, BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA (1997).

127. *See, e.g.*, Kirchberg v. Feenstra, 450 U.S. 455 (1981); Orr v. Orr, 440 U.S. 268 (1979). *But see* Nguyen v. INS, 533 U.S. 53, 58-59 (2001) (upholding different requirements for citizenship for children of unmarried women who are U.S. citizens as compared to children of unmarried men who are U.S. citizens).

128. *See, e.g.*, Marvin v. Marvin, 557 P.2d 106 (Cal. 1976) (enforcing oral or implied cohabitation contracts); Ireland v. Davis, 957 S.W.2d 310 (Ky. Ct. App. 1997) (interpreting domestic violence laws to include same-sex couples); Dunphy v. Gregor, 642 A.2d 372 (N.J. 1994) (applying bystander liability to unmarried different-sex cohabitant); Braschi v. Stahl Assocs. Co., 543 N.E.2d 49 (N.Y. 1989) (recognizing same-

marriage.[129] Some of the changes in the institution of marriage are the result of forces other than the LGBT movement, such as the advent of new reproductive technologies, the sexual revolution, and the improved position of women in society. These societal changes are not, however, disconnected from the LGBT rights movement; rather, the changes evolve synergistically with changes relating to LGBT rights. Some of the cases that have forced courts to grapple with reproductive technologies have involved LGBT people; the women's movement and the LGBT movement, although distinct, are in some ways interconnected, and so too are the sexual revolution and the LGBT rights movement.

Another reason for thinking that Ettelbrick's approach has been more effective than Stoddard's is that, for various reasons, Ettelbrick's approach has been better able to deal with the antimarriage backlash, one concrete form of which is the emergence of numerous laws and constitutional provisions that explicitly refuse to recognize same-sex marriages. The pluralist approach to relationship recognition and the functional approach to the benefits associated with relationships have been able to make progress in this environment. Some jurisdictions that have antimarriage provisions give some limited recognition to same-sex relationships. For example, Ohio has a state constitutional amendment that limits marriage to "one man and one woman" and, further, prohibits the creation of nonmarital legal relationships that provide benefits typical of marriage.[130] Some intermediate appellate courts held that interpreting the phrase "living as a spouse" in the context of the state's domestic violence law as applying to cohabitants (same-sex or different-sex) violated this constitutional amendment.[131] Despite the breadth of this constitutional amendment, the Ohio Supreme Court upheld the functional approach to family taken by the state's domestic violence law.[132]

---

sex cohabitant as family member under housing law); Gormley v. Robertson, 83 P.3d 1042 (Wash. Ct. App. 2004) (applying equitable distribution to property accumulations of unmarried same-sex couple).

129. *See* Stein, *supra* note 120.

130. OHIO CONST. art. XV, § 11 ("Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.").

131. *See* State v. McBeth, No. 5-05-34, 2006 Ohio App. LEXIS 5377 (Ohio Ct. App. Oct. 16, 2006); State v. Rodriguez, No. H-05-020, 2006 Ohio App. LEXIS 3289 (Ohio Ct. App. June 30, 2006); State v. Logsdon, No. 13-05-29, 2006 Ohio App. LEXIS 2813 (Ohio Ct. App. June 12, 2006); State v. McKinley, No. 8-05-14, 2006 Ohio App. LEXIS 2379 (Ohio Ct. App. May 22, 2006).

132. State v. Carswell, 871 N.E.2d 547 (Ohio 2007).

My look backward from today to 1989 indicates that both Stoddard and Ettelbrick were right. The aggressive push for marriage equality has made a surprising amount of progress: not only has it produced substantial legal reform in a few states, but it has also contributed to a significant change in attitudes toward LGBT people and their families. The pluralist, reformed-minded approach has also borne fruit. Various alternatives to marriage have been developed, functional accounts of family have been embraced, and the institution of marriage and its legal significance have changed. The different strategies that Stoddard and Ettelbrick proposed have both worked and, rather than being in opposition to each other, have worked well together. When, for example, attempts to achieve marriage equality have failed, alternative forms of relationship recognition have been created instead of same-sex marriage. This has happened, for example, in Maryland, where domestic partnership laws were passed after the state's supreme court rejected a legal challenge to prohibitions on same-sex marriages.[133] Sometimes, the relationship-recognition form that results is effectively a consolation prize from the perspective of the marriage-equality approach, but these alternative forms, under the influence of Ettelbrick's approach, may blossom into relationship pluralism, especially if the new form of relationship recognition develops in a sedimentary fashion. The two approaches also work synergistically in that, as functional and alternative family forms are implemented and people get used to them, resistance to same-sex marriage often weakens. By giving domestic partner benefits to employees in same-sex relationships, employers and some municipalities helped people get used to same-sex relationships and gave them recognition. This process helped facilitate support for and acceptance of same-sex marriages, civil unions, and more robust domestic partnerships. Similarly, people living in states that have had civil union or domestic partner laws for some years tend to be more supportive of same-sex relationships. The Vermont legislature, which in 1999 struggled to respond to their state supreme court's order to give same-sex relationships the same rights and benefits that different-sex couples received through marriage,[134] just recently, and by an overwhelming majority, enacted legislation giving full marriage equality to same-sex couples.[135] This demonstrates how

133. Conaway v. Deane, 932 A.2d 571 (Md. 2007). The same general scenario played out in Hawaii and Washington; the scenario in Oregon was somewhat different, but still fairly similar. *See supra* note 76 and accompanying text.

134. *See generally* DAVID MOATS, CIVIL WARS: THE BATTLE FOR GAY MARRIAGE (2005).

135. S. 115, 2009 Leg., Reg. Sess. (Vt. 2009); Abby Goodnough, *Rejecting Veto, Vermont Backs Gay Marriage*, N.Y. TIMES, Apr. 8, 2009 at A1.

recognition of nonmarital same-sex relationships can pave the way to full marriage equality for same-sex couples.

From today's perspective, the different strategies of Ettelbrick and Stoddard were not as much in tension as the two of them thought in 1989. Why, given that both are known as reflective and intelligent advocates of LGBT rights, did they think their strategies were more in tension with each other than they seemed to have been? First, in 1989, the LGBT movement was much less developed than it is today, and there were far fewer resources available to LGBT rights groups like Lambda Legal, the organization for which both Ettelbrick and Stoddard worked. At that time, they understandably must have felt that the LGBT rights movement had to pick one strategy regarding marriage. In retrospect, over the past twenty years, as the LGBT rights movement has developed and strengthened, it turns out that there is room for both strategies. Not only is this dual strategy possible given the present resources of the LGBT movement, from a pragmatic point of view, the two strategies complement each other well; the sum of their joint efforts is greater than the sum of the two approaches applied alone. Another reason why Stoddard and Ettelbrick thought their strategies were more in opposition than they in fact proved to be is, as I have already noted, because they had different goals. Stoddard wanted equal access to marriage for same-sex couples, while Ettelbrick wanted to develop new modes of recognition for LGBT relationships, to create alternatives to marriage for everyone, and to change the institution of marriage. But Stoddard and Ettelbrick shared goals as well. They both wanted the full panoply of rights for LGBT people and they wanted recognition for LGBT families in their varied forms. In retrospect, the goals shared by Stoddard and Ettelbrick could be best accomplished by pursuing both Ettelbrick's and Stoddard's approaches to marriage at the same time.

Based on these suggestions, looking forward, the most promising strategy for LGBT rights is for both approaches to be applied at the same time. The LGBT movement should—to realize the promise of the principle of equality—work for full marriage equality, but—to achieve justice and to improve society—the LGBT movement should also strive to change marriage and the way that the benefits currently associated with marriage are distributed. It is possible to apply the functional approach to the benefits associated with marriage and to create more legal options suited to the plurality of family forms that exist today while, at the same time, pursuing full marriage equality for same-sex couples. Over the past twenty years, these things have been accomplished concurrently, even in the absence of a coordinated strategy for doing so.

Marriage, as a social and a legal institution, has proven fluid and

supple,[136] more so than both its critics and its defenders have thought. Marriage has been able to weather many changes in society, even when its monopoly on legal forms for recognition of adult relationship has eroded. The meaning of marriage has significantly changed in the current social, legal, and political climate in which same-sex couples are marrying in some states, having these marriages recognized by other states, and, in yet other states, having their relationships recognized through nonmarital legal relationships. The struggle for marriage equality has, to some extent, proven to be *a* "path to liberation" and it should continue to be; but it is neither *the only* "path to liberation," nor is it a path to *complete* liberation. LGBT people need to continue to pursue LGBT rights of various sorts in other ways and to strive to obtain other forms of recognition for their families and relationships.

136. *See, e.g.*, LAWRENCE FRIEDMAN, PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW (2004); John Demos, *Images of the American Family, Then and Now*, *in* CHANGING IMAGES OF THE FAMILY 43 (Virginia Tufte & Barbara Myerhoff eds., 1979); Stein, *supra* note 65, at 663.

***