

*Avoiding Marriage Tunnel Vision: Why the Same-Sex Marriage Movement Need Not and Should Not Undermine the Advancement of Non-Marital Relationship Recognition*

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*The future of non-marital relationship recognition is in jeopardy. This is largely due to the current state of the movement responsible for the prior advancements enjoyed by non-marital relationship statuses, the LGBT rights movement, which in recent years has come to prioritize marriage equality over all other goals. The movement's prioritization of marriage equality remains a source of contention. Many people believe that it is more important to pursue the goal of pluralistic relationship recognition, which involves acquiring legal protections for the diverse relationship and familial forms in existence today without regard to marriage eligibility. While most individuals involved in the movement would not dispute that both marriage equality and pluralistic relationship recognition are important goals, the fear that these two goals cannot coexist successfully has come to fruition recently. Marriage equality supporters increasingly engage in rhetoric that disparages non-marital statuses, and marriage equality advancements have led to measurable setbacks to pluralistic relationship recognition through the repeal of non-marital statuses in a number of states that have legalized same-sex marriage. Occurrences such as these are unfortunate and unnecessary, but will not cease until the movement adopts specific strategies to advance both goals simultaneously. This article argues that ignoring the current disharmony between these two goals would be a costly mistake that would hurt many individuals both within and outside of the LGBT community. It proposes a number of strategies, such as the restructuring of non-marital relationship statuses and the reconfiguring of the movement's messages, to aid the movement in successfully advancing both goals and ensuring that marriage equality advancements do not result in the eradication of pluralistic relationship recognition.*

## **I. Introduction**

In recent decades, major advancements have been made with regard to the diversity of relationships eligible for legal recognition. Not only have a number of states expanded marriage

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eligibility to same-sex couples, but through the implementation of various non-marital statuses states across the country have started to provide legal recognition to relationships between individuals who cannot marry or choose not to marry.<sup>1</sup> The lesbian, gay, bisexual, and transgender (“LGBT”) rights movement has been a driving force behind these advancements, as it has worked tirelessly to obtain legal rights, benefits, and protections for LGBT individuals and their families.<sup>2</sup> While advancements have occurred both in obtaining marriage equality for same-sex couples and in obtaining relationship recognition for the many diverse relationships that exist outside of marriage, same-sex marriage has become the face of the LGBT rights movement, receiving great publicity and a large share of the movement’s time and resources.<sup>3</sup>

There is far from universal agreement within the LGBT rights movement, however, regarding the prioritization of marriage equality. The movement’s focus on marriage equality as opposed to acquiring legal rights and protections to serve the needs of the diverse relationship and familial forms in existence today without regard to marriage eligibility (“pluralistic relationship recognition”) has long been the subject of criticism by many individuals within the LGBT rights movement.<sup>4</sup> While the debate has ebbed and flowed over the years as same-sex marriage has become one of the most prominent, if not the most prominent, civil rights issue in the United States, the debate remains very much alive today.<sup>5</sup> In fact, the debate seems to have been revived in recent years, with many of the fears of those who disfavor the movement’s prioritization of marriage equality over pluralistic relationship recognition coming to fruition.

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<sup>1</sup> *See id.*

<sup>2</sup> *Id.*

<sup>3</sup> *See infra* notes 127, 189 and accompanying text.

<sup>4</sup> *See infra* Section II.B.

<sup>5</sup> *See id.*

The goal of pluralistic relationship recognition has suffered measurable harms in many states as a result of marriage equality advancements.<sup>6</sup> In order to promote marriage equality, supporters have been utilizing tactics that involve touting marriage as a superior relationship status and disparaging non-marital relationship statuses as inadequate, inferior, and discriminatory substitutes for marriage.<sup>7</sup> With this treatment of non-marital statuses, it is unsurprising that non-marital statuses in a number of states have been repealed or limited upon the legalization of same-sex marriage without much resistance from the LGBT rights movement – thereby dealing severe blows to the goal of pluralistic relationship recognition. Moreover, the anti-marriage messages advanced by some pluralistic relationship recognition supporters, which are only likely to increase in response to the tactics and rhetoric used by marriage equality supporters, will further entrench the idea that the goal of marriage equality and the goal of pluralistic relationship recognition cannot coexist successfully and expand the already substantial division that exists within the movement today.<sup>8</sup>

The negative consequences of the division within the LGBT rights movement regarding marriage equality and pluralistic relationship recognition are both unfortunate and unnecessary. Marriage equality and pluralistic relationship recognition are both important, core goals of the LGBT rights movement, and the attainment of each would improve the lives of many individuals both within and outside of the LGBT community. The advancement of one goal at the expense of the other creates measurable harms for LGBT individuals and families, as well as for the overall cohesiveness of the movement, and should be avoided at all costs. It is important that individuals within the movement understand that the two goals are not incompatible, and do not need to represent an either/or choice.

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<sup>6</sup> *See infra* Section III.B.

<sup>7</sup> *See id.*

<sup>8</sup> *See infra* Section III.C.

This article sets forth a number of strategies to aid the LGBT rights movement in successfully furthering marriage equality and pluralistic relationship recognition simultaneously.<sup>9</sup> As an initial matter, the movement needs to advocate marriage equality legislation that does not involve the repeal of non-marital statuses. In addition, it is important to restructure the core message set forth by marriage equality supporters as well as the core message set forth by pluralistic relationship recognition supporters such that the messages complement, rather than undermine, each other. Moreover, the movement must work toward the implementation of non-marital statuses that include, rather than exclude, opposite-sex couples. Including opposite-sex couples in non-marital statuses would provide a greater number of people with a personal stake in supporting these statuses and make the maintenance of such statuses in states that legalize same-sex marriage more feasible both legally and politically. Finally, non-marital statuses should be further differentiated from marriage so that these statuses offer a real alternative to marriage instead of providing the same state-based rights and responsibilities as marriage without the title. This would increase the demand for non-marital statuses, allow for the more widespread enactment of such statuses, and change the common perception that non-marital statuses are unnecessary in states that have legalized same-sex marriage.

Taking steps to ensure that the goal of pluralistic relationship recognition and the goal of marriage equality can coexist successfully within the movement and that the work done in pursuit of one of the goals does not undermine the other goal, will lead to a number of positive results for the LGBT rights movement.<sup>10</sup> If each of these important, longstanding goals is pursued in a proper manner, the advancement of one of the goals should actually bolster, rather than undermine, the advancement of the other. Moreover, the more success the movement has in

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<sup>9</sup> See *infra* Section IV.

<sup>10</sup> See *infra* Section V.

advancing both marriage equality and pluralistic relationship recognition, the greater the number of individuals who will have their important relationships recognized. In addition, successfully pursuing both goals simultaneously will go far toward mending the divide in the movement over this issue, and will also help the movement to acquire more supporters and form valuable coalitions. Finally, it will send the movement down a path that is more true to its core purpose of protecting and improving the lives of *all* members of the LGBT community.

This article offers a comprehensive proposal to aid the LGBT rights movement in successfully advancing two of its most important goals, pluralistic relationship recognition and marriage equality, and mending the divide within the movement over this issue. Section II traces the history of the legal recognition of non-marital statuses and same-sex marriage in the United States. It then explores the divide that has existed for many years within the LGBT rights movement regarding whether marriage equality should be the primary focus of the movement or whether the movement's time and resources would be better utilized in furtherance of pluralistic relationship recognition. Section III begins by identifying the setbacks that the goal of pluralistic relationship recognition has faced as a result of advancements in the pursuit of marriage equality. It then seeks to identify the actions and responses of marriage equality supporters, pluralistic relationship recognition supporters, and those outside of the LGBT rights movement that have led to these setbacks. Section IV proposes a number of steps that the movement could undertake to ensure that it is able to successfully further the goal of marriage equality and the goal of pluralistic relationship recognition simultaneously and that advancements with regard to one goal do not serve to undermine the other goal. Finally, Section V explores the benefits that the LGBT rights movement will experience if it is successful in implementing the proposed strategies.

## **II. History**

## A. The Emergence of Same-Sex Marriage and Non-Marital Relationship Statuses on the State Level

Beginning in the earliest years of the United States and continuing until recent decades, “marriage [was regarded] as the exclusive pathway to legitimate family life.”<sup>11</sup> For individuals who wanted their relationships to be legally recognized under state and federal law, opposite-sex marriage was the only option.<sup>12</sup> While this remains true today in the context of federal law, beginning in recent decades and often in response to calls for legal recognition of intimate adult relationships between members of the same sex, a number of states have implemented non-marital relationship statuses or expanded their marriage laws to include same-sex couples.<sup>13</sup>

In the 1980s, a few municipalities passed domestic partnership ordinances granting those who registered a limited set of rights.<sup>14</sup> The main rights consisted of hospital visitation, and, for municipal employees, certain benefits such as the ability to add their non-marital significant others to their health insurance plans.<sup>15</sup> Around sixteen cities, including the District of Columbia, followed suit in the 1990s, implementing similar domestic partnership registries or providing city employees with domestic partnership benefits without creating registries.<sup>16</sup> These early domestic partnership ordinances generally made the status available to both same- and opposite-sex couples.<sup>17</sup> Moreover, around this time Vermont began to provide domestic partner benefits for state employees, and over the years a number of other states followed suit.<sup>18</sup>

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<sup>11</sup> David D. Meyer, *Fragmentation and Consolidation in the Law of Marriage and Same-Sex Relationships*, 58 AM. J. COMP. L. 115, 115 (2010).

<sup>12</sup> *Id.* at 116.

<sup>13</sup> *Id.*

<sup>14</sup> WILLIAM ESKRIDGE, *EQUALITY PRACTICE*, 13-14 (2002).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 14.

<sup>17</sup> *Id.* at 13 (stating that Berkeley’s domestic partner ordinance was atypical for the time in that it included only same-sex couples); Carlos A. Ball, *Introduction*, 61 RUTGERS L. REV. 493, 496 (2009) (“[M]any of these early domestic partnership arrangements did not make distinctions based on the gender of the parties.”).

<sup>18</sup> NATIONAL CONFERENCE OF STATE LEGISLATURES, *STATES OFFERING BENEFITS FOR SAME-SEX PARTNERS OF STATE EMPLOYEES* (2012), <http://www.ncsl.org/issues-research/human-services/states-offering-benefits-for-same-sex-partners-of.aspx>.

The next major advancement in the recognition of non-marital relationships came from Hawaii. In 1993, the Hawaii Supreme Court in *Baehr v. Lewin* held that the denial of marriage to same-sex couples constituted discrimination on the basis of sex, a suspect class under the state constitution's equal rights amendment, and remanded the case to the lower court to determine whether the law violated the plaintiffs' constitutional rights.<sup>19</sup> On remand, the trial court held that the state had not met its burden for justifying the sex-based discrimination.<sup>20</sup> While the appeal of the trial court's decision was pending, however, an amendment to the state constitution introduced by the state legislature in 1997, which stated that "[t]he legislature shall have the power to reserve marriage to opposite-sex couples," was passed through a voter referendum in November of 1998.<sup>21</sup> As a political compromise aimed at extending some rights to LGBT individuals while ensuring that marriage was restricted to opposite-sex couples,<sup>22</sup> when the state legislature introduced the ballot measure to amend the state constitution in 1997, it also passed a law which allowed any two unmarried adults who could not legally marry because they were of the same sex or related to each other to register as reciprocal beneficiaries.<sup>23</sup> Reciprocal beneficiaries received limited benefits including hospital visitation, healthcare decision-making, and some property-related rights.<sup>24</sup> The status did not impose any duties of mutual support.<sup>25</sup>

Meanwhile, the Hawaii Supreme Court's 1993 decision in *Baehr* provoked a significant backlash outside of Hawaii. In 1996, Congress enacted the Defense of Marriage Act, which declared that only opposite-sex marriages would be recognized as marriages for purposes of federal law and that no state would be bound to recognize same-sex marriages validly entered

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<sup>19</sup> 74 Haw. 530, 580, 582 (Haw. 1993).

<sup>20</sup> *Baehr v. Miike*, 1996 WL 694235 at \*21-22 (Haw. Cir. Ct. 1996).

<sup>21</sup> HAW. CONST. art. 1, § 23; Meyer, *supra* note 11, at 119.

<sup>22</sup> HAW. REV. STAT. § 572C-2 (1997); ESKRIDGE, *supra* note 14, at 23-25.

<sup>23</sup> HAW. REV. STAT. § 572C-4 (1997); Elizabeth Kristin, *The Struggle for Same-sex Marriage Continues*, 14 BERKELEY WOMEN'S L.J. 104, 109 (1999); Stein, *supra* note 48, at 185-86.

<sup>24</sup> NCLR, *infra* note 58, at 6; ESKRIDGE, *supra* note 14, at 24.

<sup>25</sup> HAW. REV. STAT. § 572C-7 (1997); ESKRIDGE, *supra* note 14, at 25.

into under the laws of any other state.<sup>26</sup> Then, in 1998, Alaska became the first state to pass a constitutional amendment banning same-sex marriage (Hawaii's amendment merely gave the state legislature the ability to restrict marriage to opposite sex couples).<sup>27</sup> Between 1998 and 2012, an additional twenty-nine states passed constitutional amendments banning same-sex marriage.<sup>28</sup>

The amendments differ from state to state in terms of the scope of relationships banned from legal recognition. Of the thirty states with constitutional amendments banning the legal recognition of same-sex marriage, three appear to also ban the recognition of any non-marital relationship status for same- and opposite-sex couples,<sup>29</sup> ten do not address non-marital statuses and appear to ban only same-sex marriage,<sup>30</sup> and the rest appear to prohibit legal recognition of some, but not all, types of non-marital relationships.<sup>31</sup> For example, some prohibit the recognition of non-marital statuses that are the same or substantially similar to marriage,<sup>32</sup> others prohibit recognition of certain non-marital statuses only for same-sex couples,<sup>33</sup> while still others are unclear regarding whether they ban statuses that provide *any* of the benefits of marriage or only statuses that provide *all* of the benefits of marriage.<sup>34</sup>

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<sup>26</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

<sup>27</sup> Scott Titshaw, *The Reactionary Road to Free Love: How Opponents of Same-Sex Marriage are Destroying the Institution They Seek to Defend*, 115 W. VA. L. REV. (forthcoming 2012) (manuscript at 34, n. 179, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2013535](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2013535)).

<sup>28</sup> See Doug Schoen, *The Five Reasons Behind Obama's Statement On Gay Marriage*, FORBES, May 9, 2012, <http://www.forbes.com/sites/dougschoen/2012/05/09/the-five-reasons-behind-obamas-statement-on-gay-marriage/>.

<sup>29</sup> 253 IDAHO CONST. art. III, §28; 254 S.C. CONST. art. XVII, §15; N.C. CONST. art. XIV, § 6. Whether Michigan should be placed in this category is questionable in light of the language of the statute and a decision by the Michigan Supreme Court. See Titshaw, *supra* note 27 (manuscript at 44-45).

<sup>30</sup> ALASKA CONST. art. 1, §25; ARIZ. CONST. art. XXX; CAL. CONST. art. I, §7.5; COLO. CONST. art. II, §31; MISS. CONST. art. XIV, §263A; MO. CONST. art. I, §33; MONT. CONST. art. XIII, §7; NEV. CONST. art. I, §21; OR. CONST. art. XV, §5A; TENN. CONST. art. XI, §18.

<sup>31</sup> Titshaw, *supra* note 27 (manuscript at 42-43).

<sup>32</sup> See, e.g., ARK. CONST. amend., 83, §§ 1-3; FLA. CONST. art. 2, §27; KY. CONST. §233A; WIS. CONST. art. XIII, §13. For a complete list of the states that fall under each category, see Titshaw, *supra* note 27 (manuscript at 42-45).

<sup>33</sup> See, e.g., ALA. CONST. art. I, §36.03; NEB. CONST. art. I, §29. For a complete list of the states that fall under each category, see Titshaw, *supra* note 27 (manuscript at 42-45).

<sup>34</sup> See, e.g., GA. CONST. art. I, §4; KAN. CONST. art. XV, §16; OKLA. CONST. art. II, §35; VA. CONST. art. I, §15-A. For a complete list of the states that fall under each category, see Titshaw, *supra* note 27 (manuscript at 42-45, n. 245).

The backlash to *Baehr*, however, represents only one aspect of the important series of events that occurred following the decision. Importantly, “[p]eople...who had assumed that same-sex marriage was at best a long term aspiration, reconsidered that assumption” as a result of *Baehr*.<sup>35</sup> Hawaii’s experience, which was in large part responsible for beginning a serious and widespread discussion in this country regarding same-sex marriage and non-marital relationship statuses,<sup>36</sup> paved the way for the significant progress that would occur over the next thirty years regarding state recognition of same-sex marriage and non-marital relationship statuses.<sup>37</sup>

In 1999, approximately six years after the *Baehr* decision, and just one year after the first state passed a constitutional amendment banning same-sex marriage, the Vermont Supreme Court in *Baker v. State* ruled that denying same-sex couples the “statutory benefits, protections, and security incident to marriage” violated the equality provision of the state constitution.<sup>38</sup> Under *Baker*, the legislature was required to “craft an appropriate means of addressing this constitutional mandate.”<sup>39</sup> The Vermont legislature created a solution aimed at preserving the traditional definition of marriage while at the same time remedying the constitutional infirmities identified by the court.<sup>40</sup> As a result of the *Baker* decision, the Vermont legislature enacted the country’s first civil union statute,<sup>41</sup> which provided same-sex couples all of the state-based rights, benefits, and obligations of marriage.<sup>42</sup> Only non-related same-sex couples were eligible for civil unions.<sup>43</sup> Interestingly, at the same time it passed the civil union law, Vermont also

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<sup>35</sup> ESKRIDGE, *supra* note 14, at 45.

<sup>36</sup> *Id.* at 26 (“After *Baehr*, an issue that had been a curiosity became an apocalyptic sensation.”); Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U. J. GENDER SOC. POL’Y & L. 167, 168 (1999) (explaining that as a result of the decision in *Baehr*, “[a]lmost overnight, the conversation about gay and lesbian marriage moved into mainstream America.”).

<sup>37</sup> ESKRIDGE, *supra* note 14, at 46 (chronicling the passage of civil unions in Vermont and explaining that “[i]n the wake of *Baehr*, the coalition [for lesbian and gay rights] created a committee to work on the issue of same-sex marriage.”).

<sup>38</sup> *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999).

<sup>39</sup> *Id.* at 886-87.

<sup>40</sup> ESKRIDGE, *supra* note 14, at 46, 61-80. *See also* 15 VT. STAT. ANN. § 1204.

<sup>41</sup> Elizabeth M. Glazer, *Civil Union Equality*, 2012 CARDOZO L. REV. DE NOVO 125, 127 (2012).

<sup>42</sup> 15 VT. STAT. ANN. § 1201.

<sup>43</sup> 15 VT. STAT. ANN. §§ 1202-1203.

passed a law establishing a reciprocal beneficiary status. This status was limited to individuals of the same- or opposite-sex related by adoption or blood,<sup>44</sup> and it provided only a handful of rights centering on health-related decision-making.<sup>45</sup>

Also in 1999, California became the first state to recognize a domestic partnership status that was not restricted to local or state government employees.<sup>46</sup> The status provided hospital visitation rights for all registrants and health insurance coverage for the partners of state and local public employees.<sup>47</sup> The California domestic partnership registry was open to all non-related same-sex couples, but opposite-sex couples were allowed to register only if one or both members were over the age of sixty-two and satisfied the eligibility requirements for old-age benefits under the Social Security Act.<sup>48</sup> The rationale for allowing only this category of opposite-sex couples to enter the non-marital status, which a number of states continue to adhere to in setting eligibility requirements for non-marital statuses, is that individuals over the age of sixty-two risk losing federal benefits such as social security if they remarry, and non-marital statuses, which are not recognized by the federal government, do not carry such risks.<sup>49</sup> Thus, in the view of some legislators, a compelling reason exists to allow such individuals to choose a status other than marriage.<sup>50</sup> Four years later, in 2003, California expanded its existing domestic partnership law to provide domestic partners with all of the rights and obligations of marriage.<sup>51</sup>

The next major relationship recognition advancement occurred when a Massachusetts Supreme Court decision rendered in 2003 paved the way for Massachusetts to become the first

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<sup>44</sup> *Id.* § 1301.

<sup>45</sup> *Id.*

<sup>46</sup> ESKRIDGE, *supra* note 14, at 14.

<sup>47</sup> A.B. 26, 1999 Gen. Assem. (Ca. 1999), available at [http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab\\_0001-0050/ab\\_26\\_bill\\_19991010\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_0001-0050/ab_26_bill_19991010_chaptered.pdf) (version of the bill as enacted).

<sup>48</sup> *Id.* As originally enacted in 1999, the category of opposite-sex couples eligible for the status included only those opposite-sex couples wherein *both* members were over the age of sixty-two, but in 2001 eligibility was expanded to include opposite-sex couples wherein *one or both* members were over the age of sixty-two. 2001 Cal. Legis. Serv. Ch. 893 (West).

<sup>49</sup> Edward Stein, *The Topography of Legal Recognition of Same-Sex Relationships*, 50 FAM. CT. REV. 181, 186 (2012).

<sup>50</sup> *Id.* See also *infra* notes 57, 63.

<sup>51</sup> 2003 Cal. Legis. Serv. Ch. 421 (West).

state to recognize same-sex marriage.<sup>52</sup> In *Goodridge v. Department of Health*, the Massachusetts Supreme Court ruled that denying marriage licenses to same-sex couples violated the equal protection and due process clauses of the state constitution.<sup>53</sup> The Court further instructed state legislators that providing same-sex couples with civil unions instead of marriage would not remedy the law’s constitutional infirmities, as doing so would “have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits.”<sup>54</sup> As a result of *Goodridge*, in 2004 Massachusetts became the first state to legalize same-sex marriage.<sup>55</sup>

Since the Massachusetts Supreme Court decision in *Goodridge*, significant changes have occurred regarding the recognition of same-sex marriage and non-marital relationship statuses, with many states establishing non-marital relationship statuses or same-sex marriage between 2004 and 2012. The most common non-marital statuses enacted during this period were domestic partnerships providing limited rights related to healthcare decision-making, hospital visitation, or inheritance (“limited-benefits domestic partnerships”), domestic partnerships providing all of the state-based rights and benefits of marriage (“full-benefits domestic partnerships”), and civil unions providing all of the benefits, rights, and obligations granted to married couples under state law.

In terms of limited-benefits domestic partnerships and other limited-benefits statuses, Maine and Maryland established limited-benefits domestic partnerships for non-related same- and opposite-sex couples,<sup>56</sup> New Jersey and Washington established limited-benefits domestic

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<sup>52</sup> *Goodridge v. Department of Health*, 798 N.E.2d 941, 970 (2003).

<sup>53</sup> *Id.* at 970.

<sup>54</sup> *Id.*

<sup>55</sup> *Same-sex Couples Exchange Vows in Massachusetts*, CNN JUSTICE, May 17, 2004, [http://articles.cnn.com/2004-05-17/justice/mass.samesex.marriage\\_1\\_plaintiff-couples-compton-and-wilson-couples-exchange?\\_s=PM:LAW](http://articles.cnn.com/2004-05-17/justice/mass.samesex.marriage_1_plaintiff-couples-compton-and-wilson-couples-exchange?_s=PM:LAW).

<sup>56</sup> Maine’s status confers limited rights, such as guardian and conservator rights, next of kin status, inheritance rights, and victim’s compensation rights. Domestic Partnerships, Equality Maine, <http://equalitymaine.org/domestic-partnerships> (last visited July 12, 2012). Domestic partnerships in Maryland provide limited rights involving hospital visitation, medical decision-making, and tax exemptions for certain property transfers between partners. NATIONAL CENTER FOR LESBIAN RIGHTS, MARRIAGE, DOMESTIC PARTNERSHIPS, AND CIVIL UNIONS: AN OVERVIEW OF RELATIONSHIP RECOGNITION FOR SAME-SEX COUPLES WITHIN THE

partnerships for non-related opposite-sex couples in which one member (Washington) or both members (New Jersey) are over the age of sixty-two as well as non-related same-sex couples,<sup>57</sup> and Wisconsin established limited-benefits domestic partnerships for non-related same-sex couples.<sup>58</sup> In addition, Colorado established the status of designated beneficiary,<sup>59</sup> which provides limited rights and benefits and is open to any two unmarried people over the age of eighteen regardless of sex or familial relation.<sup>60</sup> The status is unique in that it allows the parties to choose, from a limited list, the specific rights and benefits that they would like for their relationship.<sup>61</sup>

Since *Goodridge* a number of states have also established full-benefits domestic partnership and civil union statuses. Oregon established a full-benefits domestic partnership status for non-related same-sex couples and Nevada established a full-benefits domestic partnership status for non-related same- and opposite-sex couples.<sup>62</sup> In addition, Washington expanded its limited benefits domestic partnership status, open to non-related opposite-sex couples wherein at least one partner is over the age of sixty-two and non-related same-sex couples, to a full-benefits domestic partnership status.<sup>63</sup> The District of Columbia also expanded

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UNITED STATES 6 (2012), [http://www.nclrights.org/site/DocServer/Relationship\\_Recognition\\_Update\\_-\\_09\\_03\\_08.pdf?docID=881](http://www.nclrights.org/site/DocServer/Relationship_Recognition_Update_-_09_03_08.pdf?docID=881) [hereinafter NCLR].

<sup>57</sup> Domestic Partnership, State of New Jersey Department of Health, <http://www.state.nj.us/health/vital/dp2.shtml> (last visited July 12, 2012); Andrew Garber, *Law Lets Couples be "Partners"*, SEATTLE TIMES, July 23, 2007, [http://seattletimes.nwsource.com/html/localnews/2003801664\\_partners23m.html](http://seattletimes.nwsource.com/html/localnews/2003801664_partners23m.html).

<sup>58</sup> This status provides limited rights such as "hospital visitation and some medical decision-making, inheritance, the right to sue for wrongful death, and immunity from testifying against the other partner in court." NATIONAL CENTER FOR LESBIAN RIGHTS, MARRIAGE, DOMESTIC PARTNERSHIPS, AND CIVIL UNIONS: AN OVERVIEW OF RELATIONSHIP RECOGNITION FOR SAME-SEX COUPLES WITHIN THE UNITED STATES 11 (2012), [http://www.nclrights.org/site/DocServer/Relationship\\_Recognition\\_Update\\_-\\_09\\_03\\_08.pdf?docID=881](http://www.nclrights.org/site/DocServer/Relationship_Recognition_Update_-_09_03_08.pdf?docID=881) [hereinafter NCLR]; WIS. STAT. ANN. § 770.001, *et seq.* See also 12 Wis. Prac., Wis. Collection Law § 4:17 (2d ed.).

<sup>59</sup> COLO. REV. STAT. ANN. § 15-22-101, *et seq.* (West 2009).

<sup>60</sup> *Id.* § 15-22-104.

<sup>61</sup> *Id.* §§ 15-22-105 to 106; Meyer, *supra* note 11, at 121-22. The rights and benefits they may choose among are limited and relate to, *inter alia*, property transfers, standing to sue in tort, inheritance, insurance and retirement benefits, hospital visitation, and healthcare decision-making. COLO. REV. STAT. ANN. § 15-22-105.

<sup>62</sup> OR. REV. STAT. §§ 106.305, 106.310, 106.315, 106.340; NEV. REV. STAT. ANN. 122A.010, *et seq.* (2009).

<sup>63</sup> NCLR, *supra* note 58, at 10. Opponents of Washington's expanded domestic partnership law sought to overturn it through a voter referendum, but were unsuccessful. Rachel La Corte, *Voters Approve "Everything but Marriage" Bill*, KOMONEWS, Nov. 5, 2009, <http://www.komonews.com/news/69333537.html>. This marked the first time that United States voters voted in favor of promoting equality for same-sex couples on a state-wide level. *Id.*

its existing limited-benefits domestic partnership status, open to same- and opposite-sex couples as well as individuals who are related, to a full-benefits status.<sup>64</sup> In terms of civil unions, Connecticut,<sup>65</sup> New Jersey,<sup>66</sup> New Hampshire,<sup>67</sup> Rhode Island,<sup>68</sup> and Delaware<sup>69</sup> all established civil unions for non-related same-sex couples. Moreover, Illinois and Hawaii became the first states to create a civil union status open to non-related opposite-sex couples as well as non-related same-sex couples.<sup>70</sup> When New Jersey's civil union law went into effect, its existing domestic partnership law was altered to provide that just as was the existing rule for opposite-sex couples, only same-sex couples in which both members were over the age of sixty-two remained eligible for the status.<sup>71</sup>

Finally, in the years since the 2004 *Goodridge* decision led to Massachusetts becoming the first state to recognize same-sex marriage, eight states and the District of Columbia have followed suit and currently grant same-sex marriages.<sup>72</sup> State court decisions holding that the

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<sup>64</sup> D.C. CODE §§ 32-701 to 710 (passed as B18-0066, 2009-2010 Council, 18th Period (D.C. 2009)); NCLR, *supra* note 58, at 4-5; Fredo Alvarez, *D.C. Council Passes Domestic Partner Law Expansion*, DCIST, May 16, 2008, [http://dcist.com/2008/05/16/dc\\_council\\_pass.php](http://dcist.com/2008/05/16/dc_council_pass.php); Press Release, National Center for Lesbian Rights, New Law Protects Children Born to Same-Sex Parents in the District of Columbia (July 22, 2009), [http://www.nclrights.org/site/PageServer?pagename=press\\_DCParentingBill072209](http://www.nclrights.org/site/PageServer?pagename=press_DCParentingBill072209).

<sup>65</sup> CONNECTICUT JUDICIAL BRANCH LAW LIBRARIES, CIVIL UNIONS IN CONNECTICUT 3 (2010), <http://www.jud.ct.gov/lawlib/Notebooks/Pathfinders/CivilUnions.pdf>. Connecticut was the first state to do establish civil unions without judicial intervention. GLAD, CONNECTICUT CIVIL UNIONS 1 (2010), <http://www.glad.org/uploads/docs/publications/ct-civil-union.pdf>.

<sup>66</sup> N.J. STAT. ANN. § 37:1-28 (West 2007); LAMBDA LEGAL, CIVIL UNIONS FOR SAME-SEX COUPLES IN NEW JERSEY 1-2, <http://data.lambdalegal.org/pdf/772.pdf>. The New Jersey civil union status was established as a result of court decision. *Lewis vs. Harris*, 188 N.J. 415 (2006).

<sup>67</sup> The New Hampshire civil union law was passed without judicial intervention. Beverley Wang, *State Senate approves civil unions for same-sex couples*, CONCORD MONITOR, Apr. 26, 2007, <http://www.concordmonitor.com/article/state-senate-approves-civil-unions-for-same-sex-couples>.

<sup>68</sup> R.I. GEN. LAWS § 15-3.1-2 (2011).

<sup>69</sup> DEL. CODE ANN. TIT. 13, § 202 (2011).

<sup>70</sup> ILL. COMP. STAT. 75/1 *et seq.* (2011); American Constitution Society, *The Illinois Experience: Straight Civil Unions and the Future of Marriage*, <http://www.acslaw.org/Civil/Unions/Chicago/ACS> (last visited July 12, 2012); NCLR, *supra* note 58, at 5; HAW. REV. STAT. § 572B-2 (2012). When Hawaii's civil union law went into effect, its existing non-marital relationship status, reciprocal beneficiaries, was not altered or displaced. NCLR, *supra* note 58, at 5.

<sup>71</sup> See *supra* note 57.

<sup>72</sup> A decision by the California Supreme Court led to the legalization of same-sex marriage in California from June 2008 until November 2008, when a constitutional amendment banning same-sex marriage was passed by voters. In re Marriage Cases, 43 Cal. 4th 757, 782-85, 847-56 (2008). Both a federal district court and a federal court of appeals have ruled that the amendment is unconstitutional, and the Supreme Court will hear the case in 2013. Adam Liptak, *Justices to Hear Two Challenges on Gay Marriage*, N.Y. TIMES, Dec. 7, 2012, [http://www.nytimes.com/2012/12/08/us/supreme-court-agrees-to-hear-two-cases-on-gay-marriage.html?\\_r=0](http://www.nytimes.com/2012/12/08/us/supreme-court-agrees-to-hear-two-cases-on-gay-marriage.html?_r=0).

denial of marriage to same-sex couples was unconstitutional led to the legalization of same-sex marriage in Connecticut and Iowa.<sup>73</sup> Legislative action led to the legalization of same-sex marriage in Vermont,<sup>74</sup> the District of Columbia,<sup>75</sup> New Hampshire,<sup>76</sup> and New York.<sup>77</sup> A combination of legislative action and the popular vote led to the recognition of same-sex marriage in Washington and Maryland.<sup>78</sup> In those states, same-sex marriage opponents introduced ballot measures to repeal the recently enacted same-sex marriage laws before they went into effect, but the ballot measures were defeated in each state.<sup>79</sup> In addition, Maine became the first state to legalize same-sex marriage through voter approval of a pro-same-sex marriage ballot measure.<sup>80</sup>

The civil union laws in Connecticut,<sup>81</sup> Vermont,<sup>82</sup> and New Hampshire<sup>83</sup> were repealed upon the legalization of same-sex marriage in those states. In addition, upon the legalization of same-sex marriage in Washington, eligibility for the state's domestic partnership status was limited such that only same- or opposite-sex couples in which at least one partner is over age sixty-two qualify for the status (under the previous law this age-based restriction was not applicable to same-sex couples).<sup>84</sup>

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<sup>73</sup> *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407, 482 (2008); *Varnum v. Brien*, 763 N.W.2d 862, 906-07 (2009).

<sup>74</sup> NCLR, *supra* note 58, at 10.

<sup>75</sup> Keith L. Alexander and Ann E. Marimow, *D.C. Begins Licensing Same-sex Marriages*, WASH. POST, Mar. 4, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/03/AR2010030300654.html>.

<sup>76</sup> NCLR, *supra* note 58, at 8.

<sup>77</sup> *Id.* at 9.

<sup>78</sup> *Id.* at 7, 11.

<sup>79</sup> *Id.* at 1, 7, 11.

<sup>80</sup> David Crary, *Maine votes in favor of legalizing gay marriage*, HUFFINGTON POST, Nov. 6, 2012, <http://www.huffingtonpost.com/huff-wires/20121106/us-ballot-measures/>.

<sup>81</sup> 2009 Conn. Legis. Serv. P.A. 09-13 (S.B. 899) (West); Conn. Gen. Stat. Ann. § 46b-38aa to 38pp.

<sup>82</sup> STATE OF VERMONT LEGISLATIVE COUNCIL, FREQUENTLY ASKED QUESTIONS ABOUT S.115, AN ACT RELATING TO CIVIL MARRIAGE, AS PASSED BY THE HOUSE AND SENATE 1, <http://www.leg.state.vt.us/misc/s115faq.pdf>.

<sup>83</sup> NCLR, *supra* note 58, at 9.

<sup>84</sup> *Id.* at 10; 2011 WA S.B. 6239 (2012).

Overall, same-sex marriage is legal in nine states and the District of Columbia.<sup>85</sup> Five states recognize civil unions.<sup>86</sup> Four states and the District of Columbia have full-benefits domestic partnership laws,<sup>87</sup> and seven states recognize non-marital statuses that provide limited rights and benefits.<sup>88</sup> In six states and the District of Columbia, opposite-sex couples can choose between marriage and a non-marital status,<sup>89</sup> and opposite-sex couples in which one or both members are at least age sixty-two can choose between marriage and a non-marital status in three additional states.<sup>90</sup> All same-sex couples can choose between marriage and a non-marital status in two states and the District of Columbia,<sup>91</sup> and same-sex couples in which at least one member is over the age of sixty-two can choose between marriage and a non-marital status in one state.<sup>92</sup> There is one state in which all same-sex couples can choose among non-marital statuses<sup>93</sup> and one state in which same-sex couples wherein both members are over age sixty-two can choose among non-marital statuses.<sup>94</sup> Finally, individuals who are related to each other can enter into non-marital statuses in three states and the District of Columbia.<sup>95</sup>

## **B. Differing Views within the LGBT Rights Movement Regarding Relationship Recognition Goals**

Over the past thirty years, significant progress has been made in the United States regarding the recognition of same-sex marriage and non-marital relationship statuses.<sup>96</sup> The impetus for much of the progress has been to provide LGBT individuals with greater rights and

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<sup>85</sup> Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, Washington, Maryland, Maine, and New York. *See generally* NCLR, *supra* note 58.

<sup>86</sup> These states are Rhode Island, Delaware, Illinois, Hawaii, and New Jersey. *Id.*

<sup>87</sup> These states are Nevada, California, Washington, and Oregon. *Id.*

<sup>88</sup> These states are Maine, Maryland, New Jersey, Colorado, Wisconsin, Hawaii, and Vermont. *Id.* In Vermont, however, only individuals who are related are eligible for the non-marital status (reciprocal beneficiaries). *See supra* note 44 and accompanying text.

<sup>89</sup> These states are Hawaii, Illinois, Nevada, Maine, Maryland, and Colorado. *See generally* NCLR, *supra* note 58.

<sup>90</sup> These states are California, New Jersey, and Washington. *Id.*

<sup>91</sup> These jurisdictions are Maine and Maryland. NCLR, *supra* note 58, at 5.

<sup>92</sup> This state is Washington. *Id.*

<sup>93</sup> This state is Hawaii. *Id.*

<sup>94</sup> This state is New Jersey. *Id.*

<sup>95</sup> These states are Hawaii, Colorado, and Vermont. *See supra* Section II.A.

<sup>96</sup> *See supra* Section II.A.

protections.<sup>97</sup> Within the LGBT rights movement, however, there has been significant disagreement with regard to the goals upon which the movement should be focusing and pursuing.<sup>98</sup> Much of the debate has focused on the issue of same-sex marriage, as for many years there has “been an ongoing and vigorous debate within the LGBT community about the moral and political advisability of pursuing same-sex marriage” and the prioritization of the pursuit of marriage equality over the pursuit of pluralistic relationship recognition.<sup>99</sup>

In discussing the emergence of this debate, many scholars cite the differing views expressed by Thomas Stoddard, then the executive director of LGBT rights legal advocacy organization Lambda Legal, and Paula Ettelbrick, then the legal director of the Lambda Legal, in a 1989 edition of *Out/Look Magazine*.<sup>100</sup> Stoddard argued in favor of “aggressively” pursuing marriage equality.<sup>101</sup> He believed that marriage was “the issue most likely to lead ultimately to a world free from discrimination against lesbians and gay men,” emphasizing the position of marriage as the “centerpiece of our entire social structure” and pointing out its “exalted” status in the United States.<sup>102</sup> In his view, anything less than marriage, such as domestic partnerships, would provide only partial equality for the LGBT community, and same-sex relationships would continue to be subordinate, second class relationships until same-sex couples enjoyed “exactly the same rights as their heterosexual counterparts.”<sup>103</sup> Acknowledging that many in the LGBT community would not choose to enter the institution of marriage due to its patriarchal history, Stoddard explained that the question was not the “desirability of marriage,” but instead “the

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<sup>97</sup> *See id.*

<sup>98</sup> Ball, *supra* note 17, at 494.

<sup>99</sup> *Id.*

<sup>100</sup> *See, e.g.,* Glazer, *supra* note 41, at 137-38; Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J. L. & GENDER 37, 48 (2011).

<sup>101</sup> Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, *OUT/LOOK: NAT'L GAY & LESBIAN Q.*, Fall 1989, reprinted in WILLIAM B. RUBENSTEIN, CARLOS A. BALL & JANE S. SCHACTER, *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* 689 (4<sup>th</sup> ed).

<sup>102</sup> *Id.* at 691.

<sup>103</sup> *Id.*

desirability of the *right to marry*,” and he pointed out that expanding marriage rights to same-sex couples could transform the institution of marriage and divest it from its patriarchal past.<sup>104</sup> According to Stoddard, marriage was the best path to full equality for LGBT individuals.<sup>105</sup>

In explaining her opposing viewpoint, Ettelbrick argued that marriage would undermine two primary objectives of the LGBT rights movement: “affirmation of gay identity and culture” and “the validation of many forms of relationships.”<sup>106</sup> Ettelbrick feared that in order to achieve marriage equality, members of the LGBT community would have to continually tout the similarity of their relationships to those of non-LGBT individuals, and the community would consequently lose its queer identity; an identity that involved challenging oppressive gender roles and “pushing the parameters of sex, sexuality, and family.”<sup>107</sup> Ettelbrick further expressed her view of marriage as “a two-tier system that allows the government to regulate relationships,” and she warned that making marriage a goal of the movement would involve unjustly prioritizing the rights of a few people, at the cost of further marginalizing all relationships, same- and opposite-sex, that exist outside of marriage.<sup>108</sup> Instead of furthering the recognition of “many different types of relationships,” pursuing same-sex marriage would necessitate “perpetuating the elevation of married relationships and of couples in general.”<sup>109</sup> Ettelbrick advised the LGBT community that:

We must first break the tradition of piling privileges and benefits on to those who are married, while ignoring the real-life needs of those who are not. Only when we deinstitutionalize marriage and bridge the economic and privilege gap between the married and unmarried will each of us have a true choice. Otherwise, our

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<sup>104</sup> *Id.* at 692 (emphasis in original).

<sup>105</sup> *Id.* at 689-92.

<sup>106</sup> Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, *OUT/LOOK: NAT'L GAY & LESBIAN Q.*, Fall 1989, reprinted in WILLIAM B. RUBENSTEIN, CARLOS A. BALL & JANE S. SCHACTER, *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* 693 (4<sup>th</sup> ed).

<sup>107</sup> *Id.* at 693-94.

<sup>108</sup> *Id.* at 696.

<sup>109</sup> *Id.* at 695.

choice not to marry will continue to lack legal protection and societal respect.<sup>110</sup>

Ettelbrick praised the work that domestic partnership laws had done towards expanding relationship recognition beyond romantic relationships and validating non-marital relationships.<sup>111</sup> She cautioned, however, that to continue this progress, domestic partnerships should not be treated as a stepping stone to marriage, but instead as a true alternative to marriage.<sup>112</sup> To Ettelbrick, marriage decidedly was not the path to liberation for LGBT individuals.

This debate has continued over the years.<sup>113</sup> As marriage equality has come to occupy what appears to be the most prominent place within the LGBT rights movement,<sup>114</sup> those individuals who disagree with the movement's prioritization of marriage equality have continued to voice their concerns, although the degree to which the concerns have been voiced has ebbed and flowed over the years. Nancy Polikoff has explained that as same-sex marriage became a real discussion immediately after *Baehr*, which created a series of anti-gay-rights initiatives, the individuals who "opposed the allocation of resources towards facilitating marriage . . . stayed on the sidelines. We were hardly inclined to oppose same-sex marriage in a climate where such opposition expressed anti-gay sentiment; yet neither could we wholeheartedly join in the fight to achieve an end we fundamentally did not embrace."<sup>115</sup> However, in the thirty years since *Baehr*, the discussion within the LGBT rights movement regarding the prioritization of marriage has continued, and Elizabeth Glazer has noted that the debate seems to have undergone a revival as

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<sup>110</sup> *Id.* at 696-97.

<sup>111</sup> Ettelbrick, *supra* note 137, at 697.

<sup>112</sup> *Id.*

<sup>113</sup> Ball, *supra* note 17, at 494 ("[T]here has also been an ongoing and vigorous debate within the LGBT community about the moral and political advisability of pursuing same-sex marriage.").

<sup>114</sup> *See infra* notes 127, 189 and accompanying text.

<sup>115</sup> Polikoff, *supra* note 36, at 169.

of 2009.<sup>116</sup> This makes sense when one considers the significant gains in marriage equality in the years immediately before and after 2009.<sup>117</sup> Moreover, the pattern in a number of states of repealing existing non-marital statuses as soon as same-sex marriage laws take effect and the increasing use by marriage equality supporters of rhetoric that disparages non-marital statuses has brought Ettelbrick's concerns to fruition in a measurable way, and likely has added fuel to the ongoing debate.

The themes of the Stoddard/Ettelbrick debate still feature prominently in the modern discussion of same-sex marriage within the LGBT rights movement. For example, Katherine Franke has expressed her concern that the movement's focus on marriage equality, when pursued through arguments that rely on the idea of marriage as a privileged, superior status, will "denigrat[e] or shrink[] an affective sexual liberty outside of marriage."<sup>118</sup> By focusing on marriage as a zero sum game for the LGBT community, Franke fears the movement has created a harmful binary where non-marital statuses "become positioned as the harbor of cowards and those who favor the cause too little . . . thereby [foreclosing] the exploration of family, intimate, sexual, and kin formations other than marriage."<sup>119</sup>

Nancy Polikoff has urged the LGBT community to read the work of Martha Fineman, who has argued for the abolition of marriage as a legal category.<sup>120</sup> In Fineman's view, if marriage as a legal category is not abolished, it "will continue to occupy a privileged status and be posited as the ideal, defining other intimate entities as deviant."<sup>121</sup> Thus, Fineman asks, "[i]nstead of seeking to eliminate the stigma by analogizing more and more relationships to marriage, why not just abolish the category as a legal status and, in that way, render all sexual

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<sup>116</sup> Glazer, *supra* note 41, at 139.

<sup>117</sup> *See supra* section II.A.

<sup>118</sup> Katherine M. Franke, *Longing for Loving*, 76 *FORDHAM L. REV.* 2685, 2686-88 (2008).

<sup>119</sup> *Id.*

<sup>120</sup> *See generally* Polikoff, *supra* note 39.

<sup>121</sup> MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 230 (1995).

relationships equal with each other and all relationships equal with the sexual?”<sup>122</sup> Fineman proposes that family law be organized around supporting caretaking relationships instead of marriage.<sup>123</sup>

Polikoff also has criticized marriage equality supporters for overlooking important opportunities to advance a system under which all families, regardless of marital status, would be protected.<sup>124</sup> In 1993, as the same-sex marriage discussion became more widespread, Polikoff wrote of her fear that:

[a]dvocating lesbian and gay marriage will detract from, even contradict, efforts to unhook economic benefits from marriage and make basic health care and other necessities available to all. It will also require a rhetorical strategy that emphasizes similarities between our relationships and heterosexual marriages, values long-term monogamous coupling above all other relationships, and denies the potential of lesbian and gay marriage to transform the gendered nature of marriage for all people.<sup>125</sup>

Additionally, Polikoff has noted that the rhetoric often used by same-sex marriage proponents glorifying the institution of marriage disparages all relationships that exist outside of marriage.<sup>126</sup>

Overall, while the pursuit of marriage equality has gained greater acceptance within the LGBT rights movement over the years, there are still many people within the movement who disagree with the prioritization of marriage equality over pluralistic relationship recognition and oppose the tactics used in pursuing marriage equality.

On the other side, as evidenced by the unparalleled amount of resources expended by the LGBT rights movement towards the pursuit of marriage equality in recent years, there are many members of the movement who strongly believe that marriage equality should remain the

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<sup>122</sup> *Id.*

<sup>123</sup> *See id.* at 230-31.

<sup>124</sup> Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 529, 551 (2009).

<sup>125</sup> Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 VA. L. REV. 1535, 1549 (1993).

<sup>126</sup> *Id.* at 544.

movement's primary focus.<sup>127</sup> Arguments in favor of same-sex marriage often echo Stoddard's views about the essential role same-sex marriage plays in gaining true equality for LGBT individuals, an equality that cannot be achieved unless same-sex couples receive both the name "marriage" and the bundle of rights that accompany marriage, and cite the unparalleled benefits, both tangible and intangible, of marriage.<sup>128</sup>

Andrew Sullivan has focused on the positive aspects of the institution of marriage for society as well as the individuals involved in making a conservative argument for same-sex marriage. Sullivan has explained that marriage fosters "social cohesion, emotional security, and economic prudence," thus "institutionalizing gay marriage would merely reinforce a healthy social trend."<sup>129</sup> In contrast, pursuing non-marital relationship recognition, such as domestic partnerships, is not a worthy goal of the movement, in Sullivan's opinion, as these statuses undercut the important functions of marriage by "chipping away at the prestige of traditional relationships and undermin[ing] the priority we give them."<sup>130</sup> According to Sullivan, legalizing same-sex marriage also would help ease the burden of coming out for LGBT individuals and help parents of LGBT individuals to better understand the lives of their children.<sup>131</sup>

Nan Hunter has discussed the many positive consequences of pursuing same-sex marriage, including the ability of same-sex marriage to further the important goal of dismantling the historical gender hierarchy of marriage.<sup>132</sup> Mark Strasser also has argued that marriage should remain the primary goal of the movement, pointing out that "the state refusal to permit same-sex couples to marry imposes stigmatic harm and, further, is offered as a justification for

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<sup>127</sup> NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE* 96-98 (2008) (explaining that marriage equality has mobilized the LGBT community more than any other issue since the government's failure to respond to the AIDs crisis of the 1980s).

<sup>128</sup> Kim, *supra* note 100, at 48.

<sup>129</sup> Andrew Sullivan, *A Conservative Case for Gay Marriage*, THE NEW REPUBLIC, Aug. 28, 1989, available at <http://sullivanarchives.theatlantic.com/homosexuality.php>.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Nan Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 16 (1991);

imposing other burdens on the LGBT community” such as the denial of parenting rights.<sup>133</sup> Pursuing only non-marital statuses, in Strasser’s opinion, does not represent a sound strategy because statuses other than marriage, such as civil unions, imply that the state views same-sex couples as unworthy of marriage and lays a foundation for later arguments that the state should be able to treat same-sex couples differently for other purposes as well.<sup>134</sup>

Evan Wolfson has voiced his disapproval of some of the tactics used by those within the LGBT rights movement who criticize the focus on marriage equality, noting that these individuals often discuss the importance of choice, while at the same time intimating that those LGBT individuals who desire the right to marry simply do not know what is best for them.<sup>135</sup> He explains that “[i]n the charge that the demand for equal marriage rights is insufficiently radical or liberationist, a condemnable desire to mimic or emulate the non-gay world, or a sell-out of less assimilationist or less privileged gay people, there is an inescapable whiff of imputed false consciousness.”<sup>136</sup> Finally, William Eskridge has, in addressing the anti-assimilationist argument of those within the LGBT community who oppose the prioritization of same-sex marriage, pointed out that such concerns may not be as relevant to future generations, stating:

To a certain extent, the anti-assimilationist argument is fueled by the anger of the baby boomers, who grew up in an anti-homosexual environment and have fought the hard battles against a compulsory heterosexuality whose hallmark is the wedding photo. For that generation (mine and Polikoff’s), our difference is essential, a factor that was perhaps necessary to get us organized for the hard, confrontational battles that were fought. This may be in the process of changing. The next generation has grown up in an environment where homosexuality is not so strange, and they may be correspondingly less enraged than my generation has been.<sup>137</sup>

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<sup>133</sup> Mark Strasser, *A Little Older, A Little Wiser, and Still Committed*, 61 RUTGERS L. REV. 507, 510 (2009).

<sup>134</sup> *Id.* at 510-513.

<sup>135</sup> Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 585 (1995).

<sup>136</sup> *Id.* (internal quotations omitted).

<sup>137</sup> William N. Eskridge, Jr., *A History of Same-sex Marriage*, 79 VA. L. REV. 1419, 1490 (1993).

Eskridge further points out that entrance into marriage does not necessarily mean LGBT culture will no longer be distinctive; in his view, the exclusion from marriage does not signify the only thing that makes the LGBT experience unique.<sup>138</sup>

As other scholars have noted, however, the space between the two sides of this intra-movement debate is not as vast as it may appear.<sup>139</sup> Scholars like Polikoff and Franke, who have offered some of the most convincing criticisms of the prioritization of marriage equality, have come to formulate a position that supports marriage equality as a goal, but highlights the importance of: 1. ensuring that marriage equality is not the *only* goal of the LGBT rights movement; 2. advancing legal reforms to support and protect those individuals who exist in relationships outside of marriage; and 3. continuing to critique the negative characteristics of the institution of marriage.<sup>140</sup> Similarly, leading proponents of same-sex marriage within the LGBT rights movement, such as Nan Hunter, William Eskridge, and Evan Wolfson, have urged the movement to work for the expansion of legal recognition and protection of non-marital relationships.<sup>141</sup> While the divide between the two sides of this intra-movement debate does not appear to be insurmountable, in order for the movement to be successful in simultaneously

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<sup>138</sup> *Id.* at 1490-91.

<sup>139</sup> *See, e.g.,* Kim, *supra* note 100, at 42 (“[T]he process of working toward same-sex marriage can facilitate greater awareness about the historical role and construction of marriage. These arguments may influence society’s willingness to embrace alternatives to an institution that has marginalized many for so long, even though same-sex marriage may result in significant improvements in marriage.”).

<sup>140</sup> Franke, *supra* note 118, at 2688 (“I happen to think we can argue that same-sex couples be allowed to marry, while also offering strong critiques, not only of the institution of marriage, but of those who wish to marry.”); Nancy D. Polikoff, *Law that Values All Families: Beyond (Straight and Gay) Marriage*, 22 J. AM. ACAD. MATRIMONIAL L. 85, 87 (2009) (“I support the right to marry for same-sex couples as a matter of civil rights law. But I oppose discrimination against couples who do not marry, and I advocate solutions to the needs all families have for economic well-being, legal recognition, emotional peace of mind, and community respect.”).

<sup>141</sup> Eskridge, *supra* note 137, at 1493 (“Those terms should include not just marriage, which is the more attractive option for many same-sex as well as different-sex couples, but also domestic partnership, which is the most attractive option for many different-sex as well as same-sex couples.”); Hunter, *supra* note 132, at 26-27 (arguing that the “legalization of gay and lesbian marriage and the adoption of domestic partnership provisions are incomplete without the other”); Wolfson, *supra* note 135, at 605-06 (“[W]e can, and should, advocate for universal health care alongside marriage, as well as alongside domestic partnership. It is not antithetical to believe that gay people should be able to exercise the equal right to marry, and at the same time believe that other family forms -- including perhaps, but not limited to, domestic partnership -- are valuable and should be treated fairly.”). *But see* Sullivan, *supra* note 129.

advancing marriage equality and pluralistic relationship recognition the causes of the existing disharmony between these two goals must be understood and addressed.

### **III. Current Issues with Achieving Harmony Between Marriage Equality and Pluralistic Relationship Recognition**

#### **A. Pluralistic Relationship Recognition and the Effects of Marriage Equality Advancements**

While significant advancements have been made with regard to the goal of pluralistic relationship recognition, its future is uncertain. Those within the LGBT rights movement who favor the prioritization of pluralistic relationship recognition have seen some of their most basic fears about the consequences of prioritizing marriage equality come to fruition in recent years. For example, civil unions, often seen as a consolation prize for same-sex marriage advocates, represent a significant step forward for those who view pluralistic relationship recognition as a more important goal.<sup>142</sup> As Katherine Franke explains, for those individuals within the movement who favor pluralistic relationship recognition, such non-marital statuses “have offered us an opportunity to order our lives in ways that have given us greater freedom than can be found in the one-size-fits-all rules of marriage.”<sup>143</sup> So far, however, when a state with an existing civil union status has legalized same-sex marriage, the legalization of same-sex marriage has prompted the repeal of the existing civil union law.<sup>144</sup> No state that has legalized same-sex marriage currently has a civil union status available as an option for its residents.

Moreover, this troubling trend is not limited to civil unions. Under the Washington same-sex marriage law, the class of people eligible for domestic partnerships was narrowed from same-sex couples and elderly opposite-sex couples to elderly same- and opposite-sex couples.<sup>145</sup>

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<sup>142</sup> Katherine M. Franke, *Marriage Is a Mixed Blessing*, N.Y. TIMES, June 23, 2011, [http://www.nytimes.com/2011/06/24/opinion/24franke.html?\\_r=1](http://www.nytimes.com/2011/06/24/opinion/24franke.html?_r=1).

<sup>143</sup> *Id.*

<sup>144</sup> Titshaw, *supra* note 27 (manuscript at 79); NCLR, *supra* note 58, at 3-4, 7-8, 10.

<sup>145</sup> NCLR, *supra* note 58, at 10.

Consequently, same-sex marriage in Washington resulted in fewer people having a choice between legally recognized relationships. Thus, it appears that the movement's marriage equality work in a number of states has not only ignored, but also undermined, the goal of pluralistic relationship recognition, with marriage equality advancements reversing much of the progress that had been made in those states with regard to pluralistic relationship recognition. While it is important to note that the legalization of same-sex marriage does not always result in the ouster or limitation of existing non-marital relationship statuses,<sup>146</sup> there are currently only five jurisdictions in the United States that recognize both same-sex marriage and any type of non-marital relationship status,<sup>147</sup> and eligibility for the non-marital statuses in two of those states is extremely limited.<sup>148</sup> With the three most recent states to legalize same-sex marriage, Maine, Maryland, and Washington, doing so with the help of positive popular votes, and polls showing that most Americans favor the legalization of same-sex marriage, it seems highly likely that more states will legalize same-sex marriage in the coming years, which, as demonstrated by past occurrences, could place non-marital relationship statuses in a perilous position.<sup>149</sup>

Based on the pattern in a number of states of repealing or limiting non-marital statuses upon the legalization of same-sex marriage, those in favor of pluralistic relationship recognition also may reasonably fear that when a state with an existing non-marital status such as limited-benefits domestic partnerships enacts a status such as civil unions as a compromise aimed at providing marriage equality supporters with a "more marriage-like" status, the "less marriage-like" status will be repealed. In the eyes of those individuals advocating for pluralistic

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<sup>146</sup> The legalization of same-sex marriage did not affect domestic partnerships in Maine, Maryland, or the District of Columbia, and did not affect the reciprocal beneficiary status in Vermont. *See generally* NCLR, *supra* note 58.

<sup>147</sup> These jurisdictions are Washington, Maine, Maryland, Vermont and the District of Columbia. *See generally* *Id.*

<sup>148</sup> Vermont's reciprocal beneficiaries are only open to individuals who are related to each other, and Washington's domestic partnership status is only open to couples in which one member is over the age of sixty-two. *Id.* at 11; *see supra* note 44.

<sup>149</sup> Neil King, Jr., *WSJ/NBC Poll: Majority Now Backs Gay Marriage*, WALL STREET J., Dec. 13, 2012, <http://blogs.wsj.com/washwire/2012/12/13/wsjnbc-poll-majority-now-backs-gay-marriage/>.

relationship recognition, this would be a negative occurrence both because relationship recognition in that state would be less pluralistic than it would have been had both statuses remained, and because it privileges marriage-like relationships. This fear did materialize to some extent in New Jersey. When New Jersey enacted its civil union law, it narrowed its existing domestic partnership status, previously available to same-sex couples and elderly opposite-sex couples, to elderly couples only regardless of sex.<sup>150</sup> Thus, same-sex couples who did not meet the age-based requirement had this relationship status choice taken away when civil unions were enacted.<sup>151</sup> In addition, in the three jurisdictions that initially established limited-benefits domestic partnerships and later established full-benefits domestic partnerships, the limited-benefits domestic partnerships, instead of remaining as an option, ceased to exist as soon as the full-benefits domestic partnerships were enacted.<sup>152</sup>

It is clear that the pursuit of marriage equality has resulted in some measurable setbacks to the goal of pluralistic relationship recognition, which is demonstrated by the practice in some states of removing or limiting existing non-marital statuses as soon as marriage or more marriage-like non-marital statuses are introduced. These setbacks increase tensions in the intra-movement debate surrounding the prioritization of marriage equality. The LGBT rights movement as a whole would be strengthened if incidents such as these that seem to “throw [non-marital relationship statuses] under the marriage equality bus” did not occur.<sup>153</sup> Before exploring how to prevent such occurrences, however, it is necessary to understand why they occur in the first place.

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<sup>150</sup> Meyer, *supra* note 11, at 131.

<sup>151</sup> *Id.* A similar narrowing of choice did not occur, however, in Hawaii. When Hawaii created marriage-like civil unions for same- and opposite-sex couples, its reciprocal beneficiary status, which provides limited benefits to individuals who are prohibited from marrying due to sex or family relation and is decidedly less marriage-like than civil unions, remained in place, providing non-related same-sex couples the ability to choose between the two statuses. *See* NCLR, *supra* note 58, at 6.

<sup>152</sup> These jurisdictions are California, the District of Columbia, and Washington. NCLR, *supra* note 58, at 4-6, 11.

<sup>153</sup> ALTERNATIVES TO MARRIAGE PROJECT, WRITTEN TESTIMONY OF LISA-NICOLLE GRIST, EXECUTIVE DIRECTOR AND MEAGHAN LAMARRE, BOARD CHAIRPERSON, ALTERNATIVES TO MARRIAGE PROJECT (2009), [http://www.unmarried.org/images//atmp\\_testimony\\_dc\\_bill\\_18-482.pdf](http://www.unmarried.org/images//atmp_testimony_dc_bill_18-482.pdf).

## **B. The Actions Leading to the Current Disharmony Between Marriage Equality and Pluralistic Relationship Recognition**

### **1. Actions of Those Within the Movement Who Prioritize Marriage Equality**

For those individuals within the LGBT rights movement whose primary goal is marriage equality, the response to the enactment of non-marital statuses that give same-sex couples more rights than they otherwise would have but lack the title of marriage and, in some cases, many of the benefits and responsibilities of marriage, is complex. For many people who view marriage equality as the ultimate goal of the movement, bestowing these non-marital statuses on same-sex couples is a step in the right direction, but ultimately unsatisfactory.<sup>154</sup> In their view, even if such statuses provide all of the rights and benefits of marriage, same-sex couples are still denied the title of marriage, which arguably connotes the treatment of LGBT individuals as second class citizens undeserving of entry into the exalted institution of marriage.<sup>155</sup> Thus, for these individuals, the positive role of non-marital statuses is viewed more as a stepping stone to marriage than an end in and of itself – the logic being that if a state is willing to go as far as legalizing civil unions or domestic partnerships, the possibility of same-sex marriage in the near future in that state is probably more likely than in other states.<sup>156</sup>

In seeking marriage, a core strategy of the LGBT rights movement has been to stress the benefits of marriage both for those who enter the institution and for society.<sup>157</sup> The argument stresses the idea that marriage alone can provide essential benefits such as superior stability and

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<sup>154</sup> See *supra* notes 165-169.

<sup>155</sup> William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV 853, 853 (2001) (“Some of the criticism [of Baker v. State], however, came from liberals who assailed these moves as falling short of full equality for lesbian, gay, and bisexual people—in essence creating a ‘separate but equal’ regime for gays.”); Kim, *supra* note 100, at 42 (“The lesson of our nation’s history is that ‘separate but equal’ is inherently unequal and destructive. To discuss merely the sufficiency of civil unions misses the larger point that the government is fencing off same-sex couples with a separate status that is a mark of inferiority and invites further bias and discrimination.”).

<sup>156</sup> Glazer, *supra* note 41, at 129 (“Because civil unions have been characterized as ‘separate but equal’ alternatives to marriage, civil unions have largely been celebrated only insofar as they have been deemed to be a necessary step toward the legalization of same-sex marriage.”).

<sup>157</sup> POLIKOFF, *supra* note 127, at 98-99.

well-being to LGBT individuals and families, and healthy, stable individuals and families provide significant benefits to society.<sup>158</sup> Within these arguments, marriage has been described as the channel through which couples “honor their relationship in the greatest way our society has to offer.”<sup>159</sup> A related argument used in the quest for marriage equality stresses that expanding marriage to same-sex couples will strengthen the institution of marriage.<sup>160</sup> Some of the rhetoric regarding strengthening the institution of marriage is borrowed from the long-touted conservative message that, due to its superiority, marriage must be protected and strengthened in order for society to thrive.<sup>161</sup> The full conservative message, however, is that this strengthening of marriage must occur “to protect society from the damage that a proliferation of diverse family structures causes.”<sup>162</sup> When same-sex marriage proponents use the concept of strengthening marriage within their arguments, they say things like “opening marriage to couples who are so willing to fight for it could only strengthen the institution for all. It would open the doors to more supporters, *not opponents*. And it would help keep the age-old institution alive.”<sup>163</sup> Even if same-sex marriage proponents do not explicitly mention the threat of alternative relationship statuses in explaining why marriage should be strengthened and from what it needs to be protected, the inference is easily made. When marriage equality supporters use rhetoric that centers on the idea that marriage is the one and only institution that can provide same-sex couples and society with

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<sup>158</sup> *See id.* *See also* HUMAN RIGHTS CAMPAIGN, ANSWERS TO QUESTIONS ABOUT MARRIAGE EQUALITY, A MESSAGE FROM THE HUMAN RIGHTS CAMPAIGN FOUNDATION PRESIDENT (2009), [http://www.hrc.org/files/assets/resources/HRC\\_Foundation\\_Answers\\_to\\_Questions\\_About\\_Marriage\\_Equality\\_2009.pdf](http://www.hrc.org/files/assets/resources/HRC_Foundation_Answers_to_Questions_About_Marriage_Equality_2009.pdf) (“Marriage strengthens couples and families, who in turn help strengthen their communities, one at a time — leading ultimately to a stronger, more robust nation.”).

<sup>159</sup> HUMAN RIGHTS CAMPAIGN, ANSWERS TO QUESTIONS ABOUT MARRIAGE EQUALITY 3 (2009), [http://www.hrc.org/files/assets/resources/HRC\\_Foundation\\_Answers\\_to\\_Questions\\_About\\_Marriage\\_Equality\\_2009.pdf](http://www.hrc.org/files/assets/resources/HRC_Foundation_Answers_to_Questions_About_Marriage_Equality_2009.pdf).

<sup>160</sup> *Id.*; *see also* NATIONAL GAY AND LESBIAN TASK FORCE, TALKING POINTS ON MARRIAGE EQUALITY FOR SAME-SEX COUPLES 2, [http://www.thetaskforce.org/downloads/resources\\_and\\_tools/TalkingPointsonMarriage.pdf](http://www.thetaskforce.org/downloads/resources_and_tools/TalkingPointsonMarriage.pdf).

<sup>161</sup> POLIKOFF, *supra* note 127, at 99-100.

<sup>162</sup> *Id.* at 100.

<sup>163</sup> HUMAN RIGHTS CAMPAIGN, *supra* note 159, at 12.

these essential benefits and thus society's goals should center on strengthening marriage, this paints non-marital statuses and non-marital relationships as detrimental and counterproductive.

Moreover, as same-sex marriage and non-marital statuses have made significant gains, both in terms of legal recognition and societal acceptance, the rhetoric used by marriage equality supporters concerning non-marital statuses has become less subtle and increasingly critical.<sup>164</sup> For example, in June 2012, on the one-year anniversary of the passage of the Illinois civil union law, Lambda Legal sent an email to its members informing them that the organization had filed a lawsuit in Illinois challenging the exclusion of same-sex couples from the institution of marriage.<sup>165</sup> According to Lambda, the lawsuit was necessary because the state was “relegating same-sex couples to the second class status of civil unions while denying them and their families the superior benefits of marriage.”<sup>166</sup> The email further stated that non-marital statuses such as civil unions and domestic partnerships were insufficient, as they failed to fully protect same-sex couples and their children in a variety of circumstances.<sup>167</sup> Lambda explained that it was not only preparing for a lawsuit, but also a “statewide education campaign” to explain why civil unions were inadequate for same-sex couples and their families.<sup>168</sup> Finally, the email informed members that Lambda had initiated marriage equality lawsuits in two other states that had enacted non-marital statuses granting the rights and benefits of marriage, and it urged members to support marriage equality.<sup>169</sup>

While Lambda has stated that it remains “committed to litigating and supporting legislative reform...for those who seek protections and respect through means other than

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<sup>164</sup> POLIKOFF, *supra* note 127, at 98 (“More alarming, the logic of the arguments made to win converts to marriage equality risks reversing, rather than advancing, progress for diverse family forms”).

<sup>165</sup> E-mail from Kevin Cathcart, Executive Director, Lambda Legal (June 16, 2012, 09:00:00 (EST)) (on file with author).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*; *see also* LAMBDA LEGAL, CIVIL UNIONS ARE NOT ENOUGH, [http://data.lambdalegal.org/publications/downloads/fs\\_civil-unions-are-not-enough.pdf](http://data.lambdalegal.org/publications/downloads/fs_civil-unions-are-not-enough.pdf).

marriage,”<sup>170</sup> the rhetoric used by the organization in the context of marriage equality seems to indicate otherwise. Other leading LGBT rights organizations currently use similar rhetoric. For example, the Human Rights Campaign (“HRC”) states on its website that “only marriage can provide families with true equality” and explains that “[c]omparing marriage to civil unions or domestic partnerships is a bit like comparing diamonds to rhinestones. One is, quite simply, the real deal; the other is not.”<sup>171</sup> Furthermore, HRC assures those struggling with the issue of marriage equality that if same-sex couples were allowed to marry, “[m]arriage would continue to recognize the highest possible commitment that can be made between two adults, plain and simple.”<sup>172</sup>

Even when major LGBT rights organizations explicitly provide support for the recognition of non-marital statuses, they often do so in a way that undermines the idea of such statuses as permanent advancements. For example, in a May 2012 press release, the National Gay and Lesbian Task Force (“NGLTF”) criticized the Colorado legislature’s failure to pass a civil union bill, but in doing so stated that “[w]hile not a substitute for full legal marriage, civil unions would have provided vital protections to loving, committed same-sex couples and their families, who continue to remain vulnerable.”<sup>173</sup> A similar press release issued by NGLTF following the passage of civil unions legislation in Delaware stated, “this legislation moves same-sex couples in Delaware closer to equality . . . [I]t’s be clear, it is not a substitute for full legal marriage, but it provides fundamental security for same-sex couples that will allow them to

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<sup>170</sup> LAMBDA LEGAL, BEYOND DISPUTE: THE BREADTH OF LAMBDA LEGAL’S RELATIONSHIP WORK 7 (2006), <http://data.lambdalegal.org/pdf/711.pdf>.

<sup>171</sup> Human Rights Campaign, Issue: Marriage, <http://www.hrc.org/issues/pages/marriage> (last visited July 13, 2012); HUMAN RIGHTS CAMPAIGN, *supra* note 159, at 5.

<sup>172</sup> HUMAN RIGHTS CAMPAIGN, *supra* note 159, at 9.

<sup>173</sup> Press Release, National Gay and Lesbian Task Force, Task Force: Colorado Families Left Vulnerable (May 15, 2012), available at [http://www.thetaskforce.org/press/releases/pr\\_051512](http://www.thetaskforce.org/press/releases/pr_051512).

take care of each other and their families. This is reason to celebrate.”<sup>174</sup> These statements seem to indicate that a non-marital status is better than nothing and thus a positive advancement, but only as a step towards marriage – the ultimate goal.

With these types of approaches to non-marital statuses, it is easy to understand why such statuses have disappeared in many of the states that have legalized same-sex marriage, and the rhetoric currently being used by same-sex marriage supporters makes it seem likely that this trend will continue.<sup>175</sup> Many of the arguments advanced by marriage equality supporters involve convincing people that civil unions and other non-marital statuses are inadequate to protect same-sex couples and their families and represent offensive attempts to relegate LGBT individuals to the status of second-class citizens. Considering this description of non-marital statuses as inadequate and offensive, it is easy to understand why the repeal or limitation of such statuses after the legalization of same-sex marriage or more marriage-like statuses has not faced much resistance.<sup>176</sup>

## **2. Actions of Those Within the Movement Who Prioritize Pluralistic Relationship Recognition**

The reaction to recent same-sex marriage and non-marital status advancements among individuals within the LGBT rights movement who prioritize pluralistic relationship recognition is also complex. One aspect of the complexity is the relationship between non-marital statuses and the prioritization of same-sex marriage within the LGBT rights movement, as non-marital statuses often have emerged as a result of the work of marriage equality supporters and in the

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<sup>174</sup> Press Release, National Gay and Lesbian Task Force, Delaware Governor Signs Civil Unions Bill (May 12, 2012), *available at* [http://www.thetaskforce.org/press/releases/pr\\_051111](http://www.thetaskforce.org/press/releases/pr_051111).

<sup>175</sup> This occurred in Vermont, Connecticut, and New Hampshire. *See* NCLR, *supra* note 58, at 3-4, 7-8, 10.

<sup>176</sup> Glazer, *supra* note 41, at 132 (“The elimination of the option to enter into a civil union in these states likely did not cause controversy because it occurred simultaneously with these states’ legalization of same-sex marriage.”).

form of a compromise to grant LGBT individuals rights while at the same time maintaining the traditional definition of marriage.<sup>177</sup>

On the one hand, for those who prioritize pluralistic relationship recognition, any non-marital statuses, even marriage-like non-marital statuses, are not marriage in name, and therefore chip away at the idea that marriage is the only valid type of relationship recognition. This is especially true when such statuses are open to opposite-sex couples as well as same-sex couples.<sup>178</sup> In addition, such statuses often expand the classes of people eligible for relationship recognition (i.e., same-sex couples or individuals who are related).<sup>179</sup> Thus, they arguably further two of the primary objectives of pluralistic relationship recognition: de-privileging marriage and protecting a more diverse range of relationships.<sup>180</sup>

On the other hand, insofar as experience has shown certain non-marital statuses, specifically civil unions and domestic partnerships that provide the rights and benefits of marriage, are merely stepping stones for marriage that are cast away as soon as same-sex marriage is legalized, such statuses are inadequate and do not ultimately further the goal of pluralistic relationship recognition. In addition, providing individuals with all of the same rights and responsibilities of marriage, while positive for pluralistic relationship recognition in the sense that it creates a relationship status outside of marriage, does not do as much to de-privilege marriage as would a status that provided a real alternative.<sup>181</sup> It can be argued that enacting non-marital statuses that are exactly the same as marriage serves to further privilege marriage by

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<sup>177</sup> See *supra* Section II.A.

<sup>178</sup> See John Culhane, *Will Opposite-sex Civil Unions Spell the End of Traditional Marriage?*, SLATE, Jan. 3, 2012, [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/01/are\\_states\\_that\\_experiment\\_with\\_opposite\\_sex\\_civil\\_unions\\_offering\\_a\\_way\\_to\\_opt\\_out\\_of\\_oppressive\\_ideas\\_about\\_marriage\\_.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/01/are_states_that_experiment_with_opposite_sex_civil_unions_offering_a_way_to_opt_out_of_oppressive_ideas_about_marriage_.html).

<sup>179</sup> See *supra* Section II.A.

<sup>180</sup> See *supra* Section II.B.

<sup>181</sup> See Edward Stein, *Marriage or Libration?: Reflections on Two Strategies in the Struggle for Lesbian and Gay rights and Relationship Recognition*, 61 RUTGERS L. REV. 567, 587 (2009).

holding it up as the ideal form of relationship recognition.<sup>182</sup> Moreover, non-marital statuses that provide the rights and benefits of marriage often are open only to same-sex couples and thereby exclude other family forms.<sup>183</sup>

Furthermore, the tactics and rhetoric used by those within the movement who prioritize marriage equality have made it increasingly difficult for those who favor pluralistic relationship recognition to also provide support for marriage equality. This likely will cause pluralistic relationship recognition supporters to engage in increasingly anti-marriage rhetoric, which will further divide the LGBT rights movement and impede the advancement of both goals. Individuals on the pluralistic relationship prioritization side of the debate are left in a bind – due to the tactics used by marriage equality supporters, they cannot join in the pursuit of marriage equality without undermining the goal of pluralistic relationship recognition.

If the tactics of marriage equality supporters continue to involve using rhetoric that disparages non-marital statuses and supporting non-marital statuses only for the purpose of using them as stepping stones to marriage, then it seems clear that pluralistic relationship recognition supporters will become increasingly hesitant to join forces with marriage equality supporters even for the limited purpose of implementing non-marital statuses.<sup>184</sup> If pluralistic relationship recognition supporters do join such efforts, and in the aftermath same-sex marriage is legalized and the non-marital status is repealed, then these individuals have engaged in an activity that is detrimental to their overall goal of pluralistic relationship recognition. They have advanced a non-marital status only to see it: 1. attacked as inadequate and offensive by the very people with whom they worked to get the status established in the first place; and 2. taken away as soon as

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<sup>182</sup> *See id.* (“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.’”).

<sup>183</sup> *See supra* Section II.A.

<sup>184</sup> *See supra* notes 156, 171-176.

same-sex marriage is legalized. Through that process, as the existing non-marital status is continuously touted as inferior, the institution of marriage is further privileged. Moreover, non-marital statuses end up in a seemingly worse position than they started in because their inadequacies have been continually highlighted as part of a strategy to legalize same-sex marriage.<sup>185</sup>

The only option many individuals within the LGBT rights movement who favor prioritizing pluralistic relationship recognition may find viable, is advocating for non-marital statuses while simultaneously working to explicitly and forcefully refute the idea of marriage as a superior status that alone can meet the relationship recognition needs of LGBT individuals.<sup>186</sup> This approach likely would involve spending a significant amount of time highlighting the troubled history and the remaining undesirable characteristics of the institution of marriage and the need for other forms of relationship recognition to better and more effectively serve peoples' needs. The disparagement of marriage, of course, would put the message of pluralistic relationship recognition supporters at odds with the message of those within the LGBT rights movement who prioritize marriage equality.<sup>187</sup>

While some pluralistic relationship recognition supporters have taken this approach already, many others have opted to take a middle ground position that involves supporting both goals.<sup>188</sup> If marriage equality supporters continue to disparage non-marital statuses, however, taking a position that involves supporting both goals will become increasingly less viable. The

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<sup>185</sup> See *supra* notes 156, 171-176.

<sup>186</sup> See Franke, *supra* note 142 (expressing worry that same-sex marriage will undermine the progress made to non-marital relationship statuses like civil unions and domestic partnerships and that “have given us greater freedom than can be found in the one-size-fits-all rules of marriage.”). Nancy Polikoff advocates an approach that “strives to meet the needs of all [people], making real the vision in the ‘Beyond Same-Sex Marriage’ statement that ‘marriage is not the only worthy form of family or relationship, and it should not be legally and economically privileged above all others.’” POLIKOFF, *supra* note 127, at 211, ch.5, ch.7. According to Polikoff, fighting claims that family diversity causes social problems and thus marriage must be privileged is an essential goal for LGBT rights organizations. *Id.* at 214.

<sup>187</sup> See *supra* Section III.B.

<sup>188</sup> See *supra* Section II.B.

more widespread anti-marriage sentiments become among pluralistic relationship recognition supporters, the larger the rift will grow between those individuals who prioritize marriage equality and those individuals who prioritize pluralistic relationship recognition. In practice, if marriage equality supporters continue to utilize an approach that centers around disparaging non-marital relationship statuses and touting marriage as the only solution for relationship recognition, and pluralistic relationship recognition supporters increasingly adopt an approach that centers around highlighting all of the problems with marriage, tensions within the community will increase, and the probability of the two sides working together harmoniously will decrease. The result will be that the advancement of each of the goals is impeded.

### **3. Actions of Those Outside of the Movement**

Many individuals who are not directly involved in the LGBT rights movement lack knowledge of the strong disagreement within the movement regarding the prioritization of marriage equality over pluralistic relationship recognition, as same-sex marriage has become the most publicized goal of the movement.<sup>189</sup> As an initial matter, for most people not involved in a same-sex relationship, the idea of non-marital relationship recognition is not a reality. In the majority of states, marriage is the only choice for opposite-sex couples who would like to enter into a legally recognized relationship, and when non-marital statuses are discussed in the political sphere it is usually with regard to providing such statuses for same-sex couples.<sup>190</sup> Thus, when non-marital statuses that were previously open to same-sex couples are repealed upon the legalization of same-sex marriage or a more marriage-like alternative, it may not seem

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<sup>189</sup> See Ball, *supra* note 17, at 493-94. See also *supra* note 127.

<sup>190</sup> See *supra* note 93 and accompanying text.

like a cause for concern for most people outside of the movement. Same-sex couples are now in the same position as most opposite-sex couples – marriage is their only choice.<sup>191</sup>

In addition, with same-sex marriage campaigns engaging in rhetoric that touts marriage as a superior status and the only one that can truly meet the needs of same-sex couples, many individuals outside of the movement likely infer that no same- or opposite-sex couple would ever choose a non-marital status over marriage and thus that such statuses are unnecessary when marriage or a more marriage-like status becomes an option.<sup>192</sup> While some organizations not directly involved with the LGBT rights movement, such as those that advocate for the rights of unmarried individuals, may work to prevent marriage equality advancements from undermining the goal of pluralistic relationship recognition, as a more widespread matter the issue is not on most peoples' radar.<sup>193</sup> Thus, there has been little pushback from those outside of the movement when the goal of pluralistic relationship recognition undergoes this type of setback at the hands of marriage equality advancements.<sup>194</sup>

Overall, the LGBT rights movement is at a critical juncture. The two sides of this intra-community debate must decide how to proceed. If marriage equality supporters choose to continue with a strategy that involves touting marriage as the only acceptable form of relationship recognition and disparaging non-marital relationship statuses, and pluralistic relationship recognition supporters adopt an approach that involves disparaging marriage to highlight the need for non-marital relationship statuses, the result will be an increasingly fractured movement where the progress of one side of the movement necessarily undermines the advancement of the other. The effectiveness of the LGBT rights movement as a whole would be

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<sup>191</sup> *See id.* (listing states where opposite-sex couples may choose a non-marital status).

<sup>192</sup> *See supra* Section III.A.

<sup>193</sup> *See, e.g.,* ALTERNATIVES TO MARRIAGE PROJECT, *supra* note 153.

<sup>194</sup> Meyer, *supra* note 11, at 130-32 (describing the lack of resistance that occurred in states that repealed civil unions upon the legalization of same-sex marriage).

impeded significantly were this to occur, and since the accomplishment of each goal would benefit many individuals both within and outside of the LGBT community, this course of events should be avoided at all costs.

#### **IV. Moving Forward**

As other scholars have discussed, the goals of marriage equality and pluralistic relationship recognition are not necessarily incompatible.<sup>195</sup> Edward Stein has explained that, “not only is this dual strategy [of pursuing both goals] 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.”<sup>196</sup> He has further noted that “over the past twenty years, [advancements in each of these goals] have been accomplished concurrently, even in the absence of a coordinated strategy for doing so.”<sup>197</sup> It is now the time, then, to coordinate a strategy for pursuing both goals. While it is clear that the movement will continue to devote significant time and resources towards marriage equality, to achieve both goals the movement must figure out how to advance the goal of marriage equality while at the same time advancing, as opposed to undermining, the goal of pluralistic relationship recognition. Some of the steps the LGBT rights movement could take towards ensuring that marriage equality advancements do not undermine the goal of pluralistic relationship recognition are more obvious, such as promoting marriage equality legislation that does not seek to repeal non-marital statuses, and opposing any efforts to repeal such statuses following the legalization of same-sex marriage. There is no clearer example of marriage

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<sup>195</sup> Zachary Kramer, *The Straight and Narrow*, 2012 CARDOZO L. REV. DE NOVO 147, 151, 154 (2012) (“[L]et’s take seriously the idea that gay equality can co-exist with fundamental marriage reform.”); Stein, *supra* note 181, at 574 (“It is possible to ‘aggressively seek full legal recognition for same-sex marriages’ 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.”).

<sup>196</sup> Stein, *supra* note 181, at 592.

<sup>197</sup> *Id.*

equality advancements undermining the goal of pluralistic relationship recognition than that of legislation legalizing same-sex marriage while concurrently repealing an existing non-marital status. The other strategies proposed in this section are less obvious, but equally important.

### **A. Choosing Proper Messages**

The general messages used to further marriage equality must be carefully worded to avoid undermining messages regarding the importance of pluralistic relationship recognition. In formulating messages, marriage equality supporters should avoid labeling non-marital statuses as inferior or inadequate second-class marriages.<sup>198</sup> Instead, they should refine their message to underscore why marriage is essential for many, but not all, same-sex couples, just as it is for many, but not all, opposite-sex couples. The message should explicitly acknowledge that for a significant number of individuals, both gay and straight, statuses other than marriage are necessary to best meet the needs of those relationships. But, it also should stress that for many couples, both same- and opposite-sex, only marriage will provide the necessary rights and responsibilities and that these are the couples for whom it is fighting in pursuing marriage equality. The message that some individuals, gay and straight, will benefit from entering into a non-marital status, and that other individuals, gay and straight, will benefit from entering into a marriage, supports both the goal of marriage equality and the goal of pluralistic relationship recognition and curtails the idea that the LGBT rights movement must choose between one of these two goals.

Following this kind of approach is important not only for avoiding the type of message that pits marriage equality directly against pluralistic relationship recognition, but also for helping to ensure that non-marital statuses are not thrown under the “marriage equality bus”

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<sup>198</sup> See Kramer, *supra* note 195, at 152 (“My modest suggestion, then, is to be more careful about how we talk about marriage and, if possible, to resist the law’s tendency toward grand rhetoric about marriage.”)

when same-sex marriage is legalized.<sup>199</sup> If non-marital statuses are understood as positive options for many different types of relationships and as something other than a marriage substitute or stepping stone to marriage, their value does not vanish after same-sex marriage is legalized. Importantly, the goal of “sedimentation,”—where a newly created relationship status exists alongside of, instead of replacing, the existing relationship status, which remains as sediment—is a realistic one, as it has already occurred in some jurisdictions in the United States and in many other countries.<sup>200</sup>

In order to make it easier for marriage equality supporters to advance a message that promotes marriage equality without criticizing non-marital statuses, pluralistic relationship recognition supporters should advance a complementary message. The message should focus upon the notion that certain individuals, gay and straight, form valuable relationships outside of marriage; relationships that the law should support and protect. The message should not, however, disparage marriage or the need to obtain marriage equality for same-sex couples. Rather, it should acknowledge that just as it is essential for individuals, gay and straight, to have the ability to form legally recognized relationships outside of marriage based on their particular circumstances, it is also essential that same-sex couples, like opposite-sex couples, have the ability to choose the institution of marriage. It does not harm a pluralistic relationship recognition argument to concede that for some same- and opposite-sex couples, the institution of marriage will provide them with the unique sets of rights and responsibilities that will serve them best, and for others, it is non-marital statuses that will serve them best. Nor is it a stretch for the concept of pluralistic relationship recognition, which is predicated on the recognition of different types of relationship statuses, to include the status of marriage; in fact, this is a position many of

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<sup>199</sup> See *supra* note 153.

<sup>200</sup> Stein, *supra* note 181, at 586-87.

the leading legal scholars advocating for pluralistic relationship recognition have come to adopt.<sup>201</sup> If this is the message advanced by pluralistic relationship recognition supporters, it is more likely that marriage equality supporters will be willing to advance a similar, equally respectful message.

In addition, the LGBT rights movement should acknowledge and applaud pluralistic relationship recognition advancements when they occur, something that has not always happened. For example, when Colorado enacted its designated beneficiary status, which provides both same- and opposite-sex couples (as well as individuals who are related to each other) with a menu of options for rights and responsibilities, the “[p]assage of this law received a tiny fraction of the attention accorded to several legislative votes on same-sex marriage during the same month.”<sup>202</sup> When advancements such as this are acknowledged by the movement, the acknowledgement often includes language denoting the passage of the non-marital statuses as steps in the right direction, but ultimately inadequate.<sup>203</sup> As Nancy Polikoff has explained, “[w]hen gay rights advocates frame such a law as a crumb distributed by those unwilling to extend marriage, they miss the opportunity to hail it as an important victory that . . . helps a wide range of LGBT relationships.”<sup>204</sup> Acknowledging and applauding the advancement of non-marital statuses without constantly comparing them to marriage sends the message that these statuses are valuable in and of themselves, and the more that these statuses are perceived this way, the harder it will be to repeal them in the future.

In a similar vein, it is important that the movement publicizes and promotes non-marital statuses after they have been enacted. As explained in detail in the previous subsection, the more

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<sup>201</sup> See *supra* note 140. See also Kramer, *supra* note 195, at 148.

<sup>202</sup> Polikoff, *supra* note 124, at 557.

<sup>203</sup> See *supra* Section III.A.

<sup>204</sup> Polikoff, *supra* note 124, at 557.

people who enter into these statuses or view them as relevant to their lives, the greater the demand for these statuses will be and the harder it will be to repeal them once they come into existence. In order to enter into or demand non-marital statuses, however, it is important that people both outside of and within the LGBT rights movement understand the benefits of these statuses. Indeed, arguments in support of repealing non-marital statuses after the legalization of same-sex marriage often cite to the statistics regarding the relatively low number of opposite-sex couples in the relevant jurisdiction who choose to enter into them.<sup>205</sup> Thus, the movement should engage in efforts to publicize these non-marital statuses and to educate the general public about them.

The unwillingness to provide enthusiastic support for non-marital statuses likely stems from the belief of marriage equality supporters that applauding and publicizing such advancements will weaken the argument for marriage equality because it will give the impression that such statuses are sufficient for everyone in the LGBT community and thus same-sex marriage is unnecessary. This, however, does not have to be the case. As discussed above, in showing support for non-marital statuses, marriage equality supporters could make clear that such statuses are an important victory for those individuals, LGBT and non-LGBT, who wish to have their relationships recognized outside of marriage, and applaud them as such, while continuing to underscore that there are still many couples who desire to marry and who would benefit from marriage. The message should further explain that just as it is essential that opposite-sex couples have the choice to enter into marriage, it is also essential, and fundamental notions of equality require, that same-sex couples also have this choice.

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<sup>205</sup> Nancy Polikoff, *It's Looking Good for Removing the Domestic Partner "Sunset" Provision from the DC Marriage Equality Bill*, Beyond (Straight and Gay) Marriage Blog, Oct. 27, 2009, <http://beyondstraightandgaymarriage.blogspot.com/2009/10/its-looking-good-for-removing-domestic.html> (“[T]he bill's chief sponsor . . . put on the record some statistics about the tiny number of different-sex couples who have registered in the places he stated were the three jurisdictions permitting such registration.”).

Finally, one of the most effective ways the movement could alter its message to ensure that marriage equality advancements do not undermine the goal of pluralistic relationship recognition would be to work for the enactment of non-marital statuses in jurisdictions that have already legalized same-sex marriage. Since same-sex marriage already would be legal, there would be no risk of undermining marriage equality goals in that particular jurisdiction. As Nancy Polikoff has explained, “there is no state in which gay rights advocates have achieved marriage equality and subsequently urged passage of a law . . . that validates relationships outside of marriage” and until that happens, it is difficult to believe that the LGBT rights movement is really committed to furthering both goals.<sup>206</sup> Working towards pluralistic relationship recognition in a jurisdiction that has already legalized same-sex marriage perhaps more forcefully than any other effort would send the message that non-marital statuses are valuable to same- and opposite-sex couples in and of themselves, and not solely as marriage substitutes that should disappear when same-sex marriage laws take effect. It is this understanding of non-marital relationship statuses that will result in such statuses obtaining the support necessary to move forward as a significant part of the relationship recognition landscape.

### **B. Including Opposite-Sex Couples in Non-Marital Statuses**

Including opposite-sex couples within non-marital relationship statuses is not only more consistent with the objectives of pluralistic relationship recognition, which involve recognizing and valuing all types of families regardless of marital status, but it also will aid the LGBT rights movement in successfully advancing the goal of pluralistic relationship recognition along with the goal of marriage equality. Opening non-marital statuses to opposite-sex couples from the beginning will give these statuses the best chance of surviving in states that later legalize same-sex marriage. As an initial matter, it will avoid the creation of a situation that places the non-

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<sup>206</sup> Polikoff, *supra* note 124, at 557.

marital status in a politically unfavorable position. When same-sex marriage is legalized in a state that has an existing non-marital status open only to same-sex couples, the result is that same-sex couples have a choice between marriage and the non-marital status while opposite-sex couples are left with only one choice: marriage.<sup>207</sup> It seems highly unlikely that many people would support a regime that discriminates against opposite-sex couples by providing only same-sex couples with an additional option for relationship recognition.<sup>208</sup> Indeed, one could envision the situation painted as same-sex couples greedily trying to obtain not just equality, but greater rights than opposite-sex couples.

In addition, if non-marital statuses were open to opposite-sex couples from the time of their enactment, it likely would be more politically difficult to repeal such statuses. Including opposite-sex couples from the beginning would mean the status was open to a much higher percentage of the population than it would be if restricted to same-sex couples.<sup>209</sup> As more people enter into non-marital statuses and experience individuals who are close to them entering into these statuses, there will be an increase in the number of people who strongly value these statuses and feel a sense of personal stake in maintaining them, making them more difficult to repeal. Notably, the experiences in a number of jurisdictions that have opened non-marital statuses to opposite-sex couples indicate that there are opposite-sex couples who will choose non-marital statuses over entering into marriage or forgoing relationship recognition (the only two options that exist for opposite-sex couples in most states).<sup>210</sup> With the ever-increasing

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<sup>207</sup> States like Vermont, Connecticut and New Hampshire likely repealed their non-marital statuses, which were limited to same-sex couples, in order to avoid this type of result. NCLR, *supra* note 58, at 3-4, 7-8, 10.

<sup>208</sup> Titshaw, *supra* note 27 (manuscript at 60) (“It’s one thing to discriminate in favor of those society prefers. It’s another thing entirely to discriminate against them.”). Indeed, one would guess that many LGBT people who have themselves been discriminated against by a relationship recognition regime in the context of marriage would not support a different relationship recognition regime that discriminated against and excluded other people.

<sup>209</sup> According to the 2010 census, “[n]ationally, about 1 percent of all couple households were same-sex couples.” UNITED STATES CENSUS BUREAU, SAME-SEX COUPLE HOUSEHOLDS 1 (2011), <http://www.census.gov/prod/2011pubs/acsbr10-03.pdf>.

<sup>210</sup> Scott Titshaw, *The Reactionary Road to Free Love: How DOMA, State Marriage Amendments, and Social Conservatives Undermine Traditional Marriage*, 115 W. VA. L. REV. 205, 278 (2012). For example, it is estimated that 45% of registrants for

number of individuals choosing to cohabit and intermingle their finances but not marry, it makes sense that there would be a significant number of people, LGBT and non-LGBT alike, interested in some form of non-marital relationship recognition.<sup>211</sup>

Opening non-marital statuses to opposite-sex couples also advances a perception of these statuses that is significantly more likely to convince a wider range of people, whether they have a personal stake in the issue or not, to support keeping these statuses in place after the legalization of same-sex marriage.<sup>212</sup> Including opposite-sex couples changes the perception of non-marital statuses from temporary, second-class marriage substitutes for same-sex couples to true alternatives to marriage that both same- and opposite-sex couples may prefer.<sup>213</sup> Upon the legalization of same-sex marriage, it likely will be much more difficult to repeal a non-marital status that is viewed as providing a permanent solution to relationship recognition for same- and opposite-sex couples than it will be to repeal a non-marital status that is viewed as a temporary, second-class marriage substitute for same-sex couples. Changing the perception of non-marital statuses in this manner likely will also help them get enacted in the first place. If opposite-sex couples begin to see non-marital statuses as something relevant to their lives as opposed to marriage substitutes for same-sex couples, it will create more demand and general support for the enactment of these statuses.

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Nevada's domestic partnership status have been opposite-sex couples. In France, 95% of the couples who register for its non-marital partnership status are opposite-sex couples. Robert Korengold, *Marriage or PACS? In France Things Are Changing*, BONJOURPARIS, <http://www.bonjourparis.com/story/marriage-or-pacs-france-things-are-changing/> (last visited July 16, 2012); Scott Sayare and Maia De La Baume, *In France, Civil Unions Gain Favor Over Marriage*, N.Y. TIMES, Dec. 15, 2010, <http://www.nytimes.com/2010/12/16/world/europe/16france.html?pagewanted=all>; *Entering in a PACS agreement*, COMPLETE FRANCE, June 15, 2009, [http://www.completefrance.com/living-in-france/news/entering\\_in\\_a\\_pacs\\_agreement\\_1\\_1199504](http://www.completefrance.com/living-in-france/news/entering_in_a_pacs_agreement_1_1199504) [hereinafter Complete France].

<sup>211</sup> Nicole C. Berg, *Designated Beneficiary Agreements: A Step in the Right Direction for Unmarried Couples*, 2011 U. ILL. L. REV. 267, 300 (2011) (explaining that “75.3% of unmarried cohabitants [are] ‘substantially interdependent economically.’”); Minara El-Rahman, *Happily Even After: Cohabitation Agreements*, FINDLAW, March 2, 2010, [http://blogs.findlaw.com/law\\_and\\_life/2010/03/happily-never-after-cohabitation-agreements.html](http://blogs.findlaw.com/law_and_life/2010/03/happily-never-after-cohabitation-agreements.html) (“The number of cohabiting unmarried partners increased by 88% between 1990 and 2007.”).

<sup>212</sup> POLIKOFF, *supra* note 127, at 156-57, 213 (“When unmarried heterosexual couples are eligible for the law’s benefits, then the law is not about marriage at all; it is about valuing all families.”). *See also* Ettelbrick, *supra* note 106, at 686-88.

<sup>213</sup> Glazer, *supra* note 41, at 128.

Moreover, including opposite-sex couples in non-marital statuses would further the movement's efforts to form coalitions to advance the goal of pluralistic relationship recognition, as it would demonstrate that this goal involves advancing relationship recognition for all families, not just LGBT families. While the idea of forming coalitions to further the goal of pluralistic relationship recognition is not new, the actual formation of coalitions must be implemented more often and on a more widespread basis. For example, when District of Columbia lawmakers were contemplating repealing the existing domestic partnership status upon the legalization of same-sex marriage, LGBT rights advocates joined with advocates for unmarried individuals to oppose the repeal of domestic partnerships, and they ultimately succeeded in keeping the domestic partnership status in existence.<sup>214</sup> One can imagine that if non-marital statuses begin to be perceived as tools for many different types of familial situations, the opportunities to build coalitions will increase considerably. The more that those outside of the LGBT rights movement are involved in the pursuit of pluralistic relationship recognition, the more difficult it will be for opponents to dismiss this goal as radical and out of touch with the needs of the broader population.

In addition to political reasons, there are also legal reasons for opening non-marital statuses to opposite-sex couples. There likely would be an issue of constitutionality if a non-marital status open only to same-sex couples remained in place following the legalization of same-sex marriage. While a few courts have held that non-marital statuses open exclusively to same-sex couples do not violate the equal protection rights of opposite-sex couples, these decisions have rested on the basis that same-sex marriage was not legal in those jurisdictions.<sup>215</sup>

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<sup>214</sup> See, e.g., ALTERNATIVES TO MARRIAGE PROJECT, *supra* note 195; AMERICAN UNIVERSITY, TESTIMONY OF PROFESSOR NANCY D. POLIKOFF IN SUPPORT OF B18-482 (2009), [http://www.wcl.american.edu/faculty/polikoff/testimony10\\_26.pdf](http://www.wcl.american.edu/faculty/polikoff/testimony10_26.pdf).

<sup>215</sup> See, e.g., *Irizarry v. Bd. of Educ. of the City of Chicago*, 251 F.3d 604 (7th Cir. 2001); *Foray v. Bell Atl.*, 56 F. Supp. 2d 327 (S.D.N.Y. 1999). See also Stein, *supra* note 54, at 186 ("Several courts have determined that an unmarried different-sex couple

The courts reasoned that restricting the non-marital status to same-sex couples was constitutional because same- and opposite-sex couples in the jurisdiction were not similarly situated since only opposite-sex couples could enter into marriages, and the discrimination was rationally related to the goal of promoting marriage.<sup>216</sup> When same-sex marriage is legalized, however, this reasoning no longer stands – same- and opposite-sex couples become similarly situated because they can both marry and the discrimination is no longer rationally related to promoting marriage if it applies only to one of the categories of individuals who are eligible for marriage. Thus, the exclusion of opposite-sex couples from a non-marital status becomes constitutionally suspect upon the legalization of same-sex marriage.<sup>217</sup> Indeed, statuses open only to same-sex couples have not remained in place following the legalization of same-sex marriage, as is shown by the experiences in Vermont, New Hampshire, and Connecticut; but in the District of Columbia, Maine, and Maryland, where non-marital statuses were open to both same- and opposite-sex couples, the statuses remained in place following the legalization of same-sex marriage.<sup>218</sup> If non-marital statuses were open to both same- and opposite-sex couples, the constitutionality concerns would be eliminated.

The inclusion of opposite-sex couples in non-marital statuses also will mean that the statuses have a stronger chance of surviving constitutional challenges in states that have constitutional amendments banning not only same-sex marriage, but also the legal recognition of “similar,” “identical,” or “substantially similar” statuses (the precise language of such constitutional amendments differs by state).<sup>219</sup> Whatever the structure of a non-marital

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and an unmarried same-sex couple are not similarly situated in relevant respects in jurisdictions where different-sex couples have the option of getting married while same-sex couples do not.”)

<sup>216</sup> See *supra* note 215.

<sup>217</sup> Titshaw, *supra* note 27 (manuscript at 67-69).

<sup>218</sup> NCLR, *supra* note 58, at 3-8, 10.

<sup>219</sup> See *id.* at 42-45, n. 241 (listing the seven states that fall into this category). In addition to the seven states listed, Texas and Ohio arguably fall into this category as well. See OHIO CONST. ART. XV, §11 (“This state and its political subdivisions shall not

relationship recognition regime, if it is open only to same-sex couples, then the claim that it seeks to provide a status that is substantially similar to marriage seems logical due to the fact that same-sex couples are banned from marrying and thus would require a status that mirrored marriage. This argument would be more difficult to make if opposite-sex couples were included in the non-marital status. In that case, the status would become an alternative for opposite-sex couples who can, but do not wish to, marry, which in turn would make it significantly more difficult to conceptualize the status as substantially similar to marriage. Instead, it becomes more logical to understand it as a relationship status that is distinct from marriage - distinct enough that it is offered as an alternative for individuals who are eligible for marriage.<sup>220</sup>

Finally, it is important to note that the inclusion of opposite-sex couples in non-marital statuses will not undermine the goal of marriage equality. Including opposite-sex couples in non-marital relationship statuses does not detract from marriage equality proponents' message regarding the clear discrimination that occurs when same-sex couples are excluded from the institution of marriage. In fact, if opposite-sex couples are included in non-marital statuses and thus can choose between a marital and a non-marital status and same-sex couples are eligible for only a non-marital status, the marriage discrimination remains apparent. Including opposite-sex couples within non-marital relationship statuses, while certainly highlighting the notion that some people are better served by relationship statuses other than marriage, does not detract from the core marriage equality arguments that many same-sex couples, like many opposite-sex

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create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.”); TEX. CONST. ART. I, §32 (prohibiting “any legal status identical or similar to marriage”).<sup>220</sup> See Katherine Bindley, *Domestic Partner Health Insurance Benefits Grow For Heterosexual Couples, Too*, HUFFINGTON POST, June 1, 2012, [http://www.huffingtonpost.com/2012/06/01/domestic-partner-health-insurance-unmarried-heterosexual-couples\\_n\\_1532584.html](http://www.huffingtonpost.com/2012/06/01/domestic-partner-health-insurance-unmarried-heterosexual-couples_n_1532584.html) (“In Ohio, gay marriage violates the constitution, and [an employer] expected critics to argue that by offering [domestic partnership employment] benefits only to same sex-couples, the policy would effectively imitate gay marriage. Granting equal benefits to straight couples turned out to be the loophole. ‘If [the benefits are] open to anyone ... including straight people who choose not to get married, there’s no way someone can claim we’re trying to imitate same-sex marriage”).

couples, would benefit most from entering the institution of marriage and that same-sex couples should have the same right as opposite-sex couples to choose marriage.

### **C. Distinguishing Non-Marital Statuses from Marriage**

Another key to ensuring that marriage equality advancements do not undermine the goal of pluralistic relationship recognition is to make non-marital statuses truly distinct from marriage. Currently, many non-marital statuses give all or most of the rights and benefits of marriage and simply omit the title of marriage.<sup>221</sup> If non-marital statuses could be meaningfully distinguished from marriage, it would provide a number of benefits in furthering the goal of pluralistic relationship recognition. This subsection will first address the positive results that would flow from creating non-marital statuses that are more distinguishable from marriage, and then it will explore possible ways to structure non-marital statuses in order to achieve this goal.

#### **1. Benefits**

If non-marital statuses were truly distinct from marriage in that they were open to a wider variety of individuals and created a different scheme of rights and responsibilities, there likely would be far less support for repealing these statuses upon the passage of same-sex marriage laws. There would no longer be any force to the argument that it would be unnecessary or repetitive to keep laws recognizing non-marital statuses on the books after same-sex marriage was legalized, as marriage and the non-marital status would no longer further identical purposes. This line of reasoning played out in the debate in the District of Columbia over whether to repeal domestic partnerships upon the legalization of same-sex marriage.<sup>222</sup> One of the most powerful arguments in favor of keeping domestic partnerships in place highlighted the differences between

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<sup>221</sup> See Stein, *supra* note 181, at 587. The omission of the title marriage is in and of itself viewed as important by some individuals, as “in sharp contrast to marriage civil unions remain unencumbered by a history of exclusion and inequality.” Glazer, *supra* note 41, at 143.

<sup>222</sup> See *infra* notes 223-224 and accompanying text.

domestic partnerships and marriages, including how domestic partnerships provided benefits and protections to a much wider range of relationships than marriage did.<sup>223</sup> In explaining why it would not repeal the domestic partnership law upon the enactment of same-sex marriage, the D.C. City Council Committee stated, “as domestic partnerships apply equally to same-sex and opposite-sex couples, *as well as to non-sexual relationships*, the Committee believes that preserving the right to register is necessary.”<sup>224</sup>

In addition, non-marital statuses that are distinguishable from marriage likely would attract more people, which only can help increase the popularity of and demand for these statuses, thereby increasing both the likelihood of their enactment and the likelihood that they remain in place after their enactment. As a simple matter, just differentiating non-marital statuses by making them more inclusive than marriage would increase the number of people who enter into such statuses because it would provide an option for relationships that were otherwise ineligible for legal recognition. It also could result, however, in more people who are in relationships that are eligible for marriage choosing a non-marital status. Right now, aside from avoiding the “baggage” some people perceive as accompanying the marriage label or, in some cases, the loss of certain federal benefits, there is little reason for people who share relationships that are eligible for both marriage and a non-marital status that provides all or most of the state-based benefits of marriage to choose the non-marital status.<sup>225</sup> The reasons for choosing marriage weigh much more heavily. Marriage provides eligibility for federal benefits, and marriage is a much more recognizable and better understood option. It is a choice that requires no explanation, as it is the status quo and remains the widely expected culmination for relationships today.

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<sup>223</sup> See, e.g., ALTERNATIVES TO MARRIAGE PROJECT, *supra* note 153.

<sup>224</sup> Nancy Polikoff, DC City Council Committee Passes Marriage Equality Bill and Preserves Domestic Partnerships, Beyond (Straight and Gay) Marriage Blog, Nov. 10, 2009, <http://beyondstraightandgaymarriage.blogspot.com/2009/11/dc-city-council-committee-passes.html> (emphasis added).

<sup>225</sup> See *supra* note 48.

If non-marital statuses were distinct from marriage, however, this calculus likely would change. There would be a significantly stronger incentive for an individual to choose a non-marital status over marriage if the non-marital status created a different set of state-based rights and benefits that better met that individual's needs. It also would be much easier to justify the choice of a non-marital status over marriage if this was the case. The experience in France provides support for such a hypothesis. In 1999, Civil Solidarity Pacts ("PACS") were introduced in France.<sup>226</sup> PACS differ from marriage in a number of ways, with one of the most significant being that they provide for a much easier dissolution.<sup>227</sup> It has become increasingly popular for opposite-sex couples to choose to enter into PACS instead of marriage (same-sex couples cannot marry in France and thus do not have this choice).<sup>228</sup> In fact, among opposite-sex couples there are currently two PACS for every three marriages.<sup>229</sup>

Finally, as a practical matter, distinguishing non-marital statuses from marriage in terms of the package of rights and responsibilities provided would mean that such statuses were more likely to be enacted and survive in those states that have constitutional amendments banning both same-sex marriage and "similar," "identical," or "substantially similar" statuses.<sup>230</sup> Indeed, "[t]he few decisions interpreting state marriage amendments thus far, make it clear that the more those institutions vary from marriage, the more likely they are to pass muster under the state amendments."<sup>231</sup> The ability of non-marital statuses to develop and remain in existence in these states likely would be viewed as a positive development even by marriage equality supporters,

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<sup>226</sup> Korengold, *supra* note 210; Complete France, *supra* note 210.

<sup>227</sup> Korengold, *supra* note 210; Sayare and De La Baume, *supra* note 210; Complete France, *supra* note 210.

<sup>228</sup> Korengold, *supra* note 210; Complete France, *supra* note 210; *French Gay Couples Get Right to "Marry, Adopt Children,"* BBC NEWS EUROPE, July 3, 2012, <http://www.bbc.co.uk/news/world-europe-18690348>.

<sup>229</sup> Susan Pease Gadoua, *Contemplating Divorce*, PSYCHOL. TODAY, Mar. 22, 2011,

<http://www.psychologytoday.com/blog/contemplating-divorce/201103/should-traditional-marriage-be-our-only-option>.

<sup>230</sup> Titshaw, *supra* note 27 (manuscript at 43-44).

<sup>231</sup> *Id.* at 45.

since it would provide rights and protections to individuals in same-sex relationships in places where same-sex marriage simply was not an option at the time.

## **2. Proposal for Differentiating Non-Marital Statuses**

Currently, a variety of non-marital statuses exist in the United States, such as civil unions, domestic partnerships, reciprocal beneficiaries, and designated beneficiaries, and each status includes a unique set of rights and responsibilities.<sup>232</sup> The statuses differ concerning the class of eligible relationships and range from creating commitments that provide as many rights and responsibilities as marriage to those that provide just a few rights and can be terminated by simply filling out a form.<sup>233</sup> Opening non-marital statuses to a wider variety of relationships, such as non-romantic and familial relationships, as some states already have done,<sup>234</sup> is advisable as a strong first step towards differentiating such statuses from marriage in a way that strengthens arguments in favor of enacting and keeping non-marital statuses in place regardless of same-sex marriage advancements. This alone, however, will not do enough to distinguish non-marital statuses from marriage. To create a true alternative to marriage, non-marital statuses must be chosen by individuals beyond those for whom they are the only available option. For this to occur, the rights and responsibilities that come with a non-marital status must be made sufficiently distinct from those that come with marriage such that for a significant number of people the package of rights and responsibilities that comes with the non-marital status will be more desirable.

While there are countless ways to structure a non-marital relationship recognition regime to further differentiate it from marriage, if one of the primary objectives of pluralistic relationship recognition involves moving away from the one-size-fits-all structure of marriage,

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<sup>232</sup> See *supra* Section II.A.

<sup>233</sup> See *id.*

<sup>234</sup> See *supra* Section II.A.

then it would make sense to create a regime that provides people with greater autonomy in structuring their relationships.<sup>235</sup> This is the logical next step when it comes to relationship recognition, as “[a]n established social fact of the last century is that adults in the Western countries have demanded more choices within their romantic relationships[,]” and countries have been attempting to address this demand through changes to their existing family law regimes.<sup>236</sup> Many of the ideas discussed in this subsection are inspired by steps certain states already have taken in structuring non-marital statuses; steps that grant people more autonomy in defining their relationships and further distinguish non-marital statuses from marriage.<sup>237</sup>

Many existing non-marital statuses aim to provide people with the package of rights and protections that legislators predict will best meet their needs based on the particular type of relationship they share. For example, Vermont’s reciprocal beneficiary status is open only to unmarried individuals who are related to each other.<sup>238</sup> Lawmakers likely assumed that there would be different expectations accompanying this type of relationship than those accompanying romantic relationships and thus structured the status such that the accompanying rights center on healthcare-related decision-making<sup>239</sup> and dissolution requires only the filing of a declaration with the state by one of the parties.<sup>240</sup> It may be that Vermont lawmakers correctly determined what rights many people whose relationship qualifies for the reciprocal beneficiary status would want or need, but it is highly unlikely that lawmakers have picked the package of rights and responsibilities that would best serve every qualifying relationship. Indeed, in the District of Columbia, where domestic partnerships are open to individuals who are related, the rights and

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<sup>235</sup> See *supra* note 143 and accompanying text.

<sup>236</sup> WILLIAM N. ESKRIDGE, JR. & DARREN SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE* 252 (2006).

<sup>237</sup> See *supra* Section II.A.

<sup>238</sup> See *supra* note 44 and accompanying text.

<sup>239</sup> *Id.*

<sup>240</sup> 15 VT. STAT. ANN. § 1305 (2012).

responsibilities that accompany the status are completely different from the rights and responsibilities that accompany Vermont's reciprocal beneficiary status.<sup>241</sup>

The same thing is true of certain domestic partnership and civil union laws. For example, the civil union laws in Vermont and Connecticut and the domestic partnership laws in California and Nevada were passed to provide same-sex couples in committed romantic relationships, i.e., relationships that shared key similarities with relationships eligible for marriage, with the same rights and responsibilities of marriage.<sup>242</sup> This likely was based on the assumption by lawmakers that since these relationships looked like relationships eligible for marriage (aside from the sex of the individuals involved), they would be best served by the package of rights and benefits that accompanied marriage, even if it was not politically feasible to grant these relationships the title of marriage. It is highly unlikely, though, that this package of rights and responsibilities best serves the needs of every eligible couple seeking legal recognition of their relationship.

Instead of trying to create one package of rights and responsibilities to best serve a particular category of relationships, a non-marital relationship recognition regime should provide people with the autonomy to choose the unique package of rights and benefits that best serves their needs. This could involve something similar to Colorado's designated beneficiary status, which allows individuals to choose among a list of rights and responsibilities and was "expressly designed not to be like marriage."<sup>243</sup> Unlike Colorado's designated beneficiary status, however, which allows couples to choose from a limited list of rights and responsibilities, the list should be significantly more expansive to provide individuals with a wider array of options that encompasses the many rights and responsibilities that come with the different non-marital

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<sup>241</sup> See *supra* note 64 and accompanying text.

<sup>242</sup> See *supra* notes 42-43, 51, 58-65, 62 and accompanying text.

<sup>243</sup> June Carbone, *Marriage as a State of Mind: Federalism, Contract, and the Expressive Interest in Family Law*, 2011 MICH. ST. L. REV. 49, 73 (2011) (internal quotations omitted).

relationship statuses in place across the country.<sup>244</sup> Under this type of approach, each couple could create a unique package that best meets their needs, and the ability to customize relationships would no longer be restricted, as it is today, to the few individuals who have the financial means and wherewithal to hire an attorney to draft relationship-related contracts.<sup>245</sup> Another benefit of this approach is that the customization process would require couples to openly communicate with each other about their expectations for the relationship, which would allow people to make better, more informed choices about their relationships.<sup>246</sup> Overall, this type of approach would create a status inherently different from marriage and its one-size-fits-all structure.

There are a number of concerns about this type of approach that should be addressed. As an initial matter, there is the potential that some people will lack the necessary understanding of the legal rights and responsibilities that they may choose among, and as a result, they will fail to choose a package that best meets their needs.<sup>247</sup> Of course, one could argue that most people lack sufficient understanding of the legal rights and responsibilities that come with marriage, and thus they too enter into a relationship status that does not best meet their needs, or they fail to use tools like prenuptial agreements to structure their marital relationship to best meet their needs.<sup>248</sup> Even so, the concern about people making bad decisions due to a lack of knowledge is an important one that should be addressed to the extent possible.

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<sup>244</sup> *Id.*

<sup>245</sup> For example, it is estimated that only 3-5% of couples enter into prenuptial agreements. Dave Carpenter, *New Vow: 'Til Prenup Do Us Part*, NBCNEWS.COM, May 28, 2010, [http://www.msnbc.msn.com/id/37364090/ns/business-personal\\_finance/t/new-vow-til-prenup-do-us-part/](http://www.msnbc.msn.com/id/37364090/ns/business-personal_finance/t/new-vow-til-prenup-do-us-part/).

<sup>246</sup> See ESKRIDGE & SPEDALE, *supra* note 236, at 255-56.

<sup>247</sup> See Edward Stein, *Looking Beyond Full Relationship Recognition for Couples Regardless of Sex: Abolition, Alternatives, and/or Functionalism*, 28 LAW & INEQ. 345, 365 (2010) (“Further, people may not understand the differences among the relationship options available to them.”).

<sup>248</sup> Perhaps one way to remedy this is to have required reading regarding legal consequences of marriage for those seeking to enter into the institution. While not required reading, the state of Washington has created a handbook to help readers understand the legal ramifications of marriage. See generally WASHINGTON COURTS, FAMILY LAW HANDBOOK, UNDERSTANDING THE LEGAL IMPLICATIONS OF MARRIAGE AND DIVORCE IN WASHINGTON STATE (2009), <http://www.courts.wa.gov/newsinfo/content/pdf/familylawhandbook.pdf>.

One potential solution would be to require people to pass an exam to obtain the right to enter into a non-marital status that allowed them the autonomy to structure their relationship, just as people must pass an exam to obtain the right to drive.<sup>249</sup> Individuals would be given materials that clearly set forth the different rights and responsibilities and the legal consequences thereof, and then they would take an exam to ensure that they understand the materials.<sup>250</sup> Only after showing a sufficient level of understanding would individuals be allowed to register for the status. Another option would be to give couples educational materials when they apply for the non-marital status with the expectation that they would read the materials during the waiting period between applying for the status and choosing their rights and responsibilities.<sup>251</sup> Then, before choosing their rights and responsibilities, couples would have to sign a document attesting to the fact that they had read the materials.<sup>252</sup> Alternatively, couples could be required to attend a class about the different rights and responsibilities available as options before undertaking a required exam, just as many states require individuals to attend a driver's education course prior to taking the written driving exam.<sup>253</sup> Or, the exam could be omitted, and couples could be required only to attend the class.

A related concern is that one member of the couple may have superior knowledge or bargaining power, which will be used to convince the other member of the couple to structure the

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<sup>249</sup> See, e.g., Connecticut Department of Motor Vehicles, Obtaining a Connecticut License for the First Time, <http://www.ct.gov/dmv/cwp/view.asp?a=805&q=244732&dmvPNavCtr=#52341> (last visited July 16, 2012).

<sup>250</sup> The materials could mirror the handbook Washington has created to educate readers about the legal ramifications of marriage. WASHINGTON COURTS, *supra* note 248.

<sup>251</sup> Many states already have a waiting period between applying for and picking up marriage licenses. FindLaw, Marriage License Requirements, <http://family.findlaw.com/marriage/marriage-license-requirements.html> (last visited July 16, 2012). Others have suggested that when couples come to register for a relationship status, they should be given forms that include explanations in lay terms of the rights and responsibilities accompanying the various statuses available. Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CAL. L. REV. 1479, 1526 (2001).

<sup>252</sup> Something like this is not unrealistic. In California, for example, couples have to sign a document indicating that they have read and understood certain materials before they are able to use a more streamlined procedure to dissolve their domestic partnership. CALIFORNIA SECRETARY OF STATE, TERMINATING A CALIFORNIA REGISTERED DOMESTIC PARTNERSHIP 3 (2011), <http://www.sos.ca.gov/dpregistry/forms/sf-dp2.pdf>.

<sup>253</sup> See, e.g., Connecticut Department of Motor Vehicles, *supra* note 295; California Department of Education, Driver Education Frequently Asked Questions, <http://www.cde.ca.gov/ci/cr/dr/drvedufaqs.asp> (last visited July 16, 2012).

relationship in a way that unfairly favors the person with superior knowledge or bargaining power. Again, this type of concern is not a new one, as it is a prominent concern regarding the enforcement of any marriage-related agreements.<sup>254</sup> While educating people so that they understand the consequences of the options they choose could go a long way towards addressing this concern, there are other steps that also could be taken.<sup>255</sup> One potential step could be to set a floor of rights and responsibilities that any couple who entered into the proposed status would receive and allow couples to customize the rest of the status's rights and responsibilities.

Another way to address the concern would be to structure the options in such a way that certain rights or responsibilities necessarily accompanied other rights and responsibilities. For example, if a couple chooses options such as filing joint state tax returns and tax-free transferring of property, options that would give rise to an expectation that the fruits of the labor of either party would belong to the couple because such rights are based on the notion of the couple forming a partnership to create a single economic unit,<sup>256</sup> then that couple would not be able to waive the creation and equitable distribution of marital property – a concept also based on the notion of the couple forming a partnership for economic purposes.<sup>257</sup> Finally, there could be a requirement that prior to registering for the status, couples fill out a form in which they disclose relevant information regarding their finances.<sup>258</sup> Just as courts asked to enforce premarital agreements generally require that certain financial information was disclosed by the parties prior

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<sup>254</sup> See, e.g., *Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990); Laurie Israel, *Realities About Prenuptial Agreements — Why Having One May Be a Bad Choice For Your Marriage*, Israel, Van Kooy & Days, LLC (2008), <http://www.ivkdllaw.com/the-firm/our-articles/pre-nuptial-agreements-and-lawyering/5-realities-about-pre-nuptial-agreements-%E2%80%94-why-having-one-may-be-a-bad-choice-for-your-marriage/>.

<sup>255</sup> See *supra* notes 249-252 and accompanying text.

<sup>256</sup> Matthew Fry, *One Small Step for Federal Taxation, One Giant Leap for Same-Sex Equality: Revising § 2702 of the Internal Revenue Code to Apply Equally to All Marriages*, 81 TEMP. L. REV. 545, 551-52, 553 (2008) (noting that “the primary justification for allowing the tax-free transfer of assets and gifts between spouses is that a married couple functions as a single economic unit” and “[t]he reasoning behind giving married couples this option [to file joint tax returns] is that the married couple is likely to function as a single economic unit and should therefore be taxed as such.”).

<sup>257</sup> DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 472 (2d ed. 2009).

<sup>258</sup> Jennifer Drobac and Antony Page have included such a requirement in their domestic partnership proposal. Jennifer A. Drobac & Antony Page, *A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law*, 41 GA. L. REV. 349, 407 (2007).

to entering the agreement and refuse to enforce provisions relating to financial information that was omitted or untrue, courts could refuse to enforce relevant rights or responsibilities in the chosen package that unfairly favor the party who omitted or misrepresented financial information.<sup>259</sup>

An alternative to the customization option that might alleviate these concerns to some degree would be for states to provide a regime that is based on a menu of relationship packages.<sup>260</sup> The menu option has been discussed in depth by William Eskridge and Darren Spedale, who point out that the advantage of such an approach is that it “permits freedom of choice” as couples get to choose an option “keyed to the level of commitment they want to signal or create[.]” and it also encourages each member of the couple to communicate about his or her expectations for the relationship.<sup>261</sup> The menu set forth by Eskridge and Spedale is based on existing relationship recognition alternatives in the United States and other countries.<sup>262</sup>

Instead of creating a menu by enacting a number of existing relationship statuses and allowing couples to choose among them, however, the regime also could come under one umbrella name, such as, for example, “links,” and states could create packages that reflect different levels of commitment or different types of relationships and include some of the rights and responsibilities encompassed in existing statuses as well as other rights and responsibilities. For example, a level one link could be aimed at people who are in relationships that focus on caretaking but do not involve the intermingling of finances, and could provide healthcare

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<sup>259</sup> ABRAMS, *supra* note 257, at 881-82.

<sup>260</sup> Scholars have advocated a number of other interesting relationship recognition ideas. For example, Edward Zelinski has proposed that civil marriage be abolished, and “[i]n lieu of a single, uniform state-established regime for marriage, different groups and communities . . . develop their own contracts to which couples will typically adhere when they embrace a particular form of marriage.” Edward Zelinski, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1165 (2006). Jennifer Drobac and Antony Page propose “a domestic partnership substitute for civil marriage” which involves allowing couples to choose between four different forms of domestic partnerships. Drobac & Page, *supra* note 258, at 353-56.

<sup>261</sup> ESKRIDGE & SPEDALE, *supra* note 236, at 255.

<sup>262</sup> *Id.* at 252-55.

decision-making and related rights, but not rights to financial support for either party.<sup>263</sup> Creating a regime consisting of a singular status with different levels may be more politically feasible than individually passing separate laws establishing each non-marital status in order to eventually create a menu of options. Giving the regime a new name also would mean that it would not carry any of the marriage-related baggage that other non-marital statuses, such as civil unions, often carry as a result of being enacted in some places as political compromises to avoid same-sex marriage.<sup>264</sup> Although this approach would give couples less autonomy than the option of having each couple create their own unique package of rights and responsibilities, it would help to ensure that couples receive a bundle of rights and benefits that has been put together with the aim of protecting both members in a logical way based upon the type of relationship they share. Additionally, the previous suggestions aimed at ensuring that people understand the package of rights and benefits they are receiving could apply in the context of this alternative as well.<sup>265</sup>

In terms of dissolving relationships formed under the various regimes discussed above, in keeping with notions of autonomy and choice, the dissolution process should avoid unnecessary obstacles such as proof of fault, lengthy waiting periods, or proof of a relationship's irretrievable breakdown.<sup>266</sup> This would go far towards creating a true alternative to marriage that many individuals feel better meets their needs. As illustrated by the adoption of no-fault divorce in

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<sup>263</sup> This would be similar to Vermont's reciprocal beneficiary status. *See supra* note 44.

<sup>264</sup> *See supra* Section II.A.

<sup>265</sup> *See supra* notes 254-259.

<sup>266</sup> ABRAMS, *supra* note 257, at 422. Currently, while non-marital statuses that differ from marriage in terms of the rights and benefits encompassed are usually easier to dissolve than marriage, those statuses that provide all of the rights and responsibilities of marriage usually require the same dissolution process as marriage. *Compare* ACLU, Dissolving a Civil Union, [http://civilunions.aclu-il.org/?page\\_id=45](http://civilunions.aclu-il.org/?page_id=45) (last visited July 16, 2012) ("The dissolution of a civil union in Illinois happens under the same laws applicable to marriage dissolution"), and Joseph A. Komosinski, State Registrar, New Jersey State League of Municipalities, Civil Union in New Jersey from a Vital Statistics Perspective, [http://www.njslom.org/civil\\_union\\_vital\\_statistics.html](http://www.njslom.org/civil_union_vital_statistics.html) (last visited July 16, 2012) (explaining that in New Jersey "[t]he dissolution of Civil Unions follows the same procedures and are subject to the same substantive rights and obligations that are involved in the dissolution of a marriage"), with COL. REV. STAT. ANN. § 15-22-111 (explaining that Colorado's designated beneficiary status may be terminated by "by either party to the agreement . . . recording a revocation with the clerk and recorder of the county in which the agreement was recorded"), and 15 VT. STAT. ANN. § 1305 (explaining that Vermont's reciprocal beneficiary status may be terminated by either party "filing a signed notarized declaration with the commissioner.").

every jurisdiction,<sup>267</sup> Americans generally place great value on the ability to dissolve their relationships quickly and without significant difficulty.<sup>268</sup> This proposition is further supported by the statistics regarding the dearth of individuals who choose to enter into a covenant marriage, a form of marriage that is significantly more difficult to dissolve than a standard marriage.<sup>269</sup>

The specific procedure for dissolving the relationship and the level of complexity involved in doing so should depend upon whether the couple chose a relationship recognition option that involved financially related rights and responsibilities as well as whether the couple has children. Just as some states have options for streamlined dissolution or “summary divorce” when married couples meet certain criteria regarding the length of the relationship, the existence of children, and financial matters,<sup>270</sup> a non-marital status regime should strive to create its own processes to dissolve relationships as efficiently as possible based on the package of rights and responsibilities accompanying the relevant relationship status. While there are a number of jurisdictional concerns that could arise if states pass differing non-marital relationship recognition regimes, states already are taking steps to address such concerns, as these concerns have long existed due to the differing relationship recognition regimes in place across the United States.<sup>271</sup> Steps such as requiring couples who register for the status to agree to submit to dissolution jurisdiction in the issuing state represent positive advancements regarding jurisdictional concerns in this context.<sup>272</sup>

There are also a number of options for differentiating non-marital statuses from marriage in important, but less drastic, ways. For example, the status could omit any requirement that

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<sup>267</sup> Barbara Glesner Fines, *Fifty Years of Family Law Practice-The Evolving Role of the Family Law Attorney*, 24 J. AM. ACAD. MATRIM. LAW. 391, 397 (2012).

<sup>268</sup> ESKRIDGE & SPEDALE, *supra* note 236, at 252.

<sup>269</sup> Feinberg, *infra* note 280, at 308-310.

<sup>270</sup> Honorable Lloyd Cutsumpas & B. Moses Vargas, Summary Dissolution, *Is Connecticut’s Current System as Effective as it Should Be?*, 6 CONN. PUB. INT. L.J. 329, 330 (2007).

<sup>271</sup> Stein, *supra* note 48, at 193-95.

<sup>272</sup> *Id.* at 194.

couples engage in a ceremony or solemnization, which is a requirement in most jurisdictions for marriage.<sup>273</sup> Couples could have a ceremony on their own if they so desired, but it would not be part of the legal requirements for entering the relationship status.<sup>274</sup> In the alternative, couples could be required to undergo a civil ceremony presided over by a government official, and ceremonies presided over by religious leaders could be optional and unrecognized by the state.<sup>275</sup> Beyond differentiating the status from marriage, omitting the ceremony requirement or requiring a civil ceremony also may help to avoid confusion about the source of recognition for the relationship.<sup>276</sup> Clearly establishing the status as one based in civil law as opposed to religious law likely would help quell some of the religious justifications for restricting relationship recognition to unrelated individuals who are of the opposite sex and in a romantic relationship.<sup>277</sup>

In addition, these statuses should avoid one of the few remaining explicitly patriarchal formal aspects of the marriage process by omitting any procedure that gives individuals (in most states only women)<sup>278</sup> the ability to adopt their significant other's surname through a less cumbersome process than a name-change normally entails.<sup>279</sup> If a non-marital relationship recognition regime avoided practices such as this that further the traditional marriage-based idea of two people merging into one person, and instead focused on practices that encourage

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<sup>273</sup> ABRAMS, *supra* note 257, at 154.

<sup>274</sup> This is the approach taken, for example, with domestic partnerships in Nevada. NEV. REV. STAT. § 122A.110 (2012).

<sup>275</sup> This is very similar to how marriage is handled in Germany. Titshaw, *supra* note 27 (manuscript at 8).

<sup>276</sup> *Id.* (“This union of religious and civil marriage [in the United States] communicates the social and historical meaning evoked by the label “marriage” in a way that the German civil register does not. It also intensifies political passions and creates confusion among U.S. lawyers and politicians, who regularly refer to religious sources when defending the “sanctity of marriage” against lesbians and gay men.”).

<sup>277</sup> *Id.*

<sup>278</sup> ABRAMS, *supra* note 257, at 197.

<sup>279</sup> *Id.*; Suzanne A. Kim, *Marital Name/Naming Marriage: Language and Status in Family Law*, 85 IND. L.J. 893, 933 (2010) (“The prevalence of women's name change today reflects gender hierarchy both inside and outside of marriage in several ways. First, as widely explored by others, it serves as a remnant of the overtly patriarchal, coverture-based structure of marriage in which a wife's identity was subsumed under that of her husband's.”).

individuals to maintain their own distinct identities within their relationships, the perception of these statuses would be further distinguished from that of marriage.<sup>280</sup>

Ultimately, there are myriad ways to differentiate non-marital statuses from marriage, and this article will not seek to address each way in which this could be accomplished. As discussed above, taking steps to further differentiate non-marital statuses from marriage will have a number of positive results in the context of ensuring that the goal of pluralistic relationship recognition is able to survive in an era of marriage equality advancements.<sup>281</sup>

## **V. The Positive Results of Pursuing Both Goals in the Proper Manner**

Taking steps such as the ones outlined in this article to successfully advance both the goal of marriage equality and the goal of pluralistic relationship recognition will lead to a number of positive results for the LGBT rights movement. The arguments setting forth the benefits of same-sex marriage to both LGBT individuals and society are familiar, and a number of them have been discussed at length in previous sections of this article; they will not be recounted here. Similarly, the arguments setting forth the benefits of pluralistic relationship recognition to both LGBT individuals and society also are familiar and a number of them have been discussed at length in previous sections of this article; they too will not be recounted here. Instead, this section focuses on the positive results for the LGBT rights movement if it successfully implements strategies to advance marriage equality and pluralistic relationship recognition simultaneously.

First, if each of these important, longstanding goals is pursued properly, the advancement of one goal should aid, rather than undermine, the advancement of the other. Experience shows that the enactment of certain non-marital statuses often paves the way for same-sex marriage.<sup>282</sup>

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<sup>280</sup> During the years of coverture the husband and wife were considered one person, the husband, for legal purposes. Jessica Feinberg, *Exposing the Traditional Marriage Agenda*, 7 NW J. L. & Soc. POL'Y 301, 313-14 (2012).

<sup>281</sup> See *supra* Section IV.A.1.

<sup>282</sup> See *supra* Section II.A.

The enactment of non-marital statuses allows people to get used to the legal recognition of same-sex relationships and become more comfortable with the concept.<sup>283</sup> Same-sex marriage seems like much less of a leap if there is already some form of legal recognition for same-sex relationships in the state.<sup>284</sup> Although past experience shows it is usually non-marital relationships paving the way for same-sex marriage, the converse also may be true. If a state that has not enacted any non-marital relationship statuses legalizes same-sex marriage, it likely would serve to expand many people's ideas about what a relationship should look like to receive legal recognition. This could pave the way in such states for the enactment of non-marital statuses that recognize a wider variety of relationships. Moreover, marriage equality efforts that are unsuccessful in the sense that they do not accomplish the legalization of same-sex marriage often lead to the creation of non-marital statuses, which in turn can pave the way for the attainment of marriage equality in the future.<sup>285</sup> As long as non-marital statuses remain in place after marriage equality is attained, both goals ultimately are furthered.

Second, if the movement is able to successfully further pluralistic relationship recognition while it also pursues marriage equality, more individuals within and outside of the LGBT community will be able to have their important relationships recognized by the law. This is true for a number of reasons. As an initial matter, many individuals in same-sex relationships live in states that have constitutional amendments banning the recognition of same-sex marriage.<sup>286</sup> While same-sex couples who live in these states can travel to another state to marry, their home state will not recognize the marriage. Thus, unless the political climate towards same-sex marriage in these states changes greatly and these states again amend their constitutions, the only

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<sup>283</sup> Stein, *supra* note 181, at 591.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 591-92. See also *supra* Section IIA.

<sup>286</sup> National Conference of State Legislatures, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws* (2012), <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx>.

opportunity same-sex couples will have for relationship recognition will be through the enactment of a non-marital status. Similarly, the current political climate in many states is such that although marriage equality may not be a realistic goal in the near future, the enactment of a non-marital status may be realistic.<sup>287</sup> While that is not to say that marriage equality should not be pursued in such states, pursuing both goals likely will allow more people to have their relationships recognized at an earlier date.

Another reason that successfully pursuing both goals will allow more people to have their important relationships recognized is that many individuals in same-sex relationships are opposed to marriage and likely would not enter the institution even if it was their only option.<sup>288</sup> For these individuals, a non-marital status is the only route through which they would seek legal recognition of their relationship. Moreover, many of the important caretaking relationships shared by people both within and outside of the LGBT community are not eligible for marriage because they involve two individuals who are related to each other. For these individuals to have their relationships recognized, non-marital statuses are the only option. In addition, just as marriage is the only institution that will provide the necessary rights and protections for some people's relationships, for other people the rights and protections that come with marriage simply do not make sense based upon the types of relationships they share. Thus, while many such individuals likely would not seek to enter into marriage, they may choose to have their relationships recognized through non-marital statuses that grant benefits and responsibilities that better meet their needs.

Third, pursuing the goal of pluralistic relationship recognition in addition to pursuing the goal of marriage equality will help the LGBT rights movement to attract more supporters.

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<sup>287</sup> Stein, *supra* note 181, at 591.

<sup>288</sup> See *supra* Section II.B.

Working to advance pluralistic relationship recognition will help the movement to be understood as one that looks out for the interests of a wide variety of individuals and families, including those outside of the LGBT community. Anyone who would prefer not to pursue relationship recognition through marriage or who shares an important relationship that is not eligible for marriage or for which the benefits of marriage would not make sense, should feel a personal stake in supporting the goal of pluralistic relationship recognition. Giving a greater number of people a sense of personal stake in the LGBT rights movement's success in attaining its goals also will aid in the formation of more expansive coalitions.<sup>289</sup>

Fourth, as detailed above, the question of whether the LGBT rights movement should be focusing on pursuing marriage equality or pluralistic relationship recognition has been a particularly divisive issue within the movement.<sup>290</sup> Working toward both goals and taking the steps outlined in this article to ensure that marriage equality advancements do not undermine the goal of pluralistic relationship recognition and vice versa, should go a long way toward mending this divide. If those within the movement see that both goals can be pursued simultaneously and that advancements regarding one of the goals can help to further the other goal, the movement will become more unified. While there always will be some disagreement within the movement regarding its goals, individuals will no longer feel that they have to choose between the goal of marriage equality and the goal of pluralistic relationship recognition, creating a movement that is more supportive of the needs of the diverse individuals who comprise it.

Finally, the successful pursuit of both goals will send the movement down a path that is truer to its overarching purpose of protecting and improving the lives of all members of the LGBT community. Even Stoddard and Ettlbrick shared this core goal, as “[t]hey both wanted

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<sup>289</sup> Such as, for example, the Alternatives to Marriage Project. Alternatives to Marriage Project, Who We Are, <http://www.unmarried.org/about-us.html> (last visited July 16, 2012).

<sup>290</sup> See *supra* Section II.B.

the full panoply of rights for LGBT people and they wanted recognition for LGBT families in their varied forms.”<sup>291</sup> Indeed, as discussed above, many of the leading marriage equality advocates believe that unmarried individuals should have their relationships legally recognized and protected, and many of the leading pluralistic relationship recognition advocates believe that marriage should remain as a choice in a relationship recognition regime. The goals of marriage equality and pluralistic relationship recognition do not need to represent an either/or choice. Instead, the simultaneous pursuit of both goals is the position most consistent with the core mission of the movement and, if perceived as possible, likely represents the course of action that most people within the movement would prefer.

## **VI. Conclusion**

Overall, it is time for the LGBT rights movement to adopt clear and explicit strategies so that it is able to simultaneously advance two of its most important goals: pluralistic relationship recognition and marriage equality. Whether one favors the prioritization of marriage equality or the prioritization of pluralistic relationship recognition, it is hard to dispute that each goal will have positive effects on the lives of many individuals both within and outside of the LGBT community. Strategies to simultaneously advance these goals may include steps such as changing the messages advanced by supporters of each goal, ensuring that non-marital statuses are open to opposite-sex couples, and creating non-marital statuses that differ substantially from marriage. If strategies such as these are implemented with significant thought and attention to detail, the movement will be able to ensure that advancements with regard to one goal do not undermine the progress of the other goal.

If the movement is able to advance both goals simultaneously, there will be a number of positive results for the LGBT rights movement and beyond. More people both within and outside

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<sup>291</sup> Stein, *supra* note 181, at 592.

of the LGBT community will have the opportunity to have their most important relationships legally recognized and protected. Successfully advancing both goals simultaneously would also go a long way toward mending the divide within the movement regarding the perceived choice between marriage equality and pluralistic relationship recognition, thereby creating a more unified LGBT rights movement. Members of the movement would have a greater sense that their voices were being heard and that the movement valued all of its members. Moreover, advancing both marriage equality and pluralistic relationship recognition would help the movement to be understood as serving more than just LGBT individuals, which could help it to receive additional support and form valuable coalitions moving forward. Finally, advancing marriage equality and pluralistic relationship recognition simultaneously in such a way that the advancements of one goal help, rather than hurt, the other goal, would aid the movement in ultimately achieving two of its most longstanding and important goals.