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## DIVORCING MARRIAGE FROM ITS INCIDENTS: FRAMING *PERRY* AS A CELEBRATION OF FAMILY SELF-DETERMINATION

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### I. INTRODUCTION

One of the primary fears articulated by opponents of gay marriage is that if gay and lesbian couples are allowed to marry, the institution of marriage will be harmed. This is a prominent theme in the defense of Proposition 8 (“Prop 8”).<sup>1</sup> The defendant-intervenors in *Perry v. Schwarzenegger*<sup>2</sup> (Prop 8 “Proponents”) repeatedly warned during the trial and in their appellate briefing that while they “cannot yet know” how gay marriage might influence the institution, they believe marriage will suffer “deinstitutionalization.”<sup>3</sup> Deinstitutionalization, according to David Blankenhorn, witness for Proponents, is the thinning or altogether removal of the rules governing an institution, such that those rules become “less comprehensible and . . . therefore less authoritative.”<sup>4</sup> Proponents offered the declining marriage rates in the Netherlands, which legalized gay marriage in 2001, in support of this theory.<sup>5</sup> Quoting E.J. Graff,<sup>6</sup> they cautioned that if we allow gay and lesbian couples to marry, the “venerable institution will

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1. CAL. CONST. art. 1, § 7.5 (“Prop 8”) (“Only marriage between a man and a woman is valid or recognized in California.”).

2. *Perry v. Schwarzenegger* (“*Perry I*”), 704 F. Supp. 2d 921, 947–50 (N.D. Cal. 2010), *aff’d sub nom Perry v. Brown* (“*Perry II*”), 671 F.3d 1052 (9th Cir. 2012), *petition for cert. granted sub nom Hollingsworth v. Perry* (“*Perry III*”), 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

3. *See* Petition for Writ of Certiorari at 6–7, *Perry III*, 81 U.S.L.W. 3075 (U.S. July 30, 2012) (No. 12-144) [hereinafter Cert. Pet.] (“Californians . . . have opted to preserve the traditional definition of marriage . . . because they believe that the traditional definition of marriage continues to meaningfully serve society’s legitimate interests, and they cannot yet know how those interests will be affected by fundamentally redefining marriage.”). *See also* Transcript of David Blankenhorn Trial Testimony at 2776, *Perry I*, 704 F. Supp. 2d 921 (No. 09-2292) [hereinafter Blankenhorn Testimony] (predicting that gay marriage will “further and . . . culminate” the deinstitutionalization of marriage).

4. Blankenhorn Testimony, *supra* note 3, at 2773.

5. *See* Transcript of Lee M. Badgett Testimony at 1441–45, *Perry I*, 704 F. Supp. 2d 921 (No. 09-2292) [hereinafter Badgett Testimony] (attempting, on cross-examination of Plaintiffs’ expert Lee M. Badgett, to establish deinstitutionalization of marriage in the Netherlands).

6. E.J. Graff is the author of *What Is Marriage For? The Strange Social History of Our Most Intimate Institution* (Beacon Press 1999) and a prominent same-sex marriage commentator.

forever stand for sexual choice.”<sup>7</sup>

At trial, the *Perry* plaintiffs (“Plaintiffs”) successfully refuted Proponents’ prediction. They persuasively discredited the suggestion that the decline in Dutch marriage rates was actually caused by the legalization of gay marriage,<sup>8</sup> and pointed to the absence of any significant change in marriage trends in Massachusetts since its first gay marriage in 2003. In countering Proponents’ warnings, Plaintiffs implicitly conceded that any change to the institution would be unwelcome.

As Plaintiffs demonstrated at trial, it is unlikely that allowing gay and lesbian couples to marry will substantially deinstitutionalize marriage. This is a shame. In the context of the gay marriage movement, the fact that marriage comes with rights, benefits,<sup>9</sup> and unique “respect and dignity”<sup>10</sup> is framed as an argument for inclusion—a demonstration of the harms gay and lesbian couples suffer as a result of being excluded. However, the root cause of these harms is not that same-sex couples may not marry, but that marriage is a prerequisite to accessing such important benefits and being afforded such dignity. The goal of expanding benefits, such as access to health care and immigration status, is profoundly important. Yet by focusing on marriage as the key point of access, we often fail to ask the basic question of whether it is appropriate to condition the receipt of (1) needed entitlements or (2) social or governmental respect, on conformity to a particular family model. While it is certainly important that our existing legal regimes not be facially discriminatory (as Prop 8 is), it is equally important that we deconstruct and rethink the regimes we take for granted to identify whose needs are not being accounted for and why.

In answering the question “How—in an ideal world—should *Perry* be decided?,” I suggest that the reasoning in a Supreme Court opinion in favor of gay marriage could frustrate efforts to achieve the goals of economic justice and dignity for non-marital families. I envision how an ideal opinion might instead promote these goals by locating the liberty interest at stake in the broader value of self-determination and by celebrating, rather than denying, the constant

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7. See Transcript of Plaintiffs’ Closing Arguments at 3089, *Perry I*, 704 F. Supp. 291 (No. 09-2292) [hereinafter Pls.’ Closing Arg.].

8. See Badgett Testimony, *supra* note 5, at 1457–60 (refuting Proponents’ understanding of Netherlands data through re-direct examination and suggesting long-term downward trend, which pre-dated 2001); Pls.’ Closing Arg., *supra* note 7, at 3000 (discussing Massachusetts and Netherlands data).

9. See Amended Complaint ¶¶ 6, 145–62, 303–12, *Pedersen v. Office of Personnel Management*, 881 F. Supp. 2d 294 (D. Conn. 2012) (No. 310-1750) (citing ineligibility for protection under the Family Medical Leave Act as one of the harms caused by DOMA); *id.* at ¶¶ 6, 348–56 (citing health insurance coverage through spousal employment); Complaint ¶¶ 95–97, *Blesch v. Holder*, No. 12-1578 (E.D.N.Y. May 31, 2012), 2012 WL 1965401 (citing sponsorship of spouse for permanent residency as immediate family member); Complaint ¶¶ 53–63, 84–85, *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 11-00948) (citing spousal exemption from estate taxes).

10. Complaint ¶ 48, *Perry I*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-2292).

evolution of marriage and family law.<sup>11</sup> I conclude that such an opinion, while allowing gay and lesbian couples access to marriage, could also lay groundwork for dismantling marriage as a unique site of privilege.

## II.

### ECONOMIC JUSTICE AND DIGNITY FOR NON-MARITAL FAMILIES

Many “non-marital” families, including many queer families, will continue to be excluded from the rights and benefits currently limited to marital families,<sup>12</sup> regardless of the outcomes in *Perry* and *Windsor v. United States*.<sup>13</sup> These non-marital families include all groups of people who define themselves as families, but are not structured around marital relationships—for example, extended families, groups of adults and the children they are raising together, interdependent friends, adult siblings who serve as one another’s primary support, people in polyamorous relationships, and partners who do not wish to marry.<sup>14</sup>

Like the gay and lesbian couples who are restricted from full access to marriage by DOMA and “mini-DOMAs”<sup>15</sup> like Prop 8, non-marital families cannot take leave from their employment to care for their seriously ill family members under the Family Medical Leave Act (“FMLA”).<sup>16</sup> They do not have

11. I envision this ideal articulation while hoping for a broad holding that requires a non-gendered definition of marriage, whatever the institution is to entail, and that reaffirms that it is unconstitutional to relegate disfavored groups into separate but (in some ways) equal institutions, though the holding is not the subject of this comment.

12. See generally NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 159–207 (2008) [hereinafter POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE] (discussing main categories of rights and benefits to which non-marital families lack access); MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS AND THE ETHICS OF QUEER LIFE 117–26 (1999) (same). For a list of the federal laws that condition rights and benefits on marital status, see GENERAL ACCOUNTING OFFICE, REPORT IDENTIFYING FEDERAL LAWS IN WHICH BENEFITS, RIGHTS, AND PRIVILEGES ARE CONTINGENT ON MARITAL STATUS (1997), available at <http://www.gao.gov/archive/1997/og97016.pdf> [hereinafter GAO Report I] (identifying 1,049 such laws); GENERAL ACCOUNTING OFFICE, UPDATE TO PRIOR REPORT (2004), available at <http://www.gao.gov/new.items/d04353r.pdf> [hereinafter GAO Report II] (identifying 120 statutory provisions involving marital status that were enacted between September 1996 and December 2003, and 31 provisions in the 1997 report that had been repealed or amended as of December 2003). Of course, the GAO’s report only accounts for federal provisions that are contingent on marital status; state laws include many more such provisions.

13. 669 F.3d 169, 188 (2d Cir. 2012) (finding DOMA unconstitutional), *cert. granted*, 81 U.S.L.W. 3116 (U.S. Dec. 7, 2012) (No. 12-307).

14. For a more detailed discussion of various non-marital family structures, see POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE, *supra* note 12, at 1–4.

15. This is a phrase commonly used to describe state statutes or constitutional provisions prohibiting the performance or recognition of gay marriages. See, e.g., Andrew Koppelman, *The Difference the Mini-DOMAs Make*, 38 LOY. U. CHI. L.J. 265, 265–66 (Winter 2007).

16. The FMLA guarantees job security to individuals who need to take time to care for a “child, spouse or parent.” 29 U.S.C. § 2601(b)(2). See also 29 CFR Part 825 (implementing FMLA). While the regulations implementing the FMLA define “parent” and “child” to include “in loco parentis” relationships (involving day-to-day responsibility for a child regardless of legal relationship), 29 CFR § 825.122(b)–(c), they define “spouse” narrowly to include only husbands

access to the tax benefits of marriage. They cannot access health insurance through their family members' employment. They cannot sponsor their non-citizen family members for permanent residency as immediate family members,<sup>17</sup> regardless of whether those family members are their primary source of financial or emotional support, and despite the fact that the government's purported goal of "promoting family unity" would be served by such sponsorship.<sup>18</sup> In most states, a child's non-marital, non-biological parent does not benefit from the presumption that they are that child's parent for the purpose of custody determinations, regardless of the circumstances under which the child was born or adopted and raised.<sup>19</sup> When individuals die, their non-marital family is not exempt from estate taxes on the inheritance of their shared home,<sup>20</sup> does not have access to survivors' benefits through the Social Security Administration,<sup>21</sup> and, in the case of wrongful death, may not recover tort damages for the family's loss.<sup>22</sup>

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and wives as defined under state law. § 825.122(a). FMLA covers "next of kin" relationships only when the person in need of care is a servicemember. § 826.122(d). Note that California law extends FMLA-like protection to registered domestic partners, but no further. *See* CAL. UN. INS. CODE § 3301(a)(1). *Cf.* D.C. CODE sec. 32-501(4)(C) (extending protection further to cover those who live together or have in the past lived together in a "committed relationship").

17. Sponsorship as the "immediate family member" of a U.S. citizen is the fastest way to gain immigration status and the only type of family sponsorship not limited by quotas. *See* U.S. Citizenship and Immigration Services, *Family of U.S. Citizens*, <http://www.uscis.gov/portal/site/uscis/> (last visited Oct. 20, 2012) (follow "Family" hyperlink; then follow "Family of U.S. Citizens" hyperlink). The definition of "immediate family member" for purposes of Adjustment of Status is limited to legal spouses, parents, and unmarried children under age 21. The additional relative categories, all of which are subject to quotas and long waits, provide the possibility of residency to only the children, parents, and siblings of U.S. citizens and the unmarried children and spouses of lawful permanent residents. *See* Asian Pacific American Legal Center, *A Devastating Wait: Family Unity and the Immigration Backlogs* 7 (2008), available at [http://www.advancingequality.org/attachments/files/117/APALC\\_family\\_report.pdf](http://www.advancingequality.org/attachments/files/117/APALC_family_report.pdf).

18. *See* H.R. Rep. No. 85-1199, at 6 (1957), reprinted in 1957 U.S.C.C.A.N. 2016, 2020 ("The legislative history of the [INA] clearly indicates that the Congress . . . was concerned with the problem of keeping families of United States Citizens and immigrants united."). Of course, the absence of family-based avenues to status for non-marital families is one of many problematic barriers to immigration status. For an in-depth discussion of the barriers to immigration status and danger of detention or deportation faced by transgender and gender-nonconforming immigrants, see generally Pooja Gehi, *Gendered (In)Security: Migration and Criminalization in the Security State*, 35 HARV. J.L. & GENDER 357 (Summer 2012).

19. *See* Nancy D. Polikoff, *The New "Illegitimacy": Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 721, 733-34 & n.74 (2012) [hereinafter Polikoff, *New Illegitimacy*] (noting that only a few states apply the presumption of parenthood absent a second-parent adoption, a mechanism that is not available in all states and is an imperfect alternative, as it is time-consuming, expensive, and legally complex).

20. *See* 26 U.S.C. § 2056(a) (2006) (exempting only a decedent's "spouse" from federal estate taxes).

21. *See* 42 U.S.C. § 402(i) (2006) (awarding lump-sum death benefits only to decedent's "spouse").

22. Note that some states have expanded the definition of "family" for the purpose of wrongful death suits. For example, in Hawaii, families may designate "reciprocal beneficiaries" for the purpose of wrongful death suits. *See* HAW. REV. STAT. § 572 C-1et seq. (2006).

Also like the gay and lesbian couples currently barred from marrying, non-marital families are denied the “respect and dignity enjoyed by opposite-sex [marital] families.”<sup>23</sup> This is not because they are denied access to the institution of marriage, but because the institution operates to stigmatize those families that do not conform to its model.<sup>24</sup> The exceptional status associated with marriage is understood to be among its core functions. Marriage is, among other things, a system of control that aims to channel individuals and sexual conduct into the preferred (nuclear) family structure.<sup>25</sup> As laid out by Professor Carl E. Schneider, the institution is designed to accomplish this by (1) discouraging alternative structures, (2) providing material rewards to those who marry, and (3) symbolically valorizing marital families.<sup>26</sup> Through these means, the state effectively penalizes families that fail to conform in order to incentivize conformity. By symbolically valorizing the marital family, the state casts non-marital families as irresponsible and undesirable social participants.<sup>27</sup> This has obvious legal consequences beyond the allocations of benefits discussed above. For instance, judges making custody determinations may believe that a child’s married parent can provide a better home than that child’s unmarried, cohabitating parent.<sup>28</sup> Policymakers are similarly invited by the stigmatization of single mothers as irresponsible parents or “welfare queens” to regulate and destabilize non-marital families.<sup>29</sup>

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23. Complaint, *Perry I*, *supra* note 10, at ¶ 48.

24. In his testimony regarding stigma, Gregory Herek, expert witness for *Perry* Plaintiffs, identified Prop 8 as an example of “structural stigma.” See Transcript of Gregory Herek Testimony at 2054, *Perry I*, 704 F. Supp. 2d 921 (No. 09-2292) [hereinafter Herek Testimony]. He defined structural stigma as “the legal institutions that designate certain groups as lacking certain resources relative to others.” *Id.* at 2051–52. This definition can easily be read to describe not only Prop 8, but also the institution of marriage itself.

25. See Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 503 (1992). See also Defendant-Intervenors-Appellants’ Brief at 78, *Perry II*, 671 F.3d 1052 (No. 10-16696) [hereinafter Proponents’ Brief] (asserting such channeling of “procreative conduct” to be the driving purpose of Prop 8).

26. See Schneider, *supra* note 25, at 503.

27. Cf. DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW*, 109–22 (2011) (examining programs of “population management,” such as taxation, military conscription, and social welfare programs, which “operate in the name of promoting, protecting, and enhancing the life of the national population and, by doing so, produce clear ideas about the characteristics of who the national population is and which ‘societal others’ should be characterized as ‘drains’ or ‘threats’ to that population”).

28. Such judicial perspectives are far from outdated. See, e.g., *Maxwell v. Maxwell*, No. 2012-CA-000224-ME (Ky. Ct. App. Oct. 19, 2012) (reversing and remanding lower court opinion, which granted custody to father due to mother’s cohabitation with female partner). See also Nancy D. Polikoff, *Kentucky Appeals Court reverses trial court ruling against lesbian mother*, BEYOND (STRAIGHT AND GAY) MARRIAGE (Oct. 19, 2012), <http://beyondstraightandgaymarriage.blogspot.com/2012/10/kentucky-appeals-court-reverses-trial.html> (cautioning that, while the appeals court reversed in *Maxwell*, trial judges continue to have the authority to make decisions like the lower court’s and to pressure parents into settling with the threat of such decisions).

29. See Holloway Sparks, *Queens, Teens and Model Mothers: Race, Gender, and the Discourse of Welfare Reform*, in *RACE AND THE POLITICS OF WELFARE REFORM* 178 (Sanford F. Schram, Joe Soss, & Richard C. Fording, eds., 2003) (examining the role of the “welfare queen”

Tethering rights, benefits, and governmental respect to the institution of marriage has a pronounced impact on low-income people, who are more likely to live in multi-generational households;<sup>30</sup> people of color, who have a tradition of extended family households;<sup>31</sup> queer people, who have, in Martha Jane Kaufman and Katie Miles' words, an "awesomely radical history of building families and raising children in highly political, inventive, and non-traditional ways;"<sup>32</sup> and people who may rely on adult family members as caretakers, such as some individuals who have disabilities or are elderly.<sup>33</sup> These intersecting communities are already more likely to experience insufficient access to the resources necessary for survival—such as shelter, health care, and employment—due to, among other forces, state violence, racism, homophobia, transphobia and ableism in hiring and housing practices, and the criminalization of poverty.<sup>34</sup> Yet, rather than supporting non-marital families with benefits that would promote stability and economic security, the state penalizes them for failure to conform to what it deems to be the more inherently "stable" family structure. Proponents and Plaintiffs alike frame family stability as a central objective of marriage,<sup>35</sup> but this reality begs the question: is the goal of marriage really family stability? Or is it rather the concentration of stability, privilege and life chances within the marital family model?

The goals of economic justice and dignity for all families require a re-envisioning of the systems through which we provide health care, social services and other support to families and individuals. Rights and resources must be tied to needs rather than offered as a reward for conformity. The subsequent sections

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theme in the 104th Congress' discourse on welfare reform).

30. See *Moore v. City of East Cleveland*, 431 U.S. 494, 508 (1977) (Brennan, J., concurring) (noting that while nuclear families are the predominant family structure in white suburbia, "the 'extended family' . . . remains . . . a prominent pattern virtually a means of survival for large numbers of the poor").

31. See Marlon M. Bailey, Priya Kandaswamy, & Mattie Udora Richardson, *Is Gay Marriage Racist?*, in *THAT'S REVOLTING: QUEER STRATEGIES FOR RESISTING ASSIMILATION* 88 (Mattilda Bernstein Sycamore, ed., 2004) ("Marriage has been used against African American people, held as an impossible standard of two-parent nuclear household that pathologizes the extended families that are integral to both our African ancestral and African American cultural lives."). See also *Moore*, 431 U.S. at 509 (Brennan, J., concurring) ("The 'extended' form is especially familiar among black families.").

32. See, e.g., Martha Jane Kaufman & Katie Miles, *Queer Kids of Queer Parents Against Gay Marriage!*, in *AGAINST EQUALITY: QUEER CRITIQUE OF GAY MARRIAGE* (Ryan Conrad, ed., 2011).

33. See POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE*, *supra* note 12, at 124 (discussing the "caretaker-dependent dyad").

34. See SPADE, *supra* note 27, at 137–40 (discussing the maldistribution of life chances by intersecting systems including public benefits programs, immigration enforcement, education financing, and policing).

35. See *Cert. Pet.*, *supra* note 3, at 27 (stating that the purpose of marriage is to ensure children are raised in stable family units (by both biological parents)); Plaintiffs' Brief at 50–52, *Perry II*, 671 F.3d 1052 (No. 10-16696) (agreeing that one of the purposes of marriage is to ensure children are raised in "stable and enduring family units," but arguing that Prop 8 is "at war" with that purpose).

consider how the Court's decision in *Perry* could be articulated to support such a process.

### III.

#### THE COURT SHOULD UNDERSTAND *PERRY* TO BE ABOUT THE RIGHT TO FAMILY SELF-DETERMINATION

The *Perry* Plaintiffs, the District Court, and the Ninth Circuit have all been careful to explain why domestic partnership is not a sufficient option for gay and lesbian couples who wish to marry, even though California law confers all the state rights and benefits of marriage on domestic partners.<sup>36</sup> In distinguishing domestic partnership from marriage, the District Court emphasized the unique superiority of marriage and defined marriage as a fundamental right for gay and straight couples alike.<sup>37</sup>

An ideal opinion would not focus on why marriage is special in the eyes of the law or society. Instead, it would frame the fundamental liberty at stake in *Perry* as the right to family self-determination—locating the right to marry within that broader liberty—and would celebrate the formations of all kinds of self-determined families.

##### *A. The Fundamental Right to Family Self-Determination*

It is clear that the constitutional protection of privacy and family self-determination goes beyond the right to marry. The Court has held that family life is protected by the Fourteenth Amendment.<sup>38</sup> In *Moore v. City of East Cleveland*, a law criminalizing households that included non-immediate family members was struck down for “slicing deeply into the family itself,” in violation of the Due Process Clause’s protection of “marriage and family life.”<sup>39</sup> The Court’s protection of the plaintiff family’s non-nuclear structure (made up of two cousins and their grandmother) suggests that preferential treatment for certain family structures may raise constitutional questions.

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36. See CAL. FAM. CODE § 297.5(a) (West 2007).

37. See *Perry I*, 704 F. Supp. 2d 921, 991–94 (N.D. Cal. 2010). The court rejected Proponents’ argument that Plaintiffs were seeking protection for a more narrow right to “gay marriage.” *Id.* The Ninth Circuit declined to address the nature of the right, focusing instead on the animus evident in the act of withdrawing a right from a disfavored group. See *Perry II*, 671 F.3d 1052, 1063–64, 1080–81 (9th Cir. 2012). However, Judge Reinhardt went out of his way to explain the “extraordinary significance of the official designation of marriage” in the eyes of society and the government. *Id.* at 1078–79. See also *infra* notes 55–59 and accompanying text.

38. See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974) (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (“[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.”).

39. *Moore*, 431 U.S. at 498–99.

Several years before deciding *Moore*, the Court addressed similar laws as applied to households made up of individuals unrelated by blood or law.<sup>40</sup> In *U.S. Department of Agriculture v. Moreno*, the Court held a law barring such households from receiving food stamps to be unconstitutional, based on the fact that the law was rooted in animus toward hippie communes. When the Court refused to apply this reasoning to a housing ordinance in *Village of Belle Terre v. Boraas*,<sup>41</sup> Justice Marshall dissented,<sup>42</sup> arguing that the ambit of the right to privacy protects “choice of household companions—whether a person’s ‘intellectual and emotional needs’ are best met by living with family, friends, professional associates, or others.”<sup>43</sup> *Moore*, *Moreno* and Marshall’s dissent in *Belle Terre* support the idea that families and households have a constitutionally protected right to define themselves.

The Court has additionally recognized a right to privacy regarding intimate family decisions, finding that families have constitutionally protected rights to decide whether to have a child<sup>44</sup> (regardless of marital status<sup>45</sup>) and how to raise and educate their children.<sup>46</sup> These cases protect a right to family self-determination.

The right to marry should be understood within the broader right to family self-determination. Many marriage cases articulate not only marriage, but also the *choice of whether to marry*, as a fundamental right.<sup>47</sup> In *Zablocki v. Redhail*,

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40. U.S. Dep’t of Agric. v. *Moreno*, 413 U.S. 528 (1973); *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

41. While the Court understood animus to be the only rationale for the *Moreno* law, 413 U.S. at 534–35, it found the *Belle Terre* law to have the rational basis of promoting “family values.” 416 U.S. at 9. The *Belle Terre* Court seems to have taken the plaintiff group’s interest in living together—which was painted as solely economic—rather lightly. It seems that *Belle Terre* might have come out differently had the group’s relationship been based on more than economic efficiency (for instance, the emotional support provided by a hippie commune, which is more easily understood as a family-like community than is a house of roommates).

42. See *Belle Terre*, 416 U.S. at 12–20 (Marshall, J., dissenting).

43. *Id.* at 15–16 (Marshall, J., dissenting) (quoting *Stanley v. Georgia*, 394 U.S. 557, 565 (1969)).

44. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965); *Roe v. Wade*, 410 U.S. 113, 153 (1973).

45. The Court extended *Griswold*, which protected the right of married couples to access contraceptives, to unmarried individuals in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”).

46. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (finding parents to have the right to make decisions about their children’s educations); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (same).

47. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978) (finding law denying marriage right to child support defaulters was an impermissible intrusion into “*freedom of choice* in an area in which we have held such freedom to be fundamental”) (emphasis added); *Turner v. Safley*, 482 U.S. 78, 95 (1987) (“[T]he *decision* to marry is a fundamental right.”) (emphasis added); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (holding “[c]hoices about marriage” to be “sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard, or disrespect”).



the Court found unconstitutional a law that prohibited parents who owed outstanding child support payments from marrying, reasoning that even those who could meet the statute's requirements would "suffer a serious intrusion into their freedom of choice [of whether or not to marry]."48

The Court could easily root an invalidation of Prop 8 in the fundamental right to marry. However, an ideal opinion would go further in recognizing the right to family self-determination. By denying gay and lesbian couples entry into the institution of marriage, Prop 8 "slic[es] deep into the family itself,"49 defining such families as non-marital rather than allowing families to define themselves. The fundamental right to choose whether to marry,<sup>50</sup> like the Moore family's right to define themselves as a (non-marital) family, is a right of self-determination, and should be sheltered from the state's "unwarranted usurpation, disregard, or disrespect."<sup>51</sup>

### *B. The Celebration of Self-Determined Families*

In protecting the fundamental right to marry, the Supreme Court has repeatedly extolled the value and significance of marriage.<sup>52</sup> While the Ninth Circuit's decision in *Perry* did not reach the question of whether gay and lesbian couples have a fundamental right to marry,<sup>53</sup> Judge Reinhardt went out of his way to acknowledge the harm gay and lesbian couples suffer as a result of being

48. *Zablocki*, 434 U.S. at 387.

49. *Moore v. City of East Cleveland*, 431 U.S. 494, 498 (1977).

50. *See Zablocki*, 434 U.S. at 387; *Turner*, 482 U.S. at 95; *M.L.B.*, 519 U.S. at 116.

51. *M.L.B.*, 519 U.S. at 116. *See also* *Bowers v. Hardwick*, 478 U.S. 186, 204–05 (1986) (Blackmun, J., dissenting) (noting that the state respects an individual's choice to build a family with another and protects the relationship because it is a central part of an individual's life).

52. *See, e.g., Turner*, 482 U.S. at 95 ("[T]he decision to marry is a fundamental right" and marriage is an "expression[ ] of emotional support and public commitment."); *Zablocki*, 434 U.S. at 384 ("The right to marry is of fundamental importance for all individuals."); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (The "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."). Perhaps the most zealous exultation of the institution, quoted in the district court's opinion in *Perry I*, 704 F. Supp. 2d 921, 992 (N.D. Cal. 2010), comes from *Griswold*:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet is an association for as noble a purpose as any involved in [the Court's] prior decisions.

381 U.S. at 486.

53. *See Perry II*, 671 F.3d 1052, 1064 (9th Cir. 2012) ("We need not and do not answer the broader question in this case, however, because California had already extended to committed same-sex couples both the incidents of marriage and the official designation of 'marriage,' and Proposition 8's only effect was to take away that important and legally significant designation, while leaving in place all of its incidents.").

denied access to the “cherished status”<sup>54</sup> of marriage. He notes that we grant the incidents of marriage only to “those who are in stable and committed lifelong relationships” (“spouses, but not siblings or roommates”).<sup>55</sup> He emphasizes that we celebrate “when a couple marries,” not “when two people merge their bank accounts,” because the “designation of marriage” is the “principle manner in which the State attaches respect and dignity to the highest form of a committed relationship.”<sup>56</sup> These statements ignore the reality that there are siblings or “roommates” whose relationships are stable, committed and lifelong (at least to the extent that any marriage is). It dismisses the idea that a pair or group’s decision to become a family might warrant respect and dignity, even if tangibly marked only by the merging of bank accounts.

Reinhardt’s opinion then demonstrates (predominantly through word play) how domestic partnership fails to live up to the status of marriage, explaining that “[t]he *name* ‘marriage’ signifies the unique recognition that society gives to harmonious, loyal, enduring, and intimate relationships” (and that *How to Register a Domestic Partnership with a Millionaire* therefore just wouldn’t be the same film).<sup>57</sup> This disfavorable comparison of domestic partnership to marriage invites the continued valuation of marital families as superior to all others (even when they differ in name only).

Rather than celebrating marriage as a unique site of “emotional support” and “commitment,”<sup>58</sup> an ideal opinion in *Perry* would acknowledge and celebrate the value of all kinds of families to the individuals who comprise them, and who rely on them for emotional and financial support, intimacy, and caretaking. Prop 8 denies gay and lesbian couples the dignity and respect afforded to straight couples. The Supreme Court in *Perry* should understand this indignity to result from the denial of family self-determination, rather than assuming marriage to be the only family structure deserving of dignity. It is not the status of domestic partnership, but the absence of choice, that harms gay and lesbian couples. Accordingly, in protecting the dignity of such couples, the Court should focus on the fundamental right to family choice rather than the fundamental right to marry.

#### IV.

##### THE COURT SHOULD ACKNOWLEDGE AND EMBRACE EVOLVING DEFINITIONS OF MARRIAGE AND FAMILY

Prop 8 Proponents argue that the state has a compelling interest in preserving the “traditional definition of marriage.”<sup>59</sup> They emphasize that

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54. *Id.* at 1078.

55. *Id.*

56. *Id.* at 1079.

57. *Id.* at 1078.

58. *Turner v. Safley*, 482 U.S. 78, 95 (1987).

59. *Cert. Pet.*, *supra* note 3, at 26–35 (arguing that the state has a compelling interest in

marriage's primary function has always been to increase the likelihood that children will be raised by both of their biological parents,<sup>60</sup> and warn the courts that we do not know what will happen to the institution if its definition is changed.<sup>61</sup> Plaintiffs counter that marriage has in fact always been "based on, and defined by, the constitutional liberty to select the partner of one's choice."<sup>62</sup> Accordingly, by invalidating anti-miscegenation laws in *Loving v. Virginia*,<sup>63</sup> the Court did not change the definition of marriage, but rather "vindicate[d] the longstanding right of *all* persons to exercise freedom of personal choice in deciding whether and whom to marry."<sup>64</sup> Plaintiffs conclude that allowing gay and lesbian couples to marry would similarly show allegiance to the longstanding right to marry; it would not comprise the recognition of a new right.

Rather than accepting either party's claim that marriage has been stagnant through the nation's history, the Court should acknowledge and embrace the fact that the state's treatment of families has evolved, and that allowing gay and lesbian couples to marry is a natural step in that evolution.<sup>65</sup> An ideal opinion would welcome the possibility that, as Proponents caution, gay marriage might precipitate further change in how families choose to define themselves and how they are treated under the law.

The argument over the definition of marriage overlooks the fact that the state's treatment of families has changed significantly over the past century. Whether or not these changes have altered the "definition" of marriage is a question of semantics. The remedying of gender imbalances in marriage law,<sup>66</sup>

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protecting the traditional definition of marriage, which furthers vital societal interests).

60. *Id.* at 26–27. They go on to explain that the "distinguishing characteristics" of straight couples (the ability to biologically procreate) "threaten legitimate interests" (in responsible procreation) and therefore require the "special provision" of marriage in order to further state interests. *Id.* at 29–30.

61. *Id.* at 6–7 ("Californians . . . have opted to preserve the traditional definition of marriage . . . because they believe that the traditional definition of marriage continues to meaningfully serve society's legitimate interests, and they cannot yet know how those interests will be affected by fundamentally redefining marriage.").

62. Plaintiffs' Brief in Opp'n to Cert. at 32, *Perry III*, No. 81 U.S.L.W. 3075 (U.S. Aug. 24, 2012) (No. 12-144) [hereinafter Pls.' Opp'n to Cert.].

63. 388 U.S. 1, 12 (1967).

64. Pls.' Opp'n to Cert., *supra* note 62, at 32.

65. Note that the district court's opinion in *Perry* acknowledges the evolution of marriage with respect to the elimination of formal gender roles, determining that "[t]radition alone . . . cannot form a rational basis for a law." *See Perry I*, 704 F. Supp. 2d 921, 998 (N.D. Cal. 2010) (citing *Williams v. Illinois*, 339 U.S. 235, 239 (1970)). However, *Perry I* does not frame the overturning of Prop 8 as evolution in and of itself, but rather casts Prop 8 as outdated in light of the elimination of marital gender roles. *See id.*

66. *See, e.g., Orr v. Orr*, 440 U.S. 268, 270–71 (1977) (finding law limiting possibility of alimony to wives unconstitutional). *See also* Transcript of Nancy Cott Testimony at 243–44, *Perry I*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-2292) [hereinafter Cott Testimony] (discussing elimination of gendered division of spousal roles in between late nineteenth century and 1970s). *See generally* POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE, *supra* note 12, at 11–33 (laying out the changes in gender roles within marriage during the twentieth century); *Perry I*, 704

the protection of children of unmarried parents from differential treatment,<sup>67</sup> the overturning of anti-miscegenation laws,<sup>68</sup> and the legalization of no-fault divorces<sup>69</sup> have changed *what marriage is*, even if they have not changed its first listed dictionary definition.<sup>70</sup> Marriage has in the past been *effectively* defined—both legally and socially—as a relationship between a supportive, controlling husband and a subservient wife, as a relationship between individuals of the same race,<sup>71</sup> and as a permanent contract. In these respects, the definition of marriage has been far from constant.

The changes marriage has undergone in the last century have occurred in spite of their likely impact on the institution in terms of both marriage rates and social understandings. The constitutional protection of unmarried parents' children removed an incentive to enter into marriages and the legalization of no-fault divorce facilitated exit. These deinstitutionalizing changes arguably mark an evolution towards a system of family law that meets the needs of people as they live their lives, and away from one that seeks to channel individuals toward state-preferred norms.<sup>72</sup>

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F. Supp. 2d at 992–93 (describing the transformation of marriage from a “male-dominated institution into an institution recognizing men and women as equals,” but identifying this as “an evolution in understanding of gender rather than a change in marriage”).

67. See, e.g., *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (finding law prohibiting children of unmarried parents from recovering damages for mother's wrongful death to violate the Equal Protection Clause); *Glonn v. Am. Guarantee & Liability Ins. Co.*, 391 U.S. 73, 75–76 (1968) (same re: unmarried parent's recovery for child's wrongful death); *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164 (1972) (finding law denying children of unmarried parents ability to inherit from father unconstitutional). See generally POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE, *supra* note 12, at 26–29 (discussing changes in treatment of children of unmarried parents).

68. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

69. California was the first state to enact a no-fault divorce statute in 1970, followed by all other states. See JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND FAMILY IN 20TH CENTURY AMERICA* 176–78 (2011). See also Cott Testimony, *supra* note 66, at 338 (stating on redirect that no-fault divorce marked a transition of the terms of marriage from state to individual authority). See generally POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE, *supra* note 12, at 31–32 (discussing the success of the no-fault divorce movement).

70. Earlier editions of *Black's Law Dictionary* indeed defined marriage as a status of one man and one woman, while the dictionary's definition has never incorporated gender roles or race. See, e.g., BLACK'S LAW DICTIONARY (3d ed. 1933) (“The civil status of one man and one woman united in law for life for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex.”).

71. See Cott Testimony, *supra* note 66, at 238 (“[P]eople who supported [racially restrictive marriage laws] saw these as very important definitional features of who could and should marry, and who could not and should not.”). Anti-miscegenation laws effectively codified the purpose of marriage—to promote the creation of “typical,” socially preferable family units and to prevent the formation of units that were considered at the time to be “socially odious,” according to commonly held (pre-1967) values. See Joseph H. Beale, John E. Laughlin, Jr., Randolph H. Guthrie & Daniel M. Sandomire, *Marriage and the Domicil*, 44 HARV. L. REV. 501, 505–07, 512–23 (1931) (examining the purpose of marriage during a time when interracial marriages were clearly labeled as “socially odious”).

72. For example, in finding the state's interest in discouraging extra-marital procreation to be insufficient in *Levy*, 391 U.S. at 71–72, the Court acknowledged that non-marital families often have the same needs as marital families, and that the stigmatization of non-marital families is not

Rather than conceding that a change to the definition of marriage would be unprecedented, an ideal opinion would recognize that the traditional “definition” and channeling function of marriage should not be maintained at the expense of the actual needs of families.<sup>73</sup> The structures that regulate families—including, but not limited to, marriage—have changed significantly as a result of the lived experiences of generations, and must be allowed to continue to evolve.

## V.

### CONCLUSION

It is clear that a Supreme Court reversal of the Ninth Circuit’s *Perry* decision could have negative consequences for all queer individuals and families. A reversal might endorse the notion that LGBT people make worse parents,<sup>74</sup> permit separate-but-equal structures under the Constitution,<sup>75</sup> or tacitly invite the popular majority to continue to withdraw the rights of minorities through the ballot.<sup>76</sup> But for non-marital families, including many queer families, the impact that an opinion in favor of gay marriage might have is uncertain. The impact could be neutral—for example, if the decision turns on an award of quasi-suspect status to classifications based on sexual orientation.<sup>77</sup> Or, if it focuses on marriage’s primacy—endorsing marriage’s role as a prerequisite to economic benefits and social respect—it could be detrimental.<sup>78</sup> For many

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an appropriate reason to deny them constitutional protection. *See also* William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1886–87 (2012) (theorizing that “the normative foundation of family law has changed . . . away from natural law norms and toward utilitarian ones,” emphasizing “individual flourishing” and accommodating social pluralism rather than “emphasizing the virtue of a single institution”).

73. *Cf. Perry I*, 704 F. Supp. 2d 921, 998 (N.D. Cal. 2010) (“Tradition alone cannot form a rational basis for a law. . . . Rather, the state must have an interest apart from the fact of the tradition itself.”) (citing *Williams v. Illinois*, 399 U.S. 235, 239 (1970)).

74. *Cf. Cert. Pet.*, *supra* note 3, at 27 (stating society’s interest in ensuring that children are raised “in stable and enduring family units by both the mothers and the fathers who brought them into this world”).

75. *Cf. Proponents’ Brief*, *supra* note 25, at 105 (dismissing the suggestion that Prop 8 is rooted in animus by noting that California offers gay and lesbian couples all the benefits and obligations of marriage through domestic partnership).

76. *Cf. Cert. Pet.*, *supra* note 3, at 7 (asking the Supreme Court to “return to the People themselves this important and sensitive issue”).

77. I do not address Equal Protection analysis in this comment. Many queer people stand to benefit, at least in theory, if the Court rules that classifications based on sexual orientation warrant heightened scrutiny. However, the application of that heightened protection to *families* would be limited if the Court did not also root its holding in the principle of family self-determination. The current distribution of rights, benefits and status based on marital status is inherently problematic, for straight families as well as queer families. I would therefore characterize a holding rooted only in Equal Protection analysis as neutral with respect to the specific goal of promoting the rights of non-marital families. A similar analysis would apply to a holding that, like the Ninth Circuit’s opinion, turned on animus.

78. For example, as Nancy D. Polikoff has warned, the legalization of gay marriage may make it more challenging for non-marital, non-biological gay and lesbian parents to protect their

non-marital families, assimilating to the marital family structure and all that it represents would require significant loss of culture, values and self. Once marriage is legally available to gay and lesbian couples, non-marital queer couples in particular will be more likely to be penalized and judged by courts and benefit systems for their refusal to conform.

The goals of economic justice and dignity for non-marital families will not be achieved in the courts alone. A radical rethinking of the way benefits and status are distributed to families would require a shift in social perspective as well as comprehensive legislative action. However, as discussed above, these goals are not without constitutional support, and could find further support in a *Perry* opinion celebrating and supporting family dignity and self-determination. This comment does not propose any specific legal mechanisms for supporting and valuing non-marital families, though many scholars and jurisdictions have.<sup>79</sup> Rather, it suggests that we, and the Court, have a choice in how we understand the legalization of gay marriage. It can be the conclusion of an isolated and relatively moderate process of adjustment to the admissions requirements of marriage. Or, it can be a significant moment in a deeper interrogation of how we understand families, and a step toward a dismantling of the distribution of privilege and assignment of value by family law—the so-called “deinstitutionalization” Proponents fear. We need to work toward separating the legal incidents of marriage from the marital relationship, and supporting people based on their actual needs, rather than on presumptions about the financial, emotional, and procreative implications of different types of relationships. An ideal opinion in *Perry* would invite a critical evaluation of why we as a society allow such vast privilege to be concentrated within the institution of marriage,<sup>80</sup>

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rights to their children. Examining *Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010), a case in which the New York Court of Appeals applied the presumption of parentage to a non-biological mother on the basis of her (Vermont) marriage to the child’s biological mother, Polikoff predicts: “Now that same-sex couples can marry in New York, the distinction articulated in *Debra H.* will solidify into a distinction between those who marry and those who do not.” See Polikoff, *New Illegitimacy*, *supra* note 19, at 723–26.

79. See, e.g., LAW COMMISSION OF CANADA, BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS ix, xix (Ottawa: Law Commission of Canada, 2001) (calling for a “more comprehensive and principled approach to the legal recognition and support of the full range of close personal relationships among adults” and proposing that each Canadian law conditioned on marriage be evaluated to determine (1) whether the objectives of the legislation are legitimate, (2) if so, if relationships are relevant to achieving them, (3) if they are relevant, whether individuals can choose which relationships are subject to the law, and (4) if relationships are relevant and self-designation of relationships is not feasible, how the government can better include relationships). See also Joëlle Godard, *Pacs Several Years On: Is It Moving Towards Marriage?*, 21 INT’L J. L., POL’Y & FAM. 310, 312–19 (2007) (describing the originally proposed version of the *pacte civil de solidarité*—France’s civil union—which would have been available to households of all kinds, including siblings). See generally WARNER, *supra* note 12; POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE, *supra* note 12.

80. As Michael Warner notes, this privilege will not be easily relinquished. See WARNER, *supra* note 12, at 96 (“As long as people marry, the state will continue to regulate the sexual lives of those who do not marry.”); *id.* at 100 (characterizing the portrayal of marriage as being primarily about love as a distraction from the unequal conditions governing people’s lives and a

and how we might design a system that better supports and honors self-determined families.